

Senate 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.

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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Health

Background

This bill amends the *Aged Care (Transitional Provisions) Act 1997* (the Transitional Provisions Act) to:

- enable funding for home care packages to 'follow' the care recipient;
- provide a consistent national process for prioritising access to subsidised home care; and
- simplify the approval process for approved providers.

The bill also amends the *Aged Care Act 1997* contingent on the commencement of the *Aged Care Amendment (Red Tape Reduction in Places Management) Act 2016*.

Merits review

Schedule 1, item 44, proposed subsection 23B-1(1)

Proposed subsection 23B-1(1) states that the Secretary may determine that a person is a prioritised home care recipient and the person's level of care as such a recipient. A person must be determined to be a prioritised home care recipient before an approved provider can be paid home care subsidy for providing home care to the person. The exercise of subsection 23B-1(1) in effect is necessary for the provision of subsidised care to a person.

As explained in the explanatory memorandum, a decision made under subsection 23B-1(1) is not subject to merits review. The justification provided is as follows:

This [i.e. the absence of merits review] is appropriate in light of the factors the Secretary must take into account under the proposed subsection (4) when making a determination. In particular:

- in deciding whether a person is a prioritised home care recipient under section 23B-1, the Secretary must consider the priority for home care services assigned to the person under section 22-2A. Decisions relating

to the priority for home care services made under section 22-2A are reviewable under section 85-1;

- the other key factor the Secretary must consider is the time a person has waited to receive subsidised home care. Merits review is not appropriate in this case, as waiting time is objectively determined and does not require the exercise of discretion by the Secretary; and
- the decision to prioritise a care recipient is a decision to allocate a finite resource (home care packages) between competing applicants (eligible care recipients) for which merits review is generally considered inappropriate. Given the limited number of home care packages available, the overturning of a decision not to prioritise an individual on merits review would naturally affect the rights of a person in respect of whom a determination has been made under Division 23B.

Subsection 23B-1(4) also provides that in addition to a consideration of the two matters outlined above, the Secretary may also consider any other matters specified in the Prioritised Home Care Recipients Principles. Subsection 23B-1(5) provides that the Secretary may also consider whether there are exceptional circumstances. Thus, determinations about whether to make a determination may involve a significant element of discretionary judgment.

Although the committee accepts that decisions allocating finite resources between competing applicants may be a basis for the exclusion of merits review, it need not be the case that in a large or moderately large program distributing benefits that a limited number of successful appeals would necessarily directly affect the rights of another person who has been awarded such a benefit. For example, some flexibility may be introduced into program funding estimates. **For this reason the committee seeks the Minister's more detailed explanation as to why merits review is impractical in the circumstances of the program and exercise of this particular power.**

The committee also seeks the Minister's advice as to whether any measures, such as alternatives to merits review, have been considered in relation to determinations made under subsection 23B-1(1). The committee is interested in measures to promote administrative accountability to ensure that processes for allocating funds are fair and to ensure the underlying policy applied to make the decisions is made clear. In this context, a requirement to give reasons and a reporting requirement are possible examples.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Appropriation Bill (No. 3) 2015-2016

Introduced into the House of Representatives on 4 February 2016
Portfolio: Finance

Background

This bill provides for additional appropriations from the Consolidated Revenue Fund for the ordinary annual services of the government in addition to the appropriations provided for by the *Appropriation Act (No. 1) 2015-2016*.

Insufficient parliamentary scrutiny of legislative power **General comment**

The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v)).

By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing (now known as the Senate Standing Committee on Appropriations, Staffing and Security) has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years (see 50th Report, p. 3; and recent annual reports of the committee).

The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and

even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure (45th Report, p. 2). The Senate has not accepted this assumption.

As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services. (*Journals of the Senate*, 22 June 2010, pp 3642–3643).

The committee concurs with the view expressed by the Appropriations and Staffing Committee that if ‘ordinary annual services of the government’ is to include items that fall within existing departmental outcomes then:

...completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas. (45th Report, p. 2).

The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government (45th Report, p. 2).

Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad ‘departmental outcomes’ to categorise appropriations, rather than on individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills.

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

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

The committee is aware that responsibility for this measure appears to have been transferred to the Prime Minister and Cabinet portfolio, as an amendment was made to the Administrative Arrangements Order (AAO) on 18 February 2016 to include ‘national policy on cities’ as a matter to

be dealt with by the Department of the Prime Minister and Cabinet. This appears to be the first time such a policy has been included in the AAO. This further suggests that this may be regarded as a new policy.

The committee notes that including expenditure on such new policies in the non-amendable bill is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills.

The committee has previously written to the Minister for Finance in relation to this general matter following tabling of its *Alert Digest No. 7 of 2014* (which included consideration of Appropriation Bill (No. 1) 2014-2015) and *Alert Digest No. 2 of 2015* (which included consideration of Appropriation Bill (No. 3) 2014-2015). The Minister's responses were considered and published in the committee's *Tenth Report of 2014* (at pp 402–406) and *Fourth Report of 2015* (at pp 267–271). In both reports the committee noted that the government does not intend to reconsider its approach to the classification of items that constitute ordinary annual services of the government; that is, the government will continue to prepare appropriation bills in a manner consistent with the view that only administered annual appropriations for new outcomes (rather than appropriations for expenditure on new policies not previously authorised by special legislation) should be included in even-numbered appropriation bills.

The committee also highlighted the possible inappropriate classification of certain expenditure as ordinary annual services of the government in relation to Appropriation Bill (No. 1) 2015-2016 in its *Alert Digest No. 6 of 2015* (at pp 6–9).

The committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure.

The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government.

Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2015-2016 which should only contain appropriations that are not amendable by the Senate).

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

The committee draws Senators' attention to this matter, as the current approach to the classification of ordinary annual services expenditure in appropriation bills may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Appropriation Bill (No. 4) 2015-2016

Introduced into the House of Representatives on 4 February 2016
Portfolio: Finance

Background

This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2015-2016*.

Delegation of legislative power

Parliamentary scrutiny

Clause 14 and Schedules 1 and 2

Clause 14 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 14 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, ACT, NT and local government may be made: clause 14(2)(a); and
- the amounts and timing of those payments: clause 14(2)(b).

Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum (at p. 11) states that this is:

...because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.

The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills—see the committee's *Seventh Report of 2015* (at pp 511–516) and *Ninth Report of 2015* (at pp 611–614). In these reports the committee requested that additional explanatory material be included in explanatory memoranda

accompanying future even-numbered appropriation bills. In particular, the committee requested:

- additional explanatory material in relation to operation of this standard provision; and
- the inclusion of detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments.

To ensure clarity and ease of use the committee stated that this information should deal only with the proposed appropriations in the relevant bill. The committee noted that this would significantly assist Senators in scrutinising payments to State, Territory and local governments by ensuring that clear explanatory information in relation to the appropriations proposed in the particular bill is readily available in one stand-alone location.

The committee notes that additional material has been provided at pp 11–12 of the explanatory memorandum to this bill. This material emphasises that determinations under clause 14 (or is equivalent in other even-numbered appropriation bills) are rare. This is because for payments to the States, Territories and local government in an even-numbered Appropriation Act, there are generally other legislative or agreed frameworks which determine how the payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. The explanatory memorandum notes that many of these arrangements can be found on the Federal Financial Relations website (<http://www.federalfinancialrelations.gov.au/>).

The explanatory memorandum (at pp 11–12) also provides some additional detail in relation to the proposed appropriations for payments to the States, Territories and local government in this bill:

In this Bill, appropriations to the States, ACT, NT and local government are sought for the Department of Agriculture and Water Resources against Outcome 3, and the Department of Infrastructure and Regional Development against Outcome 1 and Outcome 3. Further information may also be found in the portfolio statements for the respective portfolios. The most recent detailed estimates of Commonwealth payments to the States, Territories and local governments from 2015-16 to 2018-19 may be found in Annex A to Attachment D in Part 3 of Mid-Year Economic and Fiscal Outlook 2015-16 which is available at <http://www.budget.gov.au/>.

The committee thanks the Minister for including this additional explanatory material in response to the committee's requests. The committee considers that this information goes some way to providing further clarity to Senators in relation to the appropriation of money for, and the attachment of conditions to, payments to the States and Territories. However, the particular purposes to which this money will be directed remains unclear.

The committee notes that the only information provided on the face of the bill in relation to the proposed appropriations for payments to the States, Territories and local government is as follows:

- Department of Agriculture and Water Resources—\$3.4 million for outcome 3 (Improve the health of rivers and freshwater ecosystems and water use efficiency through implementing water reforms, and ensuring enhanced sustainability, efficiency and productivity in the management and use of water resources)
- Department of Infrastructure and Regional Development—\$302.6 million for outcome 1 (Improved infrastructure across Australia through investment in and coordination of transport and other infrastructure)
- Department of Infrastructure and Regional Development—\$23 million for outcome 3 (Strengthening the sustainability, capacity and diversity of regional economies including through facilitating local partnerships between all levels of government and local communities; and providing grants and financial assistance)

Noting the role of Senators in representing the people of their State or Territory and the terms of section 96 of the Constitution (which provides that ‘...the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*’), the committee requests the Minister's advice in relation to:

- **the particular purposes to which the money for payments to the States, Territories and local government to be appropriated in this bill will be directed (including a breakdown of proposed grants by State/Territory); and**
- **the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or similar**

legislation or agreements) which detail how the terms and conditions to be attached to these particular payments will be determined.

Pending the Minister's reply, the committee draws Senators' attention to the bill, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference, and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

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

Introduced into the House of Representatives on 2 February 2016

Portfolio: Employment

An identical bill was introduced into the House of Representatives on 14 November 2013 and the committee commented on that bill in *Alert Digest No. 9 of 2013*. The Minister's response to the committee's comments was published in its *Fourth Report of 2014*.

The committee restates its views in relation to provisions of this bill as outlined below.

Background

This bill provides for the following amendments in relation to the re-establishment of the Australian Building and Construction Commission:

- repeal of the Fair Work (Building Industry) Act 2012;
- minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and
- transitional provisions for:
 - changes of names of institutions and offices;
 - preserving the appointments of senior position holders;
 - preserving the employment entitlements of staff of affected organisations;
 - preserving the confidentiality of certain information;
 - the timing of reports;
 - preserving the existing safety accreditation scheme;
 - preserving examination notices and their effect;
 - legal proceedings; and
 - other related matters.

**Exclusion of judicial review rights
Part 2, schedule 1, item 2**

This item has the effect that decisions made under the *Building and Construction Industry (Improving Productivity) Act 2013* will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). No rationale is provided in the explanatory memorandum, though it is noted that the predecessor legislation (which is repealed when this bill commences) was also excluded. The explanatory memorandum also notes that decisions made under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* are excluded from review under the ADJR Act.

The committee continues its practice of expecting a justification for excluding the operation of the ADJR Act. The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act*) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.

The committee also notes that the Administrative Review Council concluded that the current exemption of Australian Building and Construction Commission decisions from the application of the ADJR Act should be removed: *Federal Judicial Review in Australia*, Report No. 50 (2012) at 205.

While it is likely that judicial review under other sources of jurisdiction would be available, in light of the ARC view referred to above and as the ADJR Act is beneficial legislation for the reasons outlined above, the committee sought the Minister's detailed explanation as to why these decisions should not be reviewable under the ADJR Act.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

**Exclusion of judicial review rights
Part 2, schedule 1, item 2**

The Committee has requested a justification as to why the operation of the *Administrative Decisions (Judicial Review) Act 1977* has been excluded by the Bill.

The *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* makes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. Effectively, this amendment maintains the current approach of exempting certain legislation from the ambit of the *Administrative Decisions (Judicial Review) Act 1977*. As stated in the explanatory memorandum, the exemption was applicable to the Bill's predecessors, the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*. A similar exemption also exists for the *Fair Work Act 2009* and the *Road Safety Remuneration Act 2012* in relation to decisions of the Fair Work Commission and Fair Work Ombudsman.

Decisions that would be made under the Bill are regulatory in nature and involve monitoring and investigation functions and the bringing of court proceedings. For example:

- where an inspector reasonably believes that a person has contravened a civil remedy provision the inspector may decide to accept a written undertaking from the person (clause 98);
- inspectors are able to issue compliance notices where the inspector reasonably believes that a person has contravened a particular provision (clause 99);
- inspectors make decisions to enter premises, and to request certain documents in connection with an investigation (clause nos 72,74 and 77); and

- the Australian Building and Construction (ABC) Commissioner may issue an examination notice where it is reasonably believed that a person has information or documents relevant to an investigation (clause 61).

An exemption is necessary to ensure that investigation activities and legal proceedings are not significantly undermined. In certain circumstances a statement of reasons (as would be required by section 13 of the *Administrative Decisions (Judicial Review) Act 1977*) may prejudice or unduly delay investigations. For example, if a person is entitled to request reasons for a decision to enter premises it is likely that investigations would be prejudiced and persons may have opportunity to conceal their unlawful conduct or dispose of relevant documents while the decision is reviewed.

The *Administrative Decisions (Judicial Review) Act 1977* has not been amended to provide appropriate exclusions from the requirement to provide reasons where requested, and it is considered that the existing exemptions from the *Administrative Decisions (Judicial Review) Act 1977* need to be retained until that occurs. Without appropriate exemptions in the *Administrative Decisions (Judicial Review) Act 1977* there is potential for investigations and court proceedings to be unreasonably hindered.

The Government considers that the requirements in relation to the court proceedings for pleadings, filing of evidence and discovery provide sufficient protections for parties and should not be interfered with, undermined or replicated by requiring a statement of reasons to be produced at the investigation stage.

There are specific provisions for review built into the Bill where such review is appropriate. For example, where a person is issued with a compliance notice they may seek a review of that decision in a relevant court (clause 100). Decisions regarding the issuing of examination notices will be subject to oversight by the Commonwealth Ombudsman.

To provide an additional layer of oversight pursuant to the judicial review of administrative decisions is unnecessary, is likely to delay and hinder the operations of the ABCC and will create unnecessary costs and delays. There is already appropriate oversight built into the specific legislation based on previous analogous legislation.

Committee Response

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

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

Introduced into the House of Representatives on 2 February 2016

Portfolio: Employment

An identical bill was introduced into the House of Representatives on 14 November 2013 and the committee commented on the bill in *Alert Digest No. 9 of 2013*. The Minister's response and further response to the committee's comments were published in its *Fourth and Sixth Reports of 2014*.

The committee restates its views in relation to provisions of this bill as outlined below.

Background

This bill seeks to:

- replace the Office of the Fair Work Building Industry Inspectorate by re-establishing the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments dealing with:
 - self-incrimination;
 - protection of liability against officials;
 - admissible records and documents, protection and disclosure of information; and
 - powers of the Commissioner in certain proceedings and jurisdiction of courts.

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of *authorised applicant*

Clause 5 sets out a number of definitions of terms used throughout the Bill. The explanatory memorandum indicates that many of the definitions replicate those contained in predecessor bills (the BCII Act and the FW(BI) Act). The term ‘authorised applicant’, however, appears to be a new term. The purpose of the term is to indicate who is entitled to seek an order relating to a contravention of a civil remedy provision. Such persons include:

- (a) the ABC Commissioner or any other inspector; or
- (b) a person affected by the contravention; or
- (c) a person prescribed by the rules for the purposes of this paragraph.

The explanatory memorandum does not indicate why it is necessary for further ‘authorised applicants’ (in addition to the persons identified in paragraphs (a) and (b)) to be prescribed by regulations. Given the breadth of persons covered by paragraph (b) of the definition (ie ‘a person affected’) it is unclear why such a power is necessary.

In the absence of an explanation it is not possible to address the appropriateness of this definitional matter being dealt with in the regulations as opposed to the primary Act. **Given that broadening the category of ‘authorised applicants’ affects who may seek enforcement action under the legislation (a matter of considerable importance) the committee sought the Minister’s advice as to the justification for the proposed approach.**

Pending the Minister’s reply, the committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Minister's response - extract

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of authorised applicant

The Committee has sought advice as to the justification of the necessity for further ‘authorised applicants’ to be able to be prescribed by rules.

Clause 5 of the Bill defines the term ‘authorised applicant’, which provides the basis for determining who may seek an order relating to an alleged contravention of a civil remedy provision. For the purposes of the Bill, an authorised applicant may be the ABC Commissioner or any other inspector, a person affected by the contravention, or a person prescribed by the rules (which may also provide that a person is prescribed only in relation to circumstances specified in the rules). This definition is based on the definition of ‘eligible person’ that was used for the same purpose in the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996*.

The ability to broaden the category of authorised applicants will ensure that the legislation adapts, if necessary, to changing industry conditions or to take advantage of administrative efficiencies so that persons best placed to take action regarding a breach of a provision of the Bill (because for example of particular knowledge/expertise) are able to pursue remedies for that breach. For example, prescribing another appropriate regulatory body as an authorised applicant may be appropriate if it is better placed to undertake enforcement activities in relation to particular alleged contraventions.

Finally, any rules that are made to prescribe a person as an ‘eligible person’ will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any broadening of the category.

Committee Response

The committee thanks the Minister for this response and notes that extensions to the definition of ‘authorised applicants’ will be subject to disallowance. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power

Clause 6

Clause 6 defines the meaning of ‘building work’. As the explanatory memorandum notes, at page 5, the ‘definition is integral’ as it determines the scope of the bill’s application. The bill re-establishes a regulator with strong enforcement powers, including examination powers, and increases existing penalties. Given this, it is regrettable that subclause 6(4) which allows rules to be made to include additional activities within the definition of building work (subclause 6(5) allows for the exclusion of activities) is only briefly explained. The explanatory memorandum states that rules ‘will be made where it is not clear whether or not a particular activity falls within the definition of building work’ (see page 7). **In light of the significance of extending the operation of the legislation, the committee sought the Minister’s more detailed explanation as to why this approach is appropriate.**

Pending the Minister’s reply, the committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Minister's response - extract

Delegation of legislative power

Clause 6

The Committee has sought a more detailed explanation as to why it is appropriate for rules to be made to include additional activities within the definition of 'building work'.

As highlighted by the Committee, the definition of 'building work' is integral to the operation of the Bill as it determines the scope of the Bill's application. While the definition contained in the Bill is appropriate and adapted for current practices and arrangements in the building and construction industry, it is important that there is sufficient flexibility to ensure that activities that are clearly intended to fall within the scope of the legislation are not inadvertently excluded for reasons of form and not substance. The definition of 'building work' in both of the Bill's predecessors (the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*) contained the same ability to prescribe activities as 'building work' by regulation. An equivalent rule making power is also provided that would allow certain activities to be excluded from the definition of 'building work'.

Building industry participants have supported the use of this rule making power as a mechanism to ensure that an appropriate boundary is set around the scope of the Bill, in particular in relation to the coverage of supply and transport activities and off-site prefabrication activities.¹ The ability to include or exclude activities by rules recognises the evolving nature of the industry, for example changes in technology that result in new work practices.

The approach has been to make the definition as clear as possible, in order to give clear guidance to participants in the industry, with the necessary flexibility to deal with any unintended consequences being addressed through the rule making power. Any rules that are made to adapt the definition of 'building work' will be subject to disallowance by both Houses of Parliament.

¹ Australian Industry Group submission to the Senate Education and Employment Legislation Committee, p. 5.

This will ensure that there is an appropriate degree of Parliamentary oversight of any extension of this definition.

Committee Response

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

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

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Alert Digest No. 9 of 2013 - extract

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

Clause 7 defines the meaning of 'industrial action'. Subclause 7(2) excludes from this definition, in paragraph (c), action by an employee if:

the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

- (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
- (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform.

Subclause 7(4) provides that (for the purposes of paragraph 2(c)) a person who seeks to rely on that paragraph has the burden of proving that the paragraph applies. The justification for reversing the onus of proof is dealt with in the statement of compatibility at pages 54 and 55:

This restriction serves the legitimate purpose of ensuring that the exception only applies in situations where the worker genuinely takes action based on a reasonable concern about the imminent risk to his or her health or safety. In proving this, the employee will not be required to demonstrate that there was in fact an imminent risk to his or her health or safety, just that they reasonably held that concern. The employee will also be required to demonstrate that they did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was safe and appropriate. The wording of this provision restricts the type of work that the employer can require the employee to undertake to work that is 'appropriate'. This ensures that an employee is not required to undertake tasks for which they are not reasonably able to perform [sic]. Overall, it is considered that the approach taken by the Bill is a reasonable and proportional limitation on [the right to just and favourable work conditions] that is based on the approach taken by the Fair Work Act with modifications to take into account considerations that are unique to the building and construction industry.

Although the Fair Work Act includes this exception, it does not appear to similarly reverse the onus of proof. In addition, although the statement of compatibility states that this modification of approach takes into account considerations unique to the building and construction industry, **the committee sought the Minister's elaboration of why these circumstances justify placing a legal burden of proof on the employee.**

In addition, two particular aspects appear to be worthy of further explanation. First, it is not clear from the explanatory materials why a legal, as opposed to an evidential burden, is thought justified. Second, although it may be accepted that whether action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety is a matter that is peculiarly within the knowledge of the employee (as per the *Guide to Framing Commonwealth Offences*), it not clear why this is also the case in relation to whether or not the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform' (paragraph 7(2)(c)(ii)). **The committee therefore also sought the Minister's more detailed explanation as to these matters.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

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

The Committee has sought further information on a number of issues relating to the exclusion of action based on a reasonable concern about an imminent risk to health and safety from the definition of 'industrial action'.

Firstly, the Committee has sought the Minister's elaboration on why a person seeking to rely on this exclusion from the definition of 'industrial action' has the burden of proving that the paragraph applies. This approach was first adopted in the *Building and Construction Industry Improvement Act 2005*, and was also incorporated into the *Workplace Relations Act 1996*. The right of an employee to take action (such as ceasing work) based on a reasonable concern about an imminent risk to his or her health or safety is a critical element in ensuring that workers are able to protect their health and safety at work without falling afoul of the relevant restrictions on the taking of industrial action. However, this right is, unfortunately, the subject of repeated and deliberate abuse by certain building industry unions. The building and construction industry has had the benefit of specific scrutiny by the Cole Royal Commission. That Royal Commission found evidence of systemic misuse of occupational health and safety issues to advance industrial objectives, noting that:

Misuse of non-existent occupational health and safety issues for industrial purposes is rife in the building and construction industry. Genuine occupational health and safety hazards are also rife. When industrial action is taken allegedly because of occupational health and safety concern by workers or unions, the onus of establishing the legitimacy of the concerns should be on those taking that action on that basis. Individual workers know when occupational health and safety issues are, and are not, justified. The onus should therefore be on workers to establish that occupational health and

*safety concern justified industrial action, and that they did not unreasonably refuse their employer's direction to perform other safe available work.*²

The misuse of health and safety concerns undermines the existing framework around the taking of industrial action in the building and construction industry and recklessly politicises health and safety concerns in a way that jeopardises safety standards in the industry. To combat this, it is appropriate to require parties who seek to rely on their reasonable concern about an imminent risk to their health and safety to be required to bear the burden of proving that concern in situations where there is doubt about the genuineness of the concern. This will discourage the misuse of this right while ensuring that parties who take action based on a reasonable concern are not disadvantaged.

The Committee has also sought a more detailed explanation as to why a legal burden is placed on employees by clause 7(4), rather than an evidential burden. It would undermine the effectiveness of the prohibition on unlawful industrial action if an employee seeking to rely on the exception held an evidential burden rather than a legal one. This is because the relevant employee is the party best placed to establish the reasonableness of their concern. Furthermore, it is appropriate that this is a legal burden of proof as it relates to matters that are both peculiarly within the knowledge of the defendant and which would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

As outlined in the Statement of Compatibility with Human Rights, the employee is not required to demonstrate that there was in fact an imminent risk to his or her safety, but that they reasonably held that concern. In this case, an employee will be required to prove that they held such a concern on the balance of probabilities and were acting in good faith. This is an appropriate standard to require given the serious and ongoing misuse of the exception in the industry.

Finally, the Committee has sought a more detailed explanation as to why employees will also be required to demonstrate that they did not unreasonably refuse to perform other available work that is safe and appropriate when seeking to rely on the exception. The Cole Royal Commission expressly recommended that the reverse onus also apply to this aspect of the exception, for the same reasons as outlined above.

² *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 73.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

**Delegation of legislative power
Subclause 11(2)**

This clause allows the rules to extend the application of the Act in relation to the exclusive economic zone and waters above the continental shelf. The explanatory memorandum repeats the effect of the provision, but does not address whether the use of delegated legislation for this purpose is appropriate. **The committee therefore sought the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

**Delegation of legislative power
Subclause 11(2)**

The Committee has sought advice as to the justification for the rule making power contained in clause 11(2) that allows for the extension of the Bill to the exclusive economic zone or the waters above the continental shelf.

The ability to extend the operation of the Bill in these zones through rules is unremarkable and mirrors section 33 of the *Fair Work Act 2009*. The ability to extend the coverage of the Bill in these areas is necessary in light of the ongoing evolution in the way that building work is undertaken in these areas. This will ensure that the Bill is able to be adapted to meet these changing circumstances. Any rules that are made to extend the coverage of the Bill will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight.

Committee Response

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

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

Alert Digest No. 9 of 2013 - extract

Undue dependence upon insufficiently defined powers

Delegation of legislative power

Paragraphs 19(1)(d) and 40(1)(c)

This paragraph empowers the ABC Commissioner to delegate all or any of his or her powers and functions under the Act (other than his or her functions or powers as an inspector) to: ‘a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph’. The committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to ‘a person’, given that there are no

limits set on the sorts of powers that might be delegated or on the categories of people to whom the powers may be delegated.

The same issue also arises in relation to clause 40(1)(c) in relation to the Federal Safety Commissioner.

The committee therefore sought the Minister's advice as to why, given that paragraphs 19(1)(a)-(c) already allow for delegations to a Deputy ABC Commissioner, an inspector and an SES employee or acting SES employee the proposed broader power of delegation is necessary and, if it is necessary, why limits cannot be imposed and or required by the primary legislation. The committee also seeks the Minister's advice as to the justification for the approach in paragraph 40(1)(c) relating to the Federal Safety Commissioner.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

Undue dependence upon insufficiently defined powers

Delegation of legislative power

Paragraphs 19(1)(d) and 40(1)(c)

The Committee has sought advice as to why it is necessary to allow delegation of the ABC Commissioner and Federal Safety Commissioner's powers and functions to 'a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph'.

Both the ABC Commissioner and the Federal Safety Commissioner have a wide range of powers and functions. The ability to delegate specific powers and functions to other persons is an important tool in allowing them to manage these obligations and ensure that they are able to effectively and efficiently manage the workload that comes with these positions.

In the majority of cases, powers will be delegated to officers who are specifically listed in clauses 19 and 40, however the nature of the work that is

undertaken by the respective Commissioners means that, in some cases, the most appropriate person to exercise the power or function may not fall within that specific list (because particular knowledge or expertise may be required). In these situations it may be necessary for the ABC Commissioner or Federal Safety Commissioner to delegate to persons with the appropriate skills and knowledge.

A range of safeguards are included in the Bill to ensure that any delegations by the ABC Commissioner and the Federal Safety Commissioner are transparent and able to be scrutinised by both Parliament and any other interested party:

- Rules that are made to prescribe a person for these purposes will be subject to disallowance by both Houses of Parliament, which will ensure that there is an appropriate degree of Parliamentary oversight.
- When delegating powers and functions, the Bill requires that Commissioners must publish details of the delegation as soon as practicable after the delegation takes place. All delegations may be subject to directions regarding how the delegate is able to exercise the powers or functions with which they have been vested, and if these directions are of general application they are taken to be a legislative instrument and therefore subject to oversight by Parliament.
- The ABC Commissioner is only able to delegate his or her power to issue examination notices to either a Deputy ABC Commissioner or, if no Deputy Commissioner has been appointed, to a Senior Executive Service (SES) employee or acting SES employee.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

Broad discretionary power

Subclause 21(3)

This subclause empowers the Minister to appoint a person as a Commissioner subject only to his or her satisfaction that the person (a) has ‘suitable qualifications or experience’ and (b) is of ‘good character’. **The committee notes that it may be desirable to indicate with more detail the nature of suitable qualifications or experience, but in the circumstances leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

Broad discretionary power

Subclause 21(3)

The Committee has stated that it may be desirable to indicate with more detail the nature of suitable qualifications or experience for the appointment of a person as ABC Commissioner, but has left the question of whether the proposed approach is appropriate to the Senate as a whole.

The approach taken to the appointment of the ABC Commissioner mirrors the equivalent provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* and is the same approach taken to the appointment of the Fair Work Ombudsman under the *Fair Work Act 2009*. The appointment is also subject to the Australian Government Merit and Transparency Policy that is administered by the Australian Public Service Commission.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

Merits review – provision of reasons

Clause 28

This clause provides for the Minister to terminate the appointment of a Commissioner in specified circumstances. The provision does not include a requirement for the provision of reasons and the explanatory memorandum does not address this point. **Particularly in light of the exclusion of application for review under the ADJR Act, the committee sought the Minister's advice as to whether consideration has been given to including a requirement in the bill that reasons be given if the appointment of a Commissioner is terminated.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

Merits review – provision of reasons

Clause 28

The Committee has stated that the provision relating to the termination of the ABC Commissioner's appointment does not specifically provide for the

provision of reasons in the event of termination and has sought advice as to whether consideration has been given to including such a requirement in the Bill.

Clause 28 of the Bill mirrors the provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* which also do not include a requirement that the Minister provide reasons if he or she terminates the appointment of a Commissioner. Other comparable legislation, including the *Safe Work Australia Act 2008* and the *Asbestos Safety and Eradication Agency Act 2013* also do not require the provision of reasons in such circumstances. This does not prevent the Minister providing the ABC Commissioner with reasons for the termination of the appointment, consistent with principles of procedural fairness.

Termination of the Commissioner's appointment can only be undertaken by the Minister in a very limited range of circumstances, which are clearly set out in the Bill. Where the grounds for termination can be clearly described (such as in the case of bankruptcy or absence from duty) the Minister must terminate the Commissioner's appointment. In relation to misbehaviour or physical or mental incapacity, the Minister 'may' terminate the Commissioner's appointment. This will ensure that the Minister has sufficient flexibility to consider all the relevant circumstances before terminating a Commissioner's appointment on these grounds.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power—determination of important matters by regulation

Clause 43

This clause provides for an accreditation scheme for Commonwealth building work to be established by the rules. There is very little detail about the scheme (which limits access to Commonwealth building work) set out in the primary legislation and the explanatory memorandum does not explain the appropriateness of this approach. **The committee therefore sought the Minister's advice as to whether consideration has been given to including the important elements relating to the scheme in the primary legislation.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

Delegation of legislative power—determination of important matters by regulation

Clause 43

The Committee has sought advice as to whether consideration has been given to including more elements relating to the work, health and safety (WHS) accreditation scheme in the primary legislation, noting that most aspects of the scheme are established by legislative instrument.

The WHS accreditation scheme provides that, subject to certain financial thresholds, only builders who are accredited under the scheme can perform building work that is funded directly or indirectly by the Commonwealth. The specifics of the scheme, such as the relevant financial thresholds and the criteria that must be met for accreditation, are currently provided for in the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*. It is

intended that this instrument will be preserved as rules made under clause 43 of the Bill following the passage of the Bill. It is not uncommon for these types of schemes to be contained in subordinate legislation as it allows flexibility to deal with changing circumstances in the building and construction industry and changes that may occur in the health and safety environment or legislative framework. The most recent amendment to the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*, for example, amended the application of the scheme to make provision for joint ventures where one of the parties carries out work outside Australia and is therefore unable to meet the full requirements of the scheme. This flexibility ensures that the scheme is able to be adapted to meet changing circumstances and Commonwealth government procurement imperatives while continuing to ensure that only builders with a strong commitment to health and safety are able to enter into contracts for building work funded by the Commonwealth. It is noted that the rules are subject to disallowance by both Houses of Parliament. This ensures that there is an appropriate degree of Parliamentary oversight of any extension of the scheme.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

**Penalties
Clause 49**

This clause provides that Division 9 of Part 3-3 of the FW Act (payment relating to periods of industrial action) applies to industrial action relating to building work with modifications. One of the modifications is that if the

person contravenes a civil remedy provision specified in the FW Act for payments relating to periods of industrial action and the person is a body corporate, the pecuniary penalty must not be more than 1000 penalty units. As noted in the explanatory memorandum, the maximum penalty under the FW Act is 60 penalty units. Although the explanatory memorandum argues, in general terms, that higher penalties are appropriate in the building industry context (at pages 2 and 3), there is no explanation for the large difference in penalties proposed by this particular clause. **The committee therefore sought the Minister's explanation of the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Penalties Clause 81

Similarly, the substantial civil penalties provided for in subclause 81(2) are not specifically justified in the documents supporting the bill. The provision of information about similar penalties in other Commonwealth legislation would allow the committee to better assess the appropriateness of increasing these penalties as proposed. **The committee therefore requested the Minister's advice as to similar penalties in other Commonwealth legislation for the purpose of assessing whether the proposed approach is appropriate.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Penalties Clause 49 and Clause 81

The Committee has sought an explanation of the proposed approach to penalty levels in the Bill.

In relation to clause 49 of the Bill, the Committee notes that the penalties in the provision are significantly higher than the equivalent provision of the *Fair Work Act 2009*. This approach was explicitly recommended by the Cole Royal Commission, which considered the issue of strike pay at some length. In particular, the Cole Royal Commission noted that the then existing prohibitions on the claiming, payment and acceptance of strike pay were being widely disregarded in the industry.³ The Royal Commission found that *'head contractors, in particular, are willing to succumb to the financial demands of unions to buy industrial peace. This can include agreeing to substantial increases in wages and salaries, paying strike pay or numerous other contributions or donations that are demanded.'*⁴ The Royal Commission considered this stemmed from a willingness by union officials to flout their own obligations under the *Workplace Relations Act 1996* to not seek or accept strike pay. In reaching this conclusion, the Royal Commission had regard to statements made by Mr Joe McDonald, the then former Assistant Secretary of the Construction, Forestry, Mining and Energy Union Western Australian Branch, who was quoted as saying in relation to strike pay that *'Every time there's been a strike, I've asked for it'* and that he did not *'pay regard to the law in relation to [taking] a shilling from the ruling class and paying it to the workers'*.⁵

In formulating its recommendations, the Cole Royal Commission found that *'widespread disregard for the laws of the Commonwealth Parliament should not be tolerated. The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it.'*⁶ Given the apparent willingness of unions to demand strike pay despite the long standing prohibitions that have been contained in various iterations of the Commonwealth's workplace relations legislation it is vital that significant penalties be adopted in order to provide an effective deterrent. It is on this basis that the penalties for contraventions of the strike pay laws contained in the *Fair Work Act 2009* have been increased.

In relation to clause 81 of the Bill, the Committee has requested advice as to similar penalties in other Commonwealth legislation to assist in assessing whether the proposed approach is appropriate.

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 236.

⁴ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 206.

⁵ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 25.

⁶ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 237.

The Government's intention is to restore penalties to the levels set by the *Building and Construction Industry Improvement Act 2005* because the implementation of the *Fair Work (Building Industry) Act 2012* has in its view demonstrated that lower penalties are inadequate in achieving real change in the industry. The government consider that the economic and industrial performance of the building and construction industry improved while the ABCC existed. During its period administering the industry specific laws and penalties, the ABCC provided economic benefits for consumers, higher levels of productivity and fewer days lost to industrial action. Finally, it is important to note that the penalties represent the maximum penalty that may be imposed and not a fixed or average penalty.

Comparable penalties are found in the *Competition and Consumer Act 2010*, which provides for a maximum pecuniary penalty of \$750,000 for conduct by a body corporate that breaches the secondary boycott provisions of that Act. A \$500,000 penalty applies to individuals. Similarly, penalties in the *Australian Securities and Investment Commission Act 2001* can be as high as \$1.7 million for conduct by a body corporate and \$340,000 for an individual.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

**Trespass on personal rights and liberties—reversal of onus
Clause 57**

As noted in the explanatory memorandum, this clause reverses the onus of proof applicable to civil proceedings for a contravention of clause 47 (unlawful picketing prohibited) and Part 2 of Chapter 6 of the bill, which contains a number of civil penalty provisions. The fullest justification for this

approach is given in the statement of compatibility (at pages 55 and 56), which states:

Chapter 6 is based on the General Protections in Part 3-1 of Chapter 3 of the Fair Work Act and those provisions also require the person to lead evidence regarding their intent. Like section 361 of the FW Act, this clause provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. A reverse onus is necessary in this context because the reasons for the person's action are a matter peculiarly known to them.

This presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.

Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee sought the Minister's further advice as to the justification for, and fairness of, the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Trespass on personal rights and liberties—reversal of onus Clause 57

The Committee has sought further advice as to the justification for, and fairness of, the reversal of the onus of proof in relation to contraventions of

clause 47 of the Bill (relating to unlawful picketing) and Part 2 of Chapter 6 of the Bill (coercion and discrimination).

As noted in the extract from the Statement of Compatibility with Human Rights that is quoted by the Committee, Chapter 6 of the Bill is modelled on Part 3-1 of Chapter 3 of the *Fair Work Act 2009*. The presumption has been included because, in the absence of a presumption relating to the reasons for which certain actions are taken, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. This presumption has also been extended to the prohibition on unlawful picketing that is contained in clause 47 of the Bill as picketing action is only prohibited if it is motivated by purposes listed in the provision or is otherwise unlawful. As with the prohibitions in Chapter 6, it would be extremely difficult, if not impossible, for a complainant to establish a person's motivation for the purposes of clause 47.

The presumption set out in clause 57 of the Bill applies unless the person proves otherwise on the balance of probabilities. As noted in the recent case of *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, displacing a presumption such as the one contained in clause 57 of the Bill only requires a search for the relevant person's 'real or actual intents' but does not extend to displacing an attributed intent derived from presumptions of a different kind.⁷ In practice, when doing this a person will be free to produce relevant evidence that demonstrates their actual intent when undertaking the action in question. In the case of unlawful picketing, for example, it would be open to a person who had engaged in picketing action to present evidence of their motivation for engaging in that behaviour. Clearly the evidence will vary depending on the nature of the matter but could take the form of documentary evidence such as email correspondence, or testimony from other parties engaged in the picketing activity directed at demonstrating that the activity resulted from an alternative motivation.

⁷ *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160 at paragraph 84.

Committee Response

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

Trespass on personal rights and liberties—privacy

Clause 61

This clause provides for examination powers. The ABC Commissioner may issue a written notice to a person requiring them to give information, produce documents or attend before the ABC Commissioner. As a precondition to the exercise of these powers the Commissioner must hold a reasonable belief that the person has information or documents relevant to an investigation into a suspected contravention by a building industry participant of:

- the Act;
- a building law; or
- is capable of giving evidence that is relevant to such an investigation.

The statement of compatibility contains a detailed justification for this clause (at pages 62 to 64). It is noted that there are a number of safeguards designed to promote the appropriate implementation of the examination notice regime and these are set out at page 63. **In light of these points the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Alert Digest No. 9 of 2013 - extract

Insufficiently defined administrative powers—broad delegation of powers

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

Paragraph 66(1)(c) provides that the ABC Commissioner may, by written instrument, appoint as an Australian Building and Construction Inspector ‘a consultant engaged by the ABC Commissioner under section 32’. The Commissioner, under paragraphs 66(1)(a) and 66(1)(b) can also appoint a person who is an employee of the Commonwealth or who holds an office or appointment under a law of the Commonwealth and persons who are employees of a State or Territory or who holds an office or appointment under a State or Territory law. Subclause 66(2) provides that a person can only be appointed under paragraph (1)(c) if the ABC Commissioner is ‘satisfied that the person is an appropriate person to be appointed as an inspector’.

Regrettably the explanatory memorandum merely repeats the effect of these provisions and does not explain the necessity to extend the class of persons who may be appointed as inspectors beyond government employees or office-holders. The same issue arises in relation to the appointment of Federal Safety Officers under paragraph 68(1)(c).

The committee therefore requested the Minister's advice as to the justification for the approach proposed in these paragraphs.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

**Insufficiently defined administrative powers—broad delegation of powers
Paragraphs 66(1)(c) and 68(1)(c)**

The Committee has sought advice as to the justification for the ability of the ABC Commissioner and the Federal Safety Commissioner to appoint consultants as ABC Inspectors and Federal Safety Officers respectively.

The ability of the ABC Commissioner and the Federal Safety Officer to appoint consultants is an important tool to allow them to engage persons with relevant experience or expertise on an ad hoc basis. This is particularly vital given the wide variety of building work that will fall within the scope of the Bill which will require specialised knowledge to regulate appropriately. To effectively support the work of the ABC Commissioner, it may be necessary to allow such consultants to exercise the power and functions of either ABC Inspectors or Federal Safety Officers. The Federal Safety Commissioner, for example, makes extensive use of consultants due to the specialist skills required of Federal Safety Officers, such as relevant lead or principal auditor certifications, familiarity with relevant Australian Standards and the ability to assess applications across all Australian jurisdictions.

There are limitations in place to ensure that consultants are only engaged where necessary and appropriate. As noted by the Committee, both the ABC Commissioner and the Federal Safety Commissioner must be satisfied that the consultant in question is 'an appropriate person to be appointed as an inspector' before they are able to make such an appointment. Consultants may only be engaged under clause 32 and clause 42 where they have suitable qualifications and experience to assist the ABC Commissioner and Federal Safety Commissioner respectively. If appointed as inspectors, consultants must comply with any direction issued by the ABC Commissioner and the Federal Safety Commissioner respectively.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

Clause 70 provides the purposes for which an inspector may exercise their ‘compliance powers’ in relation to a building matter. Paragraph 70(1)(c) provides that these purposes include ‘purposes of a provision of the rules that confer functions or powers on inspectors’. Compliance powers include a number of significant coercive powers, such as the power to enter premises, to interview any person, and to require the production of records or documents (see, generally, clauses 72 to 79).

The terms of paragraph 70(1)(c) have the result that the scope of application for these coercive compliance powers is not wholly contained in the parent (primary) legislation. Given the principle that coercive powers should be limited to contexts in which they are clearly warranted in the public interest, it is desirable they be specified within primary legislation. As the matter is not addressed in the explanatory memorandum **the committee sought the Minister's advice as to why it is not possible to comprehensively provide the purposes for which these powers may be exercised in the primary legislation.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

The Committee has sought advice as to why it is not possible to comprehensively provide the purposes for which inspectors may exercise their compliance power in the primary legislation.

The ability to expand the range of circumstances in which inspectors may exercise compliance powers has been included so that the prescribed functions and powers may be adapted to reflect changing circumstances in the building and construction industry. The industry is dynamic and new unforeseen regulatory challenges may arise which require a swift response.

A rule that seeks to add new purposes for which ABC Inspectors and Federal Safety Officers can exercise compliance powers will be a legislative instrument and therefore subject to disallowance by Parliament. Further, this kind of provision is not unusual. Section 706 of the *Fair Work Act 2009* includes an identical ability to expand the range of circumstances in which inspectors can exercise compliance powers.

Committee Response

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

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

Alert Digest No. 9 of 2013 - extract

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

Clause 72

Clause 72 confers powers on authorised officers to enter premises for compliance purposes. Although there is a provision which provides that an officer must not enter a part of premises used for residential purposes unless the officer reasonably believes that the work is being performed on that part of the premises, the powers clearly cover both business and residential premises. Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (at page 76) states that:

Legislation should only authorise entry to premises by consent or under a warrant. Any departure from this general rule requires compelling justification.

Although Commonwealth legislation does in some cases depart from this principle, the committee's view is that such departures should be few and thoroughly justified. The *Guide* (at pages 85 and 86) sets out a number of categories of circumstances in which entry without consent or a warrant has been authorised in Commonwealth legislation. One such category relates to 'licensed premises' and this may be thought to be relevant in this context. However, it is not clear that this category of exception is appropriately applied and, in any event, the *Guide* clearly indicates that it is relevant only for entry into non-residential premises.

The committee has accepted that 'situations of emergency, serious danger to public health, or where national security is involved' (Report 4/2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation*, paras 1.36 and 1.44) may justify the authorisation of entry without consent or warrant.

Whether or not this power is justified on this basis would, however, require strong justification.

Further, even if such justification were provided, the committee may see fit to ask whether there has been consideration of the appropriateness of further accountability measures. For example, the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given that the persons who exercise them need not be trained law enforcement officers, is not addressed in the explanatory memorandum.

The only justification for the approach is contained within the statement of compatibility, where the limitation of the powers to instances in which inspectors hold a specified reasonable belief is given emphasis (at page 61). It is also argued that the powers are modelled on the powers granted to Fair Work Inspectors under the *Fair Work Act*, though the ‘modifications to reflect additional powers that were granted to inspectors under the BCII Act’ are left unelaborated.

It appears that the explanatory materials do not contain a compelling justification for departure from the general principle stated in the *Guide* and supported by the committee that authorised entry to premises be founded upon consent or a warrant. **The committee therefore sought the Minister's detailed justification of the need for this approach in light of the principles stated in the *Guide* and with reference to the fact that the powers do authorise entry into residential premises. The committee also sought the Minister's advice as to whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given the persons who exercise them need not be trained law enforcement officers.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's initial response - extract**Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant****Clause 72**

The Committee has sought a justification of the need for the approach taken to the power of authorised inspectors to enter premises under the Bill, particularly whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements and requirements that guidelines for the implementation of these powers be developed.

The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the *Fair Work Act 2009*, with some minor amendments to reflect the approach taken in the *Building and Construction Industry Improvement Act 2005*. The approach in the Bill is accordingly consistent with a long history of inspector powers in industrial legislation. Similar powers are found in other industrial legislation such as the *Work Health and Safety Act 2011*.

The *Guide to Framing Commonwealth Offences* quotes the Committee as stating that entry without consent or judicial warrant should only be allowed in a very limited range of circumstances. It is the Government's view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, this would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore, resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

In relation to senior executive authorisation for the exercise of the powers, such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. The unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

Finally, the Committee has sought views on whether consideration has been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of employment of Fair Work Building Industry Inspectors. As such, ABC inspectors will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such guidelines. Where the ABC Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The ABC Commissioner will also be able to adopt administrative guidelines to inform ABC inspectors on the use of their powers and exercise of their functions. Any such document would be designed to provide practical, up-to-date advice to ABC inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

Committee initial response

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

Minister's further response - extract

Thank you for the Senate Scrutiny of Bills Committee's letter of 27 March 2014 seeking my advice about an issue raised in the Committee's *Fourth Report of 2014* in relation to the Building and Construction Industry (Improving Productivity) Bill 2013. The Committee has asked whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of the power in clause 72 for authorised officers to enter premises. I apologise for the delay in responding.

The powers of inspectors to enter premises in the Building and Construction Industry (Improving Productivity) Bill 2013 are primarily based on the provisions of the *Fair Work Act 2009* and the *Building and Construction Industry Improvement Act 2005* (repealed). The powers are consistent with a long history of inspector powers in industrial legislation and ensure that inspectors are only able to exercise entry powers for proper purposes without the use of force.

Currently, Fair Work Building Industry Inspectors have the powers of Fair Work Inspectors under the *Fair Work Act 2009* and there is no legislative requirement that the exercise of these powers be reported to Parliament. Nor was there a requirement to report to Parliament on the exercise of entry powers by inspectors appointed under the *Building and Construction Industry Improvement Act 2005* (repealed).

It is also the case that the Fair Work Building and Construction's *Annual Report* for the 2012-13 financial year includes general information about the number and type of matters that were investigated during that period. Clause 20 of the Building and Construction Industry (Improving Productivity) Bill 2013 will require annual reports of the Australian Building and Construction Commission to also include this high level information about its investigatory activities.

The Coalition Government does not consider there is sufficient justification for imposing higher reporting requirements on the new Australian Building and Construction Commissioner.

Committee's further response

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

Alert Digest No. 9 of 2013 - extract

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

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

Subclauses 76(3) and 77(3) provide for civil penalties for failing to comply with a request to a person to provide, respectively, their name and address and a record or document. Subclause 76(4) and subclause 77(4) provide that those provisions do not apply if the 'person has a reasonable excuse'. As what constitutes a reasonable excuse is open ended it will often be unclear to a person what they need to establish to rely on this defence (see the *Guide to Framing Commonwealth Offences* at page 52). The explanatory memorandum merely repeats the terms of the subclauses and does not provide any guidance.

The same issue also arises in relation to subclause 99(8) in relation to compliance notices. **The committee sought the Minister's advice as to the justification for the approach proposed in these subclauses.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract**Trespass on personal rights and liberties—definition of offence, 'reasonable excuse'****Subclauses 76(3), 77(3) and 99(8)**

The Committee has sought advice as to the justification for the use of the defence of 'reasonable excuse' in relation to failure to comply with a request to a person to provide their name and address, a record or document or a compliance notice.

The *Guide to Framing Commonwealth Offences* notes that the defence of 'reasonable excuse' should not be applied unless it is not possible to design more specific defences. In the cases highlighted by the Committee it would be impossible to list specific defences given the broad range of circumstances that could justify a person's failure to comply with the request from the inspector or the compliance notice. In this way the wide array of factors that may constitute a 'reasonable excuse' provides an important safeguard to individuals. The term 'reasonable excuse' is used in the comparable provisions of the *Fair Work Act 2009* and its predecessor, the *Workplace Relations Act 1996*. The long-standing use of the term 'reasonable excuse' in comparable contexts and the case law that has developed in the area will assist both individuals and the regulator regarding the scope of this term.

What is a reasonable excuse will depend on all the circumstances. For example, in the case of a person failing to comply with a request to provide their name and address, a person may have a reasonable excuse if he or she could not understand or respond to the request due to a disability. In the case of a failure to produce a record or document a reasonable excuse in such an instance would be where the documents to be produced were previously removed by the police or another regulatory authority. Finally, in the case of a failure to comply with a compliance notice that has been issued under the Bill, a reasonable excuse could be if the person did not receive the compliance notice and was not aware of its existence.

Committee Response

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

**Trespass on personal rights and liberties—civil penalties
Clause 86**

This clause provides in relation to the civil remedy provisions that the rules of evidence and procedure for civil matters apply, ensuring that the criminal rules of evidence and procedure are not applicable. The statement of compatibility contains a detailed discussion about whether this approach is consistent with rights associated with a fair trial.

This matter falls more directly within the terms of reference of the PJCHR, who has issued a practice note on the distinction between civil and criminal penalties. **The committee notes this and if necessary will scrutinise the clause further after considering any view the PJCHR may express about it.**

The committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Alert Digest No. 9 of 2013 - extract

**Trespass on personal rights and liberties—reversal of onus
Clause 93**

Clause 93 provides that if a person wishes to rely on a defence to a civil remedy provision, that person bears an evidential onus of proof in relation to

the matters relevant to establishing the defence. No discussion of this approach is contained in the explanatory memorandum. **Having regard to the significant penalties established by the Act and the relevant principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the committee sought the Minister's advice as to the justification for the reversal of onus proposed in this provision.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Trespass on personal rights and liberties—reversal of onus Clause 93

The Committee has sought advice as to the justification for the reversal of onus proposed in clause 93.

Clause 93 is a model provision that is taken from clause 99 of the Regulatory Powers (Standard Provisions) Bill 2013. The explanatory memorandum to the Bill explains that this clause means that if a person wishes to rely on a defence they bear the evidential onus of proving that defence. This is a general statement of how the evidential burden will apply in relation to the Bill and does not act to reverse the onus of proof itself. The reasons for reversing the onus of proof in clauses 7 and 57 are discussed above.

Committee Response

The committee thanks the Minister for this response.

Alert Digest No. 9 of 2013 - extract

**Trespass on personal rights and liberties—self-incrimination
Clauses 102 and 104**

Clause 102(1) abrogates the common law privilege against self-incrimination. It provides that a person is not excused from giving information, producing a record or document or answering a question under an examination notice (clause 61) or when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1) on the grounds that to do so would incriminate the person or otherwise expose the person to a penalty or other liability.

Subclause 102(2) does provide for a *use* and *derivative use* immunity in relation to information given under an examination notice, subject to common exceptions to such an indemnity in relation to proceedings for offences for providing false information and the obstruction of Commonwealth officials under the Criminal Code. This means that any information or documents provided cannot be used in subsequent proceedings against the person who provided them (the *use* immunity) and that the information or documents provided by a person cannot be used to investigate unlawful conduct by the person who provided them (the *derivative use* immunity).

However, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1), is subject only to *use* and *derivative use* immunities in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded from the immunities).

The statement of compatibility states that the abrogation of the privilege was ‘considered necessary by the Royal Commission [into the building and construction industry which reported in 2003] on the grounds that the [regulator] would otherwise not be able to adequately perform its functions due to the closed culture of the industry’. It is further argued that the serious consequences of abrogation are ameliorated by the existence of the *use* and *derivative use* immunity. The committee notes that the report relied upon to justify the necessity of the approach based on factual claims about the ‘closed culture of the industry’ was written 10 years ago.

A similar issue arises in relation to section 104 in relation to the admissibility of certain records and documents.

Given (1) the significance of the this issue, and (2) the fact that neither the statement of compatibility nor the explanatory memoranda explains why, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), under a notice under subclause 77(1), or documents referred to in subclauses 104(a) and 104(b), are subject only to use/derivative use immunity in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded), the committee sought the Minister's advice as to:

- 1. a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary; and**
- 2. why the use and derivative use immunities in relation to information provided when an authorised officer enters premises under paragraph 74(1)(d) or under a notice under subclause 77(1), and documents referred to in subclauses 104(a) and 104(b) are limited to criminal proceedings.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Minister's response - extract

Trespass on personal rights and liberties—self-incrimination Clauses 102 and 104

The Committee has sought a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary.

The construction industry provides many jobs for workers in small business, large enterprises and contractors. It is critical to a productive, prosperous and

internationally competitive Australia. The Coalition Government recognises the importance of an industry that is vital to job creation and which is essential to Australia's economic and social well-being.

The establishment of the ABCC in 2005 provided a genuinely strong watchdog for the building and construction industry. The ABCC was responsible for decreased lawlessness in the industry and significant productivity gains that benefitted every Australian and the Australian economy as a whole.

As highlighted by the Committee, the Cole Royal Commission considered that the abrogation of the privilege against self-incrimination was necessary on the grounds that the regulator would otherwise not be able to adequately perform its functions due to the closed culture of the industry. It is evident that the findings of the Cole Royal Commission are as relevant today as they were at the time of their initial publication with a culture of silence remaining prevalent in the building and construction industry.

The privilege against self-incrimination is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to perform their compliance functions, including monitoring compliance with the Bill and other designated building laws. The production of documents will be a key method of allowing inspectors to effectively investigate whether the Bill or a designated building law is being complied with and to collect evidence to bring enforcement proceedings. It means that all relevant information is available to them. If the ABCC is constrained in its ability to collect evidence, the entire regulatory scheme may be undermined. Finally, the approach adopted in the Bill is also consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.

The Committee has also sought information on why the use and derivative use immunities in relation to these provisions are limited to criminal proceedings for information obtained when an authorised officer enters premises under paragraph 74(1)(d), under a notice under subclause 77(1), or from documents referred to in subclauses 104(a) and 104(b). The application of use and derivative use immunity in relation to criminal proceedings recognises the severe consequences that can flow from a criminal prosecution and act to encourage parties to comply with requests for information without fear of

criminal sanction. Application of the immunities to civil proceedings, however, would severely undermine the ability of the regulator to take enforcement action for breaches of the Bill. It would prevent the use of information that has been provided to inspectors during the course of their investigations—as well as any information, document or thing obtained as a direct or indirect consequence of the use of these powers—from being used in civil proceedings against the individual who provided information or had custody of or access to the document at the time. The extension of the immunities to civil proceedings may also create an incentive for individuals to refuse any cooperation with the regulator unless information has been formally requested by an inspector under Division 3 of Part 3 of the Bill. This is consistent with the approach taken in the *Fair Work Act 2009* which also provides that a record or document obtained under the comparable paragraphs are not admissible in evidence against the individual in criminal (but not civil) proceedings.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

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

This clause enables rules to be made for the purposes of subsection 6(4) or 6(5) (relating to the meaning of building work) or subsection 10(2) (relating to the extension of the Act to Christmas Island and Cocos (Keeling) Islands) to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days. This appears to enable the rules to take effect retrospectively. The explanatory memorandum merely repeats the terms of the subclause. **The committee therefore sought the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

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

The committee has sought advice as to the justification for the rule making power in clause 120 that provides for certain rules to take effect from the commencement of the subsection for which the rules are to be made if those rules are made within 120 days.

This provision was included to allow for modification to the operation of the Bill in order to prevent unforeseen difficulties that may arise in the early stages of implementing the Bill. The time limit on the use of this provision will ensure that its use will be limited. Any such rules will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any rules that seek to have retrospective effect.

Committee Response

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

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

Comment on the explanatory memorandum

The committee notes that, generally, the explanatory memorandum is regrettably brief and uninformative, for the most part repeating the provisions of the bill. For example, the explanatory memorandum frequently notes that various provisions are modelled on or similar to provisions contained in the FW Act, but without any detail about the extent of similarities or whether there are salient differences.

A comprehensive explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this committee) as it greatly assists people to understand the legislative proposal and it may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified. A comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because the committee is provided with sufficient information to scrutinise the bill in accordance with its scrutiny principles.

Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Social Services

Background

This bill amends the *Business Services Wage Assessment Tool Payment Scheme Act 1915* to give effect to a recently mediated settlement agreement between the Commonwealth and the Applicant in a representative proceeding in the Federal Court of Australia (*Duval-Comrie v the Commonwealth* VID 1367/2013) by:

- increasing one-off payments from 50 per cent to 70 per cent of the difference between the actual wage paid to an eligible person and the amount they would have been paid had the Business Services Wage Assessment Tool (BSWAT) productivity-only component been applied;
- providing a ‘top up’ payment for persons who have already received a 50 per cent payment under the BSWAT payment scheme;
- removing the current compulsory requirement to obtain legal advice before any payments are made;
- extending all relevant scheme dates by 12 months;
- clarifying certain administrative arrangements; and
- enabling a deceased person’s legal personal representative to engage with the payment scheme on their behalf.

Trespass on personal rights and liberties—fair hearing Item 29, proposed new paragraph 36(c)

This bill makes a number of amendments to the *Business Services Wage Assessment Tool Payment Scheme Act 2015*. In a class action currently before the Federal Court of Australia, class members have agreed to release the Commonwealth from liability which may otherwise be established if the amendments are made and the settlement approved by the court. However, as stated in the statement of compatibility, class members have been given an opportunity to opt out of the representative proceedings and commence their

own legal proceedings rather than accept an offer under the payment scheme (which is to be amended by this bill). The explanatory memorandum states that '[t]his bill will provide increased one-off payments to around 10,000 eligible people under the BSWAT Payment Scheme Act 2015, and make associated amendments to improve the administration of the payment scheme' (at p. 1).

Item 29 removes the requirement that a person obtain legal advice from a legal practitioner before he or she can make an effective acceptance under the BSWAT Payment Scheme. The explanatory memorandum indicates that access 'to free legal advice will continue on a voluntary basis and in accordance with the BSWAT Rules' (at p. 3). Although a completed legal advice certificate (which complies with section 36 of the BSWAT Act) will still be necessary, it need only be completed by a legal practitioner if the person elects to receive legal advice.

The key change made by item 29 is thus to make legal advice prior to electing to opt into the BSWAT payment scheme (and thus forgo the right to pursue legal action) optional, not compulsory. The statement of compatibility emphasises that this provides 'greater choice and control to applicants' (at p. 2). The statement also suggests that making access to legal advice voluntary will 'reduce the red-tape burden on an individual applicant' and that requiring legal advice 'may be an impediment to the take-up of offers under the payment scheme and, in any event, members of the representative proceeding who choose to accept a payment under the scheme may not require further legal advice' (at p. 4).

The committee notes this advice, but is concerned about the removal of the existing requirement for compulsory legal advice (freely provided by the Commonwealth), especially as at least some persons affected suffer from a variety of disabilities. **The committee therefore seeks the Minister's more detailed explanation for this change.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to:

- remove the current exemption from the ban on conflicted remuneration for benefits paid in relation to certain life risk insurance products;
- enable the Australian Securities and Investments Commission to make a legislative instrument to permit benefits in relation to life risk insurance products to be paid provided certain requirements are met; and
- introduce a ban on volume based payments in life risk products.

The committee has no comment on this bill.

Dairy Produce Amendment (Dairy Service Levy Poll) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Agriculture and Water Resources

Background

This bill amends the *Dairy Produce Act 1986* to:

- remove the requirement for the dairy industry to hold a dairy levy poll every five years; and
- enable the Minister to make a legislative instrument to:
 - require the industry services body to establish a levy poll advisory committee to consider the levy rate every five years;
 - require the industry services body to hold a levy poll if a variation to the rate is recommended by the advisory committee; and
 - include a mechanism for dairy farmer members of Dairy Australia Limited to request a poll if they disagree with the advisory committee's decision not to convene a levy poll.

The committee has no comment on this bill.

Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

Introduced into the House of Representatives on 10 February 2016

Portfolio: Immigration and Border Protection

Background

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

General

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

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

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

expressed earlier by the committee. For example, the committee's *Fifteenth Report of 2014* included the following comments in relation to the bill preceding the Character Act:

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

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

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

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

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

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

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

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

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

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

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

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

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

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Narcotic Drugs Amendment Bill 2016

Introduced into the House of Representatives on 10 February 2016
Portfolio: Health

Background

This bill amends the *Narcotic Drugs Act 1967* to:

- give effect to certain of Australia's obligations under the *Single Convention on Narcotic Drugs, 1961* (the Single Convention);
- establish licensing and permit schemes for the cultivation and production of cannabis and cannabis resin for medicinal and scientific purposes, and for the manufacture of narcotic drugs covered by the Single Convention;
- provide for monitoring, inspection and enforcement powers for authorised inspectors and for the secretary to give directions to licence holders and former licence holders; and
- enable the secretary to authorise a state or territory government agency to undertake cultivation and production of cannabis and manufacture of medicinal cannabis products.

The bill also amends the *Therapeutic Goods Act 1989* to make a consequential amendment.

Strict liability

Various

In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

In this instance a number of strict liability offences are listed and discussed in the statement of compatibility (see p. 32). The committee notes the justification provided and that the approach has been developed by reference to the *Guide to Framing Commonwealth Offences*. **In light of this, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Privilege against self-incrimination Schedule 1, proposed section 24B

The statement of compatibility (pp 33-34) includes a comprehensive discussion of the proposal to limit the privilege against self-incrimination, as follows:

This Bill limits the right for an individual to be free from self-incrimination where the exercise of this right could seriously undermine the effectiveness of the regulatory scheme and prevent the collection of evidence.

New section 24B inserted by Schedule 1 to the Bill abrogates the privilege by providing that a person is not excused from providing information in certain limited circumstances even though that information might tend to incriminate the person or expose them to a penalty.

The provisions to which section 24B will apply are:

- new sections 10K and 12N – these are statutory conditions imposed on the holder of a licence to inform the Secretary of matters that could require or allow the Secretary to revoke the licence including, matters affecting whether the licence holder remains a fit and proper person, and any breach of the licence;
- new section 14J– this is a power for the Secretary to request information or documents from applicants for a licence and from licence holders.

The Secretary must refuse a licence application if any information requested under new subsection C14J(1) is not provided (paragraphs 8G(1)(h), 9F(1)(h)) and 11J(1)(h)) and conditions can be imposed requiring the provision of information to the Secretary (see paragraphs 10D(1)(l) and 12F(1)). A breach of any such condition or the failure of a licence holder to respond to a request for information (also an offence under new section 14M if the person is a licence holder) would both be grounds for revocation of the licence (see new paragraphs 10P(2)(a) and (i), and 13B(2)(a) and(i)). However, these provisions do not themselves override the right to be free from self-incrimination as, in common law, it must be expressly overridden by statute.

Without limiting this right, applicants and licence holders could withhold pertinent information that would seriously undermine the effective operation of the licensing system and the Secretary would not have grounds to refuse to grant a licence or to revoke a licence, as would be justified if the full facts were known. For example, a person may have no criminal convictions yet have extensive ties to organised crime or associate with people who have such ties. This person could potentially engage in illegal activities using the licence as a cover for those activities. Alternatively, that person may be influenced by other persons to allow them to engage in illegal activities.

While in some cases it may be feasible to obtain information by other means or from other persons or agencies, there will be occasions when the relevant information is only known by that person or it is not feasible to do so, which could significantly increase the risk of illegal activities being undertaken undetected.

Without the abrogation of the right to be free from self-incrimination, the regulatory scheme would be seriously compromised. The public benefit of its removal outweighs the loss of personal liberty.

The abrogation of the privilege has been limited so that self-incriminatory disclosures cannot be used against the person making the disclosure in any criminal proceedings or in any proceedings for contravention of a civil penalty proceeding (so-called ‘use immunity’). It can however be taken into account for the purposes of a decision about whether to revoke the licence or any review of such a decision, or to take any other regulatory action in relation to a licence or permit.

Exceptions are also made in relation to proceedings arising out of sections 137.1 and 137.2 (which deal with the giving of false or misleading information and documents to the Commonwealth) and of subsection 149(1) (which deals with obstruction of Commonwealth officials).

The other exception made is in relation to new subsection 14M(1) under which a licence holder is liable for a failure to comply with a notice from the Secretary under new subsection 14J(2) to provide information or documents about matters relating to a licence or any permit granted in relation to the licence. The information provided by the licence holder in purported compliance with the notice may be the only evidence the Secretary has of non-compliance with the licence.

The capacity of the Secretary to obtain accurate and full information from licence holders will be absolutely essential to the overall effectiveness of the licensing scheme and any capacity on the part of the licence holder to withhold relevant information could seriously undermine Australia’s ability to comply with its international obligations under the Single Convention.

New subsection 26B(1) does not include a ‘derivative use immunity’ (which would otherwise protect information provided by the individual from being used to investigate unlawful conduct by that person but could be used to investigate third parties). This reflects the nature of the activities that are being regulated.

The Commonwealth needs to be in a position to ensure that efforts to control the illegal activities associated with the cultivation of cannabis are not undermined by any lack of capacity to use information it has available to it for that purpose. The inclusion of a derivative use immunity has the potential to do so.

This approach is consistent with the Attorney-General’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

In light of this detailed justification, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Privacy

The Bill includes provisions that relate to:

- collecting, using, storing and disclosing personal information (including information about a person's reputation and criminal record), and
- allowing collection of personal information about the family of the person (an applicant's/licence holder's relatives are relevant to a determination by the Secretary of whether the person is 'fit and proper').

The statement of compatibility includes (at pp 35-36) a detailed discussion of the ways in which the bill may affect privacy and the justification for the proposed approach. **In light of this information the committee leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

However, section 14N authorizes disclosure in a number of listed circumstances and it is not clear whether there is a related offence for unauthorised disclosure. The committee therefore seeks the Minister's advice about this matter.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Breadth of administrative power

Proposed section 13H

This proposed section allows the Secretary to appoint officers and employees of an agency of a State or Territory that has functions relating to health, agriculture or law enforcement, as well as Australian Public Service employees, officers and employees as authorised inspectors. **Given the extensive monitoring powers that may be exercised, the committee seeks the Minister's advice as to safeguards that will apply to the exercise of these powers and whether consideration has been given to including a legislative requirement for appointed officers to hold appropriate qualifications and experience.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Coercive powers—entry and search powers without consent or a warrant

Proposed section 14C

The explanatory memorandum notes (at p. 83) that:

Authorised inspectors will, under new section 14C, be able to enter licensed premises without consent or a warrant for the purposes of determining whether the Act and any regulations and licence conditions and any applicable directions given under new sections 15, 15A, and 15B are being complied with, and to decide whether to exercise a power under the Act.

Although entry and search powers without consent or a warrant are inconsistent with the general principles in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) it is arguable that the proposed approach falls within an exception for 'exceptional circumstances' (see section 8.6 of the Guide). The Guide notes that in its 2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation* this committee stated that legislation should authorise entry without consent or warrant only in 'situations of emergency, serious danger to public health, or where national security is involved.' The Guide goes on to state that:

Where these powers are provided for, senior executive authorisation should be required and rigorous reporting requirements should be imposed. This helps to ensure a sufficient level of accountability is maintained.

Furthermore, the committee is of the view that such authorisation should only be sought if avenues for obtaining a warrant by remote means have proven absolutely impractical in the particular circumstances.

While the committee accepts that in the current circumstances the general approach could possibly be seen to be consistent with the Guide, the committee seeks the Minister's advice as to what Executive or other authorisation will be needed before entry without consent or a warrant

can take place, what reporting requirements will apply and whether there is a requirement for guidelines for the use of the powers to be made.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Merits review

Proposed sections 15E and 15H

Section 15E lists decisions of the Secretary that it is proposed will be reviewable. In addition, subsection 15E(2) states that the regulations may provide that a decision made under a specified provision of this Act is a reviewable decision. **The committee seeks the Minister's advice as to whether any decisions permitted by the Act will not be reviewable (and have therefore been omitted from the list of reviewable decisions in section 15E) and, if so the justification for this approach.**

Paragraph 15H(2)(b) provides that the Minister or internal reviewer must not take into account any other information (i.e. other than that included in the application) provided by or on behalf of the applicant after the making of the application, other than information provided in response to a notice under section 15K.

In general, when the Administrative Appeals Tribunal (AAT) exercises merits review it is obliged to act on the basis of the most up-to-date information provided to it in the course of the hearing. It is also possible that information excluded by this provision from consideration in internal review may be included in a review by the AAT. Further, it has been suggested in some cases that decision-makers may have implied statutory obligations to act on the basis of the most up-to-date information bearing on relevant matters within their actual or constructive knowledge (see, for example, *Peko-Wallsend*). **The committee therefore seeks the Minister's advice as to the justification for the approach proposed in section 15H.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions as they may be considered to make rights, liberties or obligations unduly dependent upon

non-reviewable decisions in breach of principle 1(a)(iii) of the committee's terms of reference.

**Delegation of legislative power—Henry VIII clause
Proposed paragraph 27(4)(g)**

Henry VIII clauses enable delegated legislation made by the Executive to override the operation of legislation that has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

This paragraph is a *Henry VIII* clause because it will authorise regulations to be made modifying the operation of Chapters 2 and 3 of the Act if an applicant for a licence or a licence holder is an agency of a State or Territory.

The explanatory memorandum notes (at p. 96) that:

The areas that may warrant modification are some aspects of the definition of ‘fit and proper’ test, which would not be relevant or appropriate in such a situation and the circumstances in sections 8G, 8J, 9F, 9H, 11J and 11K where the Secretary is prohibited from granting a licence and where the Secretary under new sections 10P and 13B is required to revoke a licence. These regulations would have to be consistent with Australia’s obligations under the Single Convention.

It is the practice of the committee to comment adversely on *Henry VIII* clauses when the rationale for their use is not clear, **but in light of the explanation provided the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

The committee draws Senators' attention to the provisions as they may be considered to delegate legislative powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.

**Delegation of legislative power—incorporation by reference
Subsection 28(2)**

The committee’s general approach is that scrutiny concerns arise when provisions allow the amendment of legislative provisions by incorporating material from another document as it exists from time-to-time (incorporating material by reference) because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including in standards or industry databases, is not publicly available or is available only if a fee is paid).

New subsection 28(2) creates an exception to the limitation on the incorporation by reference rule in subsection 14(2) of the *Legislative Instruments Act 2003* that would not otherwise allow regulations to be made in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time.

The explanatory memorandum notes (at p. 96) that ‘this will allow, for instance, the incorporation by reference of standards that are relevant to the cultivation of contaminant-free plants.’

While the committee notes the example provided as to a possible use of this provision, the committee seeks the Minister’s advice as to:

- **whether consideration can be given to including a requirement in the bill that instruments incorporated by reference are made freely and readily available to the public; and**
- **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law as a result of new or updated material being incorporated by reference into the law.**

Pending the Minister’s reply, the committee draws Senators’ attention to the provisions as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee’s terms of reference.

Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Industry, Innovation and Science

Background

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

Retrospective validation

General comment

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

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

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

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Parliamentary Entitlements Amendment (Injury Compensation Scheme) Bill 2016

Introduced into the House of Representatives on 10 February 2016

Portfolio: Finance

Background

This bill amends the *Parliamentary Entitlements Act 1990* to provide a legislative mechanism for the establishment of the Parliamentary injury compensation scheme.

The committee has no comment on this bill.

Renewable Fuel Bill 2016

Introduced into the House of Representatives on 8 February 2016

By: Mr Katter

Background

This bill provides for the regulation of renewable fuel content in petrol and stipulates that the renewable fuels volume percentage be mandated at 5% minimum from 1 July 2019 and 10% minimum from 1 July 2022.

Trespass on personal rights and liberties—reversal of burden of proof

Item 1, proposed subsection 36E(2)

Subsection 35E(1) creates an offence of supplying motor vehicle fuel that does not comply with relevant regulation. Subsection 35E(2) creates a defence if a person ‘believes on reasonable grounds that the fuel supplied will be further processed for the purpose of bringing the fuel into compliance with the regulations’. The defendant bears the evidential burden in relation to this matter, but the explanatory memorandum does not address this reversal of the onus of proof. **The committee therefore seeks the Member’s justification for the proposed approach, including whether the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* was taken into consideration.**

Pending the Private Member’s reply, the committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Trespass on personal rights and liberties—strict liability

Item 1, proposed sections 36N and 36P

In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for the imposition of strict liability, including

whether the approach is consistent with *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The bill includes strict liability offences, but there is no justification for these included in the explanatory memorandum. **The committee therefore seeks the Member's advice as to the justification for the approach proposed in these items.**

Pending the Private Member's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Penalty

Item 1, proposed section 36E

The penalty in proposed section 36E is 10,000 penalty units, though in the explanatory memorandum it is stated as 100 penalty units. **The committee seeks the Member's clarification as to the intended level of penalty. If the correct figure is 10,000 penalty units the committee also seeks a justification for the level of penalty, including drawing appropriate comparisons with other penalties in existing Commonwealth legislation.**

Pending the Private Member's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee terms of reference.

Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016

Introduced into the House of Representatives on 10 February 2016

Portfolio: Treasury

Background

This bill amends relevant Acts as follows:

Schedule 1 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that digital products and other imported services supplied to Australian consumers by foreign entities are subject to goods and services tax in a similar way to equivalent supplies made by Australian entities.

Schedule 2 amends the *A New Tax System (Goods and Services) Tax Act 1999* to ensure that the goods and services tax rules apply to cross-border supplies that involve non-resident entities.

Schedule 3 amends the income tax treatment of farm management deposits (FMDs) by:

- increasing the maximum amount that can be held in FMDs by a primary producer to \$800,000;
- allowing primary producers experiencing severe drought conditions to withdraw an amount that has been held in an FMD for less than 12 months without affecting the income tax treatment of the FMD in the earlier income year; and
- allowing amounts held in an FMD to offset a loan or other debt (ie. as a result of the arrangement a lower amount of interest is charged on the loan than would otherwise be the case) relating to the FMD owner's primary production business.

The committee has no comment on this bill.

Tax Laws Amendment (Norfolk Island CGT Exemption) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Treasury

Background

This bill amends the *Income Tax (Transitional Provisions) Act 1997* to exempt assets held by Norfolk Island residents before 24 October 2015 from capital gains tax (CGT).

The committee has no comment on this bill.

Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016

Introduced into the House of Representatives on 4 February 2016

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* to allow small businesses to change their entity structure without incurring a capital gains tax liability at that time.

The committee has no comment on this bill.

Trade Legislation Amendment Bill (No. 1) 2016

Introduced into the House of Representatives on 10 February 2016

Portfolio: Trade and Investment

Background

This bill amends various Acts relating to export and trade.

Schedule 1 amends the *Export Market Development Grants Act 1997* to:

- remove communications as an eligible expenditure category;
- place a limit of \$15,000 on the free sample expenditure category;
- describe the promotional literature or other advertising expenditure category as including literature or material in electronic or any other form;
- repeal the provision for in-country travel expenses to be reimbursed, and amend the amount of the daily allowance for overseas visits from \$300 to \$350;
- amend the list of excluded expenses relating to eligible promotional activities, things or eligible products;
- permit Austrade to direct funds from other sources towards Export Market Development Grants administration costs;
- set the date by which the next independent review is to be completed and that later review completion dates are to be determined by the Minister; and
- amend the definition of a grant year.

Schedule 2 amends the *Australian Trade Commission Act 1985* to change the Commission's name from the Australian Trade Commission to the Australian Trade and Investment Commission, and makes consequential amendments to other Acts as a result of this change.

The committee has no comment on this bill.

Transport Security Amendment (Serious or Organised Crime) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Infrastructure and Regional Development

Background

This bill amends the *Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003* to:

- seek to prevent the use of aviation and maritime transport or offshore facilities in connection with serious or organised crime;
- establish a regulatory framework to implement harmonised eligibility criteria for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes;
- clarify and align the legislative basis for undertaking security checking of ASIC and MSIC applicants and holders;
- provide for regulations to prescribe penalties for offences; and
- insert an additional severability provision to provide guidance to a court as to Parliament's intention.

Delegation of legislative power

Schedule 1, item 4, proposed subsection 38AB(3)

Schedule 1, item 12, proposed subsection 113F(2)

Subsection 38AB(1) provides that the regulations may, for the purposes of preventing the use of aviation in connection with serious or organised crime, prescribe requirements in relation to areas and zones established under Part 3 of the Act. Subsection 38AB(3) provides that the regulations made under this section may prescribe penalties for offences against those regulations. The subsection provides that for an offence committed by an operator the maximum penalty is 200 penalty units; for an industry participant, 100 penalty units; and for an accredited air cargo agent or any other person, 50 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* suggests that penalties that exceed 50 penalty units should not normally be imposed by regulations.

The explanatory memorandum, however, states that these offence provisions ‘follow a clear legislative precedent already established in the Aviation Act’. Further, it is noted that the ‘maximum penalties are consistent with existing penalties for these classes of offenders for corresponding offences in relation to access to secure aviation areas and zones’ and that the penalties take into account ‘the appropriate level of deterrence for the different classes of offenders’ (at p. 6). Finally, it is noted that it is intended that the regulations prescribing penalties under the new subsection 38AB(3) will be consistent with existing penalties for equivalent offences already established in the Aviation Transport Security Regulations 2005’ (at p. 6).

The same issue arises in relation to item 12, proposed subsection 113F(2), which is discussed at p. 10 of the explanatory memorandum.

In light of the explanation provided, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.

In the circumstances, the committee makes no further comment on this issue

Veterans' Affairs Legislation Amendment (Single Appeal Path) Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Veterans' Affairs

Background

This bill amends the *Military Rehabilitation and Compensation Act 2004* (the Act) to create a single appeal path made by the Military Rehabilitation and Compensation Commission.

The committee has no comment on this bill.

Commentary on amendments to bills

Criminal Code Amendment (Firearms Trafficking) Bill 2015

[Digest 1/16 – Report 2/16]

On the 11 February 2016 the Minister for Justice (Mr Keenan) presented an addendum to the explanatory memorandum and the bill was read a third time in the House of Representatives.

Offences—mandatory minimum sentences

The committee notes that this addendum provides further information in relation to the mandatory minimum sentences for firearms trafficking offences proposed in this bill. The addendum further explains the impact of these provisions in relation to minors and individuals with significant cognitive impairment. These matters are relevant to principle 1(a)(i) of the committee's terms of reference (relating to provisions which may trespass unduly on personal rights and liberties).

In particular, the committee notes that in order for the exception to the mandatory minimum penalties for minors to apply, the defendant will bear an evidential burden regarding their age. This means that the defendant will need to adduce or point to evidence that suggests a reasonable possibility that they are under 18. Similarly, in relation to individuals with significant cognitive impairment, the onus will be on the defendant to bring forward evidence in relation to their cognitive ability.

The committee draws these matters (and the committee's general comments in relation to the proposed mandatory minimum sentences at pages 84 - 88 of the committee's *Second Report of 2016*) to the attention of Senators.

Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015

[Digest 11/15 – no comment]

On 3 February 2016 the Senate agreed to two Government and two Opposition amendments and the Minister for Rural Health (Senator Nash) tabled a supplementary explanatory memorandum.

On 4 February 2016 the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee has no comment on these amendments or the additional explanatory material.

Omnibus Repeal Day (Spring 2015) Bill 2015

[Digest 13/15 – Report 1/16]

On 2 February 2016 the Minister for Employment (Senator Cash) tabled an addendum to the explanatory memorandum.

The committee takes this opportunity to thank the former Assistant Minister for Productivity for providing this additional material in response to the committee’s request. The committee notes that the additional material will assist Parliamentary scrutiny by enabling Senators and others to quickly determine which measures in the bill have not yet been considered by the Parliament.

Further information in relation to this matter is available in the committee’s *First Report of 2016* (at pages 34–36).

Scrutiny of Standing Appropriations

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.

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

Bills introduced with standing appropriation clauses in the 44th Parliament since the previous Alert Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Nil