

The Senate

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Standing  
Committee for the  
Scrutiny of Bills

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# Membership of the Committee

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|--------------------------------------|-----------------------|
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# Introduction

## Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

## Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

## Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

## **General information**

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

# Chapter 1

## Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

### Air Services Amendment Bill 2018 (No. 2)

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | This bill seeks to introduce protections for communities affected by aircraft noise by: <ul style="list-style-type: none"> <li>• setting requirements for consultation and reporting on the part of Airservices Australia;</li> <li>• establishing an Aircraft Noise Ombudsman; and</li> <li>• establishing a Community Aviation Advocate</li> </ul> |
| <b>Sponsor</b>    | Mr Adam Bandt  |
| <b>Introduced</b> | House of Representatives on 21 May 2018  |

#### Broad delegation of administrative powers<sup>1</sup>

1.2 Proposed section 73F of the bill provides that the Aircraft Noise Ombudsman (Ombudsman) may, by written instrument, delegate his or her functions and powers to an SES employee in the department, or an APS employee holding or performing the duties of an Executive Level 1 or 2 position in the department.

1.3 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory materials provide no information about why these powers are proposed to be delegated to departmental employees holding or performing the duties of Executive Level 1 or 2 positions.

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<sup>1</sup> Schedule 1, item 8, proposed section 73F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

**1.4 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Aircraft Noise Ombudsman to delegate his or her functions and powers to departmental employees in Executive Level 1 or 2 positions.**

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

1.5 Item 8 of Schedule 1 to the bill contains a number of provisions that seek to leave significant matters to be set out in the regulations, including:

- the immunity of the Ombudsman from civil proceedings;<sup>3</sup>
- the powers of the Ombudsman to require the production of information and documents related to his or her functions;<sup>4</sup>
- the conduct of hearings held as part of an inquiry by the Ombudsman, including in relation to notice of and procedure at hearings; notices to persons to provide information or documents relevant to an inquiry; summonses to attend hearings; allowances for witnesses appearing at hearings; and any other matters relevant to the conduct of hearings, the production of evidence at hearings or the appearance of witnesses at hearings;<sup>5</sup> and
- the powers of the Ombudsman to obtain information and documents from Airservices Australia, the Civil Aviation Safety Authority or the Department of Defence for the purpose of performing his or her functions; the disclosure of information or documents by the Ombudsman; the powers and functions of the Ombudsman in responding to requests from persons or communities affected by aircraft noise for assistance; and the review of decisions by the Ombudsman.<sup>6</sup>

1.6 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no explanation as to why it is necessary to leave each of these matters to be set out in the regulations.<sup>7</sup>

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2 Schedule 1, item 8, proposed paragraph 73L(e) and proposed sections 73R, 73W and 73Z. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

3 Schedule 1, item 8, proposed paragraph 73L(e).

4 Schedule 1, item 8, proposed section 73R.

5 Schedule 1, item 8, proposed section 73W.

6 Schedule 1, item 8, proposed section 73Z.

7 Explanatory memorandum, pp. 3-4.

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**1.7** The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving a number of significant matters relating to the powers of the Aircraft Noise Ombudsman to delegated legislation.

## Appropriation Bill (No. 1) 2018-2019

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government |
| <b>Portfolio</b>  | Finance  |
| <b>Introduced</b> | House of Representatives on 8 May 2018   |

### Parliamentary scrutiny—ordinary annual services of the government<sup>8</sup>

1.8 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.

1.9 This bill seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.10 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. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.<sup>9</sup>

1.11 The Senate Standing Committee on Appropriations and Staffing<sup>10</sup> has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration for many years.<sup>11</sup> It 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

8 Various provisions. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

9 See Senate standing order 24(1)(a)(v).

10 Now the Senate Standing Committee on Appropriations, Staffing and Security.

11 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

departmental outcome should be classified as ordinary annual services expenditure.<sup>12</sup>

1.12 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 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.

1.13 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.<sup>13</sup>

1.14 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which

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12 Senate Standing Committee on Appropriations and Staffing, *45<sup>th</sup> Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

13 Senate Standing Committee on Appropriations and Staffing, *45<sup>th</sup> Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.<sup>14</sup>

1.15 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 an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.<sup>15</sup>

1.16 Based on the Senate resolution of 22 June 2010, it appears that the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2018-2019:

- Establishment of international services at Avalon Airport (\$20 million in 2018-19);<sup>16</sup>
- Small and medium enterprises export hubs program (\$20 million over four years);<sup>17</sup>
- Enhancing female financial capability—Australian Securities and Investments Commission grant program (\$10 million in 2018-19).<sup>18</sup>

1.17 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;<sup>19</sup> however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

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14 Senate Standing Committee on Appropriations and Staffing, *45<sup>th</sup> Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

15 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, see *Senate Hansard*, 19 March 2018, pp. 1487-1490.

16 Budget Paper No. 2, 2018-19, p. 136.

17 Budget Paper No. 2, 2018-19, p. 154.

18 Budget Paper No. 2, 2018-19, p. 183.

19 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95; *Scrutiny Digest 2 of 2018*, pp. 1-7.

1.18 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.19 The committee notes that any 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.

**1.20 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2018-2019 which should only contain appropriations that are not amendable by the Senate).**

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### **Parliamentary scrutiny—appropriations determined by the Finance Minister<sup>20</sup>**

1.21 Clause 10 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

1.22 Subclause 10(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of \$295 million as specified by subclause 10(3), to the appropriations outlined in Schedule 1 to the Act. Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.<sup>21</sup>

1.23 The committee notes that the AFM provision in this bill allows the Finance Minister to allocate additional funds to entities up to a total of \$295 million via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the Executive. One of the core functions of the Parliament is to

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20 Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

21 Explanatory memorandum, p. 9

authorise and scrutinise proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.<sup>22</sup>

1.24 The committee has examined AFM provisions in previous appropriation bills and sought further information from the Finance Minister about their use.<sup>23</sup> The committee notes that AFM provisions have been used in previous years to allocate additional funds of varying amounts for a wide variety of purposes. Previous examples include \$48.8 million for Mersey Community Hospital and Tasmanian Health Initiatives, \$206.5 million for payments to local governments, and \$6 million for grants to arts and culture bodies.<sup>24</sup> The committee further notes that this issue also arises in relation to other appropriation bills.<sup>25</sup>

**1.25 As AFM determinations are not subject to disallowance, the primary accountability mechanism in relation to AFMs (beyond the initial passage of the authorising provision in the regular appropriation bills) is an annual report tabled in Parliament on the use of the AFM. These reports are considered in committee of the whole on a motion that the statements of expenditure be approved.<sup>26</sup> In addition, the reports are published on the Department of Finance website.<sup>27</sup> The committee draws these reports to the attention of Senators.**

**1.26 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the allocation of significant additional funds to entities in a legislative instrument not subject to disallowance.**

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22 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

23 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 95–8; and *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 5–7.

24 For further examples see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–8. For a comprehensive list of AFMs made between the 2006–07 and 2017–18 financial years, see Appendix 1 to Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017.

25 For example, see clause 12 of Appropriation Bill (No. 2) 2018–2019 (the total amount that can be determined under this AFM provision is \$380 million.)

26 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans*, Department of the Senate, 14<sup>th</sup> Edition, 2016, pp. 395–396.

27 See [https://www.finance.gov.au/publications/advance\\_to\\_the\\_finance\\_minister/](https://www.finance.gov.au/publications/advance_to_the_finance_minister/).

## Appropriation Bill (No. 2) 2018-2019

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | This bill seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure |
| <b>Portfolio</b>  | Finance   |
| <b>Introduced</b> | House of Representatives on 8 May 2018  |

### Parliamentary scrutiny—section 96 grants to the states<sup>28</sup>

1.27 Clause 16 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.*'

1.28 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;<sup>29</sup> and
- the amounts and timing of those payments.<sup>30</sup>

1.29 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.<sup>31</sup>

1.30 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.<sup>32</sup>

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28 Clause 16 and Schedules 1 and 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

29 Paragraph 16(2)(a).

30 Paragraph 16(2)(b).

31 Explanatory memorandum, p. 13.

32 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511-516; *Ninth Report of 2015*, pp. 611-614; *Fifth Report of 2016*, pp. 352-357; *Eighth Report of 2016*, pp. 457-460; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest 6 of 2017*, pp. 7-10; *Scrutiny Digest 12 of 2017*, pp. 99-104; *Scrutiny Digest 2 of 2018*, pp. 8-11.

1.31 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.32 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states in both the 2017-18 and 2018-19 budget documentation, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.<sup>33</sup> These improvements include the addition of an Appendix E to Budget Paper No. 3, which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them, and a new mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.<sup>34</sup>

1.33 The committee also notes that Appendix E to Budget Paper No. 3 for the 2018-19 budget incorporates certain additional changes on which the committee sought the minister's advice in *Scrutiny Digest 6 of 2017*,<sup>35</sup> and that the mandatory requirement for the inclusion of additional information in portfolio budget statements appears to have been met by those agencies seeking appropriations for payments to the states, territories and local government in this bill.<sup>36</sup> The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

**1.34 The committee thanks the minister for responding constructively to its proposals regarding the provision of additional information about the making of grants to the states under section 96 of the Constitution, and looks forward to these measures continuing for future appropriation bills.**

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33 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7-10; and *Eighth Report of 2016*, pp. 457-460.

34 See Department of Finance, *Guide to Preparing the 2018-19 Portfolio Budget Statements*, p. 22, <https://www.finance.gov.au/sites/default/files/guidance-portfolio-budget-statements-18-19.pdf?v=1>.

35 Senate Standing Committee for the Scrutiny of Bill, *Scrutiny Digest 6 of 2017*, 14 June 2017, pp. 7-10.

36 The committee discussed the partial compliance with the requirement to provide additional information in portfolio budget statements for the 2017-18 budget in its *Scrutiny Digest 6 of 2017*, 14 June 2017, pp. 7-10, and *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 99-104.

**1.35 The committee otherwise leaves to the Senate as a whole the appropriateness of the delegation of legislative power in clause 16, which allows the minister to determine conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.**

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### **Parliamentary scrutiny—debit limits<sup>37</sup>**

1.36 Clause 13 of the bill specifies debit limits for certain grant programs. A debit limit must be set each financial year otherwise grants under these programs cannot be made. The total amount of grants cannot exceed the relevant debit limit set each year.

1.37 The explanatory memorandum notes that Parliament may approve annual debit limits for the following special appropriations:

- the amounts that may be debited or spent from the Education Investment Fund (EIF) special account;<sup>38</sup>
- the amounts that may be spent for general purpose financial assistance or national partnership payments to the states.<sup>39</sup>

1.38 The explanatory memorandum explains the purpose of setting these debit limits:

Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.<sup>40</sup>

1.39 In this bill the following debit limits are proposed for 2018-19:

- Education Investment Fund—\$2 million;<sup>41</sup>
- General purpose financial assistance to the states—\$5 billion;<sup>42</sup> and
- National partnership payments to the states—\$25 billion.<sup>43</sup>

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37 Clause 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

38 See section 199 of the *Nation Building Funds Act 2008*.

39 See sections 9 and 16 of the *Federal Financial Relations Act 2009*.

40 Explanatory memorandum, p. 10.

41 Subclause 13(1).

42 Subclause 13(2).

43 Subclause 13(3).

1.40 In relation to the \$25 billion debit limit for national partnership payments, the committee notes that the budget papers suggest that it is expected that national partnership payments will be \$13.8 billion in 2018-19.<sup>44</sup> Therefore the debit limit proposed in this bill would allow an additional \$11.2 billion in national partnership payments to be made without the need to seek further parliamentary approval. It is not clear what the expected level of expenditure is in relation to the Education Investment Fund or general purpose financial assistance.

1.41 The committee sought the minister's advice in relation to similar provisions in Appropriation Bill (No. 2) 2017-2018 and was informed that setting debit limits at a high level is necessary to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual appropriation bills, including increases to existing undertakings to the states, and provision for any large-scale natural disasters or other major unexpected events.<sup>45</sup> While the committee acknowledges this rationale, it considers that setting debit limits far in excess of anticipated expenditure may undermine the stated intention of the debit limit regime—that is, to provide Parliament with a 'transparent mechanism by which it may review the rate at which amounts are committed for expenditure.'<sup>46</sup>

**1.42 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting debit limits for these grant programs well above the expected level of expenditure, noting that this practice appears to undermine the effectiveness of the debit limit regime as a mechanism for ensuring meaningful parliamentary oversight of these grant programs.**

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44 *Federal Financial Relations: Budget Paper No. 3 2018-19*, p. 2.

45 See *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 104-107.

46 Explanatory memorandum, p. 10.

## Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | <p>This bill seeks to amend various Acts relating to counter-terrorism to extend for a further three years the following regimes which are scheduled to sunset on 7 September 2018 including:</p> <ul style="list-style-type: none"> <li>• the control order regime in Division 104 of the <i>Criminal Code</i></li> <li>• the preventative detention order regime in Division 105 of the <i>Criminal Code</i></li> <li>• the declared areas provisions in sections 119.2 and 119.3 of the <i>Criminal Code</i>, and</li> <li>• the stop, search and seize powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i></li> </ul> <p>The bill also seeks to extend the operation of the Australian Security Intelligence Organisation's questioning and detention powers for a further 12 months and to make minor amendments to Part 5.3 of the <i>Criminal Code</i></p> |
| <b>Portfolio</b>  | Attorney-General  |
| <b>Introduced</b> | House of Representatives on 24 May 2018   |

### Extension of sunset provisions<sup>47</sup>

1.43 A number of items in the bill seek to extend the operation of significant counter-terrorism measures that are due to sunset in late 2018. In particular, the following measures are proposed to be extended for a further three year period:

- **the control order regime**,<sup>48</sup> which allows a court to impose obligations, prohibitions and restrictions on a person without charge, for purposes related to preventing terrorist acts or support for terrorist acts;
- **the preventative detention order regime**,<sup>49</sup> which allows a person to be taken into custody for up to 48 hours for the purpose of either preventing a terrorist attack that is capable of being carried out and could occur within the next 14 days, or to preserve evidence relating to a recent terrorist act;

47 Schedule 1, items 7, 11, 13, 17 and 18. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

48 In Division 104 of the *Criminal Code Act 1995* (Criminal Code).

49 In Division 105 of the Criminal Code.

- **the declared areas provisions,**<sup>50</sup> which make it an offence for a person to enter or remain in an area declared by the Minister for Foreign Affairs; and
- **the stop, search and seizure powers,**<sup>51</sup> which allow a police officer to stop, question and search persons and seize items in a Commonwealth place or prescribed security zone without a warrant (and, in relation to prescribed security zones, without the need for reasonable suspicion).

1.44 In addition the following power, which is due to sunset in late 2018, is proposed to be extended for a further 12 months:

- **ASIO's special powers relating to terrorism offences,**<sup>52</sup> which allows the Australian Security and Intelligence Organisation to question and to detain people for questioning in relation to national security.

1.45 The committee has previously raised scrutiny concerns regarding a number of these broad coercive powers as the committee's terms of reference require it to consider whether provisions of a bill trespass unduly on personal rights and liberties. In particular, the committee has previously noted that the control order regime constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.<sup>53</sup> That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence on conviction.

1.46 In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised (at least, as a matter of degree).

1.47 In addition, preventative detention orders (PDOs) are administrative orders, made, in the first instance, by a senior Australian Federal Police member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. The committee considers PDOs raise scrutiny concerns as they permit a person's detention by the executive without charge or arrest.

1.48 The committee has also previously raised concerns regarding the breadth of the offence for entering, or remaining, in declared areas, and the broad delegation of

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50 In sections 119.2 and 119.3 of the Criminal Code.

51 In Division 3A of Part 1AA of the *Crimes Act 1914*.

52 In Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*.

53 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016* and *Report No. 8 of 2016*.

power in allowing the Foreign Minister the power to make this declaration.<sup>54</sup> In particular, the committee has noted its concerns that the offence could apply even if a person did not know the area was subject to a relevant declaration and they had no intention to commit any particular crime or activity.

1.49 In addition, the committee notes that the power to stop, search and question a person in a prescribed security zone, without the need for any reasonable suspicion, has the potential to be highly invasive and coercive. Once a prescribed security zone is declared, everyone in that zone is subject to stop, question, search and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act.

1.50 Further, ASIO's special powers regime is coercive in nature as it empowers ASIO to require a person to answer questions or provide information or documents, and a failure to do so constitutes a criminal offence, and abrogates the privilege against self-incrimination. In addition, a questioning and detention warrant allows ASIO to request the detention of a non-suspect for the purpose of intelligence-gathering, and police officers to enter and search any premises where they reasonably believe the person is, and to use reasonable force in order to take the person into custody. In executing a detention warrant, the AFP officer is not required to give the person any information about the grounds for the warrant. A person may be detained for a maximum of seven days. As these powers have been granted to ASIO in support of its role as an intelligence gathering agency, these powers may apply in relation to individuals not suspected of, and not charged with, any offence, let alone a terrorism-related offence. The breadth of these powers raise significant scrutiny concerns that such powers may unduly trespass on personal rights and liberties.

1.51 The extraordinary nature of the regimes listed above is recognised in the current legislation by the inclusion of a sunset period. In extending these significant powers by a further three years (or one year in the case of the ASIO special powers regime), the committee expects that the explanatory materials accompanying the bill should provide a comprehensive justification for the continued need for such powers.

1.52 In this instance, the statement of compatibility gives detailed information about why these powers continue to be necessary and states that the proposed extension is in line with recommendations made by the Parliamentary Joint

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54 See Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

Committee on Intelligence and Security (PJCIS) in its recent reports.<sup>55</sup> In the case of ASIO's special powers the PJCIS recommended that legislation be developed to reform the compulsory questioning framework and therefore a 12 month extension of the current framework was suggested to allow sufficient time for legislation to be developed and reviewed.

1.53 While the committee acknowledges the importance of the stated purpose of the measures described above, it reiterates that these measures substantially depart from traditional approaches to the criminal law and the presumption of innocence, particularly in giving coercive powers to detain and restrain persons who may not have been convicted of, or even charged with, a criminal offence. The committee notes there is a risk that measures that were originally introduced on the basis of being a temporary response to an emergency situation may become permanent by their continual renewal. The committee considers the measures being extended by this bill raise significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties.

**1.54 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending, by a further 1-3 years, the operation of a number of broad coercive powers which raise significant scrutiny concerns.**

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55 See Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, February 2018: for control orders see recommendation 5; for preventative detention orders see recommendation 11 and for stop, search and seizure powers see recommendation 1; Parliamentary Joint Committee on Intelligence and Security, *Review of the 'declared area' provisions*, February 2018: see recommendation 1; Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention powers*, March 2018: see recommendation 4.

## Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | This bill seeks remove Commonwealth restrictions to allow any State or Territory Government to legalise and regulate cannabis |
| <b>Sponsor</b>    | Senator David Leyonhjelm  |
| <b>Introduced</b> | Senate on 9 May 2018  |

### Reversal of legal burden of proof<sup>56</sup>

1.55 The bill seeks to amend the *Defence Force Discipline Act 1982* (the Act) to insert five offences relating to defence members or defence civilians dealing in, possessing or administering prohibited drugs. It also seeks to provide that it would be a defence to each of these offences if the person proves that he or she had lawful authority for engaging in the relevant conduct. The defendant would bear a legal burden of proof in relation to each of these defences, ensuring that the defendant would need to prove, on the balance of probabilities, that he or she had lawful authority for engaging in the relevant conduct.<sup>57</sup> The proposed offences carry maximum penalties ranging from a fine of three penalty units to imprisonment for 10 years. The proposed section largely mirrors existing section 59 in the Act, with the exception that provisions setting out specific penalties where the conduct involves cannabis have been removed.<sup>58</sup>

1.56 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence, interfere with this common law right.

56 Schedule 4, item 1, proposed section 59. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

57 Proposed subsections 59(2), (4) and (8) are accompanied by notes explicitly stating that the defendant bears a legal burden in relation to the matters in those subsections. Although subsections 59(5A) and (6A) are not accompanied by such a note, in accordance with subsection 13.4(b) of the Criminal Code they appear to also reverse the legal burden of proof as they require the defendant to prove they had lawful authority for the relevant conduct. This inconsistency mirrors that of existing section 59.

58 See existing subsections 59(3), (5), (6) and (7) of the *Defence Force Discipline Act 1982*.

1.57 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification in the explanatory memorandum each time the burden is reversed, with the rights of people affected being the paramount consideration. In this instance, the explanatory memorandum does not address the fact that proposed section 59 seeks to reverse the legal burden of proof in relation to the lawful authority defences set out in proposed subsections 59(2), (4), (5A), (6A) and (8).<sup>59</sup>

**1.58 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the legal burden of proof in relation to the matters set out in proposed section 59.**

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59 Explanatory memorandum, p. 5.

## Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | This bill seeks to amend various Act in relation to health by implementing measures to support recovery arrangements for Medicare debts owed to the Commonwealth |
| <b>Portfolio</b>  | Health   |
| <b>Introduced</b> | House of Representatives on 23 May 2018  |

### Limitation on merits review<sup>60</sup>

1.59 Schedule 1 provides for the making of shared debt determinations, which would enable responsibility for the repayment of a compliance debt in relation to Medicare benefit claims to be shared between a medical practitioner and their employer where appropriate.<sup>61</sup> Proposed section 129ACB provides for merits review of decisions relating to shared debt determinations. Proposed subsection 129ACB(1) provides that the primary or secondary debtor can make an application for internal review to the Chief Executive Medicare (CEO) of a decision to claim a recoverable amount as a debt. Proposed subsection 129ACB(5) provides that, on receiving an application, the CEO must review and confirm, vary or revoke the decision. Proposed subsection 129ACB(7) provides that applications may then be made to the Administrative Appeals Tribunal (AAT) for review of reconsidered decisions, but proposed subsection 129ACB(8) provides that an application to the AAT may only be made if a garnishee notice is given under proposed subsection 129AEG(1) in relation to the debt to which the reconsidered decision relates.

1.60 The explanatory memorandum does not explain why it is necessary to limit applications for review of reconsidered decisions to the AAT to instances where a garnishee notice has been given, and merely restates the effect of the provision.<sup>62</sup> In relation to proposed section 129AEG, the explanatory memorandum also merely notes that the giving of a garnishee notice would trigger a person's eligibility to apply to the AAT, but does not explain why.

60 Schedule 1, item 14, proposed subsection 129ACB(8); Schedule 3, item 16, proposed subsection 129AAJ(8) and item 29, proposed subsection 129AEC(3); Schedule 4, item 10, proposed subsection 56D(8) and item 11, proposed subsection 56G(4); and Schedule 5, item 5, proposed subsections 99ABD(9) and 99ABG(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

61 Explanatory memorandum, p. 9.

62 Explanatory memorandum, p. 15.

1.61 The bill contains a number of similar provisions that would also prevent applications for review being made to the AAT except where a garnishee notice has been given in relation to the debt.<sup>63</sup> The explanatory memorandum also does not explain these provisions.

**1.62 The committee requests the minister's advice as to why it is considered necessary to limit the right to make an application to the AAT to circumstances where a garnishee notice has been given in relation to the debt to which a reconsidered decision relates.**

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### Strict liability offences<sup>64</sup>

1.63 Proposed subsection 20BB(4) seeks to make it an offence of strict liability for a person to fail to comply with a written notice from the Chief Executive Medicare requiring the production of a referral, where the person is required to retain the referral by subsection 20BB(1). The proposed offence is subject to a maximum penalty of 5 penalty units.

1.64 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>65</sup>

1.65 The explanatory memorandum states that the proposed offence is 'reasonable, necessary and proportionate'<sup>66</sup> to the bill's key purpose of improving the recovery arrangements for Medicare debts owed to the Commonwealth. The explanatory memorandum also states that the offence will deter non-compliance

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63 See Schedule 3, item 16, proposed subsection 129AAJ(8) and item 29, proposed subsection 129AEC(3); Schedule 4, item 10, proposed subsection 56D(8) and item 11, proposed subsection 56G(4); Schedule 5, item 5, proposed subsections 99ABD(9) and 99ABG(5).

64 Schedule 3, item 4, proposed subsection 20BB(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

66 Explanatory memorandum, p. 28.

with the Act. However, the committee notes that the explanatory memorandum does not explain what the legitimate grounds are for penalising persons lacking fault in respect of the offence.

**1.66** As the explanatory materials do not address this issue, the committee considers that it may be appropriate for the explanatory memorandum to be amended to include an explanation of what the legitimate grounds are for penalising persons lacking fault in respect of the offence under proposed subsection 20BB(4) that explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>67</sup>

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

## National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

|                    |  |
|--------------------|--|
| <b>Purpose</b>     | This bill seeks to establish a National Redress Scheme for survivors of institutional child sexual abuse and operate for a 10 year period from 1 July 2018 |
| <b>Portfolio</b>   | Social Services  |
| <b>Bill status</b> | Passed both Houses on 19 June 2018   |

1.67 A number of the measures contained in this bill are identical or substantially similar to measures the committee commented on when it considered the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (2017 bill).<sup>68</sup> The committee takes the opportunity to reiterate the relevant comments below and also make some additional comments.

### Significant matters in delegated legislation<sup>69</sup>

1.68 The bill seeks to establish a redress scheme for survivors of institutional child sexual abuse, and contains a number of provisions that would allow the scope of the scheme to be significantly altered by delegated legislation. Clauses 12 to 15 set out criteria for when a person is entitled and eligible to redress and when abuse of a person will be within the scope of the scheme and when an institution will be considered responsible for abuse. Each of these clauses also provide that the rules may narrow the scope of the scheme by prescribing cases in which these general criteria do not apply—that is, when a person is not entitled to or eligible for redress, when abuse of a person is not within the scope of the scheme and when an institution is not responsible for abuse.<sup>70</sup> The committee's view is that significant matters, such as matters central to determining the scope of the redress scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.69 The explanatory memorandum provides no explanation of the need to provide this power in relation to subclause 12(4).<sup>71</sup> In relation to subclause 13(3), the explanatory memorandum states that the power is intended to be used in

68 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 8-36.

69 Clauses 12 to 15. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

70 See subclauses 12(4), 13(3), 14(3) and 15(6).

71 Explanatory memorandum, p. 19.

exceptional cases that have not, or could not, be envisaged prior to the commencement of the scheme—for example, 'where allowing a class of persons to be eligible for redress may bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme.'<sup>72</sup> In relation to subclause 14(3), the explanatory memorandum states that it is intended the rules will prescribe that abuse is not within the scope of the scheme where the person has received a favourable court award in respect of that abuse.<sup>73</sup> Finally, in relation to subclause 15(6), the explanatory memorandum states that it is intended to prescribe that a government institution is not responsible for abuse where another institution was responsible and the government institution merely regulated or funded the other institution, or the other institution was established by or under the law of the relevant government.<sup>74</sup>

1.70 The explanatory memorandum also contains a general justification of the need to leave some matters to delegated legislation, stating that the scheme 'will need to be flexible to account for any unforeseen numbers of survivors, institutional contexts and other circumstances',<sup>75</sup> and that:

This flexibility allows the Scheme to meet its objective of a survivor-focused and expedient process, with a lower evidentiary threshold, to ensure a survivor experience less traumatic than civil justice proceedings. Protections will be in place to balance this flexibility, including governance arrangements to provide oversight of the operation of the Scheme.<sup>76</sup>

1.71 The committee sought the minister's advice as to why it was considered appropriate to leave significant matters to delegated legislation in relation to similar provisions in the 2017 bill. The minister's response emphasised the need for flexibility and also stated that he was considering specifying 'in any future legislation' predetermined classes of persons who will not be eligible for redress.<sup>77</sup> The committee notes that the current bill includes provisions that exclude persons who have a serious criminal conviction or are subject to a security notice from entitlement to redress.<sup>78</sup>

1.72 While the committee acknowledges that the exclusion of persons with serious criminal convictions or persons who are the subject of a security notice has

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72 Explanatory memorandum, p. 21.

73 Explanatory memorandum, p. 22.

74 Explanatory memorandum, p. 25.

75 Explanatory memorandum, p. 101.

76 Explanatory memorandum, p. 101.

77 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 16-17.

78 See clauses 63 and 64.

been moved to primary legislation in the current bill, it emphasises that the proposed rule-making powers under clauses 12 to 15 have not been limited by the inclusion of any general criteria with respect to the circumstances in which they may be used. As such, it remains the case that these powers may be used to significantly alter the scope of the scheme by delegated legislation. The committee therefore reiterates the scrutiny concerns it expressed in relation to similar provisions in the 2017 bill—that is, that legislation which relies heavily on delegated legislation to determine the scope and operation of a scheme can undermine effective parliamentary scrutiny as it avoids detailed parliamentary debate on the content of important provisions.<sup>79</sup>

1.73 The committee also holds a number of scrutiny concerns with respect to the type of delegated legislation by which these significant matters relating to the scope of the scheme may be prescribed, and the level of parliamentary scrutiny to which such delegated legislation will be subjected. The committee notes that the significant matters identified above are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.<sup>80</sup> In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.<sup>81</sup>

1.74 In this instance, the explanatory memorandum states that it is appropriate that aspects of the scheme are left to rules, rather than regulations, as rules 'can be adapted and modified in a timely manner' and that the 'need to respond quickly to survivor needs is a key feature of the Scheme.'<sup>82</sup> However, the committee considers that the use of delegated legislation is itself designed to allow the executive to swiftly make changes to the law and that it remains unclear how prescribing aspects of the scheme in regulations, rather than rules, would significantly lessen the flexibility of the scheme.

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79 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, p. 17.

80 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp. 21-35.

81 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp. 6-24.

82 Explanatory memorandum, p. 102.

1.75 In addition, the committee notes that the use of rules rather than regulations may also reduce parliamentary scrutiny of these significant matters. Section 44 of the *Legislation Act 2003* relevantly provides that the usual parliamentary disallowance procedures do not apply to legislative instruments if their enabling legislation facilitates the establishment of an intergovernmental scheme involving the Commonwealth and one or more states and authorises the instrument to be made for the purposes of the scheme, unless the instrument is a regulation. In this case, the bill states that the objects of the bill include implementing the joint response of the Commonwealth and any participating state or territory government to recommendations of the Royal Commission.<sup>83</sup> The bill also imposes certain requirements based on the intergovernmental National Redress Scheme for Institutional Child Sexual Abuse (Intergovernmental Agreement). It therefore appears that rules made under the bill would meet these criteria and therefore not be subject to the usual disallowance procedures. However, as the explanatory memorandum does not address this matter and the bill also includes provisions specifically excluding particular legislative instruments from the usual disallowance procedures (see discussion at paragraphs 1.94 to 1.100), it is not clear to the committee whether it is intended that the National Redress Scheme Rules will not be subject to disallowance by virtue of section 44 of the *Legislation Act 2003*.

1.76 Finally, where the Parliament delegates its legislative power in relation to significant schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.<sup>84</sup>

1.77 In this instance, the explanatory memorandum states that the Ministers' Redress Scheme Governance Board (Governance Board), which comprises the Commonwealth minister and ministers from participating states and territories, must agree to any amendments to the rules.<sup>85</sup> However, as this consultation requirement

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83 Clause 3.

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

85 Explanatory memorandum, pp. 21-22.

is set out in the Intergovernmental Agreement, rather than in the bill itself, it is not a legislative requirement. The committee notes that the Intergovernmental Agreement states that none of its provisions are intended to be legally enforceable.<sup>86</sup> The committee also notes that neither the bill nor the Intergovernmental Agreement require consultation with interested parties beyond the members of the Governance Board. In particular, no consultation is required with persons whose entitlement to redress under the scheme could be adversely affected by changes to the rules. The committee therefore considers that the requirement that the Governance Board agree to any changes to the rules does not address its scrutiny concern that the bill contains no specific consultation requirements beyond those contained in section 17 of the *Legislation Act 2003*.

**1.78 As set out above, the committee has scrutiny concerns regarding:**

- **whether rules made under the bill are subject to disallowance (noting section 44 of the *Legislation Act 2003*);**
- **the absence of specific consultation requirements before rules are made, including with persons whose entitlement to redress may be affected; and**
- **the appropriateness of allowing rules made under clauses 12 to 15 to narrow the scope of the scheme, noting that the bill contains no criteria limiting the circumstances in which such rules may be made.**

**1.79 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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

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**Exclusion of merits review<sup>87</sup>**

1.81 Clause 73 provides that if a person has made an application for redress and the Operator has made a determination on the application under clause 29, the person may apply to the Operator for review of the original determination. A person would therefore be able to apply for internal review of a determination not to approve an application for redress, or of a determination of the amount of a redress payment.

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86 Intergovernmental Agreement on the National Redress Scheme for Institutional Child Sexual Abuse, 4 May 2018, p. 3, available at [https://www.coag.gov.au/sites/default/files/agreements/iga-national-redress-scheme-sig\\_0.pdf](https://www.coag.gov.au/sites/default/files/agreements/iga-national-redress-scheme-sig_0.pdf)

87 Subclauses 20(2) and 63(5)-(7) and clause 65. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

1.82 However, the committee notes that the bill also enables the Operator and the Minister for Home Affairs to make determinations or issue notices that affect a person's eligibility to make an application for redress or entitlement to redress, and it does not appear that a person may seek internal review of such decisions as these are not determinations made under clause 29.

1.83 For instance, subclause 20(1) provides that a person cannot make an application for redress under the scheme on a number of grounds, including if the person is in jail or the application is being made in the 12 months before the scheme sunset day. However, subclause 20(2) states that these restrictions do not apply if the Operator determines there are exceptional circumstances justifying the application being made.

1.84 Subclauses 63(1) and (2) provide that a person who has made an application is not entitled to redress if, before or after making the application, they are sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a state, a territory or a foreign country, unless the Operator has made a determination that a person is not prevented from being entitled to redress under subclause (5). Subclause (5) provides that an Operator may make such a determination if the Operator is satisfied that providing redress to that person would not bring the scheme into disrepute or adversely affect public confidence in, or support for, the scheme.

1.85 Finally, subclause 65(1) provides that the Home Affairs Minister may give the Social Services Minister a security notice in relation to a specified person in a number of specified circumstances, the effect of which would be that a person is not entitled to redress while a security notice is in force.<sup>88</sup> Subclause 65(2) provides that before giving such a notice, the Home Affairs Minister must have regard to the extent, if any, that any payments to the person under the scheme may have been or may be used for a purpose that might prejudice the security of Australia or a foreign country.

1.86 The explanatory memorandum does not address the question of whether the Operator's decision not to make a determination under subclauses 20(2) or 63(5), or the Home Affairs Minister's decision to give a security notice under clause 65, are intended to be excluded from merits review. However, as these decisions will directly affect the ability of persons to access redress under the scheme, the committee considers that it may be appropriate that they be subject to merits review. The committee notes that, as the bill makes no provision for a person affected by a decision to seek external merits review before the Administrative

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88 See clause 64. See also clause 71 which provides that if a security notice is given after a person has made an application for redress, that application is taken to have been withdrawn and, if an offer of redress has been made to the person but not yet accepted, declined or withdrawn, that too is taken to be withdrawn.

Appeals Tribunal, the exclusion of internal review would leave a person without access to any form of merits review in relation to these decisions.<sup>89</sup>

**1.87 As set out above, the committee has scrutiny concerns regarding whether a refusal by the Operator to make a determination under subclauses 20(2) and 63(5), and a decision by the Home Affairs Minister to issue a security notice under subclause 64(1), will be subject to any form of merits review.**

**1.88 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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### Significant matters in delegated legislation<sup>90</sup>

1.89 Clause 29 sets out the circumstances in which the Operator would be required to make a determination to approve, or not approve, an application for redress. However, subclause 29(4) provides that the rules may require or permit the Operator to revoke such a determination (unless a person has already accepted an offer of redress<sup>91</sup>).

1.90 The committee's view is that significant matters, such as the circumstances in which the Operator may be required or permitted to revoke a determination to approve, or not approve, an application for redress, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum provides no explanation of why it is necessary to allow the rules to require that a determination made in accordance with legislative criteria be revoked, merely restating the terms of subclause 29(4).<sup>92</sup> However, the committee notes that the Department of Social Services' submission to the Senate Community Affairs Legislation Committee's inquiry into the bill states that it is intended that the rules will:

...allow a determination to be revoked where the Operator receives new information that affects the determination, and requires a determination to be revoked where that information was about a payment made after

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89 The committee raised scrutiny concerns in relation to the exclusion of external merits review of decisions on applications for redress as part of its consideration of the 2017 bill (see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 28-32). In light of the detailed explanation provided in the explanatory memorandum to the current bill (see pp. 126-127), the committee makes no comment in relation to the exclusion of external merits review in this case.

90 Subclause 29(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

91 Subclause 29(5).

92 Explanatory memorandum, p. 33.

the determination. The Operator will be required to make a new determination taking into account the new information.<sup>93</sup>

**1.91 As set out above, the committee has scrutiny concerns that the rules, and not the primary legislation, will set out the circumstances in which the Operator will be required or permitted to revoke a determination to approve, or not approve, an application for redress.**

**1.92 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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

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## Exemption from disallowance

### Procedural fairness<sup>94</sup>

1.94 Clause 32 provides that the minister may declare a method, or matters to take into account, for the purposes of working out the amount of redress payment for a person and the amount of the counselling and psychological component of redress for a person. This declaration is to be known as the 'assessment framework' and subclause 32(3) provides that it will be a legislative instrument but will not be subject to disallowance under section 42 of the *Legislation Act 2003*.

1.95 The explanatory memorandum states that this declaration is of an administrative character but has been designated as a legislative instrument so as to 'ensure certainty and transparency'.<sup>95</sup> The explanatory memorandum also states that it is necessary to exclude this declaration from disallowance 'so that the method or matters to be taken into account for the purpose of working out the amount of redress payment for a person are certain for applicants to the Scheme and decision makers'.<sup>96</sup>

1.96 However, it is not clear to the committee why the assessment framework should not be characterised as having a legislative character, as it appears to determine the law to be applied in working out the amount of redress payable for

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93 Department of Social Security, Submission to the Senate Community Affairs Legislation Committee inquiry into the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, 30 May 2018, p. 17, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/NationalRedressScheme/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/NationalRedressScheme/Submissions)

94 Clauses 32 and 33. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

95 Explanatory memorandum, p. 38.

96 Explanatory memorandum, p. 38.

each successful application.<sup>97</sup> The committee also notes that certainty with respect to how redress payments will be calculated could also be achieved by including the assessment framework in primary legislation. Alternatively, if it is considered necessary to include the assessment framework in a legislative instrument, the committee notes that it is possible to maintain parliamentary scrutiny of this matter while also preventing any uncertainty that may arise from potential disallowance. For example, it would be possible to provide that the assessment framework declaration does not come into effect until the relevant disallowance period has expired.<sup>98</sup>

1.97 Clause 33 provides that the minister may make guidelines for the purposes of applying the assessment framework and that the Operator may take such guidelines into account when applying the assessment framework. Subclause 33(4) states that these guidelines are not a legislative instrument. The explanatory memorandum states that guidelines for the application of the framework are administrative in character, and that omitting them from the bill is necessary as 'providing detailed guidelines would enable people to understand how payments are attributed and calculated, and risks the possibility of fraudulent or enhanced applications designed to receive the maximum redress payment under the Scheme being submitted.'<sup>99</sup> The explanatory memorandum further states that the scheme has a low evidentiary threshold and is based on a 'reasonable likelihood' test, aspects which are important to provide recognition and redress to survivors who may not be able or may not want to access damages through civil litigation.<sup>100</sup>

1.98 The committee considers that, although policy guidelines may be considered to be of an administrative character, the application of policy may nevertheless structure the exercise of administrative power. Importantly, if a person is not aware of the policy to be applied, they will not be able to be adequately heard as to how a power should be exercised in their case. For example, it will not be possible for them to address criteria or considerations contained in the policy. In this respect, the committee notes that subsection 10(2) of the *Freedom of Information Act 1982* provides that a 'person must not be subjected to any prejudice' only because of the application to conduct undertaken in ignorance of (among other things) unpublished guidelines 'if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information'. This rule reflects the general

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97 The committee sought the minister's advice as to why it was considered appropriate to exempt a similar provision in the 2017 bill from disallowance, noting that it appeared to be legislative in character. The minister's response did not address the committee's question. See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 8-19.

98 For an example of this approach, see section 79 of the *Public Governance, Performance and Accountability Act 2013*.

99 Explanatory memorandum, p. 38.

100 Explanatory memorandum, p. 38.

importance for a fair hearing of disclosing guidelines and policy prior to their application in individual cases.

1.99 The committee also notes that clause 104 provides that obtaining, making a record of, disclosing or using the information contained in the assessment guidelines without authorisation is an offence, subject to a maximum penalty of imprisonment for two years or 120 penalty units, or both. In justifying this clause, the explanatory memorandum reiterates that protecting the guidelines from unauthorised use and disclosure will 'assist with mitigating the risk of fraudulent and enhanced applications, as unauthorised disclosure of the guidelines could enable people to understand how payments are attributed and calculated'.<sup>101</sup> The explanatory memorandum also states that disclosure of the guidelines is undesirable as they may 'contain graphic and triggering descriptions of abuse'.<sup>102</sup>

1.100 The committee is conscious of the aim of providing a redress scheme that is not overly legalistic in nature. Nevertheless, the committee is concerned that the secrecy about the how redress payments are to be calculated runs the risk that affected persons may receive less than they should precisely because they are unaware of the method that will be applied, and the matters that will be considered, when determining the quantum of redress. It may be accepted that there is a risk of some fraudulent claims being made, although the committee also notes that it may be difficult to assess the significance of that risk. On the other hand, there is also a risk of underpayments due to the inability of applicants to present their case to the Operator or delegate. The committee also notes that the secrecy of the guidelines compromises the ability of affected and interested persons to evaluate the efficacy and fairness of the scheme. In reaching the conclusion that the guidelines should be secret, the committee is concerned that these factors have not been addressed.

**1.101 As set out above, the committee has scrutiny concerns regarding:**

- **the assessment framework not being subject to the usual parliamentary disallowance procedures; and**
- **the denial of access to the guidelines, given that this may limit the capacity of persons to fairly present their case.**

**1.102 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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101 Explanatory memorandum, p. 68.

102 Explanatory memorandum, p. 68.

**Broad discretionary power**<sup>103</sup>

1.103 Clause 60 sets out how a redress payment will be payable where the applicant dies before a determination is made on an application for redress or before an offer of redress is accepted, declined or withdrawn.<sup>104</sup> Subclause 60(2) would require the Operator to determine who should be paid the redress payment and to pay the redress payment to that person or those persons as soon as practicable. Subclause 60(3) provides that, in determining who should be paid the redress payment, the Operator *may* consider the people who are entitled to the property of the deceased person under the deceased person's will and the law relating to the disposition of the property of deceased persons. Subclause 60(5) provides that rules may prescribe matters relating to the payment of redress payments under this section.

1.104 The bill therefore appears to grant the Operator a broad power to determine who should be paid the redress payment in such circumstances, with no legislative criteria as to the matters he or she must take into account when making such determinations. While the bill provides that the Operator may consider the deceased person's will and the law relating to the disposition of the property of deceased persons in making a determination, it does not positively require this. The bill also merely allows for rules to be made in relation to the payment of redress payments under this clause, but does not positively require such rules to be made.

1.105 The explanatory memorandum provides no justification for the breadth of the Operator's proposed power to determine who should receive the redress payment of a deceased person. In relation to the power to make rules relating to such powers, the explanatory memorandum merely states that it is not possible to identify all matters relating to the payment of redress payments under this clause due to the 10-year length of the scheme and that the power 'will ensure that any issues that would prevent payment of the redress payment to a person can be addressed.'<sup>105</sup>

**1.106 As set out above, the committee has scrutiny concerns regarding the absence in the bill of:**

- **any rules or guidance about the exercise of the Operator's power to determine who should be paid the redress payment of a deceased person;**
- **any requirement that the Operator consider the deceased person's will and the law relating to the disposition of the property of deceased persons when making such a determination; and**

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103 Subclause 60(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

104 See subclauses 58(4) and 59(3), or paragraph 59(4)(d).

105 Explanatory memorandum, p. 52.

- a positive requirement that rules be made relating to the exercise of the Operator's power.

**1.107** However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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### **Limitation on merits review**<sup>106</sup>

1.108 Clause 73 provides that where the Operator has made a determination on an application for redress, the applicant may apply to the Operator for review of the original determination. Subclause 75(3) provides that, when reviewing the original determination, the reviewer may have regard only to the information and documents that were available to the person who made the original decision.

1.109 The explanatory memorandum states that this limitation on considering additional material is intended to 'balance the need for an expedited application process for survivors with the burden of administration' and that allowing the internal reviewer to 'request further information from survivors will create a high-level of administrative burden, add to the potential retraumatisation of survivors having to seek additional material and increase the operational costs for institutions to participate in the Scheme.'<sup>107</sup>

1.110 When the committee considered an identical provision in the 2017 bill, it sought the minister's advice as to why an internal reviewer of an original determination would only be able to have regard to information and documents that were available to the person who made the original determination. The minister's response provided justifications essentially the same as those provided in the explanatory memorandum to the current bill, as quoted above.<sup>108</sup>

1.111 The committee notes that the default rule for merits review (such as review by the Administrative Appeals Tribunal (AAT)) is that the reviewing body should be able to consider material that was not before the original decision-maker. As the purpose of the scheme is to provide redress to abuse victims, it is not clear to the committee why an applicant should not be able to provide further material in support of their case on review. For example, it may be that further evidence becomes available between the time of the original application and the internal review, or material may have inadvertently not been included in the original

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106 Subclause 75(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

107 Explanatory memorandum, p. 58.

108 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, p. 29.

application or not included because its relevance had not been properly understood at the time the original application was made.

1.112 It is not clear to the committee that allowing internal reviewers to have regard to such additional information would increase the administrative burden on individuals or add to potential re-traumatisation as it would be the individuals themselves who would seek to have the additional information considered, rather than the internal reviewer requiring its production. It is also not clear to the committee that this would significantly add to the cost of the internal review process.

**1.113 As set out above, the committee has scrutiny concerns regarding the appropriateness of excluding consideration of new information or documents in the internal review process.**

**1.114 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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#### **No-invalidity clause<sup>109</sup>**

1.115 Part 4-2 provides that the Operator may appoint a person to act as an applicant's nominee, and that a nominee may then act on behalf of the applicant for the purposes of the scheme. Subclause 87(1) provides that the Operator may give a nominee a notice requiring the nominee to inform the Operator of an event or change of circumstances that is likely to affect the nominee's ability to act as nominee, the ability of the Operator to give notices to the nominee under the Act, or the ability of the nominee to comply with such notices. Subclause 87(2) provides that such a notice must be in writing and specify how, and the period within which, the nominee is to inform the Operator. However, subclause 87(3) states that a notice is not ineffective just because it does not comply with the requirement that it specify how, and the period within which, the nominee must inform the Operator. Subclause 82(3) provides that, if the Operator gives a nominee a notice and the nominee does not comply with a requirement of the notice, the Operator may suspend or revoke the nominee's appointment.

1.116 The explanatory memorandum states that the effect of subclause 87(3) is that a notice will not be invalid merely because it fails to specify how the information is to be given to the Operator.<sup>110</sup> It appears that this subclause would allow the Operator to suspend or revoke the appointment of a nominee who does not comply with a requirement of a notice issued under clause 87, even where the nominee's failure to comply occurred because the notice did not specify how, and the period

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109 Subclause 87(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

110 Explanatory memorandum, p. 62.

within which, the nominee was to respond. The committee is concerned that, in such circumstances, a nominee would not have been given a fair opportunity to respond to the notice.

**1.117 As set out above, the committee has scrutiny concerns that a notice given under subclause 87(1) will not be ineffective despite a failure to specify in the notice how, and the period within which, a nominee must respond to the notice, noting that a nominee's failure to comply with a notice may result in the suspension or revocation of their appointment.**

**1.118 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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## Broad discretionary power

### Privacy<sup>111</sup>

1.119 Clause 95 provides that the Operator may disclose protected information that was provided to, or obtained by, an officer of the scheme for the purposes of the scheme if the disclosure meets certain criteria. Paragraph 95(1)(a) provides that such a disclosure may be made if the Operator certifies that the disclosure is necessary in the public interest in a particular case, or class of cases, and the disclosure is to such persons and for such purposes as the Operator determines. 'Protected information' is defined by subclause 92(2) as information about a person or institution that was provided to, or obtained by, an officer of the scheme for the purposes of the scheme, and is or was held in the records of the Department of Human Services, or information to the effect that the records of the Department of Human Services contain no information about a person or institution. Subclause 95(4) provides that the rules may make provision for and in relation to the Operator's power to certify that a disclosure is in the public interest under paragraph 95(1)(a), and subclause 95(3) requires the Operator to act in accordance with any such rules when making a certification.

1.120 The explanatory memorandum contains no explanation of why it is necessary to include this provision, merely stating that the disclosure of protected information may be considered necessary in the public interest 'for the investigation of a criminal offence or to locate a missing person'.<sup>112</sup> However, the committee notes that subclause 96(1) specifically provides that the Operator may disclose protected information if he or she is satisfied the disclosure is reasonably necessary for the purposes of the enforcement of the criminal law or the safety or wellbeing of

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111 Paragraph 95(1)(a). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

112 Explanatory memorandum, p. 64.

children. Such disclosures would be restricted to government institutions that have functions relevant to these two purposes and, where the information relates to a person, the Operator would be required to have regard to the impact the disclosure might have on the person.<sup>113</sup>

1.121 The committee notes that the proposed power in paragraph 95(1)(a) gives an extremely broad basis on which the Operator can disclose protected information (which would likely include highly sensitive allegations regarding child sexual abuse) to any person and for any reason, so long as the person seeking to disclose the information considers it necessary in the public interest to do so. The committee notes that, unlike disclosures made to government institutions under clause 96, the Operator is not required to have regard to the impact the disclosure might have on the person. There is also no requirement that rules be made in relation to the Operator's power to disclose the information and no information on the face of the primary legislation as to the circumstances in which the power can be exercised (other than that the Operator must be satisfied that it is in the public interest to make the disclosure). There is also no requirement that, before disclosing personal information about a person, the Operator must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person.

1.122 When the committee considered a similar provision in the 2017 bill, it sought the minister's advice as to why at least high level guidance about the exercise of the Operator's disclosure power could not be included in the bill, the circumstances in which it was envisaged the power might be needed (noting the proposal to allow disclosures for the purposes of enforcement of the criminal law or for the purposes of child protection under a separate provision), and why the bill contained no positive requirement that rules be made regulating the exercise of the Operator's power.

1.123 The minister advised the committee that the provision in the 2017 bill had been drafted to reflect similar provisions in other legislation within the social security portfolio, and that giving the minister the discretion to make rules would provide flexibility to address any circumstances that warrant the exercise of the power. The minister also advised that personal information held by the Operator will be given due and proper protection, and that it is envisaged public interest disclosures will only be made in certain limited circumstances. Finally, the minister advised that it was intended to make rules to regulate the Operator's disclosure power and consideration would be given to including a positive requirement to this effect in the

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113 See subclauses 96(2) and (3).

bill.<sup>114</sup> The committee notes that no such requirement has been included in current bill.

1.124 The committee reiterates its view that neither the existence of similar disclosure provisions in other legislation, nor a desire for administrative flexibility, provide a sound justification for including such a provision in this bill. The committee also reiterates that, although it is intended the Operator's disclosure power will only be used in limited circumstances and that rules will be made to constrain the use of the power, the bill itself neither restricts the circumstances in which the power may be used (beyond the requirement that the Operator be satisfied the disclosure is in the public interest) nor requires the making of rules to regulate the use of the power.

**1.125 As set out above, the committee has scrutiny concerns regarding the Operator's broad discretionary power to disclose protected information, including sensitive information relating to allegations regarding child sexual abuse, to any person and for any reason so long as it is considered necessary in the public interest to do so (and with no positive requirement that rules be made to guide the exercise of this power).**

**1.126 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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## Delegation of legislative power

### Privacy<sup>115</sup>

1.127 Subclause 97(1) provides that, where protected information is disclosed to a government institution, a government official may obtain, make a record of, disclose or use that information for the purposes of the enforcement of the criminal law; the safety or wellbeing of children; investigatory, disciplinary or employment processes related to the safety or wellbeing of children; or a purpose prescribed by the rules. In doing so, the government official must be acting in their official capacity and their actions must not be prohibited by a Commonwealth, state or territory law.

1.128 The committee's view is that significant matters, such as additional purposes for which sensitive protected information may be disclosed, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee's scrutiny concerns are heightened in this case because protected information is likely to include highly sensitive allegations regarding child

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114 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 22-23.

115 Subparagraph 97(1)(e)(iv). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

sexual abuse and its disclosure could potentially have a serious impact on persons to whom it relates.

1.129 The explanatory memorandum states that clause 97 would allow states and territories to comply with existing reportable conduct schemes, such as Victoria's reportable conduct scheme under the *Child Wellbeing and Safety Act 2005* (Vic).<sup>116</sup> However, the explanatory memorandum does not explain why it is considered necessary to allow the rules to prescribe additional purposes for which protected information may be disclosed, or what types of additional purposes it is envisaged may be prescribed by the rules.

**1.130 As set out above, the committee has scrutiny concerns that:**

- **the rules may prescribe additional purposes for which sensitive protected information may be disclosed by a government official; and**
- **there is no requirement that the government official have regard to the impact the disclosure may have on the person to whom the protected information relates.**

**1.131 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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

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### **Reversal of evidential burden of proof<sup>117</sup>**

1.133 Clause 99(1) would make it an offence for a person to obtain, make a record of, disclose or use protected information if the person is not authorised or required to do so under the Act. Subclause 99(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person did not obtain the information under, for the purposes of, or in connection with the scheme, or the person had already obtained the information before obtaining the information under, for the purposes of, or in connection with the scheme. The offence carries a maximum penalty of imprisonment for two years or 120 penalty units, or both.

1.134 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.135 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed

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116 Explanatory memorandum, p. 66.

117 Clause 99. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.136 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed subsection 99(2) have not been addressed in the explanatory materials.

**1.137 The committee notes that the explanatory memorandum includes no justification for the reversal of the evidential burden of proof in proposed subsection 99(2).**

**1.138 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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### **Immunity from liability<sup>118</sup>**

1.139 Subclauses 106(1) and (2) provide that a person who, acting in good faith, discloses information for the purposes of the scheme is not liable to any civil or criminal proceedings, or any disciplinary action, for disclosing the information. These provisions therefore remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.140 The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision and merely restates its terms.<sup>119</sup>

**1.141 As set out above, the committee has scrutiny concerns that any person who discloses information for the purposes of the scheme will have immunity from civil and criminal liability so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.**

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118 Clause 106. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

119 See explanatory memorandum, p. 68.

**1.142 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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### **Incorporation of materials existing from time to time<sup>120</sup>**

1.143 Proposed subclause 179(3) provides that the rules may apply, adopt or incorporate any matter contained in the assessment framework as in force or existing from time to time. The explanatory memorandum states that this provision relates to the 'methodology to be applied in calculating the maximum amount of the redress payment that may be payable to the person' and that this assessment framework will be available on the Federal Register of Legislation.<sup>121</sup> However, the explanatory memorandum provides no detail as to the types of documents that may be contained in the assessment framework, nor does it explain why it would be necessary for these documents to apply as in force or existing from time to time.

1.144 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

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

1.146 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue. This report comprehensively

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120 Subclause 179(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

121 Explanatory memorandum, p. 101.

outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

**1.147 The committee notes that the explanatory memorandum includes no information as to the type of documents that it is envisaged may be applied, adopted or incorporated under subclause 179(3), and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.**

**1.148 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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

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### **Broad delegation of administrative powers<sup>122</sup>**

1.150 Subclause 184(1) provides that the Operator may delegate all or any of his or her powers under the Act (other than in relation to making a determination on an application, review of a determination, or the application of civil penalties) to 'an officer of the scheme'. An 'officer of the scheme' is a person in the Department of Social Services or the Department of Human Services, performing duties or exercising powers or functions under or in relation to the Act, an independent decision-maker, or a person prescribed by the rules.<sup>123</sup> The Operator would therefore be able to delegate all or any of his or her powers to any level APS employee performing functions in relation to the Act in the two departments, to an independent decision-maker, or to 'a person' prescribed by the rules.

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

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122 Clauses 184 and 185. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

123 See clause 6.

1.152 In this case, the explanatory memorandum states that a broad delegation of the Operator's powers is necessary to enable the scheme to be administered in 'an efficient manner, which is responsive and flexible to address matters as they arise' and that the Operator will 'determine the appropriate level of delegation commensurate with the administrative function being undertaken.'<sup>124</sup> However, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level. The committee also notes that the explanatory memorandum provides no explanation of why it is considered necessary to allow the delegation of the Operator's powers to 'a person' prescribed by the rules, nor what accountability mechanisms will be put in place with respect to such persons.

1.153 Subclauses 185(3) and (4) also provide that the Operator may delegate his or her powers and functions in relation to making a determination on an application for redress and reviewing such a determination to an independent decision-maker, who would not be required to comply with any directions of the operator in relation to such a delegation. Subclause 185(1) provides that the Operator may, with the approval of the minister, engage persons to be independent decision-makers, and that the duties of public officials under the *Public Governance, Performance and Accountability Act 2013* apply to such persons. Subclause 185(2) also provides that the minister must consult with the appropriate ministers from participating states and territories before approving the engagement of an independent decision-maker.

1.154 The explanatory memorandum states that the selection of prospective independent decision-makers will include a probity and vetting process undertaken by the department to identify suitable candidates', who will then be subject to agreement from participating states and territories.<sup>125</sup> The explanatory memorandum also states that it is considered that this consultative process 'provides appropriate legislative guidance to engage appropriate independent decision-makers, whilst retaining flexibility to respond to cohorts of survivors coming through the Scheme as they present.'<sup>126</sup>

1.155 However, the committee does not consider that the proposed consultation process between the minister and the appropriate state and territory ministers provides appropriate legislative guidance as to the appropriate qualifications of independent decision makers. While the department may undertake a probity and vetting process as part of the consultation process, it remains the case that no legislative guidance is set out in the bill to require that persons engaged as independent decision-makers have appropriate expertise.

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124 Explanatory memorandum, p. 103.

125 Explanatory memorandum, p. 104.

126 Explanatory memorandum, p. 104.

1.156 When the committee considered similar provisions in the 2017 bill, it requested advice as to why it is necessary to allow the broad delegation of the Operator's powers to an APS level employee at any level, and to allow independent decision makers to be appointed without any legislative guidance as to their skills, training and experience. The minister's response provided justifications essentially the same as those provided in the explanatory memorandum to the current bill, as quoted above.<sup>127</sup> However, the range of persons to whom the Operator may delegate his or her powers and functions has been broadened under the current bill to include a person prescribed by the rules, and this matter has not been addressed in the explanatory memorandum to the current bill.

**1.157 As set out above, the committee has scrutiny concerns regarding the broad delegation of the Operator's administrative powers and of the power to engage independent decision-makers, in the absence of any legislative requirement that they possess appropriate expertise.**

**1.158 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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### **Parliamentary scrutiny—no requirement to table report<sup>128</sup>**

1.159 Subclause 192(1) would require the minister to cause a review of the operation of the scheme to be commenced as soon as possible after the second anniversary of the scheme start day or on a day prescribed by the rules, if the rules prescribe a day before the second anniversary. Subclause 192(2) sets out the range of matters that the review must consider. Subclauses 192(3) and (4) would also require that a further review of the operation of the scheme be commenced as soon as possible after the eighth anniversary of the scheme start date, or on a later date prescribed by the rules, and set out the matters that this review must consider.

1.160 However, the bill contains no requirement for the results of these reviews to be made public or tabled in Parliament and the explanatory memorandum does not address this clause beyond simply restating its terms.

**1.161 As set out above, the committee has scrutiny concerns that there is no legislative requirement that the second and eighth anniversary reviews of the operation of the scheme be tabled in the Parliament or published on the internet.**

**1.162 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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127 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2017*, 6 December 2017, pp. 34-36.

128 Clause 192. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

## National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

|                    |  |
|--------------------|--|
| <b>Purpose</b>     | This bill seeks to provide for consequential amendments to be made to Commonwealth legislation for the purpose of the Scheme established under the <i>National Redress Scheme for Institutional Child Sexual Abuse Bill 2018</i> |
| <b>Portfolio</b>   | Social Services  |
| <b>Bill status</b> | Passed both Houses on 19 June 2018   |

### Exclusion of judicial review<sup>129</sup>

1.163 This bill is consequential to the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, which seeks to establish a redress scheme for survivors of institutional child sexual abuse. Item 1 of Schedule 3 seeks to make decisions made under the redress scheme exempt from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

1.164 The committee notes that 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 1903*) and also provides for the right to reasons in some circumstances. Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion.

1.165 In this instance, the explanatory memorandum provides a number of reasons for exempting decisions made under the scheme from the ADJR Act, including:

- to ensure a timely response to eligible survivors;
- to prevent undue administrative delays;
- protections provided by the ADJR Act are unlikely to be required, as the 'reasonable likelihood' threshold means it is more likely a person who has experienced institutional child sexual abuse will have access to redress;
- internal review is available under the scheme; and
- legal proceedings may risk re-traumatising an applicant.<sup>130</sup>

129 Schedule 3, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

130 Explanatory memorandum, p. 111.

1.166 The committee previously considered an identical provision (and explanation in the accompanying explanatory memorandum) in the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017.<sup>131</sup> The committee reiterates its view that, as any judicial review application would be at the election of a person who is dissatisfied with a decision made under the scheme, it is unclear why any delays thereby created or the risk of re-traumatisation cannot be considered as part of a person's decision about whether to seek judicial review. Nor is it clear why the fact that access to redress is determined by the reasonable likelihood standard or the provision of internal review are cogent reasons for the exclusion of judicial review. In light of the fact that judicial review of decisions made by the Operator (or delegate) will still be available under s 39B of the *Judiciary Act 1903*, it is therefore unclear why ADJR Act review is to be excluded. The committee considers, from a scrutiny perspective, the proliferation of exclusions from the ADJR Act should be avoided.

**1.167 As set out above, the committee has scrutiny concerns regarding the exemption of decisions made under the redress scheme from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.**

**1.168 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.**

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131 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2017*, 15 November 2017, pp. 20-21.

## Space Activities Amendment (Launches and Returns) Bill 2018

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | This bill seeks to amend the <i>Space Activities Act 1998</i> to: <ul style="list-style-type: none"> <li>• broaden the regulatory framework to include arrangements for launches from aircraft in flight and launches of high power rockets; and</li> <li>• reduce barriers to participation in the space industry, by amending approval processes and insurance requirements for launches and returns</li> </ul> |
| <b>Portfolio</b>  | Jobs and Innovation   |
| <b>Introduced</b> | House of Representatives on 30 May 2018   |

### Incorporation of external material into the law<sup>132</sup>

1.169 Proposed section 110 provides a general rule-making power and proposed subsection 110(3) provides that, despite subsection 14(2) of the *Legislation Act 2003*, those rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing from time to time.

1.170 The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated, nor does it explain why it would be necessary or appropriate to incorporate matters in instruments or writings as in force from time to time. It merely restates the operation and effect of the relevant provisions. Nor does it explain whether such incorporated instruments or documents will be made freely available.<sup>133</sup>

1.171 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is

132 Schedule 1, item 187, proposed subsection 110(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

133 The committee notes that the explanatory memorandum states that proposed subsection 110(3) allows the incorporation of an instrument or writing 'as in force or existing at the time when the provisions of a legislative instrument commence' (see p. 32). This appears to contradict the terms of proposed subsection 110(3), which would permit incorporation of an instrument or writing as in force or existing from time to time.

incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);

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

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

1.173 The issue of access to material incorporated into the law by reference to external documents has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.<sup>134</sup> This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

**1.174 The committee requests the minister's advice as to:**

- **why it is necessary and appropriate that the rules incorporate documents as in force or existing from time to time, rather than as in force or existing at a particular time (for example, when the rules are made);**
- **the type of documents that it is envisaged may be applied, adopted or incorporated by reference in rules made under proposed section 110; and**
- **whether these documents will be made freely available to all persons interested in the law.**

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

## Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | <p>This bill seeks to amend Acts in relation to taxation and superannuation</p> <p>Schedule 1 seeks to provide for a one-off 12 month amnesty to employers to self-correct superannuation guarantee non-compliance</p> <p>Schedule 2 seeks to amend the <i>Superannuation Guarantee (Administration) Act 1992</i> to allow individuals to avoid unintentionally breaching their concessional contributions cap</p> <p>Schedule 3 seeks to ensure that the non-arm's length income rules for superannuation entities apply in certain circumstances</p> <p>Schedule 4 seeks to amend the total superannuation balance rules</p> |
| <b>Portfolio</b>  | Treasury   |
| <b>Introduced</b> | House of Representatives on 24 Ma y 2018   |

### Availability of merits review<sup>135</sup>

1.175 Schedule 1 of the bill seeks to establish a one-off 12-month amnesty for employers in relation to superannuation guarantee (SG) shortfalls. The amnesty includes reduced penalties and fees in relation to historical SG non-compliance, and allows employers to claim tax deductions for payments of SG charge during the amnesty period. The amnesty is intended to encourage employers to voluntarily disclose historical SG non-compliance and pay employees' full SG entitlements.<sup>136</sup>

1.176 Proposed subsection 74(1) sets out the circumstances in which an employer would qualify for the amnesty for a particular quarter. Proposed subsection 74(4) provides that the employer ceases to qualify, and is taken never to have qualified, for the amnesty if the Commissioner notifies the employer under proposed subsection 74(5). Proposed subsection 74(5) provides that the Commissioner may notify the employer, in writing, that the employer has ceased to qualify for the amnesty if the employer has failed to:

- pay to the Commissioner amounts equivalent to any SG charge (imposed on the disclosed SG shortfall) on or before the day the charge becomes payable,

<sup>135</sup> Schedule 1, item 13, proposed subsections 74(4) and (5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

<sup>136</sup> See explanatory statement, p. 10.

and has failed to enter into a payment arrangement in relation to that amount; or

- comply with such a payment arrangement.

1.177 The Commissioner's decision to notify an employer that they have ceased to qualify for the amnesty appears to be discretionary. Moreover, the explanatory memorandum states that, where an employer is disqualified, the Commissioner may unwind any benefits that have accrued to the employer under the amnesty by amending the employer's assessments.<sup>137</sup> It therefore appears to the committee that a decision by the Commissioner to disqualify an employer from the amnesty could materially affect that employer's interest.

1.178 Consequently, it appears to the committee that a decision by the Commissioner to disqualify an employer from the amnesty would be suitable for merits review. However, the explanatory memorandum does not indicate whether such decisions would be reviewable. It only restates the operation of the relevant provisions, and explains the effect of a disqualification decision (that is, that the Commissioner may unwind benefits that have accrued to the employer).

1.179 The committee notes that, by contrast, proposed subsection 19AB(7) provides that a person who is dissatisfied with a decision of the Commissioner in relation to an application for an employer shortfall exemption certificate may object to the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953* (Administration Act). That Part provides for review of the Commissioner's decisions by the Administrative Appeals Tribunal. The explanatory memorandum states that subsection 197AB(7) ensures that the standard objection processes that apply for tax administration matters apply to such decisions.<sup>138</sup>

1.180 It is not clear to the committee why the standard objection processes in the Administration Act should apply to decisions relating to exemption certificates, but not to decisions by the Commissioner to disqualify an employer from the amnesty in relation to SG shortfalls.

**1.181 The committee requests the minister's advice as to:**

- **whether decisions by the Commissioner to disqualify a person from the amnesty in relation to superannuation guarantee shortfalls would be subject to merits review; and**
- **if not, the characteristics of such decisions that would justify excluding merits review.**

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137 Explanatory memorandum, p. 14.

138 Explanatory memorandum, p. 29.

## Water Amendment Bill 2018

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | This bill seeks to amend the <i>Water Act 2007</i> to introduce a new directions power to enable the minister to direct the Murray-Darling Basin Authority to prepare an instrument that has the same effect as a previously disallowed Basin Plan amendment |
| <b>Portfolio</b>  | Agriculture and Water Resources  |
| <b>Introduced</b> | House of Representatives on 10 May 2018  |

### Removal of consultation requirements<sup>139</sup>

1.182 The *Water Act 2007* (Water Act) aims to facilitate the management by the Commonwealth, in conjunction with Basin States,<sup>140</sup> of the water resources of the Murray Darling Basin (the Basin) in a manner that optimises economic, social and environmental outcomes.<sup>141</sup> To give effect to these objects, the Water Act requires the Murray Darling Basin Authority (the Authority) to prepare a Basin Plan and give it to the minister for adoption. The Basin Plan provides for the cross-jurisdictional management of the Basin, and is intended to facilitate long-term sustainable use of the Basin's water resources. The Water Act also provides for amendments to the Basin Plan to be prepared by the Authority and given to the minister for adoption.

1.183 The Basin Plan Amendment Instrument 2017 (No. 1) (NBR Instrument), which amended the Basin Plan to implement changes arising from several reviews, was disallowed by the Senate on 14 February 2018. The government has stated that this has resulted in uncertainty as to the realisation of the long-term vision for the Basin Plan, and in particular as to Basin States' capacity to have in place Basin Plan compliant water resources plans by 30 June 2019.<sup>142</sup>

1.184 The current bill is intended to rectify these uncertainties, by enabling the NBR Instrument, as well as future instruments that have been disallowed by the Parliament, to be remade and tabled again before Parliament as soon as practicable.<sup>143</sup> To this end, the bill seeks to insert a new section 49AA into the Water Act, which would allow the minister to direct the Authority to prepare an

139 Schedule 1, item 2, proposed subsection 49AA(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

140 'Basin State' is defined in section 4 of the Water Act to mean New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.

141 See section 3 of the Water Act.

142 Second reading speech, p. 1.

143 Second reading speech, p. 1.

amendment to the Basin Plan if the amendment will be the same in effect as a disallowed amendment and is given within 12 months of the earlier amendment being disallowed.

1.185 Proposed subsection 49AA(4) provides that sections 46-48 of the Water Act do not apply to an amendment of the Basin Plan that is to be prepared, or is prepared or adopted, in accordance with a ministerial direction. These sections of the Water Act contain detailed requirements for consultation on proposed Basin Plan amendments with Basin States, specified bodies, and members of the public:

- section 46 provides that the Authority must, in preparing an amendment to the Basin Plan, consult with the Basin States, the Basin Officials Committee<sup>144</sup> and the Basin Community Committee.<sup>145</sup> The Authority may also undertake such other consultation as it considers appropriate. In preparing an amendment of rules relating to trading of water rights, the Authority must obtain the advice of the Australian Competition and Consumer Commission;
- section 47 provides that the Authority must prepare a plain-English summary of the proposed amendment and invite submissions on both the amendment and the summary from the Basin States and members of the public;
- section 47A provides that, after complying with section 47, the Authority must invite comments on the proposed amendment from the Murray-Darling Basin Ministerial Council;<sup>146</sup> and
- section 48 provides that, after the Authority gives the minister an amendment of the Basin Plan, the minister must consider the amendment and either adopt the amendment or return the amendment to the Authority with suggestions for further consideration. Where the minister returns the amendment to the Authority, the Authority must consider the minister's suggestions, undertake such additional consultation as the Authority considers necessary or appropriate, and give the minister either an identical

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144 The Basin Officials Committee was established by the Murray-Darling Basin Agreement (Schedule 1 to the Water Act). The BOC comprises one official from each of the Basin States, and is responsible for providing advice to the Ministerial Council, and for implementing policy decisions of the Ministerial Council on matters such as state water shares and the funding and delivery of natural resource management programs.

145 The Basin Community Committee (BCC) was established by the Authority pursuant to requirements in section 202 of the Water Act. Among other functions, the BCC reports on community concerns around Basin Plan implementation and provides information to Basin communities about the Authority's programs.

146 The Murray-Darling Basin Ministerial Council (MC) was established by the Murray-Darling Basin Agreement (Schedule 1 to the Water Act). It comprises ministers from each of the Basin States, and is chaired by the Commonwealth. The MC has policy and decision-making roles for matters such as state water shares and the funding and delivery of natural resource management programs.

or an altered version of the amendment. The minister must then either adopt the amendment or direct the Authority to make further alterations.

1.186 Where the Parliament delegates its legislative power in relation to significant regulatory schemes, the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003* (Legislation Act)) are included in the legislation and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee therefore expects a detailed justification in the explanatory memorandum should a bill seek to remove or disapply specific consultation requirements. In this instance, the explanatory memorandum states that subsection 49AA(4) 'clarifies' that sections 46 to 48 of the Water Act do not apply, but that as the amendment must be the same in effect as an earlier amendment that has been disallowed:

[T]he Authority cannot prepare an amendment that introduces new provisions that will deliver a different outcome to the earlier amendment that has not been subject to the extensive consultation process under the Water Act. There is also a 12-month limitation to ensure the previous consultation on the earlier amendment is relevant and valid.<sup>147</sup>

1.187 However, the committee notes that circumstances relevant to Basin management and associated community attitudes may change relatively quickly. It is therefore unclear that prior consultation undertaken in relation to a disallowed Basin Plan amendment would remain sufficiently relevant to justify excluding further consultation where the amendment is remade pursuant to a ministerial direction—particularly if the direction is issued towards the end of the applicable 12-month period.

1.188 Additionally, the committee notes that proposed subsection 49AA(6) provides that certain changes would not prevent an amendment made pursuant to a ministerial direction from being the same in effect as the earlier amendment (and therefore not subject to the consultation requirements). Clause 2 of proposed Schedule 10 also provides that certain changes would not prevent the remade NBR instrument from being the same in effect as the previous (disallowed) version of that instrument.

1.189 With respect to the NBR Instrument, the committee also notes that certain submissions to the Rural and Regional Affairs and Transport Legislation Committee highlighted concerns regarding consultation undertaken on that instrument. In particular, some submissions asserted that the disallowed NBR Instrument, as presented to the Parliament in late 2017, was substantially different to the version that was subject to public consultation in 2016, and contained changes that had

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147 Explanatory memorandum, p. 6.

never been subject to public consultation.<sup>148</sup> These submissions appear to raise additional concerns about the appropriateness of proposal to disapply the consultation requirements in the Water Act with respect to the NBR Instrument.

1.190 Finally, the committee notes that proposed subsection 49AA(5) provides that while a direction given under proposed subsection 49AA(1) would be a legislative instrument, it would not be subject to disallowance under the Legislation Act. In general, the committee will be concerned by any measures that seek to limit or remove parliamentary scrutiny of delegated legislation. However, as the ministerial direction would only direct the Authority to prepare an amendment instrument, and the amendment instrument will itself remain subject to disallowance under the Legislation Act,<sup>149</sup> the committee makes no comment in relation to this aspect of the bill.

**1.191 The committee requests the minister's more detailed justification for disapplying the consultation requirements in sections 46-48 of the *Water Act 2007* to Basin Plan amendments prepared pursuant to a ministerial direction under proposed section 49AA.**

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148 Senate Rural and Regional Affairs Legislation Committee, *Water Amendment Bill 2018*, June 2018, pp. 19-20.

149 The committee also notes that a ministerial direction given to any person or body is not generally subject to disallowance: see table item 2 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

## Bills with no committee comment

1.192 The committee has no comment in relation to the following bills which were introduced into the Parliament between 8 – 31 May 2018:

- Aged Care (Single Quality Framework) Reform Bill 2018
- Appropriation Bill (No. 5) 2017-2018
- Appropriation Bill (No. 6) 2017-2018
- Appropriation (Parliamentary Departments) Bill (No. 1) 2018-2019
- Australian Research Council Amendment Bill 2018
- Corporations (Fees) Amendment (ASIC Fees) Bill 2018
- Corporations (Review Fees) Amendment Bill 2018
- Defence Amendment (Sovereign Naval Shipbuilding) Bill 2018
- Export Legislation Amendment (Live-stock) Bill 2018
- Fair Work Amendment (Making Australia More Equal) Bill 2018
- Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment Bill 2018
- Live Sheep Long Haul Export Prohibition Bill 2018
- National Consumer Credit Protection (Fees) Amendment (ASIC Fees) Bill 2018
- Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018
- Social Services Legislation Amendment (Maintaining Income Thresholds) Bill 2018
- Superannuation Auditor Registration Imposition Amendment (ASIC Fees) Bill 2018
- Superannuation Industry (Supervision) Amendment (ASIC Fees) Bill 2018
- Treasury Laws Amendment (Accelerated Depreciation for Small Business Entities) Bill 2018
- Treasury Laws Amendment (APRA Governance) Bill 2018
- Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018
- Treasury Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2018
- Treasury Laws Amendment (Personal Income Tax Plan) Bill 2018
- Treasury Laws Amendment (Tax Integrity and Other Measures No. 2) Bill 2018
- Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Bill 2018

## Commentary on amendments and explanatory materials

### Private Health Insurance Legislation Amendment Bill 2018

#### [Digest 5/18]

1.193 On 31 May 2018 the Minister for Health (Mr Hunt) presented an addendum to the explanatory memorandum and the bill was read a third time.

**1.194 The committee thanks the minister for providing this addendum to the explanatory memorandum which includes information responding to concerns raised by the committee.<sup>150</sup>**

1.195 The committee has provided commentary on the minister's response in relation to this bill elsewhere in this *Digest*,<sup>151</sup> and notes that the information provided in the addendum does not entirely address the committee's concerns.

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### Road Vehicle Standards Bill 2018

#### Road Vehicle Standards Charges (Imposition—Customs) Bill 2018

#### Road Vehicle Standards Charges (Imposition—Excise) Bill 2018

#### Road Vehicle Standards Charges (Imposition—General) Bill 2018

#### [Digests 2 & 3/18]

1.196 On 30 May 2018 in the House of Representatives the Minister for Urban Infrastructure and Cities (Mr Fletcher) presented supplementary explanatory memoranda, and the bills were read a third time.

**1.197 The committee thanks the minister for providing these addenda to the explanatory memoranda which includes key information previously requested by the committee.<sup>152</sup>**

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150 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, pp. 47-51.

151 See pp. 118 - 127.

152 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, pp. 239-276 and 277-281.

## Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017

### Telecommunications (Regional Broadband Scheme) Charge Bill 2017

*[Digests 8 & 10/17]*

1.198 In relation to the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 (Competition Bill), on 10 May 2018 the House of Representatives agreed to 13 Government amendments, the Minister for Urban Infrastructure and Cities (Mr Fletcher) presented a supplementary explanatory memorandum, and the bill was read a third time.

1.199 In relation to the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 (Regional Bill), on 10 May 2018 the House of Representatives agreed to one Government amendment, the Minister for Urban Infrastructure and Cities (Mr Fletcher) presented a supplementary explanatory memorandum, and the bill was read a third time.

1.200 In *Scrutiny Digest 8 of 2017* and *Scrutiny Digest 10 of 2017*, the committee raised concerns that each bill sought to modify the usual disallowance procedures, by requiring a House of Parliament to positively pass a resolution disallowing certain determinations for the disallowance to be effective. This would mean that if a disallowance motion was lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument would take effect. Amendment (13) in relation to the Competition Bill and (1) in relation to the Regional Bill, effectively reinstates the usual disallowance procedures under the *Legislation Act 2003*, and appear to address the committee's concerns.

**1.201 The committee welcomes the amendments, made in response to concerns raised by the committee, to provide that determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period.**

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

- Copyright Amendment (Service Providers) Bill 2017;<sup>153</sup>
- Home Affairs and Integrity Agencies Legislation Amendment Bill 2018;<sup>154</sup>

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153 On 10 May 2018 in the Senate the Assistant Minister for Science, Jobs and Innovation (Senator Seselja) tabled an addendum to the explanatory memorandum and the bill was read a third time.

154 On 8 May 2018 the House of Representatives agreed to 28 Government amendments, the Minister for Home Affairs (Mr Dutton) presented a supplementary memorandum and the bill was read a third time.

- Investigation and Prosecution Measures Bill 2017;<sup>155</sup>
- Migration Amendment (Skilling Australians Fund) Bill 2018;<sup>156</sup> and
- Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018.<sup>157</sup>

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155 On 9 May 2018 the Senate agreed to two Government amendments and the Assistant Minister for Agriculture and Water Resources (Senator Ruston) tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

156 On 15 February 2018 the Senate agreed to two Opposition amendments and on 8 May 2018 agreed to two Centre Alliance amendments. On 9 May 2018 the House of Representatives agreed to the Senate amendments and the bill was passed.

157 On 30 May 2018 the House of Representatives agreed to one Government amendment, the Minister for Revenue and Financial Services (Ms O'Dwyer) presented a supplementary explanatory memorandum and the bill was read a third time.



## Chapter 2

### Commentary on ministerial responses

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

### Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018

|                    |   |
|--------------------|---|
| <b>Purpose</b>     | This bill seeks to establish the Aboriginal and Torres Strait Islander Land and Sea Future Fund |
| <b>Portfolio</b>   | Indigenous Affairs  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.2 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 14 June 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>1</sup>

#### Exemption from disallowance and sunseting<sup>2</sup>

##### *Initial scrutiny – extract*

2.3 The bill seeks to establish the Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF). Under clause 30, the Future Fund Board would be responsible for making decisions with respect to ATSILSFF investments. Subclause 32(1) seeks to allow the responsible ministers to give the Future Fund Board written directions about the performance of its ATSILSFF investment functions. Such directions are to be known collectively as the ATSILSFF Investment Mandate.<sup>3</sup>

1 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

2 Subclause 32(8). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

3 Subclause 32(3).

2.4 Subclause 32(8) states that the directions making up the ATSILSFF Investment Mandate would be legislative instruments. However, two notes following this subclause state that these directions would not be subject to the disallowance or sunset provisions set out in the *Legislation Act 2003*, as the Legislation (Exemptions and Other Matters) Regulation 2015 prescribes that directions by a minister are not subject to disallowance or sunset.<sup>4</sup>

2.5 The explanatory memorandum states that this approach 'enables the public and the Parliament to hold the Government accountable for the directions it issues to the Future Fund Board without impeding the Government's ability to manage its finances',<sup>5</sup> and is consistent with arrangements for other funds invested by the Future Fund Board.<sup>6</sup> However, the explanatory memorandum does not otherwise explain why it is appropriate for the directions making up the investment mandate to be exempt from disallowance and sunset requirements.

2.6 The committee notes that the explanatory memorandum states that the ATSILSFF Investment Mandate will enable the government to give 'strategic guidance' to the Future Fund Board and that it will reflect the government's 'policy intent' with regard to the investments of the ATSILSFF. The committee's consistent position is that significant concepts relating to a legislative scheme, including the provision of strategic guidance and the setting out of policy intent, should be included in primary legislation, or at least in legislative instruments subject to parliamentary disallowance, sunset and tabling, unless a sound justification for using non-disallowable delegated legislation is provided.

2.7 The committee requests the minister's advice as to why it is considered appropriate that ministerial directions making up the ATSILSFF Investment Mandate are not to be subject to the usual disallowance and sunset provisions under the *Legislation Act 2003*.

### **Minister's response**

2.8 The minister advised:

I note that setting the investment mandate for the ATSILFF is a responsibility of the Minister for Finance and the Treasurer, in consultation with me. Several aspects of the ATSILSFF Bill are modelled on the enabling legislation for the other Funds invested and administered by the Future Fund Board of Guardians (the Board).

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4 See paragraphs 44(2)(b) and 54(2)(b) of the *Legislation Act 2003* and sections 9 and 11 of the Legislation (Exemptions and Other Matters) Regulation 2015.

5 Explanatory memorandum, p. 18.

6 Explanatory memorandum, p. 17.

I have copied this letter to the Finance Minister and the Treasurer, given their responsibilities in relation to the Board and the Funds invested by the Board.

*ATSILSFF investment mandate exemption from disallowance and sunseting*

The ATISILSFF investment mandate is a direction by Ministers to a body and is, therefore, exempt from disallowance under sub-item 9(2), and sunseting under sub-item 11(3), of the *Legislation (Exemption and other Matters) Regulation 2015*.

The Government considers this approach is appropriate as it is consistent with arrangements in place for investment mandate directions for the other Funds invested by the Board. This approach provides certainty to the Board in investing the Funds for which it is responsible.

The ATISILSFF Bill provides adequate scrutiny of the investment mandate. The ATISILSFF Bill requires that prior to issuing the ATISILSFF investment mandate, the responsible Ministers must consult both the Minister for Indigenous Affairs (s 32(7) refers) and the Board (s 35(1) refers). If the Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 35(2) refers). This requirement ensures that Parliament is kept informed of any concerns raised by the Board.

The ATISILSFF investment mandate will be informed by independent expert advice, including advice on setting an appropriate benchmark rate of return to meet the policy objectives within the current market conditions.

The Government considers that it is appropriate that the ATISILSFF investment mandate is exempt from sunseting as the process for setting the investment mandate has been designed to ensure the mandate remains relevant over the long term. The same approach has been taken for the other Funds managed by the Board (e.g. see s 39(7) of the *Medical Research Future Fund Act 2015*).

**Committee comment**

2.9 The committee thanks the minister for this response. The committee notes the minister's advice that he considers it is appropriate that ministerial directions making up the ATISILSFF investment mandate will not be subject to the usual disallowance and sunseting provisions under the *Legislation Act 2003* because this approach would be consistent with the treatment of investment mandate directions for other funds invested by the Future Fund Board, and would also provide certainty to the Board when investing funds.

2.10 The committee also notes the minister's advice that he considers the bill provides for adequate scrutiny of the investment mandate, as it requires the responsible ministers to consult with the Minister for Indigenous Affairs and the

Future Fund Board prior to issuing an investment mandate direction, and requires any submission made by the Future Fund Board regarding a draft direction to be tabled in Parliament. Finally, the committee notes the minister's advice that the investment mandate will be informed by expert advice, including on the appropriate benchmark rate of return to meet policy objectives in current market conditions.

2.11 The committee emphasises that its consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law. With respect to the need to provide the Future Fund Board with certainty when investing funds, the committee notes that it would be possible to maintain parliamentary scrutiny of the investment mandate while also preventing any uncertainty that may arise from potential disallowance. For example, it would be possible to provide that an investment mandate direction does not come into effect until the relevant disallowance period has expired.<sup>7</sup>

2.12 Finally, while the committee acknowledges that the responsible ministers would be required to consult with the Minister for Indigenous Affairs and the Future Fund Board prior to giving investment mandate directions, because the investment mandate will contain strategic guidance and set out the government's policy intent with regard to the investments of the ATSILSFF, it may be more appropriate for the directions making up the investment mandate to be subjected to disallowance and sunseting.

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

**2.14 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not subjecting ministerial directions making up the ATSILSFF Investment Mandate to the disallowance and sunseting provisions under the *Legislation Act 2003*.**

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7 For an example of this approach, see section 79 of the *Public Governance, Performance and Accountability Act 2013*.

## Parliamentary scrutiny—no requirement to table report<sup>8</sup>

### *Initial scrutiny – extract*

2.15 Clause 55 would require the responsible ministers to cause a review of the operation of the Act to be undertaken before the tenth anniversary of the commencement of the section.

2.16 The explanatory memorandum states that this review is 'intended to provide the opportunity to consider whether the Act is providing the outcomes envisaged.'<sup>9</sup> However, the bill contains no requirement for the results of this review to be made public or tabled in Parliament, and this is not addressed in the explanatory memorandum.

2.17 In order to facilitate appropriate parliamentary scrutiny of the operation of this Act (and the ATSILSFF), the committee considers it may be appropriate for clause 55 of the bill to be amended to include a legislative requirement that the review be:

- tabled in the Parliament within 15 sitting days after it is received by the responsible ministers; and
- published on the internet within 30 days after it is received by the responsible ministers.

2.18 The committee requests the minister's response in relation to this matter.

### *Minister's response*

2.19 The minister advised:

The ATSILSFF Bill follows the arrangement adopted in the *DisabilityCare Australia Fund Act 2013* and the *Medical Research Future Fund Act 2015*. Both contain a requirement for a review of the operation of the Acts to be undertaken but do not require the results of the review to be made public or tabled in the Parliament. The *Future Fund Act 2006* and the *Nation-building Funds Act 2008* do not contain a requirement for a review of the operation of the Acts to be conducted.

I note that there is nothing preventing the responsible Ministers tabling the report of the review in the Parliament.

### *Committee comment*

2.20 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed arrangements follow those in certain other legislation which require a review of the operation of the Act to be undertaken but do not require the results of the review to be made public or tabled in Parliament.

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8 Clause 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

9 Explanatory memorandum, p. 27.

The committee also notes the minister's advice that neither the *Future Fund Act 2006* nor the *Nation-building Funds Act 2008* contain a requirement that a review of the Act be conducted. Finally, the committee notes the minister's advice that nothing prevents the responsible ministers from tabling the report of the review in Parliament.

2.21 The committee emphasises that its consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law. The committee also reiterates that, although nothing in the bill prevents the responsible ministers from tabling the report of the review in Parliament, it remains the case that nothing in the bill *requires* that it be tabled.

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

**2.23 The committee considers that, in order to enhance parliamentary scrutiny, it would be appropriate for clause 55 of the bill to be amended to include a legislative requirement that the review be:**

- **tabled in Parliament within 15 sitting days after it is received by the responsible ministers; and**
- **published on the internet within 30 days after it is received by the responsible ministers.**

**2.24 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not including in the bill a positive requirement that the review of the operation of the Act be tabled in Parliament and published on the internet.**

## Australian Institute of Health and Welfare Amendment Bill 2018

|                    |   |
|--------------------|---|
| <b>Purpose</b>     | This bill seeks to amend the <i>Australian Institute of Health and Welfare Act 1987</i> to replace the current representative-based structure of the Australian Institute of Health and Welfare Board with membership consisting of a collective mix of skills from a range of different fields |
| <b>Portfolio</b>   | Health  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.25 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 23 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>10</sup>

### **Broad delegation of administrative powers<sup>11</sup>**

#### ***Initial scrutiny – extract***

2.26 Proposed section 28 of the bill seeks to enable the Chief Executive Officer (CEO) of the Australian Institute of Health and Welfare (AIHW) to delegate any or all of the CEO's functions or powers under the *Australian Institute of Health and Welfare Act 1987* (AIHW Act) to:

- a member of the staff of the AIHW (which may be any APS-level employee);<sup>12</sup> or
- with the written approval of the Board of the AIHW—any other person or body.

2.27 Under proposed section 17A, the CEO would be responsible for the day-to-day administration of the AIHW. That section also seeks to confer on the CEO the power to do all things necessary or convenient to be done in connection with the

10 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

11 Schedule 1, item 25, proposed section 28. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

12 See section 19 of the *Australian Institute of Health and Welfare Act 1987*.

CEO's duties, and to provide that all acts done in the name of, or on behalf of, the AIHW by the CEO shall be deemed to have been done by the AIHW. Proposed section 28 therefore appears to permit the delegation of a number of significant powers related to the administration of the AIHW to a very broad range of persons or bodies. Neither the bill nor the AIHW Act appears to limit the scope of the powers and functions that may be delegated. Further, the only restriction on the persons to whom powers and functions may be delegated is that the Board must give written approval to delegate powers and functions to persons other than AIHW staff.

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

2.29 In this instance, the explanatory memorandum does not explain why it is necessary to provide the CEO with a broad power of delegation, including to persons or bodies outside of the Australian Public Service. It merely restates the operation and effect of the relevant provisions.

2.30 The committee requests the minister's detailed justification for permitting the CEO of the Australian Institute of Health and Welfare to delegate any or all of his or powers and functions to a member of staff of the institute or, with the permission of the Board, to any person or body.

2.31 The committee considers it may be appropriate to amend the bill to require that the CEO and/or the Board be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated, and requests the minister's advice in relation to this matter.

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

2.32 The minister advised:

The broad delegation powers of the CEO have been in place since 1987. The Institute is a relatively small agency with a staff profile that is limited to a small number of SES officers. Many of the day-to-day activities may not need to be performed by SES staff. The broad delegation powers allow the CEO to exercise judgement in allocating functions or powers to staff, which is critical to maintaining the efficient and effective running of the Institute.

The CEO's functions and powers extend to delegating matters including approval of contracts, data release and publications to staff with

appropriate skills and qualifications. For example, officers below SES level have a delegation to approve low-value financial commitments, travel expenses and other minor purchases.

There are safeguards to ensure that appropriate delegations are in place, with the CEO reporting to the Institute's Board. The Board has appointed an Audit and Finance Committee, which provides advice on the Institute's compliance regime and assurance program. The Committee obtains assurance from the internal auditors, who are appointed by the Board, to ensure that internal controls are operating properly. Tests carried out by the internal auditors include checking that delegates appointed by the CEO are using their delegation correctly. This level of oversight by the Board provides the necessary safeguards to ensure that the CEO's delegations are appropriate.

### **Committee comment**

2.33 The committee thanks the minister for this response. The committee notes the minister's advice that the Institute is a relatively small agency that employs only a small number of Senior Executive Service (SES) officers, and that many of the day-to-day activities associated with the administration of the Institute may not need to be performed by SES staff. The committee also notes the advice that the broad delegation of powers proposed by the bill allows the CEO to exercise judgement in allocating functions and powers to staff and that it is intended that matters will be delegated to staff with appropriate skills and qualifications.

2.34 The committee further notes the minister's advice that there are safeguards in place to ensure that powers are appropriately delegated, including oversight by the Institute's Board. The committee also notes the advice regarding how oversight by the Board would operate in practice, as well as the minister's view that Board oversight will provide the necessary safeguards to ensure the appropriate delegation of the CEO's functions and powers.

2.35 While noting this advice, the committee reiterates its view that, where it is proposed to delegate functions and powers below the SES level, such delegations should be limited to persons with expertise appropriate to the functions and powers delegated. In this instance, while the minister's response indicates how it is *intended* the CEO's power of delegation is to be exercised, there is nothing on the face of the bill that would ensure the power would be exercised in this manner.

**2.36 The committee considers that it may be appropriate to amend the bill to require that the CEO be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.**

**2.37 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the CEO to delegate functions and powers to *any* staff member of the Australian Institute of Health and Welfare or, with the approval of the Board, to 'any person'.**

## Corporations Amendment (Asia Region Funds Passport) Bill 2018

|                    |   |
|--------------------|---|
| <b>Purpose</b>     | This bill seeks to provide a multilateral framework to allow eligible funds to be marketed across economies participating in the Asia Region Funds Passport with limited additional regulatory requirements |
| <b>Portfolio</b>   | Treasury  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.38 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter received 31 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>13</sup>

### Reversal of the evidential burden of proof<sup>14</sup>

#### *Initial scrutiny – extract*

2.39 Proposed subsection 1213L(1) provides that a person who obtains a copy of a register of members of a foreign passport fund under section 1213K<sup>15</sup> must not use information obtained from a register of members of a notified foreign passport fund<sup>16</sup> to contact or send material to a member, or disclose information knowing that the information is likely to be used for that purpose. A breach of proposed subsection 1213L(1) is punishable by a pecuniary penalty of 60 penalty units.

13 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

14 Schedule 1, item 1, proposed subsection 1213L(2), and Schedule 1, item 1, proposed subsection 1213M(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

15 Proposed section 1213K provides for a right to obtain a copy of the register of members of a foreign passport fund, the manner in which the application must be made, and the manner and language in which the register must be provided.

16 Proposed Part 8A.4 relates to notified foreign passport funds. Pursuant to proposed section 1213C, a foreign passport fund becomes a 'notified foreign passport fund' if the operator lodges a notice with ASIC of intention to offer interests in the fund to persons within Australia and, within the consideration period for the notice (15 days from lodgement), ASIC has not rejected the notice or notified the operator that insufficient information has been provided.

Proposed subsection 1213L(2) provides an exception (offence-specific defence) to that offence, providing that the offence does not apply if the use or disclosure is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them, or the use or disclosure is approved by the operator of the relevant fund.

2.40 In addition, proposed subsection 1213M(1) creates an offence of strict liability, which applies where the operator of a foreign passport fund is required under the home economy for the fund to prepare a report in relation to the fund, and to make that report available to members of the fund in that home economy, without charge. The operator would commit the offence if the operator fails to give Australian members of the fund a copy of the report and (if necessary) a summary in English of all or part of the report, in accordance with proposed section 1213M. Proposed subsection 1213M(6) provides an exception (offence-specific defence) to that offence, providing that the offence does not apply if the operator of the fund is required under another provision of the *Corporations Act 2001* (Corporations Act) to lodge the relevant report, or to give the report to Australian members of the fund.

2.41 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.42 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right. While in the instances outlined above the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

2.43 The committee also notes that the *Guide to Framing Commonwealth Offences*<sup>17</sup> provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>18</sup>

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

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

2.44 With respect to the reversal of the evidential burden of proof in proposed subsection 1213L(2), the explanatory memorandum states:

The rationale for the defendant bearing the evidential burden of proof for all exceptions is that the information is peculiarly within the defendant's knowledge. In this case, the defendant is best placed to show that the material was relevant to the member's interests, or the fund had approved the person contacting the members.<sup>19</sup>

2.45 While the committee notes this explanation, it is not apparent that the matters in proposed subsection 1213L(2) are peculiarly within the knowledge of the defendant. In particular, whether the operator of a fund has approved the use or disclosure of information in a register appears to be a matter of which the operator would be particularly apprised. The committee further notes that a defendant being 'best placed' to point to evidence in relation to a matter does not equate to the matter being peculiarly within the defendant's knowledge.

2.46 The explanatory memorandum provides no explanation for the reversal of the burden of proof in proposed subsection 1213M(6). Moreover, it is not apparent that the matters in that subsection (that is, whether the defendant is authorised or required under the Corporations Act to lodge the relevant report or to give that report to Australian members of the fund) would be peculiarly within the knowledge of the defendant. Rather, they appear to be factual matters which could be established by the prosecution through reasonable inquiries.

2.47 As the explanatory materials do not address, or do not adequately address, the issue, the committee requests the minister's detailed justification for the reversal of the evidential burden of proof in proposed subsections 1213L(2) and 1213M(6). The committee's consideration of the appropriateness of a provision that reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>20</sup>

### **Minister's response**

2.48 The minister advised:

Proposed section 1213L prohibits a person from requesting or using a copy of the register of members of a notified foreign passport fund to contact or send material to members. Proposed subsection 1213L(2) provides that a person does not contravene this prohibition if the person can show that the use or disclosure is relevant to the member's interests in the fund or the use or disclosure is approved by the fund operator. This is an 'offence-specific defence' which reverses the evidential burden of proof. A

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19 Explanatory memorandum, p. 68.

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

contravention of this provision carries a penalty of 60 penalty units for a corporation.

The Guide notes that offence-specific defences may be appropriate where the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish it.<sup>21</sup>

The Guide also states that it may be justifiable to reverse a burden of proof if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.<sup>22</sup>

There are several factors which justify a reversal of the burden of proof in relation to proposed section 1213L.

Firstly, the alternative framing (which does not reverse the evidence burden) would require ASIC to establish that the use or disclosure was not relevant to the member's interests in the fund or was not approved by the fund's operator. This evidence may be difficult for ASIC to obtain given that the fund operator is not an Australian entity or located in Australia.

The Guide notes that such difficulties are generally not a sound justification for reversing the burden of proof because '[i]f an element of the offence is difficult for the prosecution to prove, [reversing the burden] ... may place the defendant in a position in which he or she would also find it difficult.'<sup>23</sup> However, in the context of proposed section 1213L, it should be easily within the capacity of the person to produce information (for example, a documentary record) confirming how the proposed use or disclosure was considered in the interests of members or the fund operator's approval of the release.

Secondly, proposed subsection 1213L(4) does not reverse the legal burden of proof. Nor does it reverse the evidential burden of proof for the central question in establishing the offence, namely, whether the third party used or disclosed members' private information to send them unsolicited material.

Finally, it should be noted that the offence-specific defence in proposed subsection 1213L(2) is modelled on other sections in the *Corporations Act 2001* (the Corporations Act), including the offence-specific defence to

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21 Guide, [4.3.1]

22 Guide, [4.3.1]

23 Guide, [4.3.1]

section 177 (misusing the information in the members' register for a company or registered scheme). It is desirable for the enforceability (and resulting deterrent effect) of the proposed subsection 1213L(2) to be equally as strong as its corresponding provisions which apply to Australian companies, registered schemes and disclosing entities.

We released the Bill for public consultation from 20 December 2017 to 25 January 2018 and from 19 February to 5 March 2018. Stakeholders did not raise any concerns about the reversal of the evidential burden in this proposed provision or proposed subsection 1213M(6) (discussed in further detail below).

Proposed subsection 1213M(1) requires the operator of a notified foreign passport fund to give the fund's Australian members a copy of any report that it prepares under the fund's home economy laws and gives to the fund's members in that economy without charge. Proposed subsection 1213M(6) creates an exception to this offence where the operator is required under another provision of the Corporations Act to lodge the report with ASIC or to give the report to the fund's Australian members. As this is framed as an exception, the operator bears an evidential burden under subsection 13.3(3) of the *Criminal Code Act 1995*.

Placing the evidential burden on the operator does not create added hardship for the defendant. The defendant can easily discharge the burden by pointing to the other provision in the Corporations Act which requires the defendant to lodge the report or provide it to members.

The alternative framing (which does not reverse the evidential burden) would have been to include, as part of the offence, a requirement that there are no provisions in the Corporations Act which require the operator to lodge the report or provide the report to its Australian members. This alternative framing would not have provided any significant advantages to a defendant because ASIC could discharge the burden by simply alleging that there were no such provisions in the Corporations Act. The evidential burden would then shift anyway to the defendant to prove that such a provision existed.

Finally, it should be noted that an exception (as opposed to an offence-specific defence) does not put a defendant at a procedural disadvantage because the defendant does not need to wait until the defence case is called before leading evidence of the exception.<sup>24</sup>

### **Committee comment**

2.49 The committee thanks the minister for this response. With respect to the reversal of the burden of proof in proposed subsection 1213L(2), the committee notes the minister's advice that an alternative framing (which does not reverse the evidential burden) would require ASIC to establish evidence that may be difficult to

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24 See the ALRC Report 112 at [7.6].

obtain (given that the fund operator is not an Australian entity and or located in Australia), but that it 'should be easily' within the capacity of the defendant to produce such information. The committee also notes the minister's advice that the proposed subsection does not reverse the evidential burden of proof for the central question in establishing the offence in proposed subsection 1213L(1) (that is, whether the defendant used or disclosed members' private information to send them unsolicited material).

2.50 The committee further notes the minister's advice that the defence in proposed subsection 1213L(2) is modelled on other sections in the Corporations Act and that it is desirable in terms of enforcement and deterrence that the proposed provision apply to funds in the same manner as corresponding provisions apply to Australian companies, registered schemes and disclosing entities.

2.51 With respect to the reversal of the burden of proof in proposed subsection 1213M(6), the committee notes the minister's advice that this reversal does not create added hardship for the defendant, as the defendant 'can easily discharge the burden' by pointing to the provision in the Corporations Act which requires the defendant to lodge the relevant report or provide it to members.

2.52 The committee also notes the minister's advice that an alternative framing of the matters in proposed subsection 1213M(6) would not deliver any significant advantages for the defendant because ASIC could discharge the burden by simply alleging that there were no provisions in the Corporations Act requiring the defendant to lodge the relevant report or provide it to members, and the evidential burden would then shift to the defendant to prove such provisions existed.

2.53 While noting the minister's advice, the committee reiterates that it generally considers a matter is appropriate for inclusion in an offence-specific defence where the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>25</sup> While the committee appreciates that it may be relatively easy for the defendant to obtain evidence as to the matters in proposed subsections 1213L(2) and 1213M(6) (and thereby discharge the burden of proof), this does not equate to those matters being *peculiarly* within the defendant's knowledge. For example, whether a fund operator has approved the release of information would be a matter of which that operator would be particularly apprised.

2.54 The committee also appreciates that proposed subsection 1213L(2) reverses only the evidential (rather than the legal) burden of proof. However, as outlined in the committee's initial comments, reversing the evidential burden of proof still interferes with the common-law right to be presumed innocent until proven guilty, and the committee would expect this reversal to be fully justified in the explanatory

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

memorandum. Further, while proposed section 1213L(2) may not reverse the burden of proof in relation to the central element of the offence, it nevertheless reverses the burden in relation to matters that go to the defendant's culpability. It is therefore unclear why it is appropriate that the defendant, rather than the prosecution, should bear the burden of proof in relation to those matters.

2.55 Finally, the committee emphasises that it does not generally consider consistency with existing provisions to be sufficient justification for reversing the evidential burden of proof. As outlined elsewhere in its comments on this bill, it appears to the committee that it may be possible to achieve consistency between the proposed provisions in the bill and corresponding provisions in the Corporations Act by aligning provisions in the Corporations Act with the *Guide to Framing Commonwealth Offences*.

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

**2.57 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in proposed subsections 1213L(2) and 1213M(6).**

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## **Strict liability offences carrying custodial penalties<sup>26</sup>**

### ***Initial scrutiny – extract***

2.58 The bill seeks to create a number of strict liability offences, and to extend a number of existing strict liability offences to foreign passport funds. The majority of these offences attract a pecuniary penalty only. However, the following provisions also attract a custodial penalty:

- Item 91 seeks to insert proposed subsection 314A(9), which would apply strict liability to the following offences relating to the operator of a notified foreign passport fund:
  - failing to provide an Australian member of the fund with a copy of the annual financial report and associated auditor's report;
  - failing to provide a notice to each Australian member of the fund, notifying the member that they may elect to receive a hard copy or an electronic copy of the reports; and

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26 Schedule 1, items 91, 98, 101 and 105. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- failing to provide the reports in English or, if the member so elects, in an official language of the home economy of the fund;

Each of the offences would attract a penalty of 10 penalty units, three months imprisonment, or both;

- Item 98 seeks to amend section 319(1A) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where the operator fails to lodge relevant financial reports with the Australian Securities and Investments Commission (ASIC) under proposed subsection 319(1AA), and is punishable by 60 penalty units, 1 year's imprisonment, or both;
- Item 101 seeks to amend subsection 321(1A) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where the operator fails to comply with a direction from ASIC to lodge financial reports and associated auditor's reports, and is punishable by 10 penalty units, three months' imprisonment, or both; and
- Item 105 seeks to amend subsection 322(2)(b) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where a report lodged with ASIC by a notified foreign passport fund is subsequently amended, and the operator fails to lodge the amended report with ASIC within 14 days, or to give a copy of the amended report free of charge to any Australian member of the fund who requests it. The offence is punishable by 10 penalty units, 3 months' imprisonment, or both.

2.59 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>27</sup>

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

2.60 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by a term of imprisonment and only punishable by a fine of up to 60 penalty units for an individual.<sup>28</sup> In this instance, the bill proposes to create offences of strict liability subject to three months' imprisonment, and to expand existing strict liability offences subject to terms of imprisonment between three months and one year.

2.61 With respect to the offences that would be created by proposed section 314A, the explanatory memorandum states that the application of strict liability is appropriate in order to provide a strong deterrent for directors of operators of notified foreign passport funds against contravening the reporting requirements, and indicates that the offences are comparable to those that apply to directors of Australian companies.<sup>29</sup>

2.62 The explanatory memorandum does not provide a justification for extending existing strict liability offences attracting custodial penalties to notified foreign passport funds, beyond indicating that similar offences in the Corporations Act apply to Australian companies, registered schemes and reporting entities.<sup>30</sup> However, the statement of compatibility provides some further explanation in this respect, stating:

Several of the strict liability offences that are extended to operators of notified foreign passport funds by the new law do not comply with the Guide because they either exceed the maximum recommended penalty suggested by the Guide or impose a term of imprisonment. Each of these offences is an existing offence that already applies in respect of conduct by a company, registered scheme or reporting entity. Extending these offences so that they apply to conduct by an operator of a notified foreign passport fund is...necessary because it is important that the deterrent effect in each circumstance is no less strong than it is for Australian companies, registered schemes and disclosing entities. For this reason equivalent penalties have been imposed for these offences.<sup>31</sup>

2.63 While noting this explanation, the committee reiterates its longstanding view that it is not considered appropriate to apply strict liability in circumstances where a custodial penalty may be imposed. Moreover, while the committee appreciates the importance of treating foreign passport funds and Australian companies, registered schemes and reporting entities equally, it does not consider consistency with existing offences sufficient to justify applying strict liability to offences attracting custodial

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

29 Explanatory memorandum, p. 63.

30 Explanatory memorandum, pp. 80-81.

31 Statement of compatibility, p. 157.

penalties. In this regard, the committee considers it would be possible to achieve consistency by making all penalties (that is, those proposed to be imposed on foreign passport funds and those that already apply to Australian entities under the Corporations Act) consistent with the *Guide to Framing Commonwealth Offences*.

2.64 As the explanatory materials do not adequately address this issue, the committee requests the minister's more detailed justification for the application of strict liability to the offences created or extended by items 91, 98, 101, and 105, which attract penalties of between three months' and one years' imprisonment.

### **Minister's response**

2.65 The minister advised:

Items 91, 98, 101 and 105 of the Bill extend existing strict liability offences in the Corporations Act to operators of notified foreign passport funds. While item 91 creates new section 314A, concerning annual financial reporting by notified foreign passport funds to Australian members, this is based on existing section 314, concerning annual financial reporting by companies, registered schemes and disclosing entities, and the penalty is the same as the penalty for section 314.

Operators of notified foreign passport funds must be bodies corporate (see the eligibility requirements for operators in Part 3 of the Passport Rules contained in Annex 3 of the Memorandum of Cooperation (MOC)<sup>32</sup>). In practice, bodies corporate cannot serve a term of imprisonment. Nevertheless, it is appreciated that expanding an offence which carries a term of imprisonment to operators may result in convictions carrying additional social stigma.

The explanatory material accompanying the Bill noted that:

*Several of the strict liability offences that are extended to operators of notified foreign passport funds by the new law do not comply with the Guide because they ... impose a term of imprisonment....[Extending these offences] is necessary because it is important that the deterrent effect in each circumstance is no less strong than it is for Australian companies, registered schemes and disclosing entities. For this reason equivalent penalties have been imposed for these offences.*<sup>33</sup>

The Committee, in its comments on the Bill, accepted that achieving consistency between the treatment of an Australian passport fund and a notified foreign passport fund is a legitimate objective. However, the

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32 Australia, as a signatory to the Memorandum of Cooperation for the Asia Region Funds Passport, is required to implement the Passport Rules contained in Annex 3 of the Memorandum of Cooperation. Section 1211 of Schedule 1, Item 1 of the Bill allows the Minister to make, by legislative instrument, Passport Rules for Australia that are substantially the same as the Passport Rules set out in Annex 3 of the Memorandum of Cooperation.

33 Explanatory Memorandum for the Bill, Statement of Compatibility, p. 157.

Committee stated that it 'considers it would be possible to achieve consistency by making all penalties (that is, those proposed to be imposed on foreign passport funds and those that already apply to Australian entities under the Corporations Act) consistent with the Guide'.<sup>34</sup>

Currently, there are a number of other strict liability offences in the Corporations Act which impose a term of imprisonment and are inconsistent with the Guide. A comprehensive review of all the penalties in the Corporations Act has been undertaken as part of a review by the ASIC Enforcement Review Taskforce (the Taskforce). The Taskforce recommended that imprisonment be removed as a possible sanction for strict liability offences in recommendation 36<sup>35</sup> and the Government agreed to this recommendation on 28 April 2016.<sup>36</sup> Recommendation 36 is one of the recommendations that is being prioritised and the custodial penalties for all strict liabilities in the Corporations Act (including those in proposed subsections 314A(9), 319(1A), 321(1A) and 322(2) and the provisions on which they are modelled) will be removed as part of that work. The Government considers that implementing Recommendation 36 comprehensively across the Corporations Act is preferable to dealing with individual penalties on an ad hoc basis. This will ensure there is a consistent approach to updating the penalty regime for entities that are regulated under the Corporations Act.

### **Committee comment**

2.66 The committee thanks the minister for this response. The committee notes the minister's advice that the relevant offences will only apply to the operators of notified foreign passport funds, which must be bodies corporate. The committee also notes the minister's advice that, in accordance with recommendation 36 of the ASIC Enforcement Review Taskforce Report (ASIC Report), the government is working to remove custodial penalties for all strict liability offences in the Corporations Act, which will include the offences in proposed section 314A and proposed subsections 319(1A), 321(1A) and 322(2), as well as the provisions on which those offences are modelled.

2.67 The committee further notes the minister's advice that the government considers it preferable to implement recommendation 36 on a comprehensive basis, rather than dealing with individual penalties on an ad hoc basis, to ensure there is a

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34 Scrutiny Digest 5/18, p. 17.

35 The ASIC Enforcement Review Taskforce Report is available at: <https://treasury.gov.au/publication/p2018-282438/>.

36 The Government's response is available at: <https://treasury.gov.au/publication/p2018-282438/>. See also the press release at: <http://sjm.ministers.treasury.gov.au/media-release/boosting-penalties-to-protect-australian-consumers-from-corporate-and-financial-misconduct/>.

consistent approach to updating the penalty regime for entities that are regulated under the Corporations Act.

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

**2.69 In light of the information provided, and noting in particular that only bodies corporate would be subject to the relevant offences, the committee makes no further comment on this matter.**

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## **Broad delegation of legislative power<sup>37</sup>**

### ***Initial scrutiny – extract***

2.70 A number of provisions in the bill give the power to ASIC or the regulations to provide that the Corporations legislation<sup>38</sup> applies in certain circumstances as if specified provisions were omitted, modified or varied, and to allow ASIC to exempt entities from all or specified provisions of the Corporations legislation.

2.71 Division 3 of proposed Part 8A.7 provides for the continued application of the Corporations legislation in certain circumstances. Within that Division:

- proposed section 1216K provides that ASIC may, by legislative instrument or notifiable instrument,<sup>39</sup> declare that the Corporations legislation continues to apply in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified Australian passport fund, and to an entity in relation to such a fund, as if specified provisions were omitted, modified or varied;
- proposed section 1216L provides that regulations may provide that the Corporations legislation continues to apply in relation to a fund that has

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37 Schedule 1, item 1, proposed sections 1216K, 1216L, 1217, 1217A and 1217B, and Schedule 2, items 114 and 115. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

38 Pursuant to section 9 of the Corporations Act, 'Corporations legislation' includes the Corporations Act, the *Australian Securities and Investment Commission Act 2011*, and certain rules of court made because of a provision of the Corporations Act. 'Corporations legislation' also includes the Passport Rules (see below).

39 Proposed subsection 1216K(3) provides that a declaration relating to all entities, a specified class of entities, all former passport funds or a specified class of such funds must be made by legislative instrument. Proposed subsection 1216K(4) provides that a declaration relating to a specified entity or specified former passport fund must be made by notifiable instrument.

been deregistered as Australian passport funds or removed as a notified foreign passport fund, and to an entity in relation to such funds as if specified provisions were omitted, modified or varied.

2.72 Modification, variation, or omission may apply to all or specified provisions of the Corporations legislation, to all former passport funds and associated entities, to classes of funds or entities, and to individual funds or entities.

2.73 Proposed Part 8A.8 seeks to give ASIC the power to exempt entities from provisions in proposed Chapter 8A and the Passport Rules,<sup>40</sup> and to modify such provisions as they apply to an entity. That Part also seeks to allow the regulations to exempt passport funds and associated entities from any and all provisions of the Corporations legislation, and to modify the Corporations legislation as it applies to such funds and entities. Within proposed Part 8A.8:

- proposed section 1217 seeks to allow ASIC, by legislative instrument or notifiable instrument,<sup>41</sup> to exempt an entity from a provision of proposed Chapter 8A, and to declare that the Chapter applies to an entity as if specified provisions were omitted, modified or varied;
- proposed section 1217A seeks to allow ASIC, by legislative instrument or notifiable instrument,<sup>42</sup> to exempt an entity from the provision of the Passport Rules, and to declare that the Passport Rules apply to an entity as if specified provisions were omitted, modified or varied; and
- proposed section 1217B seeks to allow the regulations to exempt passport funds and entities from all or specified provisions of the Corporations legislation, or provide that the Corporations legislation applies as if specified provisions were omitted, modified or varied.

2.74 The relevant exemptions, omissions, modifications and variations may apply to all or specified provisions of the Corporations legislation or the Passport Rules, and to all passport funds and associated entities, classes of funds or entities, and individual funds or entities.

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40 Pursuant to proposed section 1211A, 'Passport Rules' means rules made by the minister under proposed section 1211, as in force from time to time.

41 Proposed subsection 1217(6) provides that an exemption or declaration relating to all entities, a specified class of entities, all passport funds or a specified class of funds must be made by legislative instrument. Proposed subsection 1217(7) provides that an exemption or declaration relating to a specified entity or fund must be made by notifiable instrument.

42 Proposed subsection 1217A(7) provides that an exemption or declaration relating to all entities, a specified class of entities, all passport funds or a specified class of funds must be made by legislative instrument. Proposed subsection 1217A(8) provides that a declaration relating to a specified entity or fund must be made by notifiable instrument.

2.75 Finally, items 114 and 115 seek to amend section 343 of the Corporations Act, to provide that the regulations may modify the operation of Chapter 2M (which relates to matters such as the preparation of financial reports and the keeping of records) in relation to a notified foreign passport fund.

2.76 The bill would therefore appear to allow delegated legislation (including regulations and other legislative and notifiable instruments) to modify both primary and delegated legislation, and to exempt certain passport funds and associated entities from all or specified provisions of primary and delegated legislation.

2.77 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

2.78 The committee will also have concerns about provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation, or that modify or exempt persons or entities from the operation of other delegated legislation. These provisions have the effect of limiting, or in some cases removing, parliamentary scrutiny. Consequently, the committee will be concerned about provisions of this kind—particularly where they permit exemptions or modifications that apply to a broad range of entities or legislative provisions—and expects a justification for the use of such provisions to be included in the explanatory memorandum.

2.79 With respect to ASIC's power to continue and modify the application of the Corporations legislation (proposed section 1216K), the explanatory memorandum states:

This power is designed to enable ASIC to deal flexibly with any issues that may require continuing regulatory oversight after an Australian passport fund has been deregistered or a notified passport fund has been denotified. In particular, the power is designed to enable ASIC to undertake continuing regulatory oversight in order to protect the interests of any members who became members after the fund became a passport fund. The MOC [Memorandum of Cooperation], which was agreed by all economies participating in the Asia Region Funds Passport regime, expressly recognises the potential need for deregistered funds to be subject to the same obligations applicable to registered funds...

ASIC's exercise of this power is generally subject to the same scrutiny and oversight as other Henry VIII clauses in the Corporations Act, including merits review and disallowance by Parliament.<sup>43</sup>

2.80 The explanatory memorandum provides no justification for allowing the regulations to continue and to modify the application of the Corporations legislation, merely restating the operation and effect of the relevant provisions and noting that the regulations will be subject to the standard rules that apply to legislative instruments under the *Legislation Act 2003*.<sup>44</sup>

2.81 With respect to ASIC's power to modify and to exempt entities from the operation of Chapter 8A, the explanatory memorandum states:

The new exemption and modification powers allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act produces unintended or unforeseen results that are not consistent with the policy intention for the Passport, including the intention of the MOC. Issues may arise that were not contemplated at the time of drafting because the Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to MISs [managed investment schemes] or use arrangements that are not available in Australia. In this context, it is appropriate for ASIC to be able to provide relief where the issues to be addressed are too individual and specific to justify addressing them by legislative means.

The exemption and modification powers in the new law are subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.<sup>45</sup>

2.82 The explanatory memorandum indicates that this explanation also applies to ASIC's power to modify and to exempt entities from the Passport Rules.<sup>46</sup>

2.83 With respect to the regulation-making power regarding exemptions from and modifications to the Corporations legislation (proposed section 1217B), the explanatory memorandum states:

This power provides the flexibility required to deal with unintended consequences that may arise as the Passport is introduced. The modification powers provided under this section represent a necessary tool to deal with such circumstances to ensure that the laws as they relate to passport funds operate appropriately.

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43 Explanatory memorandum, p. 121.

44 Explanatory memorandum, pp. 121-122.

45 Explanatory memorandum, pp. 117-118.

46 Explanatory memorandum, p. 118.

These regulations will be disallowable, are subject to the sunseting scheme and must be notified on the FRL.<sup>47</sup>

2.84 Finally, the explanatory memorandum provides the following explanation for extending the power to modify the operation of Chapter 2M of the Corporations Act to notified foreign passport funds:

This power provides the flexibility required to deal with the unintended consequences and extends the existing modification by regulations power in relation to companies, registered schemes and disclosing entities.

These regulations will be disallowable, are subject to the sunseting scheme and must be notified on the FRL.<sup>48</sup>

2.85 The committee appreciates that the proposed powers to modify and exempt entities from the operation of the Corporations legislation are intended to ensure the necessary flexibility to deal with unintended consequences associated with the implementation of the Asia Region Funds Passport, and to address issues that may require continuing oversight.

2.86 However, the committee does not generally consider administrative flexibility alone to be sufficient justification for broad delegations of legislative power (such as the power for delegated legislation to modify the operation of primary legislation, as proposed by the bill). The committee also remains concerned that the bill does not appear to provide for any limitation on ASIC's powers of modification and exemption, or on the ability for regulations to provide for modifications to, and exemptions from, the Corporations legislation. For example, the bill does not set out any conditions that must be satisfied before such powers are exercised.

2.87 Additionally, where the Parliament delegates its legislative power in relation to significant legislative schemes (including the power to modify and exempt entities from the operation of primary legislation), the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such requirements are currently set out in the bill.

2.88 The committee requests the minister's more detailed advice as to:

- the justification for why it is proposed to allow delegated legislation (regulations, and declarations and exemptions made by ASIC) to modify and exempt funds and entities from the operation of primary and delegated legislation;

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47 Explanatory memorandum, p. 120.

48 Explanatory memorandum, p. 120.

- whether it would be appropriate to amend the bill to insert (at least high-level) guidance concerning the exercise of ASIC's powers, and the making of regulations, to modify and exempt funds and entities from the operation of primary and delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of delegated legislation (that is, regulations, declarations and exemptions), and as to whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the bill, with compliance with those obligations a condition of relevant instruments' validity.

### **Minister's response**

2.89 The minister advised:

#### Broad delegation of legislative powers - Policy rationale and guidance on its exercise

The Explanatory Memorandum provides an explanation of the rationale for each exemption, modification and variation power, and these have been reproduced in the Committee's report.<sup>49</sup> For example page 120 of the Explanatory Memorandum justifies proposed Part 8A.8 as follows:

*[The exemption and modification powers in Part 8A.8] allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act produces unintended or unforeseen results that are not consistent with the policy intention for the Passport, including the intention of the MOC. Issues may arise that were not contemplated at the time of drafting because the Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to MISs [managed investment schemes] or use arrangements that are not available in Australia. In this context, it is appropriate for ASIC to be able to provide relief where the issues to be addressed are too individual and specific to justify addressing them by legislative means.*

*The exemption and modification powers in the new law are subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.*

In the Asia Region Funds Passport (ARFP) context, the failure to grant timely relief in a circumstance where the law produces an unintended result could cause significant harm to Australian investors, damage Australia's international standing, or lead to other participating economies taking action against Australia under the MOC. The exemption, modification and variation powers are designed to allow for prompt

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49 See pages 117-118 of the Explanatory Memorandum in relation proposed Part 8A.8, page 120 in relation to proposed section 1216L and page 121 in relation to proposed section 1216K.

action, while still ensuring that there is a degree of scrutiny (for example, regulations are tabled in Parliament and subject to disallowance and ASIC's decisions are subject to merits review under Part 9.4A).

The Committee has questioned whether it would be appropriate to amend the Bill to insert guidance concerning the exercise of the new powers.

Some guidance on AISC's exercise of the powers, more generally, already exists. ASIC has developed, in Regulatory Guide 51, high-level principles for using its exemption and modification powers. These principles include that ASIC, when considering applications for relief, will:

- only grant relief in new policy applications where there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial benefit;
- seek to achieve two broad objectives - consistency and definite principles; and
- refrain from granting retrospective relief.

As a practical matter, the exemption, modification and variation powers in the Bill would also need to be exercised in conformity with the MOC signed by all participating economies. For example, if an exemption, modification or variation diverged from the MOC and the common understanding of the other participating economies, another participating economy could initiate the process for resolving differences under paragraph 8 of the MOC. A failure to resolve a difference could lead to other participating economies refusing to recognise Australian Passport Funds.

Any further guidance in the Bill would necessarily need to be very general and high-level - and hence be of limited practical utility - because it is not possible to envisage the specific situations where the exemption, modification and variation powers may be used. This is because the ARFP is a new regime which is yet to commence. Further, foreign passport funds use different structures and arrangements to Australian funds and aspects of Australia's corporation law may become ambiguous or difficult to apply in the context of these different structures and may produce unintended outcomes. The structures and arrangements used by foreign passport funds are also expected to undergo continuing change as the funds industry is subject to rapid innovation, other participating countries may change their domestic laws (eg to create new structures for funds), and new countries may join the ARFP scheme.

#### Broad delegation of legislative powers - Consultation requirements

Regulations which exempt, modify or vary the corporations law must comply with the consultation requirements in the *Corporations Agreement 2002* (Corporations Agreement). Under clause 507 of the Corporations Agreement, four weeks public consultation is required for amendments

that alter subject-matters covered by new Chapter 8A unless the states and territories consent to a shortened consultation period.

As the Committee notes, there are also more limited consultation requirements in section 17 of the *Legislation Act 2003*. These require rule-makers to undertake any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake. A failure to comply with these requirements does not affect the validity or enforceability of the legislative instrument (section 19).

The MOC also requires Australia to consult with other participating countries. Most significantly, paragraph 4(1)(e) of Annex 4 of the MOC requires the Passport regulators in the other participating economies to be consulted on any exemption or modification.

The Committee's first question related to the type of consultation that may be conducted prior to the exercise of the exemption, modification and variation powers. In addition to complying with the consultation requirements outlined above, it is envisaged that in some circumstances rule-makers may also wish to hold roundtables with key stakeholders or conduct follow-up conversations with stakeholders who made submissions during the public consultation period.

The Committee's second question relates to whether specific consultation obligations could be included in the Bill. It would be difficult to set precise consultation requirements which are appropriate in all situations as the appropriate length and nature of the consultation will depend on:

- the complexity and length of the exemption or modification;
- the urgency of exercising the power;
- the number of parties that are likely to be affected by the exemption or modification (and whether their identity is known); and
- whether the exemption or modification implements a decision made by the Joint Committee and whether failing to implement the decision in Australia would be likely to result in other countries refusing to recognise Australia as a participating economy.

Including additional consultation requirements beyond those contained in the Corporations Agreement, the *Legislation Act 2003* and the MOC could inappropriately constrain the exercise of the powers and prevent prompt action being undertaken to protect Australian investors or preserve Australia's international competitiveness. It is also difficult to justify imposing constraints in the ARFP context when there are no constraints on the exercise of the exemption, modification and variation powers in Chapter 5C (which applies to registered schemes).

### **Committee comment**

2.90 The committee thanks the minister for this response. The committee notes the minister's advice that, in the Asia Region Funds Passport (ARFP) context, the

failure to grant timely relief in a circumstance where the law produces an unintended result could cause significant harm to Australian investors, damage Australia's international standing, or lead to other participating economies taking legal action against Australia. The committee also notes the minister's advice that the exemption, modification and variation powers are designed to allow for prompt action, while still ensuring that there is a degree of scrutiny (for example, regulations are tabled in Parliament, and ASIC's decisions are subject to merits review).

2.91 The committee further notes the minister's advice that guidance on ASIC's use of the exemption, modification and variation powers already exists in a regulatory guidance. The committee also notes the example provided as to how ASIC will use this guidance when considering applications for relief, as well as the advice that the exemption, modification and variation powers would need to be exercised in conformity with the MOC—which has been signed by all participating economies. The committee also notes the minister's advice that including any further guidance in the bill would necessarily be very general and high-level as the ARFP regime is a new regime, and it is not yet possible to envisage the situations in which such powers would be used, meaning any guidance regarding the exercise of the relevant powers would be of limited utility.

2.92 The committee also notes the minister's advice that foreign passport funds use different, and continually changing, structures and arrangements to Australian funds, and consequently aspects of Australia's corporation law may become ambiguous or difficult to apply in the context of these structures and may produce unintended outcomes.

2.93 With respect to the question of consultation, the committee notes the minister's advice that regulations which exempt, modify or vary the corporations law must comply with the consultation requirements in the *Corporations Agreement 2002*, which requires four weeks public consultation to be undertaken on amendments that alter subject matter covered by new Chapter 8A (which includes a number of the exemption, modification and variation powers unless the states and territories consent to a shortened consultation period). The committee further notes the minister's advice that the MOC also requires Australia to consult with other participating economies, and specifically requires Passport regulators in other participating economies to be consulted on any exemption or modification.

2.94 Finally, the committee notes the minister's advice that including consultation requirements beyond those contained in the Corporations Agreement, the MOC and the Legislation Act could inappropriately constrain the exercise of the exemption, modification and variation powers and prevent prompt action being taken to protect Australian investors or preserve Australia's international competitiveness.

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

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

## Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018

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|--------------------|---|
| <b>Purpose</b>     | This bill seeks to amend various Acts to enable the separation of VET student loans debts from other forms of Higher Education Loan Program debts<br><br>The bill also seeks to amend the <i>VET Student Loans Act 2016</i> to allow the courses and loan caps determination to incorporate any matter by reference as in force from time to time |
| <b>Portfolio</b>   | Education and Training  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.97 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 29 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the assistant minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>50</sup>

### **Absolute liability offences<sup>51</sup>**

#### ***Initial scrutiny – extract***

2.98 Proposed subsection 23ED(1) seeks to require a person who has an accumulated or undischarged Vocational Education and Training Student Loan (VETSL) debt<sup>52</sup> and who leaves Australia with the intention of remaining outside of Australia for at least 183 days (other than in circumstances specified in the rules), to give the Commissioner of Taxation (the Commissioner) a notice in an approved form. Proposed subsection 23ED(2) seeks to place the same requirement to provide a notice on a person who has been outside Australia for at least 183 days in any 12 month period (other than in circumstances specified in the rules) and who was not required to give a notice under subsection (1). Proposed subsection 23ED(3) would require a foreign resident who has an accumulated VETSL debt on 1 June

50 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

51 Schedule 1, item 20, proposed sections 23ED and 23FE. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

52 The bill defines 'VETSL debt' under Schedule 1, item 20, proposed section 23BA.

immediately preceding an income year to give a notice relating to their income for the income year.

2.99 Proposed section 23FE seeks to apply Part III of the *Taxation Administration Act 1953* (TAA Act) in relation to a failure to comply with proposed section 23ED as if that section were a taxation law within the meaning of section 2 of the TAA Act. Pursuant to sections 8C and 8E of Part III of the TAA Act, a failure to give the Commissioner the notices specified in proposed section 23ED would therefore be an offence of absolute liability subject in the first instance to a maximum penalty of 20 penalty units. Where a person has been previously convicted of two or more relevant offences, a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, may be imposed.

2.100 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When legislation states that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

2.101 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>53</sup>

2.102 In this instance, the explanatory memorandum notes that proposed section 23FE seeks to apply Part III of the TAA to proposed section 23ED and that this provision is modelled on section 154-90 of the *Higher Education Support Act 2003*.<sup>54</sup> However, the explanatory memorandum neither explains nor justifies the fact that this will make a failure to comply with section 23ED an offence of absolute liability, potentially subject to a penalty of imprisonment for up to 12 months. The committee's consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law.

2.103 The committee requests the assistant minister's detailed justification, with reference to the principles set out in the *Guide to Framing Commonwealth*

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

54 Explanatory memorandum, p. 33.

*Offences*,<sup>55</sup> for applying an offence of absolute liability, subject to a maximum penalty of up to 12 months imprisonment, to a failure to comply with the requirements of proposed section 23ED.

2.104 If it is considered necessary to apply Part III of the *Taxation Administration Act 1953*, the committee also requests the minister's advice as to why it would not be appropriate to modify its operation so as to make a failure to comply with proposed section 23ED an offence of strict liability, rather than absolute liability, and subject only to a pecuniary, and not custodial, penalty.

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

2.105 The minister advised:

Under the measures in the bill, the Commissioner of Taxation (the Commissioner) will have the general administration of a number of provisions proposed to be inserted in the bill.

The relevant offence is refusing or failing, as and when required, to provide information or a document to the Commissioner. The Tax Administration Act contains the relevant machinery provisions and treats this offence as one of absolute liability. The absolute liability applies only to this particular element. That is, not providing the required information. This is considered appropriate because to do otherwise would undermine the deterrence factor, which in turn is important to support self-regulation and integrity in the tax system. Not requiring fault significantly enhances the effectiveness of this deterrent by ensuring people take some care to understand and comply with their obligations.

Deterring people from failing to notify the Commissioner is of vital importance to the effective administration of the tax system, in particular in the context of the self-assessment system. In this particular situation, failure to notify the Commissioner in a timely manner would undermine the effectiveness of the framework and the policy regarding the VET Student Loans program, once it is administratively separated from the Higher Education Loan Program (HELP).

Additionally, early judicial commentary prior to the enactment of subsection 8C(1A) of the Tax Administration Act (in *Ambrose v Edmonds Wilson* (1988) 19 ATR 1217, 88 ATC 4173) noted that the offence in Part III of the Tax Administration Act necessarily implies that a defence of honest and reasonable mistake is excluded, and is therefore an offence of absolute liability. It was noted that this is "necessary for the operation of the legislation which in turn is seen by the legislature to be for the good of the general populace."

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

It should be noted that the Tax Administration Act includes a specific defence to the extent that the person is not capable of complying (refer to subsection 8C(1B) of the Tax Administration Act). In these circumstances, this specific defence is more appropriate than the mistake of fact defence under section 9.2 of the Schedule to the *Criminal Code Act 1995* (the Criminal Code), so that making the offence one of strict liability rather than absolute liability would not assist.

This follows from the nature of the offence, as there cannot be a mistaken belief about the facts relating to the physical elements of the offence. If there were a mistake, it would have regard to the application of the requirement to provide the information, however such a mistake or ignorance of the requirement does not prevent criminal responsibility (section 9.3 of the Schedule to the Criminal Code).

I also note that the operation of proposed sections 23ED and 23FE does not represent a substantive change from the existing arrangements for VET student loan debts. Similar provisions are already contained in the *Higher Education Support Act 2003* (HESA) and apply to VET student loans debtors. This is by virtue of VET student loan debts currently being HELP debts administered under HESA.

The purpose of the bill is to separate VET student loan debts from other forms of HELP debts, including from the broader debt reporting obligations to which the Tax Administration Act applies, and that are treated as absolute liability offences. The current proposal maintains the same offences that apply now, but under separate arrangements for VET student loan debts.

Specifically, proposed section 23FE is modelled on section 154-90 of HESA, which currently applies to VET student loan debts and was inserted by the *Education Legislation Amendment (Overseas Debt Recovery) Act 2015*.

The Explanatory Memorandum to this Act, explained that extending the application of Part III of the Tax Administration Act to failure to comply with section 154-18 of HESA (on which proposed section 23ED of the VSL Act is modelled), was intended to ensure that the Australian Taxation Office can administer the provisions in line with broader provisions for administering HELP and taxation arrangements. This administration included the capacity to apply a similar range of penalties as can be applied for tax purposes. Proposed section 23FE is included in the bill for the same reasons.

In summary, the application of an offence of absolute liability to a failure to comply with proposed section 23ED will simply continue the existing treatment applying to VET student loan debts and is consistent with the treatment of other forms of HELP debts. In doing so, it will provide the necessary deterrence, and significantly enhance the effectiveness of the enforcement regime relating to the administration of VET student loan debts.

I intend to table an addendum to the Explanatory Memorandum to the bill to address these issues and I will endeavour to ensure that information of this nature is presented more clearly in future explanatory material.

### **Committee comment**

2.106 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that it is considered appropriate to apply absolute liability to the offence under section 8C(1) of the TAA, as not requiring proof of fault significantly enhances the effectiveness of the offence as a deterrent, and deterring people from failing to notify the Commissioner is of vital importance to the effective administration of the tax system. The committee also notes the assistant minister's advice that it is considered appropriate to apply this absolute liability offence to proposed section 23ED of the *VET Student Loans Act 2016* as deterrence is also important in this context and will allow the administration of the provisions of that Act in line with broader provisions for the administration of HELP and taxation arrangements, including the application of similar penalties.

2.107 The committee further notes the assistant minister's advice that judicial commentary<sup>56</sup> prior to the enactment of subsection 8C(1A), which explicitly applies absolute liability to the offence under subsection 8C(1), indicated that the offence necessarily implies that a defence of honest and reasonable mistake of fact is excluded and that the offence is therefore one of absolute liability in any event.

2.108 Finally, the committee notes the assistant minister's advice that modifying the operation of the offence such that it is subject to strict liability, rather than absolute liability, would not be appropriate as there 'cannot be a mistaken belief about the facts relating to the physical elements of the offence'. As such, the assistant minister suggests that the existing offence-specific defence under subsection 8C(1B), which states that the offence does not apply where a person is not capable of complying with the relevant requirement, is more appropriate.

2.109 The committee considers that the case law cited by the assistant minister serves to highlight the scrutiny concerns with respect to the application of absolute liability. In this case, a farmer was found to have committed the offence of failing to comply with a notice requiring him to submit a tax return within 14 days, despite it being established that he was entirely ignorant of the existence of the notice because it had been sent to his accountant, who neither informed the farmer of the notice nor submitted the farmer's tax return, as he had been engaged to do.<sup>57</sup> Such an outcome highlights the committee's scrutiny concerns with the application of absolute liability to these offences—namely, that a defendant may be found to have committed an offence in the absence of any proof of fault, and that a defence of honest and reasonable mistake of fact (i.e. that a defendant reasonably believed that

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56 See *Ambrose v Edmonds Wilson* (1988) 19 ATR 1217, 88 ATC 4173.

57 See *Ambrose v Edmonds Wilson* (1988) 19 ATR 1217, 88 ATC 4173.

his or her accountant had done what they had been engaged to do) will not be available.

2.110 Finally, the committee notes that the assistance minister's response does not address its question as to whether the operation of the offence can be modified so as to make a failure to comply with proposed section 23ED subject only to a pecuniary, rather than a custodial, penalty. While the proposed penalty may align the enforcement regime applying to VET student loan debts with other forms of HELP debts, the committee reiterates that its consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law.

**2.111 The committee welcomes the assistant minister's undertaking to table an addendum to the explanatory memorandum and to ensure information is presented more clearly in future explanatory material.**

**2.112 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of making a failure to comply with proposed section 23ED an offence of absolute liability which is potentially subject to a penalty of imprisonment for up to 12 months.**

## National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

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| <b>Purpose</b>     | This bill seeks to amend the <i>National Consumer Credit Protection Act 2009</i> and the <i>Privacy Act 1988</i> to: <ul style="list-style-type: none"> <li>• introduce a mandatory credit reporting regime;</li> <li>• expand ASIC's powers to enable monitoring compliance; and</li> <li>• impose additional requirements on where data held by a credit reporting body must be stored</li> </ul> |
| <b>Portfolio</b>   | Treasury  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.113 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The Treasurer responded to the committee's comments in a letter dated 30 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>58</sup>

### Significant matters in delegated legislation

#### Privacy<sup>59</sup>

2.114 The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (2012 Act) amended the *Privacy Act 1988* (Privacy Act) to establish a framework under which credit providers and credit reporting bodies could collect, use and disclose a greater range of credit information. This framework came into effect on 12 March 2014.

2.115 Prior to the enactment of the framework established by the 2012 Act, the credit reporting system limited the information that could be collected, used and disclosed by credit providers and credit reporting bodies to 'negative information' about an individual. This included identity information, default history information and bankruptcy information. The 2012 Act expanded the information permitted to be collected, used and disclosed to include repayment information, as well as the

58 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

59 Schedule 1, item 4, proposed sections 133CN and 133CZA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

type of credit a person has and the maximum amount of credit available to a person under a consumer credit agreement. The 2012 Act enabled credit providers to disclose this information to credit reporting bodies on a voluntary basis.

2.116 The present bill seeks to amend the Privacy Act and the *National Consumer Credit Protection Act 2009* (Credit Act) to mandate a comprehensive consumer credit reporting scheme. To implement this scheme, the bill seeks to designate large Authorised Deposit-taking Institutions (ADIs)<sup>60</sup> and certain other credit providers as 'eligible licensees', and to require those licensees to supply credit information about all open accounts held with the licensee to credit reporting bodies. The information that must be provided ('mandatory credit information') includes the following:

- identification information, including name, date of birth and address;
- consumer credit liability information, including the name of the credit provider, type of consumer credit, and maximum amount of credit available;
- repayment history information, including whether or not an individual is obliged to make monthly payments in relation to a consumer credit agreement, and when those payments are due and payable;
- default information, including information about payments that are overdue, and steps taken to recover the overdue amounts;
- payment information including information about payments of overdue amounts that have been made by an individual; and
- new arrangement information, including information about variations to a consumer credit agreement.<sup>61</sup>

2.117 Eligible licensees would be required to provide mandatory credit information to eligible credit reporting bodies in two tranches—each comprising mandatory credit information about half the accounts held by the licensee. A failure to provide this information would be punishable by a civil penalty of 2,000 penalty units,<sup>62</sup> and would also be an offence attracting a penalty of 100 penalty units.<sup>63</sup>

2.118 The explanatory memorandum provides that the bill seeks to correct an information asymmetry between consumers and credit providers, and thereby to

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60 An ADI is likely to be considered 'large' if its total resident assets exceed \$100 billion. See explanatory memorandum, p. 11.

61 See proposed section 133CP. For further detail on the type of information that must be provided, see sections 6, 6V, 6Q, 6T and 6S of the *Privacy Act 1988*.

62 See proposed section 133CR.

63 See proposed section 133CX.

improve the management of personal and credit reporting information.<sup>64</sup> In this regard, the statement of compatibility further states:

A more comprehensive credit reporting regime allows credit providers to better establish a consumer's credit worthiness and lead to a more competitive and efficient credit market. [This] benefits consumers by enabling...reliable individuals to seek more competitive rates when purchasing credit and enabling those with a historically poor credit rating to demonstrate their credit worthiness through future consistency and reliability.<sup>65</sup>

2.119 The committee acknowledges the importance of improving the administration of Australia's credit reporting regime. However, the committee is concerned that requiring the disclosure of mandatory credit information has the potential to unduly trespass on the privacy of individuals—particularly the customers of the large ADIs contemplated by the bill, as the information required to be disclosed includes a substantial amount of personal and financial information about individuals.

2.120 The explanatory memorandum provides that the mandatory credit reporting regime proposed by the bill does not alter existing provisions set out in the Privacy Act and the Privacy Code governing use and disclosure of credit information.<sup>66</sup> The explanatory memorandum further states that the Act and the Code will continue to:

- set out the permitted uses and disclosure of an individual's personal and credit information by credit providers and credit reporting bodies;
- impose requirements on credit providers and reporting bodies to ensure the accuracy and currency of information in the credit reporting system;
- impose a requirement on a credit reporting body to protect the information it collects from misuse and unauthorised access;
- impose a requirement on a credit reporting body to have a publically available policy on how it collects, holds, uses and discloses credit information as well as procedures in place to ensure that the obligations under the Privacy Act and Privacy Code are met; and
- impose timeframes on both credit providers and credit reporting bodies on how long credit information can be kept before it must be destroyed.<sup>67</sup>

2.121 The statement of compatibility also emphasises that the present bill does not propose to alter any protections in the Privacy Act, and sets out the safeguards

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64 Explanatory memorandum, pp. 6-7.

65 Statement of compatibility, pp. 42-43.

66 Explanatory memorandum, p. 9.

67 Explanatory memorandum, pp. 9-10.

introduced by the 2012 Act to protect individuals' credit information from improper use and disclosure.<sup>68</sup>

2.122 While noting these safeguards, the committee is concerned that the bill appears to leave a number of relatively substantial elements of the mandatory credit reporting scheme—which may have significant privacy implications—to delegated legislation. For example, the bill seeks to require 'eligible licensees' to supply credit information to 'eligible credit reporting bodies'. The terms 'eligible licensee' and 'eligible credit reporting body' are defined in proposed section 133CN as follows:

- a licensee will be an 'eligible licensee' if it is a large ADI or a body corporate of a kind prescribed by the regulations, and it is a credit provider;<sup>69</sup>
- a reporting body will be an 'eligible credit reporting body' for a licensee if:
  - on 2 November 2017, there was an agreement of the kind referred to in paragraph 20Q(2)(a) of the Privacy Act in force between the body and the licensee, and the licensee is an eligible licensee on 1 July 2018; or
  - the conditions, if any, prescribed by the regulations are met.<sup>70</sup>

2.123 The bill would therefore appear to leave significant elements of the mandatory credit reporting scheme (for example, the entities required to provide credit information and the entities to which credit information must be provided) to delegated legislation.

2.124 The committee is concerned that leaving part of the definition of 'eligible credit reporting body' to regulations has the potential to undermine existing protections in the Privacy Act. Currently, paragraph 20Q(2)(a) of the Privacy Act requires a credit reporting body to enter into agreements with credit providers that require the providers to protect credit reporting information<sup>71</sup> from misuse, interference and loss, and from unauthorised access, modification and disclosure. Section 20Q was inserted by the 2012 Act. In relation to that provision, the explanatory memorandum to the 2012 bill stated:

The purpose of these specific obligations is to ensure that both credit reporting bodies and credit providers take proactive steps in establishing practices which maintain the security of credit information. Given that credit reporting bodies will play a central role in handling and managing

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68 Statement of compatibility, p. 43.

69 See proposed subsection 133CN(1).

70 See proposed subsection 133CN(2).

71 Disclosed under Division 2 of that Act—which relates to credit reporting bodies.

credit information it is appropriate that they be charged with the responsibility to develop appropriate agreements.<sup>72</sup>

2.125 The explanatory memorandum to the present bill recognises the importance of agreements under paragraph 20Q(2)(a), stating that they ensure the credit provider has an established relationship with the credit reporting body, and has an agreement in place to ensure that information remains confidential and secure.<sup>73</sup>

2.126 However, under proposed section 133CN a licensee that becomes an 'eligible licensee' after 1 July 2018 must make its initial bulk supply of mandatory credit information to a credit reporting body that meets conditions prescribed by the regulations—rather than to a reporting body with which the licensee has an agreement under paragraph 20Q(2)(a) of the Privacy Act. While acknowledging that credit providers would be required to supply credit information on an ongoing basis to reporting bodies with whom they have a contract under paragraph 20Q(2)(a), the committee is concerned that the requirement to make the bulk supply of credit information to a body that meets conditions prescribed by regulations could weaken the protections conferred by the Privacy Act. The explanatory memorandum does not provide an explanation of the conditions that may be imposed under the regulations.

2.127 Additionally, proposed Division 3 provides that regulations may set out the circumstances in which a credit reporting body must share ('on-disclose') credit information received under the mandatory credit reporting scheme proposed by the bill. For example, proposed section 133CZA:

- prohibits a credit reporting body from disclosing protected information that is prescribed by the regulations, or is of a kind prescribed by the regulations, to a credit provider where certain conditions are met;<sup>74</sup> and
- requires a credit reporting body to disclose such protected information as the regulations require to be disclosed, or is of a kind prescribed by the regulations, to a credit provider where certain conditions are met.<sup>75</sup>

Breaches of those provisions would be punishable by a civil penalty of 2,000 penalty units, and may also attract a criminal penalty of 100 penalty units.<sup>76</sup>

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72 Explanatory memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012, pp. 146-147.

73 Explanatory memorandum, p. 28.

74 See proposed subsection 133CZA(2). 'Protected information' is defined in proposed section 133CZA(1), and includes any information that the credit reporting body is supplied under Division 2 (which sets up the mandatory supply requirements), and any information derived from information supplied under Division 2.

75 See proposed subsection 133CZA(3).

76 See proposed section 133CZB.

2.128 With respect to those provisions, the statement of compatibility states that:

These circumstances [that is, the circumstances in which information must, or must not, be shared] will be limited and not extend beyond those circumstances in the Privacy Act. Primarily this will be when a credit provider is seeking information about a customer's credit worthiness when considering a request for consumer credit.<sup>77</sup>

2.129 While noting this explanation, and the example of circumstances in which disclosure would be required or permitted, the committee remains concerned that the bill would leave a significant element of the mandatory credit reporting regime (that is, when information may be on-disclosed) to delegated legislation.

2.130 The committee's consistent view is that significant matters, such as key elements of a mandatory credit reporting scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the committee's concerns are heightened because the elements proposed to be left to delegated legislation (that is, the persons required to disclose credit information, the entities to whom that information must be disclosed, and the circumstances in which 'on-disclosure' is required and prohibited) may have significant implications for individuals' privacy. The explanatory memorandum does not provide a justification for why it is proposed to use delegated legislation in this way—merely outlining the operation and effect of the relevant provisions.

2.131 Further, where the Parliament delegates its legislative power in relation to significant legislative schemes, the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such consultation requirements are currently set out in the bill.

2.132 As the explanatory materials do not adequately address this matter, the committee requests the Treasurer's detailed justification for leaving key elements of the mandatory credit reporting scheme proposed by the bill—including matters that may have significant impacts on individuals' privacy—to delegated legislation.

2.133 The committee also requests the minister's advice as to the type of consultation that it is envisaged will be conducted prior to the making of regulations in relation to the proposed credit reporting scheme, and as to whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation, with compliance with such obligations a condition of the regulations' validity.

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77 Statement of compatibility, p. 44.

**Treasurer's response**

## 2.134 The Treasurer advised:

The Committee has asked for further advice on the elements of the mandatory comprehensive credit reporting (CCR) regime that will be included in regulations and the impact of these elements on a person's privacy.

The Committee has also asked for advice on the type of consultation that will take place on the regulations and whether the Bill should be amended to include a specific obligation to consult and that compliance with this obligation is a condition of the regulations being valid.

First, the Bill does not unduly trespass on the privacy of an individual. The Bill requires that certain credit providers participate in the existing voluntary system established by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*. The Bill does not establish a new or broader credit reporting system.

While the CCR regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act. The Bill does not alter the information that can be shared.

The Bill does provide that certain elements of the CCR Regime will be included in regulations. The regulation making powers in the Bill may:

- exclude a kind of credit account for which credit information does not need to be supplied to a credit reporting body;
- restrict a credit reporting body from disclosing information it has received through the mandatory regime;
- set out the information that must be included in statements provided to the Treasurer by credit providers and credit reporting bodies after the initial bulk supplies;
- prescribe events when a credit provider must supply credit information to a credit reporting body;
- prescribe a kind of credit provider which is subject to the mandatory comprehensive credit reporting regime; and
- prescribe a credit reporting body which is an eligible credit reporting body and will therefore receive credit information through the mandatory regime.

My response focuses on those regulation making powers the Committee considers have the potential to impact a person's privacy. Namely:

- prescribe a kind of credit provider which is subject to the mandatory comprehensive credit reporting regime;

- prescribe a credit reporting body which is an eligible credit reporting body and will therefore receive credit information through the mandatory regime; and
- restrict a credit reporting body from disclosing information it has received through the mandatory regime.

At this stage the Government does not intend to prescribe additional credit providers who are subject to the CCR regime in regulations.

Rather than mandate that all credit providers participate in the CCR regime from 1 July 2017, the Government's policy requires Australia's four largest authorised deposit-taking institutions to participate. It is expected that the critical mass of information supplied by these credit providers will encourage other credit providers to voluntarily participate in the regime.

However, if this is not the case the Government may use the regulation making power to bring additional credit providers into the CCR regime. This will not impact on a person's privacy. These credit providers will, by definition, remain subject to the *Privacy Act 1988* and can already voluntarily share this information.

The possibility that additional credit providers may become subject to the mandatory regime necessitates that regulations prescribe conditions that a credit reporting body will meet in order to be an eligible credit reporting body for these credit providers.

The conditions may include whether the credit provider had a contract with a credit reporting body at a particular point in time. Prescribing conditions in the regulations enables the Government to consider who participants in the credit reporting system are at the time that the regime is extended to additional credit providers.

This approach does not weaken the protections included in the *Privacy Act 1988*. By definition, the credit reporting bodies will continue to remain subject to the rules in the privacy framework, including that contracts are in place which include certain requirements around security.

Finally, the Committee raised concerns about the regulation making power which places restrictions on how a credit reporting body may share the information it has received through the CCR regime, including information derived from this data. The Committee considers this may have significant implications on a person's privacy.

The Bill is clear that, except where a credit provider has concerns about a credit reporting body's data security, the Bill does not limit the operation of the *Privacy Act 1988* (see item 4, Schedule 1, section 133CZK). The CCR regime has been drafted to operate within the existing privacy framework and this provision seeks to put this beyond doubt.

The existing privacy framework places no requirement on a credit provider to supply credit information in order to access credit information. The proposed regulations will look to reflect the concept referred to in the

sector as the 'principle of reciprocity'. This provides that to receive credit information from a credit reporting body the requesting credit provider must submit the same level of credit information to the credit reporting system. The principle of reciprocity will encourage non-mandated credit providers to contribute credit information.

The Australian Retail Credit Association, the peak organisation involved in the disclosure, exchange and application of credit reporting data has developed an industry standard for the collection and sharing of credit information. This is referred to as the Principles of Reciprocity and Data Exchange (PRDE).

The PRDE operates within the existing framework set out by the *Privacy Act 1988* and the Privacy Code and the limits imposed on the use and disclosure of credit information.

Feedback through consultation on the Bill indicated that those credit providers subject to the CCR regime wanted the same protections afforded by the PRDE to apply to the supply of their information. That is, where the credit provider was a signatory to the PRDE, a credit reporting body could only share that information with other PRDE signatories, or to the extent allowed by the PRDE.

The proposed regulations will refer to the PRDE. It is important that the Government has the flexibility to adapt how the 'principles of reciprocity' are set out in law should the approach set out in the industry standard change.

I do not consider it necessary for the making of the regulations to be conditional on meeting certain obligations with regards to consultation. The Government intends to consult on the draft regulations prior to submitting the regulations to the Executive Council. Officers in the Department of Treasury have already begun to discuss the content of the regulations with key stakeholders. Feedback to the Senate Economics Committee inquiry to the Bill was overwhelmingly positive about the approach the Government has taken to consultation on the development of the Bill.

### **Committee comment**

2.135 The committee thanks the Treasurer for this response, and notes the Treasurer's advice that the bill does not unduly trespass on individuals' privacy, and only requires certain credit providers to participate in the existing voluntary system established by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (2012 Act). It does not establish a new or broader credit reporting system or alter the information that can be shared.

2.136 The committee further notes the Treasurer's advice that, at this stage, the government does not intend to prescribe additional credit providers who are subject to the mandatory comprehensive credit reporting (CCR) regime in regulations. Rather, the bill will (if enacted) require Australia's four largest authorised deposit-

taking institutions (ADIs) to participate in the CCR regime, with other credit providers expected to participate on a voluntary basis thereafter.

2.137 The committee further notes the Treasurer's advice that if other credit providers do not voluntarily participate, the government may use the regulation-making powers to bring additional providers into the CCR regime. The committee also notes the Treasurer's advice that the use of the regulation-making power will not impact on a person's privacy, as credit providers will remain subject to the *Privacy Act 1988* (Privacy Act), and may already provide information that would be required under the CCR regime on a voluntary basis.

2.138 The committee also notes the Treasurer's advice that the fact that additional credit providers may become subject to the CCR regime necessitates that regulations prescribe conditions that a credit reporting body will meet in order to be an eligible reporting body for these credit providers. The committee notes the advice that prescribing such conditions by regulation enables government to consider who participants in the CCR regime at the time the regime is extended but does not weaken the protections included in the Privacy Act, including that contracts are in place which include certain requirements around privacy.

2.139 With regard to the matter of on-disclosing information, the committee notes the Treasurer's advice that the bill does not limit the operation of the Privacy Act—except where a credit provider has concerns about a reporting body's data security. The committee also notes the advice that the Australian Retail Credit Association (ARCA) has developed an industry standard for the collection and sharing of credit information, referred to as the Principles of Reciprocity and Data Exchange (PRDE). The committee notes the advice that the PRDE operates within the existing framework set out by the Privacy Act and Privacy Code, as well as the limits imposed on the use and disclosure of credit information. The committee notes the Treasurer's advice that the credit providers subject to the CCR regime have indicated that they want the same protections afforded by the PRDE to apply to the supply of their information, and that regulations will refer to the PRDE.

2.140 Finally, the committee notes the Treasurer's advice that, while it is not considered necessary for the making of regulations to be conditional on specific consultation obligations, the government intends to consult on draft regulations prior to submitting the regulations to the Executive Council for approval.

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

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

## Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

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| <b>Purpose</b>     | <p>This bill seeks to amend the <i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (the Act) to:</p> <ul style="list-style-type: none"> <li>• transfer regulatory responsibility for offshore greenhouse gas wells and environmental management from the minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA);</li> <li>• clarify the powers of NOPSEMA inspectors to determine whether regulated entities are compliant with their obligations under the Act and associated regulations;</li> <li>• ensure valid designation of certain areas as 'frontier areas' for the purposes of the Designated Frontier Area tax incentive; and</li> <li>• make minor technical amendments</li> </ul> |
| <b>Portfolio</b>   | Industry, Innovation and Science   |
| <b>Introduced</b>  | House of Representatives on 28 March 2018  |
| <b>Bill status</b> | Before the House of Representatives  |

2.143 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 22 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>78</sup>

### Reversal of the legal burden of proof<sup>79</sup>

#### *Initial scrutiny – extract*

2.144 Section 584 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGs Act) currently provides that, in a prosecution for an offence in relation to a breach of a direction given by the responsible Commonwealth Minister<sup>80</sup> under

78 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

79 Schedule 1, item 40 and Schedule 15, item 13, proposed clause 23. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

80 Pursuant to section 7 of the OPGGS Act, the 'responsible Commonwealth Minister' is the minister responsible for the administration of the Act, or another minister acting for or on behalf of that minister.

certain provisions of the OPGGS Act, it is a defence if the defendant proved that they took all reasonable steps to comply with the direction. The defendant bears a legal burden of proof in relation to this matter. Item 40 of Schedule 1 to the bill seeks to amend section 584 to include directions given by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the Titles Administrator. This would have the effect of providing a defence to the offences of breaching a direction given under proposed sections 579A, 591B or 594A (to be inserted by this bill),<sup>81</sup> in relation to which the defendant bears a legal burden of proof.

2.145 Additionally, clause 23 of proposed Schedule 2B provides that it is a defence to a prosecution for refusing or failing to do anything required by a well integrity law<sup>82</sup> if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time. The defendant bears a legal burden of proof in relation to that matter.

2.146 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence interfere with this common law right. As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects a full justification each time the burden is reversed—with the rights of people affected being the paramount consideration.

2.147 The *Guide* further states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.<sup>83</sup>

2.148 In relation to the reversal of the legal burden of proof in item 40, the explanatory memorandum states that the burden has been reversed 'because the matter [that is, whether the defendant took reasonable steps to comply with a direction] is likely to be exclusively within the knowledge of the defendant...[particularly] given the remote nature of offshore greenhouse gas storage operations'.<sup>84</sup> For clause 23 of proposed Schedule 2B, the explanatory

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81 See Schedule 1, items 27, 45 and 50.

82 'Well integrity law' is defined in clause 2 of proposed Schedule 2B, and includes Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011, and the provisions of the OPGGS Act to the extent that the provisions relate to the integrity of wells.

83 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 51-52.

84 Explanatory memorandum, p. 33.

memorandum refers to paragraph 419, which provides a similar explanation (in relation to the evidential burden of proof—noted below).<sup>85</sup> In relation to the reversal of the legal burden of proof more generally, the statement of compatibility states:

[The reversals of the legal burden of proof are] consistent with the Guide, which states that where the facts of a defence are peculiarly within the defendant's knowledge it may be appropriate for the burden of proof to be placed on the defendant.<sup>86</sup>

2.149 It would appear to the committee that whether a defendant took all reasonable steps to comply with a direction, or whether it was not practicable for the defendant to comply with a well integrity law owing to an emergency, may be matters that are appropriate to include as offence-specific defences (as opposed to elements of the relevant offences)—and may justify reversing the *evidential* burden of proof.

2.150 However, it is not apparent why it is necessary to reverse the *legal* burden of proof in relation to those matters. It would appear that if the facts amounting to whether a defendant took all reasonable steps to comply with a direction, or whether it was not practicable to do a thing owing to an emergency, are peculiarly within the knowledge of the defendant, it would be sufficient to require the defendant to raise evidence in relation to those matters, and to require the prosecution, as usual, to disprove the matters beyond reasonable doubt.

2.151 The explanatory materials do not appear to provide a specific justification for the reversal of the *legal* burden. In this regard, the committee notes that, in relation to clause 23 of proposed Schedule 2B, the explanatory memorandum refers to paragraph 419, which provides a justification for reversing the *evidential* burden.

2.152 As the explanatory materials do not appear to adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in the instances described above, including why it is not considered sufficient to reverse the evidential, rather than the legal, burden of proof.

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85 Explanatory memorandum, p. 98.

86 Statement of compatibility, pp. 11, 13.

### **Minister's response**

2.153 The minister advised:<sup>87</sup>

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (the Bill) contains a number of offence provisions which have corresponding offence specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction (the breach of directions defence); and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time (the well integrity defence).

These defences operate as optional exceptions to the criminal responsibility regime established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act).

...

Both of these defences are already substantively contained in the Act:

- Breach of Directions Defence: The inclusion of the breach of directions defence in the current Bill represents an expansion of an existing defence (section 584 of the Act) to reflect new measures in the Bill relating to the transfer of regulatory responsibility for greenhouse gas operations from the Minister to NOPSEMA.
- Well Integrity Defence: The inclusion of the well integrity defence is a mirrored application to a well integrity law of an existing defence for a failure to comply with OHS (clause 92 of Schedule 3) and environmental management laws (clause 18 of Schedule 2A). This is in connection with the measure in the Bill to create a new Schedule 2B to provide a complete and comprehensive suite of compliance powers relating to the well integrity function, which was transferred to NOPSEMA in 2011.

...

Both defences are likely to be used by companies with significant resources, who are more than capable of shouldering the legal burden if they wish to claim a defence. The industry is highly regulated and companies involved have chosen to voluntarily participate in this regulated

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87 This is an edited extract of the minister's response which does not include details relating to human rights considerations. The full text of the minister's response may be accessed online: see correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

environment on a for profit basis. In addition, in relation to the breach of directions defence, the penalties are generally 100 penalty units and do not involve imprisonment.

...

*Merely Reversing Evidential Burden is Insufficient*

Allowing for a reversal of the evidential burden of proof only would create internal inconsistencies in the Act and its established treatment of offences and defences. It is essential to avoid any perception by the offshore petroleum and greenhouse gas storage industries that the Commonwealth is 'soft' on compliance. Defences should be available only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that they have done so.

To provide the ability of a defendant to simply point to evidence that suggests a reasonable possibility that reasonable steps were taken to comply with a direction or that compliance with well integrity laws was not practicable in the face of an emergency would result in the regulator being unable to successfully and meaningfully take enforcement action in the case of an offence being committed, and this would undermine the legitimate objective in question.

In the aftermath of an event where one or more workers may have suffered serious injury or may have died, or where significant environmental damage may have occurred, it is appropriate that a titleholder should have to demonstrate, on the balance of probabilities, that the titleholder took all available action to prevent the occurrence, rather than merely to meet the evidential burden relating to the possibility of having done so.

Due to the remote occurrence of the regulated activities, the regulator is not able to, at the relevant time, independently assess and verify what is reasonable or practicable in the event of noncompliance. Accordingly, the defence would almost always succeed without the real ability of the prosecution to contest its veracity. The relevant facts are entirely within the defendant's knowledge and not at all within the regulator's knowledge. This puts the regulator at a significant disadvantage when attempting to establish the chain of causation of an adverse event and to meet a legal burden of proof that a defence cannot be relied upon. This would ultimately lead to suboptimal outcomes for OHS of offshore workers and protection of the marine environment.

**Committee comment**

2.154 The committee thanks the minister for this response. The committee notes the minister's advice that the relevant defences (the breach of directions defence and the well integrity defence) are likely to be used by companies with significant resources, which are capable of shouldering the legal burden of proof should they

wish to claim one of these defences, and that the companies have chosen to participate in a highly regulated industry on a for profit basis. The committee also notes the minister's advice that the relevant defences should be available only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that this is the case.

2.155 The committee also notes the minister's advice that to permit a defendant to simply point to evidence in relation to the defences (that is, to only reverse the evidential burden) would impede the regulator's ability to take enforcement action. The committee notes the minister's advice that, owing to the remote nature of regulated activities, the regulator is not able, at the relevant time, to independently assess and verify what is reasonable or practicable in the event of noncompliance. The committee also notes the advice that, accordingly, a defence that only reverses the evidential burden of proof would almost always succeed, given that the regulator is in a poor position to test its veracity.

2.156 Finally, the committee notes the minister's advice that the facts relevant to the breach of directions defence and the well integrity defence are entirely within the defendant's knowledge and not at all within the regulator's knowledge. The committee notes the advice that this puts the regulator at a significant disadvantage when attempting to establish the chain of causation in relation to an adverse event—leading to suboptimal environmental and safety outcomes.

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

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

## Primary Industries Levies and Charges Collection Amendment Bill 2018

|                    |   |
|--------------------|---|
| <b>Purpose</b>     | This bill seeks to amend the <i>Primary Industries Levies and Charges Collection Act 1991</i> to: <ul style="list-style-type: none"> <li>allow the Secretary of the Department of Agriculture and Water Resources to determine certain acts which, when performed, would make a person liable to collect and report levies; and</li> <li>support the operation of levy payer registers</li> </ul> |
| <b>Portfolio</b>   | Agriculture and Water Resources   |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before House of Representatives   |

2.159 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 31 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>88</sup>

### Significant matters in delegated legislation

### Significant matters in non-statutory guidelines<sup>89</sup>

#### *Initial scrutiny – extract*

2.160 Section 7 of the *Primary Industries Levies and Charges Collection Act 1991* (the Act) makes a range of persons that perform certain acts related to the buying, selling, importing and exporting of agricultural produce liable to collect levies and charges. Proposed subsection 7A(1) seeks to allow the secretary to determine, by legislative instrument, additional acts that, when performed, would make a person liable to collect levies and charges. The effect of such a determination would be to expand the scope of activities in relation to which intermediaries<sup>90</sup> would be required to collect levies or charges.

88 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

89 Schedule 1, item 5, proposed section 7A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

90 Section 4 of the Act defines an 'intermediary', in relation to a producer, as a person required under subsections 7(1), (2), (3) or (3A) to pay an amount on behalf of that producer.

2.161 Proposed subsections 7A(3) and (4) provide that the minister may, by written instrument, issue guidelines for the purposes section 7A, and that such guidelines are not legislative instruments. Proposed subsection 7A(2) provides that the secretary must have regard to any guidelines in force under subsection 7A(3) when exercising a power under subsection 7A(1).

2.162 The committee's view is that significant matters, such as the types of acts in relation to which a person will be liable to collect a levy or charge, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that 'leviable commodities are now being traded using platforms, such as online marketplaces, and the way the legislation defines intermediaries needs to be updated to accurately reflect modern business practices'<sup>91</sup> and that the proposed section will ensure 'that these acts can be covered by the legislative framework and ensure levies and charges can continue to be collected at the most efficient point in the supply chain.'<sup>92</sup>

2.163 However, beyond the general statement that the proposed amendments 'align with other powers already provided to the Secretary in the Act in relation to the administration and operation of the levy system',<sup>93</sup> the explanatory memorandum provides no justification for leaving the determination of additional acts to delegated legislation rather than setting these acts out in the bill itself. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.164 In addition, the committee notes that although the bill allows the minister to issue guidelines under subsection 7A(3), it does not positively require that they be issued. In the event that the minister does not issue such guidelines, the secretary's power to determine additional acts would not be subject to any guidance. The explanatory memorandum states that the guidelines will include 'considerations such as Australia's obligations as a member of the World Trade Organisation relating to importation and exportation',<sup>94</sup> but does not explain why the bill does not *require* that they be issued. The explanatory memorandum also does not explain why the guidelines will not be legislative instruments, as set out under subsection 7(4), and therefore not be subject to any form of parliamentary scrutiny.

2.165 Finally, where the Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are

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91 Explanatory memorandum, p. 2.

92 Explanatory memorandum, p. 6.

93 Explanatory memorandum, p. 2.

94 Explanatory memorandum, p. 6.

included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. Therefore, if the secretary is to be granted the power to determine additional acts by legislative instrument, the committee considers it would be appropriate for consideration to be given to including specific consultation requirements on the face of the bill.

2.166 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave to delegated legislation the determination of acts which, when performed, will make a person liable to collect a levy or charge;
- the type of consultation that it is envisaged will be conducted prior to the making of such a determination; and
- whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

2.167 The committee also requests the minister's advice as to why the bill does not positively require the minister to issue guidelines with respect to the secretary's power to determine additional acts for which a person will be liable to collect a levy or charge, and why it is considered appropriate to state that these guidelines will not be legislative instruments (and therefore not subject to any parliamentary scrutiny).

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

2.168 The minister advised:

#### **Why it is considered necessary and appropriate to leave to delegated legislation the determination of acts which, when performed, will make a person liable to collect a levy or charge?**

Item 5 of the Primary Industries Levies and Charges Collection Amendment Bill 2018 (the Bill) proposes to insert section 7A into the *Primary Industries Levies and Charges Collection Act 1991* (the Act). This section will enable the Secretary to, by legislative instrument, determine that certain acts in relation to collection products, would make an intermediary liable to collect and report levies and charges. This aligns with other administrative roles that the Secretary performs under the Act to support the efficient collection of levies and levy information, which include:

- entering into collection agreements with states, territories and other organisations
- granting exemptions, refunds and remissions to Australian producers, and
- determining the collection of production or processing details.

I consider this item to be necessary and appropriate to ensure that the levies and charges legislative framework can readily respond to innovation throughout the supply chain.

Since the Act was introduced in 1991, levies and charges have been collected on behalf of Australian producers at the most efficient point in the supply chain. As Australia is a high-cost agricultural producer, participants in rural industries have continued to innovate how their produce are bought and sold to remain competitive in the global market. Understandably, these innovations, new business types and modern ways of buying and selling agricultural produce do not clearly fit within the legislative framework created in 1991.

Australian producers continue to be liable for levy and charge under the Act, however, the intermediaries they now deal with were not contemplated in 1991. Those intermediaries may therefore not be clearly described in the legislation, or aware of the requirement to collect levy and submit levy returns on the Australian producer's behalf. Without the proposed amendments to the Act, Australian producers will face additional red-tape, as they will have to submit their own returns. This will mean that as new business practices continue to emerge, collection and reporting of levies and charges will become less efficient and cost effective for industry, given that the cost of collecting levies on behalf of industry is recovered by the Department of Agriculture and Water Resources (the department). Delegated legislation is necessary to allow the collection mechanisms, which are unique to each industry, to be agile to realise the benefits of increased efficiency and reduced cost recovery charges.

As it is difficult to predict the future buying and selling practices of Australian producers, I consider the ability to respond rapidly will minimise the administrative burden placed on Australian producers and future-proof the regulation of levied industries. These amendments are vital to this efficiency and would continue to support the profitability and competitiveness of Australian producers.

**The type of consultation that it is envisaged will be conducted prior to the making of such a determination**

For many years, levies and charges have been imposed at the request of primary industries following industry wide consultation and agreement. The Government's role, through the department, is to support industries' implementation of an effective collection system for industry at a minimum cost.

As part of consultation process that is required to achieve this, I consider that it would be appropriate for the department to draw upon existing consultation frameworks, for example the *Levy Principles and Guidelines* (the LPGs). The LPGs were first developed in 1997 to help industry bodies prepare a sound case for the introduction of a levy or charge or a change to an existing levy or charge, to be considered by industry participants.

Consultation with Australian producers and intermediaries is a key part of the levy system and is embedded in the LPGs. When an industry proposes to introduce a levy or charge, it must consult with all existing and potential levy payers to establish industry support of the levy or charge. This includes consultation with affected individuals or organisations classified as 'intermediaries' under the Act that would be required to collect the levy or charge.

As part of the consultation process for the purposes of a section 7A determination, industry will be expected to advise stakeholders on how the proposal is efficient, practical and imposes the smallest administrative burden on the least number of people or organisations. It is envisaged that intermediaries will be engaged to provide input into the proposals, plan for potential changes to their processes and/or systems and raise issues that affect the efficient collection of the levy.

I am confident that individuals and organisations affected by a determination under section 7A will be consulted in a manner that leverages off proven and existing best practice as indicated above. While Australian producers are liable for the levies and charges, it is essential that intermediaries support the collection and reporting mechanisms in consideration of the shared goals along the value chain.

**Whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument)**

Section 17 of the *Legislation Act 2003* (the Legislation Act) prescribes the consultation obligations of the rule-maker before making legislative instruments, which includes being satisfied that consultation has taken place and that it is appropriate regardless of its form. Paragraph 6(1)(c) of the Legislation Act defines the rule-maker for an instrument made by a person other than the Governor-General as a person currently authorised to make the instrument. For the purposes of the proposed section 7A of the Act, the rule-maker is the Secretary.

I consider that expanding consultation obligations beyond the requirements of section 17 of the Legislation Act and existing practice will reduce the ability of the Secretary to respond effectively to innovations without adding a clear benefit. In addition, to do so would add complexity and would not align with the LPGs that, in my view, provide an established, satisfactory consultation framework for the administration of levies and charges.

The department actively gathers and welcomes industry intelligence to inform its understanding of emerging intermediaries that provide alternative points of levy collection. I am satisfied that the proposed consultation with affected people in line with section 17 of the Legislation Act and a Secretary's determination will result in the most efficient and cost-effective outcome for industry.

In addition, I draw the committee's attention to the fact that legislative instruments made by the Secretary for the purposes of section 7A of the Act are subject to parliamentary scrutiny.

### **Significant matters in non-statutory guidelines**

The proposed subsection 7A(3) of the Act provides that the Minister may, by written instrument, issue guidelines to which the Secretary must have regard under subsection 7A(2) of the Act. Proposed subsection 7A(4) of the Act provides that guidelines made under subsection 7A(3) of the Act are not legislative instruments. While the proposed guidelines are not subject to disallowance, any legislative instruments made by the Secretary under subsection 7A(1) of the Act are subject to parliamentary scrutiny.

This amendment is designed to allow Australian producers to meet their levy obligations while taking advantage of new mechanisms to get their produce to market. Section 7A of the Act would allow the Secretary to make the levy system responsive to new and unforeseen trading mechanisms. As it is difficult to predict future practices of Australian producers, it would be appropriate to support the Secretary in the early stages to use his or her discretion on a case-by-case basis to establish a baseline and develop a sound basis for the guidelines. The Secretary's determination will follow consultation with affected parties and are subject to disallowance, I consider it premature to issue guidelines.

I consider that the proposed guidelines in subsection 7A(3) of the Act should not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. The guidelines would be specific operational guidance material, designed to assist the Secretary to make a legislative instrument that determines which acts are those of intermediaries.

The proposed section 7A of the Act will promote clarity for stakeholders by allowing the Secretary to specify which acts, when performed in relation to a collection product, would make a person liable to report and collect levy on behalf of Australian producers.

As the guidelines proposed by subsection 7A(3) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act. However any decision made in accordance with those guidelines will be subject to those provisions. The established and robust consultation processes which will precede a determination, and the parliamentary scrutiny which will follow, provide proper oversight of the administrative process proposed.

Further, as proposed in subsection 7A(5) of the Act, the Minister having made any such guidelines relating to the determination of acts of intermediaries, must cause the guidelines issued under subsection 7A(3) of the Act to be published on the department's public website, which is accessible to all interested stakeholders.

**Committee comment**

2.169 The committee thanks the minister for this response. The committee notes the minister's advice that enabling the secretary to determine, by legislative instrument, acts which will make a person liable to collect a levy or charge will align with other administrative roles performed by the secretary under the Act to support the efficient collection of levies and levy information, and is necessary to ensure that the legislative framework can readily respond to changes in the supply chain. The committee also notes the minister's advice that the use of delegated legislation in this instance is necessary as it is difficult to predict future buying and selling practices, and responding rapidly to changes in these practices will minimise the administrative burden placed on Australian producers.

2.170 With respect to consultation prior to making a determination under proposed section 7A, the committee notes the minister's advice that he considers it would be appropriate for the department to draw on existing consultation frameworks, rather than including specific consultation obligations in the bill, as including this in the bill would add complexity and reduce the ability of the secretary to respond effectively to innovations. The committee also notes the minister's advice that both industry and intermediaries will be consulted, with the latter group being engaged to provide input, plan for potential changes to their systems and processes, and raise issues concerning the efficient collection of the levy.

2.171 The committee also notes the minister's advice that it is considered appropriate that guidelines issued by the minister under proposed section 7A(3) be stated as not being legislative instruments as they would not determine or alter the content of the law or create or affect a privilege, interest or right; rather, such guidelines would be specific operational guidance material designed to assist the secretary to make a legislative instrument. Finally the committee notes the minister's advice that, although these guidelines will not themselves be subject to disallowance, decisions made in accordance with the guidelines—that is, determinations made by the secretary under proposed subsection 7A(1)—would be subject to disallowance.

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

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

## Private Health Insurance Legislation Amendment Bill 2018

|                    |  |
|--------------------|--|
| <b>Purpose</b>     | <p>This bill seeks to amend various Acts in relation to private health insurance to:</p> <ul style="list-style-type: none"> <li>• increase maximum excess levels for products providing an exemption from the Medicare levy surcharge;</li> <li>• allow for age-based premium discounts for hospital cover;</li> <li>• amend the powers of the Private Health Insurance Ombudsman;</li> <li>• allow private health insurers to cover travel and accommodation costs as part of a hospital product for people attending health services;</li> <li>• establish a legislative framework for the minister to assess and determine whether or not to include a private hospital in a class of hospitals eligible for second-tier default benefits;</li> <li>• amend the information provision for consumers;</li> <li>• allow insurers to terminate products as well as close them to new policy-holders; and</li> <li>• remove the use of benefit limitation periods in private health insurance policies</li> </ul> |
| <b>Portfolio</b>   | Health   |
| <b>Introduced</b>  | House of Representatives on 28 March 2018  |
| <b>Bill status</b> | Before the Senate  |

2.174 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter dated 21 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>95</sup>

95 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Coercive powers<sup>96</sup>

### *Initial scrutiny – extract*

2.175 The bill seeks to insert a new section 20SA in the *Ombudsman Act 1976* (the Act), which would provide the Private Health Insurance Ombudsman (PHIO) with the power to enter, at any reasonable time of the day:

- a place occupied by a private health insurer or private health insurance broker;
- a place occupied by a person predominantly for the purpose of performing services for, or on behalf of, a private health insurer or private health insurance broker; or
- a place where documents or other records relating to a private health insurer, a private health insurance broker or the carrying on of health insurance business are kept.

2.176 New section 20SA also seeks to allow the PHIO, having entered a place referred to above, to inspect, take extracts from, or make copies of, documents or records to verify evidence provided in relation to a complaint. Proposed section 20TA seeks to provide the same powers to the PHIO when conducting an investigation commenced on his or her own initiative.<sup>97</sup>

2.177 Proposed section 20ZHA would require the PHIO to show his or her identity card prior to entering premises and 20ZHB would make it an offence subject to a maximum penalty of 30 penalty units for a person who is the occupier of, or in charge of, a place mentioned in proposed sections 20SA or 20TA, not to provide the PHIO with reasonable facilities and assistance for the effective exercise of the entry and inspection powers.

2.178 The committee notes that the *Guide to Framing Commonwealth Offences* states that legislation should only authorise entry to premises by consent or under a warrant and that '[a]ny departure from this general rule requires compelling justification.'<sup>98</sup> The *Guide* also includes a list of the limited circumstances in which it may be appropriate to provide a power to enter premises without consent or a warrant.<sup>99</sup> Where a bill seeks to allow entry without consent or a warrant, the

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96 Schedule 3, item 1, proposed section 20SA and item 2, proposed section 20TA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

97 Explanatory memorandum, p. 44.

98 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 76.

99 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 85-86.

committee would therefore expect a detailed justification to be provided in the explanatory memorandum.

2.179 In this case, the statement of compatibility states only that the requirement to show an identity card prior to entry 'provides for the transparent utilisation of the PHIO's inspection powers and mitigates arbitrariness and risk of abuse', and that the PHIO will be bound by the requirements of the *Privacy Act 1988* when inspecting documents.<sup>100</sup> The explanatory materials do not otherwise provide a justification for the proposed powers to enter premises and inspect documents without consent or a warrant.

2.180 The committee therefore seeks the minister's advice as to why it is considered necessary to allow the Private Health Insurance Ombudsman to enter premises and inspect documents without consent or a warrant.

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

2.181 The minister advised:

These powers are designed to strengthen the PHIO's powers and functions to assist people who have made a complaint to the PHIO.

As part of resolving a complaint, the PHIO typically attempts to access records relevant to the complaint from the respondent. In almost all cases, respondents voluntarily provide full records to the PHIO in order to investigate complaints. However, there are some instances where upon further investigation, additional records such as phone calls, letters and emails have been overlooked by respondents when providing responses to the PHIO.

The PHIO has an existing power under section 20ZE to issue a notice compelling a respondent to give the PHIO information relevant to investigating a complaint. Notwithstanding this power, the Government considers that the ability of PHIO to resolve consumer complaints would be strengthened by the power to enter places occupied by private health insurers and private health insurance brokers and inspect documents or other records.

By having the power to access the respondent's records directly within their premises, the PHIO's investigating officers are able to verify evidence that the respondent has provided to the PHIO. The Government considers that this power could be used by the PHIO to provide assurance to complainants that they have verified the accuracy of information provided by the respondent. The PHIO can also use this power when conducting an investigation on his or her own initiative.

Respondents have consistently provided access to the PHIO investigating officers to verify the accuracy of information and this is expected to

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100 Explanatory memorandum, p. 37.

continue. It is expected that the PHIO would provide respondents with at least 48 hours' notice of exercising the power of entry.

This new power is not expected to be used, but addresses the theoretical possibility that a respondent may not voluntarily consent to the PHIO entering their premises.

Given that the PHIO is not a regulator and the Government considers that it is not appropriate to apply the *Regulatory Powers (Standard Provisions) Act 2014* the powers will only be used by the PHIO in an instance when consent is not forthcoming, noting that this has not occurred.

The purpose of entry in these circumstances is not to obtain evidence to support a criminal or civil prosecution; the intention is to confirm information provided by a consumer and to enable the PHIO to make non-binding recommendations, having received comprehensive information from both parties.

These are exceptional circumstances as the private health insurers have a disproportionate amount of power in the relationship with consumers. These measures will potentially increase consumer confidence in the actions of the insurer.

It is important to note that as part of the annual reporting arrangements, the PHIO is currently required to provide the Attorney-General with a report to table in Parliament. This report is prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013* and section 63 of the *Public Service Act 1999*. The content of these reports provides Parliament with visibility of the use of the PHIO's inspection powers.

I propose to provide further explanation of these powers in an Addendum to the Explanatory Memorandum.

### **Committee comment**

2.182 The committee thanks the minister for this response. The committee notes the minister's advice that granting the PHIO the power to enter places occupied by private health insurers and private health insurance brokers and inspect documents will strengthen the ability of the PHIO to resolve complaints and conduct own-motion investigations by enabling the verification of evidence provided by respondents. The committee also notes the minister's advice that it is expected that the PHIO would provide respondents with at least 48 hours' notice when exercising the power of entry and that, although the power is not expected to be used, it addresses the theoretical possibility that a respondent may not voluntarily consent to the PHIO entering their premises.

2.183 The committee also notes the minister's advice that it is not considered appropriate to apply the *Regulatory Powers (Standard Provisions) Act 2014* in this instance as the PHIO is not a regulator, the powers will only be used where consent is not forthcoming, and the purpose of entry is not to obtain evidence to support a

criminal or civil prosecution, but to confirm information provided by a consumer to enable the PHIO to make non-binding recommendations based on comprehensive information from both parties.

2.184 The committee finally notes the minister's advice that the PHIO's annual reporting obligations provide the Parliament with information on the use of the PHIO's inspection powers, and that the minister intends to provide further explanation of the proposed powers of entry and inspection in an addendum to the explanatory memorandum.

2.185 The committee notes that the minister's response does not address its specific question as to why it is considered necessary to allow the PHIO to enter premises and inspect documents without consent or a warrant. If it is considered inappropriate to apply the *Regulatory Powers (Standard Provisions) Act 2014* in this instance, the committee considers that it would nevertheless be possible to amend the bill to include a requirement that a warrant be obtained prior to entering premises and inspecting documents. The minister's response indicates that at least 48 hours' notice will be provided when exercising these powers and it therefore appears that obtaining a warrant would not be impractical for reasons of urgency.

**2.186 The committee welcomes the minister's undertaking to provide further explanation of the Private Health Insurance Ombudsman's proposed powers of entry and inspection in an addendum to the explanatory memorandum.**

**2.187 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Private Health Insurance Ombudsman to enter premises and inspect documents without consent or a warrant.**

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## Reversal of evidential burden of proof<sup>101</sup>

### *Initial scrutiny – extract*

2.188 Proposed section 20ZIA would require the PHIO to issue an identity card to each person who exercises powers of entry and inspection under proposed sections 20SA and 20TA (discussed above at paragraphs 2.175 to 2.180). Proposed subsection 20ZIA(4) seeks to make it an offence of strict liability for a person who ceases to be a member of staff, or a person to whom the PHIO has delegated powers under proposed section 20SA or 20TA, to fail to return their identity card to the PHIO within 14 days of so ceasing. Proposed subsection 20ZIA(5) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the

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101 Schedule 3, item 5. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

identity card was lost or destroyed. The offence carries a maximum penalty of 1 penalty unit.

2.189 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.190 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

2.191 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. However, the reversal of the evidential burden of proof in proposed section 20ZIA has not been addressed in the explanatory materials.<sup>102</sup>

2.192 As the explanatory materials do not address this issue, the committee considers that it may be appropriate for the explanatory memorandum to be amended to include a justification for the reversal of the evidential burden of proof in proposed section 20ZIA that explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>103</sup>

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

2.193 The minister advised:

The *Guide to Framing Commonwealth Offences* acknowledges that it is appropriate to reverse the onus of proof and place a burden on the defendant in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The offence provision provided by subsection 20ZIA(4) is a common provision in relation to identity cards. Subsection 20ZIA(4) provides that a person commits an offence of strict liability if the person ceases to be a member of staff mentioned in section 31 or ceases to be a person to whom the PHIO has delegated its powers under section 34 in relation to section 20SA or 20TA, and the person does not return their identity card to

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102 Explanatory memorandum, p. 45.

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

the PHIO within 14 days of so ceasing. Subsection (5) provides that subsection (4) does not apply if the identity card was lost or destroyed.

Under proposed section 20Z1A, it is up to the defendant in a prosecution to provide evidence that the identify card was lost or destroyed (and that the exception under subsection (5) applies), as she or he will be the only person with knowledge of those circumstances. It is unreasonable for the prosecution to prove that the card was not lost or destroyed.

The prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove these matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code.

### ***Committee comment***

2.194 The committee thanks the minister for providing this additional information. The committee notes the minister's advice that it is appropriate to reverse the evidential burden of proof in relation to whether an identity card was lost or destroyed as the defendant will be the only person with knowledge of those circumstances and that it would therefore be unreasonable for the prosecution to prove that the card was not lost or destroyed.

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

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

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## **Broad delegation of administrative powers<sup>104</sup>**

### ***Initial scrutiny – extract***

2.197 Item 6 of Schedule 3 seeks to amend subsection 34(2C) of the Act, which sets out the powers of the PHIO to delegate his or her powers and functions. The Act currently provides that the PHIO may delegate any or all of his or her powers or functions, other than those related to reporting to the minister on the outcome of investigations,<sup>105</sup> to members of staff mentioned under section 31. Section 31 states that staff required for the purposes of the Act will be engaged under the *Public*

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104 Schedule 3, item 6. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

105 See sections 20R and 20V of the Act.

*Service Act 1999*. The proposed amendment would therefore allow the PHIO to delegate any or all of his or her powers to 'a person', rather than to an Australian Public Service (APS) employee at any level.

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

2.199 In this case, the explanatory memorandum states that the proposed expansion of the range of persons to whom the PHIO may delegate his or her powers is intended to provide the PHIO with the 'flexibility to delegate powers to suitable qualified officers' in cases where they do not come within the scope of persons described at section 31 of the Act—that is, APS employees at any level. The explanatory memorandum also states that this amendment would ensure 'consistency with the other subject matter specific roles held by the Commonwealth Ombudsman'.<sup>106</sup>

2.200 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to 'a person'. The committee also notes that the explanatory memorandum contains no guidance as to the specific circumstances in which it is envisaged it may be necessary to delegate powers or functions to persons outside the APS, nor any guidance as to what accountability mechanisms will be put in place with respect to such persons.

2.201 The committee also notes that, given the proposed amendment to the PHIO's delegation powers, the proposed new powers of entry and inspection, discussed above at paragraph 2.175 to 2.180, would be delegable to any person, including persons outside the APS. The committee notes that the *Guide to Framing Commonwealth Offences* states that 'Legislation conferring coercive powers should require that these powers only be exercised by an appropriately qualified person or class of persons'.<sup>107</sup>

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106 Explanatory memorandum, p. 45.

107 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 73-74.

2.202 The committee would therefore also expect a detailed justification to be provided in the explanatory memorandum where it is proposed to allow the delegation of entry and inspection powers to 'a person', including information on the attributes or qualifications persons exercising such powers will be required to possess. However, the explanatory materials do not address these issues.

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

- why it is considered necessary to allow for the delegation of the PHIO's functions or powers, including powers of entry and inspection, to any person, including persons outside the APS; and
- the appropriateness of amending the bill to require that the PHIO be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.

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

2.204 The minister advised:

I note the Committee's concern in relation to the delegation of administrative powers to a relatively large class of persons. Currently, under sub-section 34(2C), the Commonwealth Ombudsman can delegate all powers or functions under the *Ombudsman Act 1976*, except those contained in section 20R and 20V, to any member of staff.

With respect to specific circumstances in which it is envisaged it may be necessary to delegate powers or functions to persons outside the Australian Public Service, it is expected that in practice the Ombudsman would only authorise people with appropriate attributes, qualifications, qualities and relevant experience. Some complaints that are brought to the PHIO can be complex in nature and may require a subject matter expert to assist with investigations.

As the inspection and audit function is new, it is not entirely clear what the necessary staffing level will be. The proposed amendment will enable the PHIO to ensure the function is staffed at the appropriate level, and provides flexibility to reduce staffing levels if there is limited need to use the inspections power. This is prudent business practice and supports the effective and efficient use of agency resources to meet operational requirements.

Prior to the commencement of the new functions, the PHIO will have in place procedures that will ensure that only those people with appropriate qualifications and experience, and relevant training, are delegated key functions associated with the PHIO.

The Committee has asked whether Government would amend the Bill to require that the PHIO be satisfied that persons performing delegated functions and exercising powers have the expertise appropriate to the function or power delegated. As this is not an entirely new power for the Ombudsman, I am satisfied that, in light of the above safeguards, the power will be used within the parameters of the Bill.

### ***Committee comment***

2.205 The committee thanks the minister for this response. The committee notes the minister's advice that the Commonwealth Ombudsman can currently delegate all powers or functions (except those contained in section 20R or 20V) to any member of staff, and that it is expected that the PHIO would only delegate powers or functions to persons outside the APS who have appropriate attributes, qualifications, qualities and experience. The committee also notes the minister's advice that the delegation of powers and functions to persons outside the APS may be necessary as some complaints to the PHIO can be complex and subject matter experts may be required to assist with investigations.

2.206 The committee further notes the minister's advice that the proposed amendment will enable the PHIO to ensure that the new inspection and audit function is staffed at an appropriate level and that procedures will be implemented to ensure that only people with appropriate qualifications and experience are delegated key functions associated with the PHIO. The committee finally notes the minister's advice that, in light of these safeguards, he does not consider it necessary to amend the bill.

2.207 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated. While the committee notes the minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the minister's response. The committee also reiterates its particular concern that it is proposed to allow the delegation of powers of entry and inspection to *any* person, including persons outside of the public service.

**2.208 The committee considers it may be appropriate to amend the bill to require that the Private Health Insurance Ombudsman's (PHIO) be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.**

**2.209 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the delegation of the PHIO's powers and functions, including powers of entry and inspection, to 'any' person.**

## Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

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|--------------------|---|
| <b>Purpose</b>     | <p>This bill seeks to amend various Acts relating to taxation, superannuation, competition and consumers</p> <p>Schedules 1 to 6 seek to:</p> <ul style="list-style-type: none"> <li>• allow the Commissioner to issue directions to pay unpaid superannuation guarantee and undertake superannuation guarantee education courses where employers fail to comply;</li> <li>• allow the Commissioner to disclose more information about superannuation guarantee non-compliance to affected employees;</li> <li>• extend Single Touch Payroll reporting to all employers;</li> <li>• enable regular reporting by superannuation funds; and</li> <li>• implement data matching in relation to welfare payments</li> </ul> <p>Schedule 7 seeks to enable the sharing and verification of tax file numbers</p> <p>Schedule 8 seeks to make a number of miscellaneous amendments and technical changes to various Acts</p> <p>Schedule 9 seeks to add three specifically-listed deductible gift recipients</p> |
| <b>Portfolio</b>   | Treasury  |
| <b>Introduced</b>  | House of Representatives on 28 March 2018   |
| <b>Bill status</b> | Before the House of Representatives   |

2.210 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The minister responded to the committee's comments in a letter received 31 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>108</sup>

108 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Strict liability offences<sup>109</sup>

### *Initial scrutiny – extract*

2.211 Part 1 of Schedule 1 seeks to amend the *Taxation Administration Act 1953* (TAA) to allow the Commissioner of Taxation (Commissioner) to issue directions to employers to pay the Superannuation Guarantee Charge to employees who have not received their full entitlement. Proposed subsection 265-95(2) makes failure to follow a direction to pay the charge and discharge the liability an offence of strict liability, subject to a penalty of 50 penalty units or imprisonment for 12 months, or both.

2.212 The explanatory memorandum explains that the proposed offences are 'consistent with the existing offences that apply to other failures to comply with taxation obligations.'<sup>110</sup> Further, the explanatory memorandum argues the proposed offences are drafted so that the Commissioner would only issue directions in relation to serious contraventions of the obligation to pay the superannuation guarantee amount, and by 'employers whose actions are consistent with an ongoing and intentional disregard of those obligations.'<sup>111</sup>

2.213 In addition, in Schedule 5, proposed section 255-120 seeks to create a new strict liability offence for failure to comply with a Federal Court order requiring an entity to comply with a requirement to give security under section 255-100 of the TAA. This offence is also subject to a penalty of 50 penalty units or imprisonment for 12 months, or both.

2.214 The explanatory memorandum argues the penalty 'ensures that appropriate consequences apply to entities that refuse to comply with an order that has been made against them by the Court. The amount of the penalty and the application of strict liability is the same as the offence for refusing to comply with other Court orders and the associated penalty that are already imposed under sections 8G and 8H. Applying the same consequences in respect of security deposits ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.'<sup>112</sup>

2.215 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict

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109 Schedule 1, item 1, proposed subsection 265-95(2) and Schedule 5, item 14, proposed subsection 255-120(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

110 Explanatory memorandum, pp. 12-13.

111 Explanatory memorandum, p. 13.

112 Explanatory memorandum, p. 83.

liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>113</sup>

2.216 The *Guide to Framing Commonwealth Offences* also states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.<sup>114</sup> In this instance, the bill proposes applying strict liability to offences that are subject to up to 12 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

2.217 The committee requests a detailed justification from the minister for the proposed strict liability offences, particularly the imposition of up to 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.<sup>115</sup>

### **Minister's response**

2.218 The minister advised:

*Offence for failing to comply with a direction to pay superannuation guarantee charge*

Schedule 1 to the Bill applies strict liability to the proposed offence for failing to comply with a direction to pay a superannuation guarantee charge which is subject to a maximum penalty of 50 penalty units or imprisonment for up to 12 months.

This is justified on the basis that the direction to pay will only apply to a narrow subset of employers with serious contraventions of their obligations to pay superannuation guarantee liabilities as required by law and whose actions are consistent with an ongoing and intentional disregard of those obligations. Such behaviour undermines the integrity of the superannuation system and unlike other debts owed to the

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

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

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

Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals.

Employers who dispute the amount of the debt are given full protection from committing an offence for not complying with a direction to pay until after the dispute is resolved.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that an employer (who has failed to pay the underlying superannuation guarantee liability) has been served a notice for the direction to pay that liability and yet still fails to comply cannot be justified. The direction to pay is only intended to be applied to employers who have the capability to pay but have consistently refused to pay. Those who are not capable of paying will be covered by the applicable defence, provided they have taken reasonable steps to try to discharge the liability.

With respect to the substance of the proposed penalties, these have been deliberately set to send the strongest possible signal that appropriately reflects the severity of the behaviour.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the Guide that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that apply in respect of similar prohibited behaviours, such as the existing penalties for the failure to comply with certain tax requirements under a taxation law under section 8C of the *Taxation Administration Act 1953*. These penalties are provided for by section 8E and apply different penalties to first, second, and third or subsequent offences. An employer who commits a first offence is liable to a fine of up to 20 penalty units; a second offence attracts a fine of up to 40 penalty units; and a third or subsequent offence attracts a fine of up to 50 penalty units and/or imprisonment of 12 months.

The penalty of up to 12 months imprisonment for the proposed offence is justified on the basis that the offence relates to continuous failures to pay the superannuation guarantee liability. The penalty is comparable to the highest third and subsequent tiered penalty that currently applies to offences under section 8C.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that continuously failing to comply with superannuation and taxation obligations is unacceptable.

*Offence for failing to comply with a Court order to provide security*

Schedule 5 to the Bill applies strict liability to the proposed offence for failing to comply with a Court order to provide the security which is

subject to a maximum penalty of 50 penalty units or imprisonment for up to 12 months.

This is justified on the basis that this addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit requirement. Therefore the taxpayers who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that a taxpayer has been issued with an order by the Federal Court to provide the security and yet still fails to comply cannot be justified. A taxpayer does not commit an offence if they are not capable of complying with the Court order.

With respect to the substance of the proposed penalties, these have been specifically set to send the strongest possible signal that appropriately reflects the severity of the behaviour of disregarding a Court order.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the Guide that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that apply in respect of similar prohibited behaviours, such as the existing penalties for refusing to comply with other Court orders under sections 8G and 8H of the *Taxation Administration Act 1953*.

The penalty of up to 12 months imprisonment for the proposed offence is justified on the basis that applying the same consequences in respect of security deposits ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that refusing to comply with a Court order is unacceptable.

### **Committee comment**

2.219 The committee thanks the minister for this response, and notes the minister's advice that the physical elements of the proposed offences provide the appropriate basis for determining liability. The committee also notes the minister's advice that the offences will generally only apply in cases of deliberate non-compliance or where non-compliance cannot be justified and that, where a person is incapable of complying, the person will not commit the offence or will be covered by

a defence. With respect to the offence in proposed subsection 265-92(5), the committee also notes the minister's advice that non-compliance with a direction reflects behaviours that undermine the integrity of the superannuation system, and that may have a significant detrimental impact on individuals.

2.220 The committee further notes the minister's advice that the proposed penalties have been specifically set to send the strongest possible signal that appropriately reflects the severity of the behaviour to which the offences apply. The committee also notes the advice that, in setting the penalties for the offences, specific regard was had to the principle articulated in the *Guide to Framing Commonwealth Offences*<sup>116</sup> that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. The committee notes the advice that the proposed penalties are consistent with those that apply in respect of similar prohibited behaviours under the *Taxation Administration Act 1953*.

2.221 While acknowledging the reasons for applying strict liability, and the advice regarding the magnitude of the proposed penalties, the committee reiterates its longstanding scrutiny view that it is inappropriate to apply strict liability to offences carrying a custodial penalty. The committee also emphasises that it does not consider consistency with existing penalties to be sufficient justification for applying strict liability in circumstances where a term of imprisonment may be imposed.

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

**2.223 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to offences in circumstances where an individual may be subject to a penalty of up to 12 months imprisonment.**

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## Absolute liability offences<sup>117</sup>

### *Initial scrutiny – extract*

2.224 Part 2 of Schedule 1 seeks to create a framework under which the Commissioner may issue 'education directions' to a person the Commissioner

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

117 Schedule 1, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

reasonably believes has failed to comply with certain taxation obligations.<sup>118</sup> Item 3 of Schedule 1 seeks to include a failure to comply with an education direction in accordance with proposed subsection 384-15(3)<sup>119</sup> in the list of circumstances in which a person commits an offence under section 8C of the TAA. Pursuant to sections 8C and 8E of the TAA, a failure to comply with an education direction would therefore be an offence of absolute liability subject in the first instance to a maximum penalty of 20 penalty units. Where a person has been previously convicted of two or more relevant offences, a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, may be imposed.

2.225 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When legislation states that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

2.226 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for including a failure to comply with an education direction as one that is subject to an offence of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>120</sup>

2.227 In this instance, the explanatory memorandum states that extending the existing absolute liability offence under section 8C and the tiered penalties under section 8E of the TAA is 'appropriate as it maintains consistency with the other failures that are already covered by section 8C', and a failure to comply with an education direction is 'directly comparable to the existing requirements to notify the Commissioner of particular matters or attend before the Commissioner or another person'.<sup>121</sup>

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118 These apply to failures to comply with obligations arising from the payment of the superannuation guarantee charge payable under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or related estimates of the charge that are payable under the TAA, or other obligations under the SGAA or the TAA as it relates to the SGAA. See explanatory memorandum, p. 21.

119 Schedule 1, item 4.

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

121 Explanatory memorandum, pp. 25-26, 119-120.

2.228 However, the explanatory memorandum does not explain what are the legitimate grounds for penalising persons lacking fault in this instance, nor why it is appropriate to subject a failure to comply with a direction to an offence of absolute liability as opposed to strict liability (which would allow a defence of honest and reasonable mistake of fact to be raised). The explanatory memorandum also does not explain why it is considered appropriate to apply a penalty of up to 12 months imprisonment to an offence of absolute liability, rather than the 10 penalty units suggested in the *Guide to Framing Commonwealth Offences*.<sup>122</sup> The committee's consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law.

2.229 The committee requests the minister's detailed justification, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*,<sup>123</sup> for making a failure to comply with an education direction an offence of absolute liability, subject to a maximum penalty of up to 12 months imprisonment.

### **Minister's response**

2.230 The minister advised:

Schedule 1 to the Bill applies absolute liability to the proposed offence for failing to comply with an education direction. The offence has been inserted into the existing framework in section 8C of the *Taxation Administration Act 1953* and the tiered penalties in section 8E. The penalty of 12 months imprisonment will only arise on a third or subsequent offence and can only be applied if the employer has been convicted of two previous offences under section 8C.

The proposed offence is justified on the basis that the measure provides the Commissioner with additional tools to enforce compliance with the existing obligations in respect of the superannuation guarantee. The additional penalties that can apply under the education direction provide additional incentives to employers to ensure that they are fully compliant with their existing superannuation guarantee obligations. Employer non-compliance with superannuation obligations undermines the integrity of the superannuation system and unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that an employer who fails to

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

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

comply with the direction to attend the specified education course and provide evidence to the Commissioner cannot be justified. An employer will be covered by the applicable defence contained in subsection 8C(1B) of the *Taxation Administration Act 1953* which provides that an offence does not occur if an employer is not capable of complying with the education direction.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the *Guide to Framing Commonwealth Offences* that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable and specifically align to those that apply in respect of similar prohibited behaviours, such as the existing penalties for the failure to comply with certain tax requirements under a taxation law under section 8C of the *Taxation Administration Act 1953*. The penalty appropriately reflects the severity of the behaviour by imposing heavier penalties for subsequent offences.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that continuously failing to comply with superannuation and taxation obligations is unacceptable.

### **Committee comment**

2.231 The committee thanks the minister for this response. The committee notes the minister's advice that the application of absolute liability is justified on the basis that the proposed offence provides an additional incentive to employers to ensure they are fully compliant with their existing superannuation guarantee obligations. The committee notes the advice that non-compliance with such obligations undermines the integrity of the superannuation system and may have significant detrimental impacts on individuals.

2.232 The committee also notes the minister's advice that the physical elements of the proposed offence provide an appropriate basis for determining liability. The committee notes the advice that the offence will generally only apply where a person fails to comply with a direction in circumstances where non-compliance cannot be justified, and that a person will be covered by a defence where the person is incapable of complying with the direction.

2.233 Finally, the committee notes the minister's advice that, in setting the penalty for the offence, specific regard was had to the principle articulated in the *Guide to Framing Commonwealth Offences*<sup>124</sup> that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. The committee notes

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

the advice that the proposed penalties are consistent with those that apply to similar prohibited behaviours under the *Taxation Administration Act 1953*.

2.234 While acknowledging the reasons for applying absolute liability, and the advice regarding the magnitude of the proposed penalties, the committee reiterates its longstanding scrutiny view that it is inappropriate to apply strict liability to offences carrying a custodial penalty. In this regard, the committee also emphasises that it does not consider consistency with existing penalties to be sufficient justification for applying absolute liability in circumstances where a term of imprisonment may be imposed.

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

**2.236 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of making a failure to comply with an education direction an offence of absolute liability in circumstances where an individual may be subject to up to 12 months imprisonment.**

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## Reversal of evidential burden of proof<sup>125</sup>

### *Initial scrutiny – extract*

1.19 Subsection 8K(1) of the TAA makes it an offence for a person to make a statement to a taxation officer that is false or misleading in a material particular, and subsection 8K(1B) makes it an offence for a person to make a statement to a taxation officer that omits any matter or thing and the statement is misleading in a material particular because of this omission. Subsection 8N(1) also makes it an offence for a person to make a statement to a taxation officer that is false or misleading in a material particular or omits any matter or thing without which the statement is misleading in a material particular, and the person is reckless as to whether the statement is false or misleading in a material particular.

2.237 Proposed subsection 8K(2B) provides an exception (offence specific defence) to the offences under subsections 8K(1) and (1B), stating that the offences do not apply if the original statement is a member information statement made under section 390-5 of the TAA, the person who made the original statement makes a further statement correcting the original statement in each of the respects in which it is false or misleading in a material particular, and the further statement was made

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125 Schedule 4, items 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

within the grace period determined by the Commissioner under proposed section 390-7<sup>126</sup> and is in an approved form. Proposed subsection 8N(3) provides an identical exception in relation to the offence set out under section 8N.

2.238 The offences under subsections 8K(1) and (1B) carry a maximum penalty of 20 penalty units in the first instance, and 40 penalty units where a person has previously been convicted of a relevant offence.<sup>127</sup> The offence under subsection 8N(1) carries a maximum penalty of 30 penalty units in the first instance, and a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, where the person has previously been convicted of a relevant offence.<sup>128</sup>

2.239 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.240 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.22 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 8K(2B) and 8N(3) have not been addressed in the explanatory materials.

1.23 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>129</sup>

### **Minister's response**

2.241 The minister advised:

In Schedule 4 to the Bill, the defence ensures that superannuation funds will not be subject to offences of making false or misleading statements if

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126 Schedule 4, item 5.

127 TAA, section 8M.

128 TAA, section 8R.

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

they provide a correct statement in the approved form and within the required period. The superannuation fund has the burden of proof of establishing that the defence is available to them.

The defence is framed as an offence-specific defence, which means that the evidential burden for proving that the defendant (being the superannuation fund) has made a member information statement and makes a further statement to correct the original member information statement to the Commissioner is placed on the defendant. This approach is justified on the basis that the defendant would be best placed to know if they made an error in the statement and the actions the defendant is taking to correct a member information statement are peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution to disprove these actions than for the defendant to establish them.

### ***Committee comment***

2.242 The committee thanks the minister for this response. The committee notes the minister's advice that reversing the evidential burden of proof is justified on the basis that the actions the defendant is taking to correct the relevant member information statement are peculiarly within the defendant's knowledge, and it would be significantly more difficult and costly for the prosecution to disprove these actions than for the defendant to establish them.

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

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

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## **Charges in delegated legislation<sup>130</sup>**

### ***Initial scrutiny – extract***

2.245 Item 3 of Schedule 8 seeks to repeal and replace subsections 43-10(7) and (8) of the *Fuel Tax Act 2006* relating to the determination of the rate of road user charge. Proposed subsection (7) provides that the amount of road user charge for a taxable fuel is to be worked out using the rate determined under subsection (8) that applies to taxable fuel. Proposed subsection (8) seeks to allow the Transport Minister to determine, by legislative instrument, a rate of road user charge for taxable fuels

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130 Schedule 8, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

for which duty is payable at a rate per litre of fuel, a rate per kilogram of fuel, or a rate expressed in a unit of measurement other than litres or kilograms.

2.246 The explanatory memorandum states that the proposed amendments are intended to 'streamline the process of applying the [Road User Charge (RUC)] to fuels sold in kilograms and provide ongoing structural flexibility for the Transport Minister to determine rates for the RUC in litres, kilograms and other units of measurement of fuel.'<sup>131</sup> The committee notes that the proposed amendments would have the effect of continuing the Transport Minister's current power to determine, by legislative instrument, the rate of road user charge<sup>132</sup> while providing greater flexibility with respect to determining rates for fuels sold in different units of measurement.

2.247 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).<sup>133</sup> The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee notes that the *Fuel Tax Act 2006* imposes a public consultation requirement on the Transport Minister prior to determining an increased rate of road user charge,<sup>134</sup> and that proposed new subsection 43-10(12)<sup>135</sup> would prevent the road user charge from being increased more than once in a financial year for each class of taxable fuel. However, no guidance is provided on the face of the bill as to the method of calculating the road user charge rate, nor are maximum charges specified. Where charges are to be determined by legislative instrument, the committee considers that, at a minimum, some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

2.248 The committee requests the minister's advice as to why there are no limits on the road user charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

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131 Explanatory memorandum, p. 99.

132 Noting that currently section 43-10(7) of the *Fuel Tax Act 2006* provides that the amount of road user charge for taxable fuel is 21 cents for each litre of fuel, unless the Transport Minister has determined a different rate via a legislative instrument.

133 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

134 *Fuel Tax Act 2006*, subsection 43-10(9).

135 Schedule 8, item 5.

**Minister's response**

2.249 The minister advised:

*Limit on the road user charge*

The Committee has sought information with regards to the absence of an obvious limit on the road user charge specified in primary legislation.

The Australian Government levies fuel excise and duties at various rates set in the Schedule to the Excise Tariff Act 1921. Fuel tax credits provide a rebate to businesses for the tax that is embedded in the price of fuel used for certain business activities, effectively removing or reducing the amount of fuel tax on business inputs. The road user charge then reduces the amount of fuel tax credit that is claimable for fuel used on-road in a heavy vehicle.

The amount of the road user charge is effectively limited to the rate of fuel tax credits applying to the relevant fuel. Where the road user charge exceeds the fuel tax credit rate, there is no liability for the excess.

*Guidance in relation to the method of calculation of the charge and/or maximum charge*

The Committee has sought further information about whether guidance in relation to the method of calculation of the charge and/or maximum charge can be specifically included in the Bill.

It would not be appropriate to provide guidance on the method of calculation of the road user charge due to the current framework which involves a cooperative Council of Australian Government (COAG) process.

Under the current framework, the road user charge is determined by the Transport Minister in consultation with Cabinet. In practice, the Transport Minister's determinations follow agreements by transport ministers of the States and Territories at the COAG Transport and Infrastructure Council, informed by advice from the National Transport Commission.

Commonwealth, State and Territory governments have agreed to pursue heavy vehicle road reform. As part of that reform, options are being explored with the States and Territories that may involve amendments to the current framework for the heavy vehicle road user charge.

**Committee comment**

2.250 The committee thanks the minister for this response, and notes the minister's advice that the amount of the road user charge is effectively limited to the rate of fuel tax credits applying to the relevant fuel and that, where the charge exceeds the fuel tax credit rate, there is no liability for the excess.

2.251 The committee also notes the minister's advice that it would not be appropriate to provide guidance on the method of calculation of the road user charge due to the current framework which involves a cooperative Council of Australian Governments (COAG) process. Finally, the committee notes the advice

that Commonwealth, State and Territory governments have agreed to pursue heavy vehicle road reform and that, as part of this reform, options are being explored that may involve amendments to the framework for the heavy vehicle road user charge.

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

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

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### **No-invalidity clause<sup>136</sup>**

#### ***Initial scrutiny – extract***

2.254 Proposed section 353-25 provides that the Commissioner may give an offshore information notice requesting a person give any information or produce any documents the Commissioner reasonably believes is offshore information and is relevant to the assessment of any tax administered by the Commissioner. Proposed subsection 353-30 sets out that there are evidentiary consequences for a failure to comply with this request, such that the offshore information or contents of offshore documents or copies will not be admissible in evidence in proceedings under Part IVC of the TAA on a review or appeal relating to a tax-related liability. Proposed subsection 353-30(4) provides that if, before any hearing of a proceeding on such an appeal or review, the Commissioner forms the view that the applicant has refused or failed to comply with a request in an offshore information notice and the Commissioner is unlikely to give consent that the information be made admissible, the Commissioner must, by notice in writing, inform the applicant that the Commissioner has formed those views. However, a failure to so notify an applicant does not affect the validity of the Commissioner's decision not to consent to the admissibility of the evidence. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

2.255 The committee notes that whether or not the Commissioner consents to the relevant evidence being admissible in Part IVC proceedings may have important consequences for the conduct of those proceedings. Proposed subsection 353-30(4), in requiring the Commissioner to inform the person that consent to adduce that

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136 Schedule 8, item 19, proposed subsection 353-30(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

withheld information is not likely to be given, may thus be seen as facilitating a fair hearing in the Part IVC proceedings, given the effect that not consenting to the admissibility of the evidence may have on their ability to present their case.

2.256 The default position in the law is that non-compliance with requirements designed to facilitate a fair hearing will result in the invalidity of the decision. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of legal or administrative review to provide a remedy for administrative errors. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no explanation for the inclusion of the no-invalidity clause.

2.257 The committee therefore seeks the minister's advice as to why the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision, particularly in light of the potential effect on a taxpayer's opportunity to present their case.

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

2.258 The minister advised:

Schedule 8 to the Bill includes amendments rewriting provisions regarding offshore information notices from the *Income Tax Assessment Act 1936* into Schedule 1 to the *Taxation Administration Act 1953*. Consistent with the current law, the rewritten provisions provide that the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision.

This aspect of the offshore information notice provisions has not changed and is therefore not dealt with in the explanatory memorandum for the Bill. Information about the original provisions may be found in the explanatory memorandum for the Taxation Laws Amendment (Foreign Income) Bill 1990.

### ***Committee comment***

2.259 The committee thanks the minister for this response, and notes the minister's advice that proposed subsection 353-30(4) does not deviate from the old law (that is, it only re-writes it) and is therefore not dealt with in the explanatory memorandum. The committee also notes the minister's advice that information on the original provisions may be found in the explanatory memorandum to the Taxation Laws Amendment (Foreign Income) Bill 1990 (1990 Bill).

2.260 While noting this advice, the committee emphasises that although proposed subsection 353-30(4) may not alter the substantive effect of the law, it is nevertheless a provision in a new bill currently before the Parliament. The committee would therefore expect the explanatory memorandum to provide a full explanation

of the operation and effect of the provision, and to justify why the inclusion of a no-invalidity clause is appropriate. The committee does not consider it reasonable to require parliamentarians and members of the public to locate this information in explanatory materials dating back 28 years.

2.261 In any event, the committee notes that the explanatory memorandum to the 1990 bill<sup>137</sup> does not appear to justify including a no-invalidity clause in the provision corresponding to proposed subsection 353-30(4) (subsection 264A(15) of the *Income Tax Assessment Act 1936*). It appears only to restate the operation and effect of the relevant provisions. As noted in the committee's original comments, given that no-invalidity clauses may limit the practical efficacy of legal or administrative review, the committee would expect a sound justification for the use of such clauses to be included in the explanatory memorandum.

2.262 Finally, the committee notes that the taxation law is subject to continuous change, and has undergone a number of substantial reforms since the explanatory memorandum to the 1990 Bill was drafted. Without further information, it is unclear to the committee that a document drafted 28 years ago remains relevant in the context of the current taxation law.

**2.263 As the information provided by the minister does not adequately address the committee's concerns, the committee again requests the minister's detailed justification for the no-invalidity clause in proposed subsection 353-30(4), which provides that the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal will not affect the validity of that decision.**

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137 The committee's research indicates that the explanatory memorandum to the 1990 Bill appears to be available on the Australasian Legal Information Institute (AUSTLII) website. See [http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill\\_em/tlaib1990378/memo\\_0.html](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill_em/tlaib1990378/memo_0.html).

## Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018

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|---------------------------|--|
| <p><b>Purpose</b></p>     | <p>This bill seeks to amend the <i>Australian Securities and Investments Commission Act 2001</i> and the <i>Competition and Consumer Act 2010</i></p> <p>Schedule 1 seeks to ease evidentiary requirements for private litigants through expanded 'follow on' provisions</p> <p>Schedule 2 seeks to extend the unconscionable conduct protections to publicly listed companies</p> <p>Schedule 3 seeks to amend the definition of 'unsolicited services' to allow the protections of false billing provisions to apply to false bills for services not provided</p> <p>Schedule 4 seeks to clarify that unsolicited consumer agreements may be entered into in a public place</p> <p>Schedule 5 seeks to increase price transparency by requiring that additional fees or charges associated with pre-selected options be included in the headline price</p> <p>Schedule 6 seeks to allow the ACCC to obtain information concerning product safety</p> <p>Schedule 7 seeks to enable regulators to use existing investigative powers to assess whether or not a term of a standard form contract is unfair</p> <p>Schedule 8 seeks to allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so</p> <p>Schedule 9 seeks to clarify the scope of consumer guarantees where goods are transported or stored</p> <p>Schedule 10 seeks to ensure that the terminology used in the consumer protection provisions is consistent with similar provisions</p> <p>Schedule 11 seeks to clarify that all Australian Consumer Law related consumer protections that already apply to financial services also apply to financial products</p> |
| <p><b>Portfolio</b></p>   | <p>Treasury</p>  |
| <p><b>Introduced</b></p>  | <p>House of Representatives on 28 March 2018</p>   |
| <p><b>Bill status</b></p> | <p>Before the House of Representatives</p>   |

2.264 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The assistant minister responded to the committee's comments in a letter dated 29 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the assistant minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>138</sup>

### **Privilege against self-incrimination**<sup>139</sup>

#### ***Initial scrutiny – extract***

2.265 Item 1 of Schedule 6 to the bill proposes to replace existing subsections 133D(1) and (2) of the *Competition and Consumer Act 2010* (Competition Act). The new subsections would provide that the Commonwealth minister<sup>140</sup> or an inspector may give a disclosure notice to a person (the 'notice recipient') if the person giving the notice has reason to believe that the person is capable of giving information, producing documents or giving evidence in relation to the safety of consumer goods or product-related services. A disclosure notice is a written notice requiring the recipient to give such information or evidence, or to produce such documents, as are specified in the notice. This may include a requirement to appear before a person to give the relevant information or evidence, or to produce the relevant documents.<sup>141</sup>

2.266 The substantive effect of these amendments will be to expand the classes of persons to whom a disclosure notice can be given to include third parties. Existing subsections 133D(1) and (2) only permit the issue of disclosure notices to the suppliers of consumer goods and product-related services.

2.267 Subsection 133E(1) of the Competition Act provides that a person is not excused from giving information or evidence, or producing a document, pursuant to a disclosure notice on the grounds that to do so might tend to incriminate the person or expose them to a penalty. This provision therefore overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material that may tend to incriminate himself or herself.<sup>142</sup> The amendments proposed by the bill would expand the classes of persons who may be affected by the existing abrogation of the privilege.

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138 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

139 Schedule 6, item 1 The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

140 'Commonwealth minister' refers to the minister responsible for administering the *Competition and Consumer Act 2010*.

141 See subsection 133D(3) of the *Competition and Consumer Act 2010*.

142 See *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

2.268 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination may be overridden. However, abrogating this privilege represents a serious loss of personal liberty. Consequently, in considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

2.269 In this instance, the statement of compatibility provides some explanation of why it is necessary to abrogate the privilege against self-incrimination, stating:

Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. It is not always possible or appropriate for the ACCC to obtain this information from other parties voluntarily, particularly where they may be subject to legal or confidential restrictions. Being able to obtain this information in a timely manner enables the regulator to complete safety investigations earlier and ensure consumers are alerted sooner.<sup>143</sup>

2.270 The committee also notes that a 'use' immunity is provided in subsection 133E(2) of the Competition Act, which provides that information or evidence given, or a document produced, pursuant to a disclosure notice cannot be used as evidence against an individual in any proceedings instituted by the individual, or in any criminal proceedings other than proceedings for an offence against section 133F or 133G. Sections 133F and 133G relate to compliance with disclosure notices and the provision of false or misleading information. The 'use' immunity in subsection 133E(2) of the Competition Act is also acknowledged in the explanatory materials.<sup>144</sup>

2.271 However, neither the Competition Act nor the bill includes a 'derivative use' immunity. This means that information obtained as an indirect consequence of the giving of information or evidence, or the production of a document, pursuant to a disclosure notice, may still be admissible in evidence against the person to whom the notice is given. Moreover, the explanatory materials do not explain why a 'derivative use' immunity is not included in the existing provisions and why it is therefore appropriate, in the absence of such an immunity, to expand the classes of persons who may be affected by the existing abrogation of the privilege.

2.272 The committee requests the assistant minister's more detailed justification for the expansion of the classes of persons who may be affected by the abrogation of the privilege against self-incrimination, and in particular the appropriateness of not

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143 Statement of compatibility, p. 24.

144 Explanatory memorandum, p. 14; statement of compatibility, p. 24.

providing a derivative use immunity, by reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.<sup>145</sup>

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

2.273 The assistant minister advised:

As set out in the Explanatory Memorandum to the Bill, the *Competition and Consumer Act 2010* (CCA) contains a power to compel information about product safety from *suppliers*. Schedule 6 seeks to extend this power so that this information can be compelled from *third parties*.

This recognises that the Australian Competition and Consumer Commission (ACCC) requires effective powers to obtain timely and complete information about product safety, which could be used for example to decide whether to initiate recall action, to ascertain the location of defective goods or to accurately inform consumers about safety risks. Schedule 6 seeks to allow the ACCC to obtain information of the same type as the power currently allows, but from third party sources.

The limitation of the current power (to suppliers) does not accord with the modernisation of manufacturing and distribution arrangements. The raw material and data relating to the safety of consumer goods or product related services is often held by test laboratories or safety consultants rather than the suppliers themselves.

Further, the current power does not allow the ACCC to obtain information from consumers injured by a consumer good, and who may be subject to a confidentiality agreement as part of a settlement agreement (which prevents them voluntarily providing the information). The result is that unsafe products remain on the market for longer, putting the Australian public at undue risk of death, serious injury or illness.

As the Committee has noted, the existing provision (section 133D) abrogates the common law privilege against self-incrimination, but a limited use immunity is provided for individuals at subsection 133E(2). No derivative use immunity applies. The provision as amended by Schedule 6 would retain these characteristics.

The Committee has sought a more detailed justification for the expansion of the classes of persons who may be affected by the abrogation of the privilege against self-incrimination, and in particular the appropriateness of not providing a derivative use immunity.

#### Privilege against self-incrimination

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) recognises that it may be appropriate to

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145 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 94-99.

override the privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence; however, the public benefit to be derived from overriding the privilege must outweigh the loss to the individual.

Schedule 6 recognises the importance of obtaining timely and complete information about product safety risks, including in circumstances where the recipient of a disclosure notice might otherwise claim the privilege against self-incrimination. For example, where a test laboratory holds information disclosing problems with a product it tested, this could present a safety risk to a potentially very large number of consumers, whether or not the laboratory itself contravened the law (e.g. by issuing fraudulent compliance certificates).

I acknowledge that Schedule 6 would allow information obtained from the recipient of a disclosure notice to be used to investigate and take action against *another person*. This is an appropriate outcome because the question of whether the notice recipient could self-incriminate is irrelevant to the rights of that other person. As already indicated, notice recipients who are individuals are protected by the limited use immunity at subsection 133E(2).

#### Derivative use immunity

Further, consistent with other information-gathering powers in the CCA, it is not appropriate for the Bill to include a derivative use immunity. As noted in the Guide, more circumscribed immunities have been accepted for legislation governing the ACCC (e.g. section 155), and other agencies who regulate the activities of bodies corporate but exercise information-gathering powers against natural persons. These limited immunities have been accepted due to the particular difficulties of corporate regulation.

I acknowledge the information obtained from a notice recipient protected by the limited use immunity at subsection 133E(2) could be used to obtain further information which could in turn be used against the original notice recipient. This is an appropriate outcome because it represents an acceptable balance between the rights of the notice recipient and the public interest in pursuing misconduct related to product safety.

Importantly, derivative use immunity does not presently attach to comparable provisions in the CCA. There is no compelling reason for section 133D, as proposed to be amended by the Bill, to depart from the treatment of the CCA's information-gathering powers in this respect.

#### **Committee comment**

2.274 The committee thanks the assistant minister for this response, and notes the assistant minister's advice that the Australian Competition and Consumer Commission (ACCC) requires effective powers to obtain timely and complete information about product safety to perform a variety of its regulatory functions. The committee notes the advice that Schedule 6 seeks to address a current gap in the

ACCC's regulatory powers by enabling the ACCC to obtain information relating to product safety from third parties.

2.275 The committee also notes the assistant minister's advice that the *Guide to Framing Commonwealth Offences* recognises that it may be appropriate to override the privilege against self-incrimination where its use could severely undermine the effectiveness of a regulatory regime and prevent the collection of evidence.<sup>146</sup> The committee notes the advice that Schedule 6 recognises the importance of obtaining timely and complete information about product safety risks, including in circumstances where the recipient of a disclosure notice might otherwise claim the privilege against self-incrimination.

2.276 The committee further notes the assistant minister's advice that it is appropriate only to provide a 'use' immunity (and not a 'derivative use' immunity) for the recipients of disclosure notices, and that providing only a 'use' immunity represents an acceptable balance between the rights of notice recipients and the public interest in pursuing misconduct related to product safety.

2.277 Finally, the committee notes the assistant minister's advice that more circumscribed immunities (for example, including a 'use' but not a 'derivate use' immunity) have previously been accepted for legislation governing the ACCC and other agencies who regulate the activities of bodies corporate but exercise information-gathering powers against natural persons.<sup>147</sup> However, as set out in previous reports,<sup>148</sup> the committee would still prefer to see an explanation of relevant matters included in the explanatory memorandum, to enable the committee, and the Parliament, to determine whether a more limited immunity is appropriate in the relevant circumstances.

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

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

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146 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 95.

147 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 98.

148 See Senate Standing Committee for the Scrutiny of Bills, *Report 11/2005*, pp. 226-228.

## Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018

|                    |  |
|--------------------|--|
| <b>Purpose</b>     | <p>This bill seeks to amend various Acts in relation to taxation</p> <p>Schedule 1 seeks to ensure that the multinational anti-avoidance law applies to artificial or contrived arrangements involving trusts and partnerships entered into by multinational entities to avoid the taxation of business profits in Australia</p> <p>Schedule 2 seeks to include additional conditions that must be met for the small business capital gains tax concessions to capital gains to apply</p> <p>Schedule 3 seeks to provide for venture capital tax concessions to be available for investments in 'fintech' businesses</p> <p>Schedule 4 seeks to provide a tax exemption for payments made under the Defence Force Ombudsman Scheme</p> |
| <b>Portfolio</b>   | Treasury   |
| <b>Introduced</b>  | House of Representatives on 28 March 2018  |
| <b>Bill status</b> | Before the Senate  |

2.280 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The Treasurer responded to the committee's comments in a letter dated 30 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>149</sup>

### Retrospective application<sup>150</sup>

#### *Initial scrutiny – extract*

2.281 Schedule 2 of the bill seeks to amend the *Income Tax Assessment Act 1997* to include additional conditions that must be satisfied in order for small business capital gains tax (CGT) concessions to apply. The explanatory memorandum states that the changes will result in CGT concessions only applying to assets used, held ready for use or that are an interest in a small business.<sup>151</sup>

149 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

150 Schedule 2, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

151 Explanatory memorandum, p. 13.

2.282 The application provision in Schedule 2 provides for the amendments to commence in relation to CGT events on or after 1 July 2017, which results in the amendments applying retrospectively. The explanatory memorandum notes the retrospective application is, 'consistent with the Budget announcement [made] by the Government on 9 May 2017 to ensure small business CGT concessions are only available in relation to assets used in a small business and ownership interests in small business.'<sup>152</sup>

2.283 The explanatory memorandum argues that, while it may disadvantage some taxpayers, as an integrity measure the retrospective application is 'necessary to minimise the scope for entities to inappropriately access the small business CGT concessions in the period after the measure was announced but before legislation is enacted.'<sup>153</sup>

2.284 The committee reiterates its long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release') challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).

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

2.286 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). In this instance it has been 11 months since the Budget announcement

2.287 The committee therefore requests the Treasurer's more detailed advice as to how many individuals will be detrimentally affected by the retrospective application of the legislation, and the extent of their detriment.

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152 Explanatory memorandum, p. 23.

153 Explanatory memorandum, p. 23.

***Treasurer's response***

2.288 The Treasurer advised:

The Government announced in the 2017-18 Budget that it would amend the concessions "to ensure that the concessions can only be accessed in relation to assets used in a small business or ownership interests in a small business" with effect from 1 July 2017. This announcement ahead of the commencement of the amendments allowed taxpayers to take the proposed changes into account when considering applying the CGT small business concessions.

I am advised by the Australian Taxation Office (ATO) that detailed information about the number of adversely affected taxpayers and the extent of any adverse effects is not available. This is because the ATO has not yet received any tax return data for transactions in the 2017-18 income year, which this measure would affect.

Additionally, to be affected by this measure, taxpayers must access the CGT concessions in relation to specific types of assets (principally interests in large businesses). Tax returns include only limited information on taxpayers' use of the small business CGT concessions, which is not sufficient to identify taxpayers that would be affected by the 2017-18 Budget measure as they have accessed the concessions in relation to such an asset. For the ATO to identify instances where taxpayers have sought to access the concessions in ways that these amendments would prevent, further information would be required, such as from ATO compliance action.

***Committee comment***

2.289 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that detailed information about the number of adversely affected taxpayers and the extent of adverse effects is not available. The committee also notes the Treasurer's advice that the government's announcement in the 2017-18 Budget allowed taxpayers to take the proposed changes into account when considering applying the CGT small business concessions.

2.290 The committee notes that it has received correspondence from a number of former small business owners that claim that, if these amendments are applied retrospectively, they will incur a large taxation liability, which they were not aware of at the time their small businesses were sold.

2.291 The committee is concerned that the government is not aware of the extent of the detrimental impact that will be caused by the retrospective application of these amendments. The committee takes the opportunity to reiterate its long-standing scrutiny concern that the retrospective application of legislative provisions challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in

accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive.

**2.292 The committee considers it may be appropriate for the bill to be amended to apply the changes to the CGT small business concessions to events happening after the bill receives Royal Assent.**

**2.293 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying the amendments in relation to the CGT small business concessions.**

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## No-invalidity clause<sup>154</sup>

### *Initial scrutiny – extract*

2.294 Schedule 3 of the bill seeks to amend the *Income Tax Assessment Act 1997* (ITAA) to implement reforms of tax incentives for venture capital investors and their investments in financial technology or 'fintech'.<sup>155</sup> The changes are intended to clarify that certain 'fintech' activities are not ineligible activities for the purpose of venture capital tax concessions.<sup>156</sup>

2.295 Proposed subsection 118-432(2) provides that Innovation and Science Australia may, on receipt of an application, make a written decision finding that a specified activity is a substantially novel application of technology (or refuse to make such a finding). This is known as a 'private finding'. A refusal to make a private finding will be subject to internal and Administrative Appeals Tribunal (AAT) review in the same way as other administrative decisions relating to venture capital tax concessions.<sup>157</sup>

**2.296** Proposed subsection 118-432(5) provides that Innovation and Science Australia must notify the applicant in writing of any decision about an application for a private finding; however, proposed subsection 118-432(6) provides that failure to so notify an applicant does not affect the validity of the finding (or refusal to make a finding).<sup>158</sup>

2.297 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does

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154 Schedule 3, item 3, proposed subsection 118-432(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

155 Explanatory memorandum, p. 25.

156 Explanatory memorandum, p. 27.

157 Schedule 3, item 5; explanatory memorandum, p. 33.

158 Proposed subsection 118-432(6).

not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of administrative review to provide a remedy for administrative errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

2.298 In this instance, the explanatory memorandum does not include a justification for including the no-invalidity clause in proposed subsection 118-432(6).

2.299 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to include a no-invalidity clause in proposed subsection 118-432(6). The committee also requests advice about how, in practice, an applicant will be able to seek internal and AAT review of a refusal to make a finding under proposed subsection 118-432(2) in circumstances where Innovation and Science Australia does not notify the applicant of that refusal.

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

2.300 The Treasurer advised:

Among other things, these amendments allow for Innovation and Science Australia (ISA) to, on application, make a finding that an activity is a novel application of technology. The Committee has sought advice on why if ISA does not provide notice in writing of such a finding (or a decision not to make a finding), this does not result in the finding or decision being invalid. The Committee has also sought advice on how failure to provide such notice may affect the ability of the applicant to seek internal and Administrative Appeals Tribunal review of a refusal to make a finding.

Providing notice of a finding is an administrative matter that does not affect the substance of a decision. The consistent and longstanding approach for all findings by ISA and for reviewable decisions under the *Administrative Appeals Tribunal Act 1975* (AAT Act) generally is that a failure to comply with such an administrative requirement does not affect the validity of the underlying decision (see subsections 29-5(3) and 29-10(7) of the *Venture Capital Act 2002*, subsections 27C(4), 27K(4), 28F(5) and 30B(3) of the *Industry Research and Development Act 1986* and subsection 27A(3) of the AAT Act).

In the case of findings, this practice is generally to the benefit of the applicant - the existence of a finding provides certainty as to whether a venture capital fund is investing in an eligible business, and it would not be appropriate to defer or deny the effect of a decision because of a defective notification process.

I am also advised that there was close engagement with stakeholders in the development of this legislation and no concerns were raised about this matter.

In the event ISA does not provide notice of a decision not to make a finding, it would be expected that the applicant would follow up with ISA and ISA would rectify the error as soon as it came to their attention.

In the event ISA continued to not provide notice of the decision, the applicant would remain entitled to internal review of the decision and would have an unlimited period to apply for this review as a request for a review of a decision by ISA can be made until 21 days after notice of the decision is provided (see subsection 29-10(2) of the *Venture Capital Act 2002*). Should ISA continue to be non-responsive, it would be taken to confirm the decision after 60 days and the applicant could seek review by the Administrative Appeals Tribunal (see subsection 29-10(5) of the *Venture Capital Act 2002*).

It would also be open to the applicant to seek an order from the Federal Court compelling ISA to comply with its legislative obligation to provide a notice of the decision.

### ***Committee comment***

2.301 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that providing notice of a finding is an administrative matter that does not affect the validity of the underlying decision, and this is generally to the benefit of the applicant as it would not be appropriate to defer or deny the effect of a decision because of a defective notification process. The committee also notes the Treasurer's advice as to how an applicant would be made aware of whether a decision had been made should the ISA not notify the applicant.

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

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

## Underwater Cultural Heritage Bill 2018

|                    |  |
|--------------------|--|
| <b>Purpose</b>     | This bill seeks to provide for the protection and conservation of Australia's underwater cultural heritage |
| <b>Portfolio</b>   | Environment and Energy   |
| <b>Introduced</b>  | House of Representatives on 28 March 2018  |
| <b>Bill status</b> | Before the House of Representatives  |

2.304 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2018*. The assistant minister responded to the committee's comments in a letter dated 31 May 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>159</sup>

### Significant matters in delegated legislation

#### Broad discretionary power<sup>160</sup>

##### *Initial scrutiny – extract*

2.305 Part 2 of the bill relates to what may constitute 'protected underwater cultural heritage' for the purposes of the bill. Clauses 17, 18 and 19 give the minister broad powers to declare certain articles to be protected underwater cultural heritage. In doing so, the minister must have regard to any criteria that are in force under clause 22.<sup>161</sup>

2.306 Clause 22 of the bill provides that the Underwater Cultural Heritage Rules may prescribe criteria to assist in assessing the heritage significance of particular items that may be protected under the bill. The explanatory memorandum states that it is intended for the rules to prescribe criteria which are drawn from the Australia ICOMOS 1979 *Burra Charter*; an international agreement that established the basis for heritage significance criteria in Australia.<sup>162</sup> In addition, subclauses 23(4) and 25(3) provide that the minister must have regard to the matters (if any) specified in the Underwater Cultural Heritage Rules in deciding whether to grant or vary a permit relating to protected underwater cultural heritage. The explanatory

159 See correspondence relating to *Scrutiny Digest No. 6 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

160 Clauses 22, 23 and 25. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

161 Subclause 22(2).

162 Explanatory memorandum, p. 24.

memorandum states that the rules may contain guidance on matters such as how the diversity of permit purposes should be dealt with, how to assess what might constitute an adverse impact and whether an adverse impact should be allowed in certain circumstances.<sup>163</sup>

2.307 The committee's view is that significant matters, such as criteria relating to assessing whether an item is of heritage significance or whether to grant or vary a permit, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum does not provide information as to why these criteria are not included in the bill.

2.308 The committee also notes that clause 22 provides that the rules *may* prescribe criteria to which the minister must have regard when declaring articles to be protected, or provisionally protected, rather than requiring that the rules *must* prescribe such criteria. As such, if rules are not made prescribing assessment criteria, this would leave the minister with broad discretionary powers, unguided by any legislative criteria, to declare what underwater cultural heritage articles are to be protected. In addition, as noted above, subclauses 23(4) and 25(3) provide that the minister must have regard to the matters, if any, specified in the rules in deciding whether to grant or vary a permit relating to protected underwater cultural heritage. If the rules do not specify any such matters, there would be no legislative criteria on which the minister would base his or her decision to grant or vary a permit. The explanatory memorandum does not address this issue.

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

- why at least high-level criteria relating to the assessment of heritage significance and the granting of permits relating to protected underwater cultural heritage cannot be included in the primary legislation; and
- why there is no positive requirement that the rules *must* prescribe criteria relating to assessing heritage significance and specify matters relating to the granting or variation of permits.

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

2.310 The assistant minister advised:

It is appropriate for the criteria relating to the assessment of heritage significance to be included in the rules because of the subjective nature of heritage values assessment and its connection with evolving cultural attitudes in the community. This will provide flexibility for amendments to the criteria to be made if required.

The degree to which the community places value on particular heritage fluctuates over time. These changes in community attitudes can necessitate changes to the detailed heritage assessment guidance that in

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163 Explanatory memorandum, p. 26.

turn may also impact the effectiveness of the criteria, which may require modification.

Similar to the heritage criteria, the purpose of providing rules to guide the granting or varying permits is to allow more detailed guidance to be provided that deals effectively with the varying circumstances of permit applications. Like the assessment of heritage values, there is a degree of subjectivity in the decisions e.g. what constitutes an adverse impact in a particular case.

Including the heritage assessment criteria and permit guidance in the rules provide flexibility to revise them to reflect policy needs. For example, it may be appropriate to amend the criteria or guidance may also need to be revised from time to time to align with Commonwealth, State or Territory planning and heritage policies or changing environmental conditions. This is especially important where underwater cultural heritage regulated by the Bill is located in areas that are solely within the jurisdiction of State or Territory planning processes.

Additionally, the rules which will contain the heritage assessment criteria and specifying matters relating to the granting and variation of permits will be subject to public and Parliamentary scrutiny, and would be disallowable under the *Legislation Act 2003* (the **Legislation Act**). As such, the rules will be subject to public and Parliamentary scrutiny, including scrutiny by the Senate Standing Committee on Regulations and Ordinances. Consequently, there will be sufficient political and practical oversight of the heritage criteria and matters relating to permits.

Although the Bill does not contain a positive requirement, it is intended that the Rules will prescribe criteria relating to assessing heritage significance and specifying matters relating to the granting or variation of permits. However, the Committee's concerns are acknowledged and consideration will be given to the inclusion of a positive requirement in the Bill's amendments.

### **Committee comment**

2.311 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that it is considered appropriate for criteria relating to the assessment of heritage significance and the granting of permits to be included in the rules because this will provide flexibility to respond to changing cultural attitudes in the community, and to allow revisions in order to align the criteria with changes to Commonwealth, state or territory planning and heritage policies or environmental conditions. The committee also notes the assistant minister's advice that, as the rules will be subject to disallowance under the *Legislation Act 2003*, it is considered that there will be sufficient oversight of the heritage criteria and matters relating to permits.

2.312 The committee further notes the assistant minister's advice that, although the bill does not contain a positive requirement to this effect, it is intended that the

rules will prescribe criteria relating to assessing heritage significance and specify matters relating to the granting or variation of permits. The committee finally notes the assistant minister's advice that consideration will be given to introducing an amendment to the bill to include such a positive requirement.

2.313 The committee notes that Division 1 of Part 2 of the bill specifies certain articles that are automatically protected as underwater cultural heritage or the type that may be declared to be so. In contrast, the bill contains no guidance as to when the minister may exercise his or her power to grant or vary a permit to engage in specified conduct relating to specified underwater cultural heritage, a specified protected zone, or specified foreign underwater cultural heritage. As such, the bill contains no criteria as to the circumstances in which it may be appropriate to grant or vary such a permit, beyond the requirement that the minister must have regard to the matters, if any, specified in the rules for this purpose.<sup>164</sup> The committee therefore remains concerned that, if the rules do not specify any such matters, there would be no legislative criteria on which the minister could base his or her decision to grant or vary a permit.

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

**2.315 The committee welcomes the assistant minister's undertaking to consider introducing an amendment to the bill so as to include a positive requirement that the rules *must* prescribe criteria relating to assessing heritage significance and the granting or variation of permits. The committee will consider any amendments made to the bill in a future Scrutiny Digest.**

**2.316 In light of the information provided, the committee makes no further comment on the appropriateness of including criteria for the assessment of heritage significance in the rules.**

**2.317 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not including in the bill any criteria to guide the minister's decision to grant or vary a permit relating to protected underwater cultural heritage.**

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164 Subclause 23(4).

## Strict liability offences<sup>165</sup>

### *Initial scrutiny – extract*

2.318 Clauses 27 to 39 seek to create various offences for activities relating to protected underwater cultural heritage. Each clause applies strict liability to the offence and carries a penalty of 60 penalty units.

2.319 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>166</sup>

2.320 In this case, the explanatory memorandum states that strict liability has been applied to the offences in the bill to ensure the integrity of the regulatory regime, and is to be used in circumstances where there is public interest in ensuring that regulatory schemes are observed and where it can reasonably be expected that individuals who may be affected by the scheme are aware of their duties and obligations.

2.321 The *Guide to Framing Commonwealth Offences*<sup>167</sup> states that applying strict liability may be justified where all of a number of criteria apply, including that there are legitimate grounds for penalising persons lacking fault.

2.322 The committee notes that while the explanatory memorandum explains that the use of strict liability will ensure the integrity of the regulatory regime being established in the bill, it does not explain what the legitimate grounds are for penalising persons lacking fault in respect of each of the offences relating to protected underwater cultural heritage. This is of particular relevance to the proposed offences that do not relate to the use of permits (for example the offence

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165 Clauses 27 to 39. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

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

of engaging in prohibited conduct in a protected zone)<sup>168</sup>, that may result in a person who has not been put on notice being held liable without any requirement to prove fault.

2.323 The committee requests a detailed justification from the minister for each proposed strict liability offence in clauses 27 to 39 of the bill, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.<sup>169</sup>

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

2.324 The assistant minister advised:

The inclusion of strict liability for the offences in the Bill (detailed in the table below) is consistent with the following principles outlined in the Guide to Framing Commonwealth Offences.

- The offences are not punishable by imprisonment, and the offences are punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate). This means that persons who commit a strict liability offence under the Bill will not be subject to unduly harsh or unfair penalties.
- The punishment of offences not involving fault will reduce the cost of pursuing offences which will enhance the effectiveness of the enforcement regime and deter certain conduct.
- There are legitimate grounds for penalising non-compliance when the person should be, or is, aware of their obligations. In practice, the Bill regulates a specific community, which includes scuba divers; private persons in legal possession of shipwreck relics; dealers in antiques or second hand goods; numismatists and companies involved with commercial marine activities. Due to their exposure to the regulation of protected underwater cultural heritage, these individuals and companies could reasonably identify whether their conduct would constitute an offence.
- The Bill allows for infringement notices to be issued for strict liability offences to help ensure that individuals are not punished disproportionately to the severity of an offence, and provides an alternative where a criminal conviction may have significant impact on their career or business.

The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).

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168 See clause 29.

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

| UCH Bill Clause   | Justification for applying strict liability   |
|---|---|
| <p><b>Proposed subsection 27(6)</b> – Failure to notify Minister of transfer of permit</p>              | <ul style="list-style-type: none"> <li>• A permit places the person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>  |
| <p><b>Proposed section 28(3)</b> – Breach of permit condition</p>                                       | <ul style="list-style-type: none"> <li>• A permit places the person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>  |
| <p><b>Proposed section 29(5)</b> – Prohibited conduct within protected zone without a permit</p>        | <ul style="list-style-type: none"> <li>• Strict control over incursions into protected zones by vessels and persons is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. Protected zone may prohibit entry without a permit and this fact is clearly communicated on hydrographic charts used for marine navigation in Australia. There are also public safety concerns as some protected zones contain unexploded ordinance.</li> <li>• The existence of protected zones has been made aware to both the general public and specific stakeholders through the application of existing <i>Historic Shipwrecks Act 1976</i>, so there is a reasonable expectation that persons operating in the marine environment should have knowledge of these regulations.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
| <p><b>Proposed section 30(5)</b> – Conduct with an adverse impact on protected UCH without a permit</p> | <ul style="list-style-type: none"> <li>• The control of adverse impacts by vessels and persons is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. The type and severity of impacts can vary greatly and could involve low level but cumulative impacts that may be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness.</li> <li>• The principle of enjoying but not damaging, destroying or interfering with underwater cultural heritage has been widely communicated</li> </ul>   |

|   |   |
|---|---|
|   | <p>to both the general public and specific stakeholders through the application of the existing <i>Historic Shipwrecks Act 1976</i>, so there is a reasonable expectation that persons interacting with underwater cultural heritage should have knowledge of its regulation.</p> <ul style="list-style-type: none"> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>  |
| <p><b>Proposed section 31(5)</b> – Possession of protected UCH without a permit</p>               | <ul style="list-style-type: none"> <li>• The offence of illegal possession of shipwrecks has been widely communicated to both the general public and specific stakeholders through the application of the existing <i>Historic Shipwrecks Act 1976</i>, so there is a reasonable expectation that persons interacting with the underwater cultural heritage should have knowledge of this regulation.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>  |
| <p><b>Proposed section 32(4)</b> – Supply and offers to supply protected UCH without a permit</p> | <ul style="list-style-type: none"> <li>• Regulatory control over the movement and location of protected underwater cultural heritage is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. The severity of this statutory requirement is low and may be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness.</li> <li>• This regulation has been widely communicated to both the general public and specific stakeholders through the application of the existing <i>Historic Shipwrecks Act 1976</i>, so there is a reasonable expectation that persons interacting with the underwater cultural heritage should have knowledge of this regulation.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
| <p><b>Proposed section 33(4)</b> – Advertising to sell UCH without including permit number</p>    | <ul style="list-style-type: none"> <li>• A permit places a person on notice to guard against the possibility of any contravention.</li> <li>• The punishment of the offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring this conduct. The severity of this statutory requirement is low and may tend to be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness.</li> <li>• The penalty does not include imprisonment and</li> </ul>  |

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|  | <p>the fine does not exceed 60 penalty units for an individual.</p>  |
| <p><b>Proposed section Subclause 34(4)</b> – Importing protected UCH without a permit</p>  | <ul style="list-style-type: none"> <li>• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
| <p><b>Proposed section 35(4)</b> – Exporting UCH without a permit</p>                      | <ul style="list-style-type: none"> <li>• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
| <p><b>Proposed section 36(4)</b> – Importing UCH of a foreign country without a permit</p> | <ul style="list-style-type: none"> <li>• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
| <p><b>Proposed section Subclause 37(5)</b> – Failing to produce a permit</p>               | <ul style="list-style-type: none"> <li>• A permit places a person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>   |
| <p><b>Proposed section Subclause 38(6)</b> – Failing to produce a permit</p>               | <ul style="list-style-type: none"> <li>• The failure of a person to respond to a notice is a pre-condition of the offence.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul>  |

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| <p><b>Proposed section 39(7) –</b><br/>Failure to comply with<br/>Ministerial direction</p> | <ul style="list-style-type: none"> <li>• The failure of a person to comply with directions in the notice is a pre-condition of the offence.</li> <li>• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.</li> </ul> |
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### **Committee comment**

2.325 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the application of strict liability to offences under the bill is considered to be consistent with the principles outlined in the *Guide to Framing Commonwealth Offences*<sup>170</sup> for the following reasons: the offences are only punishable by a fine of up to 60 penalty units; the punishment of offences not involving fault will enhance the effectiveness of the enforcement regime and deter certain conduct; and persons subject to regulation under the bill should be aware of their obligations.

2.326 The committee also notes the assistant minister's advice that the application of strict liability is considered appropriate because 'in practice' the bill will regulate a specific community—that is, scuba divers, private persons in legal possession of shipwreck relics; dealers in antiques or second hand goods; numismatists and companies involved with commercial marine activities—and that these individuals and companies could reasonably identify whether their conduct would constitute an offence.

2.327 The committee further notes the assistant minister's advice that a number of matters relevant to these offences should be known to the general public and to specific stakeholders. For example, the existence of protected zones; the principle of enjoying but not damaging or interfering with underwater cultural heritage; the offence of illegal possession of shipwrecks; offences relating to supplying or offering to supply items of underwater cultural heritage without a permit; and the regulation of the transfer of cultural heritage objects between countries.

2.328 However, the committee notes that the regulatory framework proposed under the bill is not restricted to members of the specific community identified by the assistant minister. Rather, the regulatory framework would apply to all individuals and companies and the committee considers that it is not clear that persons beyond those identified above could reasonably be expected to be aware of either the current regulatory framework under the *Historic Shipwrecks Act 1976* or the proposed regulatory framework under this bill.

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

2.329 The committee therefore retains its scrutiny concerns about the application of strict liability (which removes the requirement to prove fault) to those proposed offences where a person would not be put on notice of their obligations by information contained in a permit or by receipt of a ministerial notice.<sup>171</sup> For example, it is not clear to the committee that a member of the public who does not have a professional interest in the regulation of underwater cultural heritage could reasonably be expected to be aware that it would be an offence to engage in prohibited conduct in a protected zone (see clause 29), or to have possession, custody or control of protected underwater cultural heritage without a permit (see clause 31). The committee considers that the application of strict liability to these offences may result in a person who has not been put on notice being held liable without any requirement to prove fault.

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

**2.331 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to the offences in clauses 29 to 31 and 37, noting that this may result in a person who has not been put on notice being held liable without any requirement to prove fault.**

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## Reversal of evidential burden of proof<sup>172</sup>

### *Initial scrutiny – extract*

2.332 As noted above, clauses 29 to 32 and 34 to 36<sup>173</sup> create various offences for activities relating to protected underwater cultural heritage. Exceptions to the offences (offence specific defences) are provided in the relevant clauses, stating that the offence does not apply if the relevant conduct occurred in accordance with a permit granted under clause 23, or in relation to subclause 31(3), if the person is the Commonwealth, a State or a Territory or an authority of them. The offences in clauses 29 to 31 and 35 carry a maximum penalty of imprisonment for 5 years or 300

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171 For example, clauses 29 to 31 and 37.

172 Clauses 29 to 32 and 34 to 36. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

173 See subclauses 29(2), 30(3), 31(2) and (3), 32(2), 34(2), 35(2) and 36(2). The committee notes that there are other offence-specific defences in the bill, but the committee makes no comment in relation to these.

penalty units, or both; and the offences in clauses 32, 34 and 36 carry a maximum penalty of imprisonment for 2 years or 120 penalty units, or both.

2.333 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.334 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

2.335 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be individually justified.

2.336 The statement of compatibility states that the matters to be proved in making out the offence specific defences in the bill are matters that would be in the particular knowledge of the defendant. However, the committee notes that the *Guide to Framing Commonwealth Offences*<sup>174</sup> provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>175</sup>

2.337 In this case, it is not apparent that matters such as whether conduct occurred in accordance with a permit, are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

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

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

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

the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>176</sup>

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

2.339 The assistant minister advised:

As the Committee has identified, some provisions of the Bill contain offence-specific defences. Offence-specific defences reverse the evidential burden by requiring a defendant, rather than the prosecution, to raise evidence about a matter.

The Guide identifies that it may be appropriate for legislation to create offence-specific defences where the facts in question are peculiarly within the knowledge of the defendant, and where it would be difficult, burdensome or costly for the prosecution to raise evidence about a matter. The creation of offence-specific defences in a number of provisions of the Bill is appropriate because the defences concern matters which are peculiarly within the knowledge of the defendant, such as whether the defendant engaged in prohibited conduct in a protected zone for the purposes of saving human life, preventing serious environmental harm or securing the safety of an endangered vessel. Additionally, the matters relevant to the offence-specific defences in the Bill are matters about which should be able to easily and inexpensively present evidence.

| UCH Bill Clause   | Justification for reversal of evidential burden of proof   |
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| <p><b>Proposed section 29(2)</b> – Prohibited conduct within protected zone</p> | <ul style="list-style-type: none"> <li>• Defendants have peculiar knowledge about the details of their conduct, and whether the conduct was engaged in in accordance with a permit. As the offence concerns conduct that takes place in the marine environment, this could be a difficult matter for the prosecution to raise evidence about.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence, as they would have peculiar knowledge of their reasons for undertaking prohibited conduct in a protected zone, and of the specific conduct they engaged in while in that protected zone.</li> </ul> |
| <p><b>Proposed section 29(3)</b> – Prohibited conduct within protected zone</p> | <ul style="list-style-type: none"> <li>• Defendants have peculiar knowledge about the details of their conduct, and whether they engage in their conduct for the purposes of saving human life, dealing with an emergency involving a serious threat to the environment, or securing the safety of a vessel endangered by</li> </ul>   |

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

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|   | <p>weather or navigational. These would be difficult matters for the prosecution to raise evidence about, given that the conduct would have occurred in the marine environment.</p> <ul style="list-style-type: none"> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence, as they would have peculiar knowledge of their reasons for undertaking prohibited conduct in a protected zone, and of the specific conduct they engaged in while in that protected zone.</li> </ul>                                       |
| <b>Proposed section 30(3)</b> – Conduct with an adverse impact on protected UCH           | <ul style="list-style-type: none"> <li>• Defendants have peculiar knowledge of the details of their conduct in the marine environment, and whether that conduct was engaged in in accordance with the terms of a permit. This may be a difficult matter for the prosecution to raise evidence about, especially in cases where the conduct has occurred in relation to protected underwater cultural heritage that is outside Australian waters.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul> |
| <b>Proposed section 31(2)</b> – Possession of protected UCH without a permit              | <ul style="list-style-type: none"> <li>• It would be difficult for the prosecution to raise evidence that a person having possession of protected underwater cultural heritage without a permit, especially in cases where events have occurred, or the person resides, outside Australian jurisdiction.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul>   |
| <b>Proposed section 31(3)</b> – Possession of protected UCH unless authorised by a permit | <ul style="list-style-type: none"> <li>• It would be difficult for the prosecution to raise evidence that a person is not or is not part of, is an authority of or is acting on behalf of the Commonwealth, State or Territory Government.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul>   |
| <b>Proposed section 32(2)</b> – Possession of protected UCH unless authorised by a permit | <ul style="list-style-type: none"> <li>• It would be difficult for the prosecution to raise evidence that a person having supplied protected underwater cultural heritage a permit.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul>  |
| <b>Proposed section 35(2)</b> – Exporting UCH without a permit                            | <ul style="list-style-type: none"> <li>• It would be difficult for the prosecution to raise evidence that a person exporting protected underwater cultural heritage without a permit,</li> </ul>   |

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|  | <p>especially in cases where the person resides, outside Australian jurisdiction.</p> <ul style="list-style-type: none"> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul>  |
| <p><b>Proposed section 36(2)</b> – Importing UCH of a foreign country without a permit</p> | <ul style="list-style-type: none"> <li>• It would be difficult for the prosecution to raise evidence that a person imported protected underwater cultural heritage without a permit, especially in cases where events have occurred, or the person resides, outside Australian jurisdiction.</li> <li>• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.</li> </ul> |

### **Committee comment**

2.340 The committee thanks the assistant minister for this response. The committee notes the assistant minister's general advice that the proposed offence-specific defences are appropriate because it is considered that they relate to matters that are peculiarly within the knowledge of the defendant and are matters about which the defendant should be able to 'easily and inexpensively present evidence.'

2.341 However, the committee emphasises that it generally considers a matter is appropriate for inclusion in an offence-specific defence when:

- it is peculiarly within the knowledge of the defendant; *and*
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>177</sup>

2.342 The committee considers that these criteria are not satisfied merely by a defendant being 'best placed' to raise evidence in relation to a matter, nor by it being 'difficult' for the prosecution to raise evidence in relation to a matter, as stated in the assistant minister's specific justifications for each proposed offence-specific defence.

2.343 With the exception of the proposed defence set out under subclause 29(3), relating to the purposes for which a defendant engaged in the relevant conduct, it remains unclear to the committee how the matters set out in these offence-specific defences can be characterised as being peculiarly within the knowledge of the defendant.

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

2.344 The defences under subclauses 29(2), 30(3), 31(2), 32(2), 34(2), 35(2), and 36(2) relate to whether the relevant conduct occurred in accordance with a permit and the committee remains of the view that these matters appear to be matters more appropriate to be included as elements of each offence. The defence under subsection 31(3) relates to whether or not the defendant is the Commonwealth, a state or a territory or an authority of them, which also is a matter that does not appear to be peculiarly within the knowledge of the defendant.

**2.345 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.**

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### **Broad scope of offence provision<sup>178</sup>**

#### ***Initial scrutiny – extract***

2.346 Clause 40 seeks to make it an offence to fail to notify the minister within 21 days if a person finds an article of underwater cultural heritage, that appears to be of an archaeological character, in Australian waters. 'Underwater cultural heritage' is defined as being any trace of human existence that has a cultural, historical or archaeological character and is located under water.<sup>179</sup> The offence carries a maximum penalty of 120 penalty units (and a civil penalty of 120 penalty units).

2.347 There is no guidance in the bill or the explanatory memorandum as to what factors would contribute to an item appearing to be 'of an archaeological character'. It is unclear to the committee how a person who finds an article in the water would be put on notice about the requirements of clause 40, and how such a person would determine whether the article is one of underwater cultural heritage and 'appears to be of an archaeological character'.

2.348 The committee requests the minister's advice as to how a person who finds an article in Australian waters will know whether that article is one of 'underwater cultural heritage' that 'appears to be of an archaeological character'. Further the committee requests the minister's advice as to how the general public will be notified of their obligations under clause 40 to notify the minister within 21 days if they find such an article.

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178 Clause 40. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

179 Clause 15.

**Assistant Minister's response**

2.349 The assistant minister advised:

The requirement to report the discovery of shipwrecks or other under types of underwater cultural heritage is an essential component of the regulatory regime to be established by the Bill. The obligation to report articles of underwater cultural heritage helps persons recognise that in-situ cultural heritage in the marine environment has the potential to be protected underwater cultural heritage. Without the obligation to report, discoveries of underwater cultural heritage may not be reported and subject to adverse impact.

In practice, a limited community of people with technical expertise in diving or marine survey are likely to discover and report discovery of in-situ cultural material in the marine environment. Generally, these individuals and companies have sufficient training and education to identify cultural heritage. In shallower waters, people who find underwater cultural heritage, such as a wrecked vessel or aircraft, would be able to recognise that it is of an archaeological character based on it the level of deterioration or the extent that it has become part of the marine environment, for instance, the amount of coral cover and deposition of sand. In other cases, the underwater cultural heritage may be detected as anomalies by electronic remote sensing devices. A person in this case may not be aware of the specific nature of the material but would have a clear understanding that it is cultural in nature and should be reported. This is the case with commercial marine surveying and study where the report of the discovery is provided through the supply of remote sensing data that can be subsequently interpreted.

The public will be provided with detailed guidelines to help identify discoveries that may require notification under the Bill. This guidance will be prepared and published following enactment of the Bill. Detailed public information will also continue to be provided via the Australian Government Department of the Environment and Energy website.

**Committee comment**

2.350 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that, without an obligation to report, discoveries of underwater cultural heritage may not be reported and suffer adverse impacts. The committee also notes the assistant minister's advice that, in practice, a limited community of people with technical expertise in diving or marine survey are likely to discover cultural material in the marine environment and these individuals and companies have sufficient training and education to identify cultural heritage. The committee further notes the assistant minister's advice that, while a person who finds an object in shallower waters may not be aware of its 'specific nature', they would have a clear understanding that it is cultural in nature and should be reported.

2.351 The committee further notes the assistant minister's advice that the public will be provided with detailed guidelines to help identify discoveries that may require notification, and that these guidelines will be prepared and published following the enactment of the bill, in addition to public information continuing to be provided on the Department of Environment and Energy website.

2.352 As noted above at paragraph 2.328, the bill seeks to apply a regulatory framework not just to individuals and companies who, by virtue of their professional involvement in the area, may be expected to be familiar with legislative requirements governing the protection of underwater cultural heritage, but also to the general public. As such, the committee remains concerned that, even if the department publishes detailed guidelines on this matter, a person who finds an article in Australian waters is unlikely to have sufficient knowledge of the regulatory framework to determine whether or not that article is one of underwater cultural heritage that appears to be of an archaeological character, and to be aware of their obligation to notify the minister within 21 days of finding the article.

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

**2.354 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of making it an offence to fail to notify the minister within 21 days of discovering an article of underwater cultural heritage that appears to be of an archaeological character, in circumstances where the bill provides no guidance as to what constitutes 'archaeological character' and it is not clear how members of the public will be made aware of their reporting obligations.**

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## **Broad delegation of administrative power<sup>180</sup>**

### ***Initial scrutiny – extract***

2.355 Clauses 41 and 42 trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions and offences proposed in the bill. Subclauses 41(4) and 42(3) provide that an authorised person may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be

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180 Clauses 41 and 42. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

2.356 The committee therefore requests the minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.

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

2.357 The assistant minister advised:

Under the monitoring and investigative powers provided for under clauses 41 and 42 of the Bill, authorised persons may be assisted by other persons in exercising powers or performing functions under Parts 2 and 3 of the *Regulatory Powers Act 2014 (Regulatory Powers Act)*. Sections 23 and 53 of the Regulatory Powers Act set out the powers, functions and duties of a person assisting an authorised person.

It may be necessary when undertaking certain monitoring or investigations to have other persons assisting an authorised person or persons, because:

- the other person may possess particular expertise, knowledge or skills which may be required to enable the authorised person to perform their functions or duties under the Bill;
- the assistance of another person is needed to carry out functions and duties, and there may be no other authorised person available to assist;
- the area to be investigated or monitored is large, or things or articles to be moved are heavy or difficult to move safely.

It would not be appropriate to amend the Bill to specify the expertise of persons assisting an authorised officer because of the diverse nature of expertise that may be required. In the context of underwater cultural heritage investigations, persons assisting the authorised person might include those with specific typological knowledge of underwater cultural heritage, or in some actual cases, bomb disposal experts dealing with potentially unexploded ordinance collected by the public etc. As such, it would not be possible to specify expertise or qualifications that would cover every investigative scenario.

While the Committee's point that it is important that authorised persons have appropriate knowledge and expertise is acknowledged, it is considered that there are already adequate safeguards to ensure that persons assisting authorised persons do so in an appropriate manner and that they are appropriately qualified.

Sections 23 and 53 of the Regulatory Powers Act provide for matters in relation to other persons assisting authorised persons, and will apply to the Act by virtue of proposed sections 41 and 42 of the Bill. In particular,

sections 23 and 53 of the Regulatory Powers Act state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable. When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons, it is intended that regard will be had to whether the other person has the expertise appropriate to the function or power being carried out.

Additionally, under sections 23 and 53 of the Regulatory Powers Act, persons assisting an authorised person must do so in accordance with a direction given by the authorised person. Consequently, persons assisting an authorised person to perform monitoring or investigation functions under the Bill will always be subject to the direction and supervision of authorised persons. Authorised persons for must be appointed as inspectors by the Secretary under proposed section 60 of the Bill.

Proposed section 60(3) provides that the Secretary may only appoint a person as an inspector if the Secretary is satisfied that the person has the knowledge or experience necessary to carry out his or her functions under the Bill. This means that inspectors will always have knowledge and experience necessary to provide directions to persons assisting to ensure that persons assisting exercise their powers and perform their duties in an appropriate manner. This will help to ensure that persons assisting correctly follow procedures and handle evidence appropriately.

Additionally, if needed, the Secretary is able to direct inspectors under proposed section 60(3) of the Bill to only avail themselves of the assistance of persons assisting where the inspector is satisfied that the person assisting is appropriately qualified or has the appropriate knowledge or expertise. Were the Secretary to give a direction of this nature in writing, it would be a legislative instrument (section 60(4)).

### **Committee comment**

2.358 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that it may be necessary for authorised persons to be assisted by other persons when undertaking monitoring or investigation activities because particular expertise, knowledge or skills are required, no other authorised person is available, or the area to be monitored or investigated is large, or things or articles to be moved are heavy or difficult to move safely. The committee also notes the assistant minister's advice that it would not be appropriate to specify the expertise required of persons assisting authorised officers as a diverse range of expertise may be required for underwater cultural heritage investigations and it would not be possible to cover every investigative scenario.

2.359 The committee also notes the assistant minister's advice that under sections 23 and 53 of the *Regulatory Powers (Standard Provisions Act) 2014* (Regulatory Powers Act), which state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable, it is intended that regard will be had to whether such other persons have appropriate expertise. The

committee further notes the assistant minister's advice that the secretary may only appoint a person as an inspector if he or she is satisfied the person has the knowledge or experience necessary to carry out his or her functions under the bill, and that persons assisting will be subject to the direction of such inspectors.

2.360 The committee finally notes the assistant minister's advice that the secretary would be able to direct inspectors to only avail themselves of the assistance of persons assisting where the inspector is satisfied they have appropriate expertise, and that the bill specifies such a direction would be a legislative instrument.

2.361 However, the committee notes that, while sections 23 and 53 of the Regulatory Powers Act only allow authorised persons to be assisted where this assistance is necessary and reasonable, these sections do not contain a requirement that any person assisting must possess appropriate expertise.

2.362 In addition, the committee notes that, while the bill does provide the secretary with a general power to direct inspectors in the exercise of their powers,<sup>181</sup> it does not specifically state that the secretary may direct inspectors to only make use of persons assisting who have appropriate expertise. The committee considers that, if it is intended that such a direction will be made under this general power to direct inspectors, it would be more appropriate to include this requirement in the bill itself. The committee emphasises that it does not consider it necessary to set out in the bill specific expertise requirements in relation to each possible investigative scenario; rather it considers that a general requirement that persons assisting have expertise appropriate to the function or power being carried out would be sufficient. Finally, the committee also notes that proposed subsection 60(5) states that such a direction given by the secretary would *not* be a legislative instrument, contrary to the assistant minister's advice.<sup>182</sup>

**2.363 The committee considers that it would be appropriate for the bill to be amended so as to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.**

**2.364 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising investigation and monitoring powers in circumstances where there is no legislative requirement that such persons have expertise appropriate to the function or power being carried out.**

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181 This power is contained in proposed subsection 60(4), rather than 60(3) as was stated in the assistant minister's response.

182 This provision is contained in proposed subsection 60(5), rather than 60(4) as was stated in the assistant minister's response.

## Forfeiture<sup>183</sup>

### *Initial scrutiny – extract*

2.365 Clause 47 provides that if a person is convicted of an offence against the Act or is found to have contravened a civil penalty provision of the Act, a court may order the forfeiture to the Commonwealth of any vessels, equipment or articles used or otherwise involved in the commission of the offence or the contravention of the civil penalty provision. Subclause 47(3) provides that any vessel, equipment or article forfeited may be sold or otherwise dealt with as the minister thinks fit.

2.366 Forfeiture of proceeds and instruments of Commonwealth indictable offences is generally dealt with under the *Proceeds of Crime Act 2002* (POCA). The *Guide to Framing Commonwealth Offences* notes that it may sometimes be necessary to include additional forfeiture provisions in other legislation, but that where these additional provisions are needed, the powers and safeguards in those provisions should be consistent with the POCA, including provisions to safeguard the interests of innocent third parties.<sup>184</sup>

2.367 It does not appear from the face of the bill, or the explanatory material, that clause 47 incorporates any of the safeguards set out in the POCA to safeguard the interests of innocent third parties, or to ensure appropriate judicial oversight of forfeiture orders.

2.368 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why the proposed forfeiture provision does not incorporate safeguards consistent with the *Proceeds of Crime Act 2002* to protect the interests of innocent third parties. The committee's consideration of the appropriateness of a new forfeiture provision is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>185</sup>

### *Assistant Minister's response*

2.369 The assistant minister advised:

Proposed section 47 of the Bill only allows for forfeiture to be determined by the court upon conviction for an offence or proved contravention of a civil penalty. No third party has the ability to possess protected underwater cultural heritage without a permit, which means a person who has purchased underwater cultural heritage with no permit or who

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183 Clause 47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

184 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

185 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

received a false permit cannot be considered an 'innocent' third party under the Bill.

Any application for court ordered forfeiture will focus on the protecting Australia's unique underwater cultural heritage. The Bill safeguards the interests of third parties by allowing a court to determine forfeiture. For this reason no additional public safeguards are considered necessary.

### **Committee comment**

2.370 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that no third party has the ability to possess protected underwater cultural heritage without a permit and that, as a result, a person who has purchased underwater cultural heritage without a permit, or who received a false permit, cannot be considered an innocent third party under the bill. The committee also notes the assistant minister's advice that the bill safeguards the interests of third parties by allowing a court to determine forfeiture and that it is considered that no additional safeguards are necessary.

2.371 The committee emphasises that the proposed forfeiture provision is not restricted to items of protected underwater cultural heritage. Rather the provision allows a court to order the forfeiture of any vessel, equipment or article used or otherwise involved in the commission of an offence, or involved in the contravention of a civil penalty provision. Innocent third parties potentially affected by the forfeiture provision could include the owners of any vessels, equipment or articles that were used or involved in the commission of an offence, or contravention of a civil penalty provision, without their knowledge. The committee therefore considers that the assistant minister's response does not address its original concern that the bill appears to lack appropriate protections in relation to the interests of innocent third parties.

2.372 The committee reiterates that the *Guide to Framing Commonwealth Offences* suggests that, where it is necessary to include forfeiture provisions in legislation, the powers and safeguards in those provisions should be consistent with the *Proceeds of Crime Act 2002* (POCA), including provisions to safeguard the interests of innocent third parties.<sup>186</sup> The *Guide* lists a number of safeguards contained in the POCA that the committee considers may be appropriate to, with appropriate modifications, include in this bill. For example, the POCA provides that:

- a person with an interest in the property should be given written notice of an application to forfeit that property;
- an affected person should be able to appear and give evidence at a hearing to forfeit property;

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186 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

- an innocent party should be able to have their property excluded from a forfeiture order; and
- a person should be able to be compensated for innocently held interest in property that is subsequently forfeited.<sup>187</sup>

**2.373** The committee requests the minister's further detailed advice, with reference to the relevant principles as set out in the *Guide to Framing Commonwealth Offences*,<sup>188</sup> as to why the proposed forfeiture provision does not incorporate safeguards consistent with those contained in the *Proceeds of Crime Act 2002* to protect the interests of innocent third parties, noting that innocent third parties could include owners of any vessels, equipment or articles that were used or involved in the commission of an offence, or contravention of a civil penalty provision, without their knowledge.

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### **Incorporation of external material into the law<sup>189</sup>**

#### ***Initial scrutiny – extract***

2.374 Clause 61 provides that the minister may make the Underwater Cultural Heritage Rules. Subclause 61(4) provides that the rules may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated in a reporting standard and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

2.375 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and

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187 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 46–47.

188 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

189 Clause 61. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

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

2.377 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.<sup>190</sup> This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

2.378 Noting the above comments, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 61(4), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the rules are first made.

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

2.379 The assistant minister advised:

The protection of underwater cultural heritage is a matter of international concern and there may be international guidelines and conventions that will need to be incorporated into the rules in the future. An examples of these guidelines and conventions include the Annex rules to the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage*. For this reason, the Bill must demonstrate contrary intention to section 14(2) of the Legislation Act to provide sufficient flexibility to incorporate external material into the law if necessary.

It is practically necessary to apply incorporated material as in force or existing from time to time. The types of documents that may be incorporated in the rules would be authoritative conventions and international guidelines. Any changes to these documents would need to be incorporated from time to time to ensure regulated persons clearly

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

understand their obligations under the rules. It is intended that any external material incorporated into the rules will be made freely available.

As the rules incorporating external documents will be a disallowable instrument. Additionally, under section 41 of the Legislation Act, a House of the Parliament may, at any time while the rules are subject to disallowance, require any document incorporated by reference in the rules to be made available for inspection by that House. Accordingly, there will be an appropriate level of Parliamentary oversight and scrutiny of any documents incorporated in the rules in future.

### ***Committee comment***

2.380 The committee thanks the assistant minister for this response. The committee notes the minister's advice that it may be necessary to incorporate into the rules international guidelines and conventions—for example, the Annex rules to the UNESCO 2001 *Convention on the Protection of Underwater Cultural Heritage*. The committee also notes the assistant minister's advice that it is necessary to apply this material as in force from time to time as changes to authoritative conventions and international guidelines will need to be incorporated to ensure regulated persons clearly understand their obligations under the rules. Finally, the committee notes the assistant minister's advice that it is intended that any external material incorporated into the rules will be made freely available.

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

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

## Chapter 3

### Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.<sup>1</sup> It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>2</sup>

3.4 The committee draws the following bills to the attention of senators:

- **National Redress Scheme for Institutional Child Sexual Abuse Bill 2018**—Part 6-1, Division 4, section 161; and
- **Space Activities Amendment (Launches and Returns) Bill 2018**—Schedule 1, item 129, subclause 75E(4).

**Senator John Williams**  
**Acting Chair**

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1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

