

Senate Standing Committee
for the
Scrutiny of Bills

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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Joseph Ludwig	ALP, Queensland
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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.

Biological Control Amendment Bill 2016

Introduced into the House of Representatives on 25 February 2016

Portfolio: Agriculture and Water Resources

Background

This bill amends the *Biological Control Act 1984* to clarify the definition of an organism to reflect the use of viruses and sub-viral agents as agent and target organisms for biological control activities in the Australian Capital Territory (including the Jervis Bay Territory).

The committee has no comment on this bill.

Commonwealth Electoral Amendment Bill 2016

Introduced into the House of Representatives on 22 February 2015

Portfolio: Finance

Background

This bill amends the *Commonwealth Electoral Act 1918* by:

- introducing optional preferential voting above the line for Senate elections;
- providing vote savings provisions to capture voter intent and reduce the risk of increased vote informality;
- abolishing group and individual voting tickets;
- introducing a restriction that there be a unique registered officer and deputy registered officer for a federally registered party;
- allowing party logos to be printed on ballot papers for both the House of Representatives and the Senate; and
- making technical amendments.

The committee has no comment on this bill.

Passenger Movement Charge Amendment (Norfolk Island) Bill 2016

Introduced into the House of Representatives on 24 February 2016

Portfolio: Immigration and Border Protection

Background

This bill amends the *Passenger Movement Charge Act 1978* to extend the passenger movement charge to people departing Norfolk Island.

The committee has no comment on this bill.

Public Governance, Performance and Accountability Amendment (Procuring Australian Goods and Services) Bill 2016

Introduced into the House of Representatives on 22 February 2015

By: Mr Katter

Background

This bill amends the *Public Governance, Performance and Accountability Act 2013* to ensure that contracts on behalf of the Commonwealth, corporate Commonwealth entities and wholly owned Commonwealth companies are fulfilled with Australian goods and services.

Broad discretionary power

Schedule 1, item 2, proposed section 99AB

Proposed section 99AB provides for a very broad and unstructured discretionary power pursuant to which the Finance Minister may exempt an arrangement, goods, or services from the operation of section 99AA. The power is conditioned on the Minister's belief that the exemption is 'in the public interest'.

The committee seeks the Member's advice as to whether consideration has been given to including relevant considerations to guide the exercise of this power in the bill.

Pending the Member'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.

Territories Legislation Amendment Bill 2016

Introduced into the House of Representatives on 24 February 2016
Portfolio: Infrastructure and Regional Development

Background

This bill amends various Acts relating to Territories.

Schedule 1 amends the *Norfolk Island Legislation Amendment Act 2015* to allow New Zealand citizens who hold a permanent visa and reside on Norfolk Island access to social security payments from 1 July 2016.

Schedule 2 amends the *Norfolk Island Legislation Amendment Act 2015* to align the early claims period for family assistance payments with the early claims periods for social security and child support payments before 1 July 2016.

Schedule 3 amends the *Child Support (Assessment) Act 1989* and *Child Support (Registration and Collection) Act 1988* to extend the child support scheme to residents of the Indian Ocean Territories of Christmas Island and Cocos (Keeling) Island.

Schedule 4 amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to require eligible Australian citizens and eligible other persons living on Norfolk Island to enrol and vote in federal elections and referendums from 1 July 2016.

Schedule 5 amends the *Norfolk Island Act 1979* and the *Acts Interpretation Act 1901* to:

- extend all Commonwealth laws to Norfolk Island, unless expressly provided otherwise;
- broaden the definition of the Norfolk Island Regional Council to enable flexibility in the application of local government law to Norfolk Island; and
- make consequential and transitional amendments to various Commonwealth Acts.

Delegation of legislative power—Henry VIII and rules with retrospective application Schedule 5, item 5

Schedule 5, along with the *Norfolk Island Legislation Amendment Act 2015*, has the purpose of normalising federal legislative arrangements for Norfolk Island. In particular, the Schedule extends all Commonwealth Acts to Norfolk Island, unless expressly provided otherwise. (Reversing the existing presumption that Acts did not extend to Norfolk Island unless expressed to do so.)

As noted in the explanatory memorandum (at p. 4), the changes made are thus ‘very broad in nature’. Item 5 of the Schedule provides for a rule-making power to prescribe matters of a transitional nature. Two matters of scrutiny concern arise in relation to this rule-making power. First, subitem 5(3) provides that the rules may provide for the amendment of primary legislation (in the case of rules made before 1 July 2017). Second, subitem 5(4) provides that transitional rules may have retrospective effect (despite subsection 12(2) of the *Legislation Act 2003*).

The explanatory memorandum contains a detailed explanation of the transitional rule-making power:

Subitem 5(1) provides that the Minister may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by Schedule 5. Subitem 5(2) provides limits and safeguards on the Minister’s transitional rule-making power. That is, the transitional rules may not create an offence or civil penalty; provide powers of: arrest or detention; or entry, search or seizure; impose a tax; set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act; or directly amend the text of the *Norfolk Island Act 1979*. Subitem 5(3) provides that transitional rules made before 1 July 2017 may provide that this Act or any other Act or instrument has effect with any modifications prescribed by the transitional rules. Subitem 5(4) provides that subsection 12(2) of the *Legislation Act 2003* concerning the retrospective application of legislative instruments does not apply to transitional rules made before 1 July 2017. Subsection 12(2) of the *Legislation Act 2003* prevents a legislative instrument from taking effect before registration if this would affect the rights of a person to their disadvantage or impose a liability upon them for things done or omitted before that registration.

The scope of the changes in Schedule 5 to normalise federal legislative arrangements on Norfolk Island is broad. It is possible that amendments made

to the *Acts Interpretation Act 1901* and section 18 of the *Norfolk Island Act 1979* may affect the application of Commonwealth legislation to Norfolk Island in a way that was unintended. The transitional rule-making power provides the Minister (in consultation with the relevant portfolio Minister) with an expedient way of resolving unforeseen issues or unintended consequences associated with the Schedule 5 amendments.

To provide for the unusual circumstances created by the extension of Commonwealth laws to Norfolk Island, transitional rules made in the first year may amend the application of Commonwealth legislation to Norfolk Island and be retrospective. Retrospectivity may pre-date the commencement of this Schedule and impose a retrospective disadvantage, contrary to subsection 12(2) of the *Legislation Act 2003*. However, subitem 5(2) places limits on what transitional rules can do, and the capacity for the transitional rules to retrospectively impose a disadvantage is time limited, starting with the commencement of the Schedule and not applying to transitional rules made on or after 1 July 2017. The transitional rules may also operate to retrospective advantage.

While the committee remains concerned about the scope of this power, its potential to apply retrospectively and that it could give rise to detriment, in light of the detailed justification provided the committee draws its concerns to the attention of Senators and leaves the question of whether the proposed rule-making power is appropriate to the Senate as a whole.

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

Commentary on amendments to bills

Commonwealth Electoral Amendment Bill 2016

[Digest 3/16 – no comment]

On 24 February 2016 the House of Representatives agreed to six Government amendments, the Assistant Minister for Finance presented a supplementary explanatory memorandum and the bill was read a third time.

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

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

[Digest 14/15 – Report 1/16]

On 22 February 2016 the Assistant Minister for Agriculture and Water Resources (Senator Ruston) tabled an addendum to the explanatory memorandum.

The committee thanks the Minister for Justice for providing this addendum which inserted key information into the explanatory memorandum as requested by the committee in its *First Report of 2016* (see pages 10–15). The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

[Digest 14/15 – Report 1/16]

On 22 February 2016 the Assistant Minister for Agriculture and Water Resources (Senator Ruston) tabled a replacement explanatory memorandum.

The committee thanks the Attorney-General for providing this replacement explanatory memorandum which includes additional explanatory material as requested by the committee in its *First Report of 2016* (see pages 18–26). The committee welcomes the inclusion of additional information in explanatory material accompanying bills as

these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

Omnibus Repeal Day (Autumn 2015) Bill 2015

[Digest 4/15 – no comment]

On 24 February 2016 the Senate agreed to two Australian Greens amendments and the bill was read a third time.

The committee has no comment on these amendments.

Social Services Legislation Amendment (Family Measures) Bill 2015

On 24 February 2016 the Senate agreed to one Government amendment, the Minister for Communications (Senator Fifield) tabled a supplementary explanatory memorandum and the bill was read a third time.

On 29 February 2016 the House of Representatives agreed to the Senate amendment and the bill was passed.

The committee welcomes this amendment which defers the commencement dates for two measures in light of the time taken for passage of the bill. The amendment therefore ensures that the measures do not operate retrospectively.

Tax Laws Amendment (Implementation of the Common Reporting Standard) Bill 2015

[Digest 1/16 – no response required]

On 23 February 2016 the Minister for Education and Training (Senator Birmingham) tabled a supplementary explanatory memorandum.

On 24 February 2016 the Senate agreed to two Government and six Opposition amendments and the bill was read a third time.

On 29 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.

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