



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

22 June 2015 (drawing on material in the committee's *Alert Digest No. 6 of 2015* and *Sixth Report of 2015*)

Introduction

This newsletter highlights key aspects of the Senate Scrutiny of Bills Committee's work, with a particular focus on information that may be useful when bills are debated and to raise awareness about scrutiny principles (see Senate Standing Order 24).

For more detail and discussion of these matters and comments on additional bills look to the committee's [Alert Digests](#) and [Reports](#). An index to all committee comments is available [here](#).

Key scrutiny issues

- **Airports Amendment Bill 2015** ([Alert Digest No. 6 of 2015](#))
 - ❖ Delegation of legislative power: Proposed subsection 96B(11) of this bill provides that an airport plan for Sydney West Airport is not a legislative instrument, meaning that disallowance and sunset provisions of the *Legislative Instruments Act 2003* will not apply. The justification for the approach is that the plan is administrative rather than legislative in nature; however, the courts have recognised that it is difficult to draw a line in such cases. The committee seeks advice as whether consideration has been given to providing at least some level of parliamentary scrutiny of the plan (such as a tabling requirement) even if not subject to disallowance.
 - ❖ Merits review: Proposed paragraphs 242(2)(f)–(fb) provide that decisions relating to the Sydney West Airport plan are not reviewable by the AAT as the economic and national significance of the project makes it unsuitable for ordinary merits review, and usual judicial review will be available for relevant ministerial determinations. The committee has noted explanation provided and leaves the matter to the Senate as a whole.
- **Appropriation Bill (No. 1) 2015-2016** ([Alert Digest No. 6 of 2015](#))
 - ❖ Insufficient parliamentary scrutiny of legislative power: Various provisions of this bill seek to appropriate money for the 'ordinary annual services of the government', but include appropriations for items which appear to be new policies or projects not previously authorised by special legislation. This incorrect classification undermines the Senate's right to amend proposed laws appropriating money on all matters not involving the ordinary annual services of the government. The committee reiterates views put previously in relation to this issue and draws the matter to the attention of Senators.
- **Appropriation Bill (No. 4) 2014-2015** ([Sixth Report of 2015](#))
 - ❖ Delegation of legislative power (scrutiny of payments to the States and Territories): The committee thanks the Minister for advice in relation to the nature of determinations made under clause 14 of the bill relating to grants of financial assistance to the States, and is seeking further advice on the issue of parliamentary scrutiny mechanisms relating to such payments.
 - ❖ This issue is also relevant to clause 16 of **Appropriation Bill (No. 2) 2015-2016**, which is still before the Parliament.
- **Australian Small Business and Family Enterprise Ombudsman Bill 2015** ([Alert Digest No. 6 of 2015](#))

- ❖ Merits review: Subclause 92(b) provides that decisions by the Ombudsman that it is not in the public interest to delete information from a report before it is tabled or published may be appealed to the AAT. However, the provisions provide that the decision be comprised of two elements: (i) that the information or recommendation would be ‘likely to adversely affect the interests of any persons’ and (ii) that ‘the Minister reasonably believes that it is in the public interest to delete the information or recommendation’. The committee seeks clarification as to whether both elements of this decision may be appealed to the AAT.
 - ❖ Undue trespass on personal rights and liberties—reversal of onus of proof: The committee seeks the Minister’s advice as to why, in certain circumstances, the bill imposes an evidential burden on a defendant rather than requiring the prosecution to prove every element of an offence
 - ❖ Undue trespass on personal rights and liberties—privacy: Part 5, Division 2 of this bill authorises the use or disclosure of protected information in various circumstances, which is not explained in the explanatory memorandum or statement of compatibility. The committee seeks the Minister’s advice as to the justification for, and interaction between these provisions and the privacy interests of affected persons.
- **Export Charges (Collection) Bill 2015** ([Alert Digest No. 6 of 2015](#))
 - ❖ Delegation of legislative power: Clause 11 allows for late payment fees to be prescribed by the regulations, but does not contain parameters to ensure that the power will be appropriately limited. The committee seeks the Minister’s advice as to whether consideration can be given to this matter.
 - ❖ Merits review: Subclause 12(5) gives the Secretary the power to refuse to give a licence, permission, permit, etc. until an outstanding charge or fee is paid. Such a decision will not be reviewable, however as an explanation is provided and judicial review will be available, the committee leaves the matter to the Senate.
 - ❖ Undue trespass on rights and liberties—protection from civil proceedings: Clause 20 of this bill excludes the usual opportunity for a person to bring a civil action against the Commonwealth or a ‘protected person’ when action was taken in ‘good faith’. The committee is seeking the Minister’s justification for the proposed approach and requesting examples of circumstances in which liability might ordinarily arise but will be excluded by this provision.
 - ❖ These issues are also relevant to the **Imported Food Charges (Collection) Bill 2015**.
 - **Law Enforcement Legislation Amendment (Powers) Bill 2015** ([Sixth Report of 2015](#))
 - ❖ Retrospective Application: The explanatory memorandum to this bill does not address the fairness of proposed amendments that have retrospective application. The Minister provided a detailed response to the committee in relation to this matter. The committee requests that the key information be included in the explanatory memorandum, but leaves the question of whether the retrospective application of these amendments is appropriate to the Senate.
 - **Migration Amendment (Strengthening Biometrics Integrity) Bill 2015** ([Sixth Report of 2015](#))
 - ❖ Insufficient safeguards: A provision in the bill will provide a new power for the Minister or an officer to require that personal identifiers be provided in ‘another way’. The committee has previously expressed reservations about the breadth of this new power and the lack of safeguards and parliamentary oversight. The Minister advised the committee that the current approach is inflexible and that the use of regulations will limit the ability of the department to respond quickly and to effectively utilise new technology. However, the committee noted that speed and flexibility are often cited to the committee as reasons for the use of subordinate legislation and that the use of regulations would appropriately provide for Parliamentary scrutiny. The committee therefore restated that (as a result of the breadth of this power) the authorisation of new methods for the collection of personal identifiers should be established by regulation. The committee draws this view to the attention of the Senators and leaves the matter to the Senate.
 - ❖ Breadth of discretionary power: The committee previously sought advice as to whether the bill could be amended to include a requirement for the department to take reasonable steps to ensure that a

support person be present during the collection of personal identifiers from minors and incapable persons (which the Minister is considering); and to publicly report on the number of instances in which identifiers are obtained without consent or the presence of a support person, and to provide information to the Ombudsman periodically (which the Minister has committed to do). The committee thanks the Minister for these undertakings and is seeking advice as to how, in the absence of a legislative requirement, his department will ensure that the keeping of statistics and reporting occurs.

- **Passports Legislation Amendment (Integrity) Bill 2015** ([Alert Digest No. 6 of 2015](#))

- ❖ Undue trespass on personal rights and liberties—evidential burden of proof: A number of provisions provide that a defendant bears an evidential burden in relation to a defence that they had a reasonable excuse in relation to specified elements of an offence. While reasonable excuse is generally considered too open ended, in light of the information provided in the explanatory memorandum the committee leaves the matter to the Senate for consideration.
- ❖ Merits review: The bill excludes merits review for decisions to issue travel documents for specified law enforcement purposes and to surrender cancelled documents in specified circumstances. The committee leaves the matter to the Senate as the underlying decisions are reviewable.
- ❖ Broad discretionary power/merits review: Proposed subsection 53(4) confers a broad discretionary power on the Minister to refuse any name or signature of a person that the Minister considers to be unacceptable, inappropriate or offensive. The exercise of the power may mean that a person may not use their lawful name for travel. The committee is seeking advice as to whether (1) decisions will be reviewable in the AAT; and (2) consideration has been given to drafting the power so that it is more constrained.

- **Private Health Insurance (Prudential Supervision) Bill 2015** ([Alert Digest No. 6 of 2015](#))

- ❖ Broad discretionary power: Subclause 15(1) includes a broadly framed power for APRA to grant an application to be registered as a private health insurer subject to any terms and conditions APRA deems to be appropriate. The committee seeks the Minister's advice as to whether consideration can be given to including more guidance in the bill about how the power is to be exercised.
- ❖ Undue trespass on personal rights and liberties—reversal of onus of proof: There is no justification in the explanatory memorandum for placing an evidential burden on the defendant in relation to certain defences. The committee is therefore seeking the Minister's advice.
- ❖ Delegation of legislative power—Incorporation of instruments from time to time: A prudential standard may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. The committee is seeking advice as to whether the incorporated material will be readily and freely available to the public and whether the legislation can include a requirement for the standards to be published and updated on APRA's website.
- ❖ Delegation of administrative power: The necessity and appropriateness of the delegation of significant monitoring and investigation powers to 'an APRA staff member' is not explored in detail in the explanatory memorandum. The committee is therefore seeking the Minister's advice.
- ❖ Undue trespass on personal rights and liberties—privilege against self-incrimination: While, as a matter of general principle, the committee remains concerned about the abrogation of the privilege against self-incrimination, in light of the explanation provided, in this instance the committee leaves the matter to the Senate as a whole.

- **Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015** ([Sixth Report of 2015](#))

- ❖ Trespass on personal rights and liberties—strict liability and reversal of onus: The committee thanks the Minister for providing a detailed response in relation to an offence that arises where a person breaches notification requirements that apply to a compensation recipient who proposes to leave Australia. The committee requests that the key information be included in the explanatory

memorandum, and reiterates the importance of ensuring that persons are aware of notification requirements when failure to comply may result in the person committing a strict liability offence.

- **Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015** ([Alert Digest No. 6 of 2015](#))
 - ❖ Delegation of legislative power: Proposed subsection 19DA(5) empowers the Secretary to prescribe, by legislative instrument, circumstances for determining whether a person is experiencing a personal financial crisis and for waiving the ordinary waiting period. The use of a legislative instrument is said to allow the Secretary to consider unforeseeable or extreme circumstances where it would be appropriate for a person to have immediate access to income support. While the committee remains concerned about the delegation of legislative power in such circumstances as a matter of general principle, in light of the explanation provided the committee leaves the matter to the Senate and draws the matter to the attention of the Regulations and Ordinances Committee for information.
- **Tribunals Amalgamation Bill 2014** ([Alert Digest No. 6 of 2015](#))
 - ❖ Amendments to the bill: In its Third Report of 2015 the committee expressed concern that the rights of appellants may be diminished by a proposal to allow the determination of second reviews of social services matters to be conducted on the papers without the consent of the parties. The committee noted that a government amendment to the bill passed by the Senate addressed the committee's concerns. The committee also expressed concern about proposed changes to provisions for termination of members of the AAT. The committee notes that an opposition amendment to the bill passed by the Senate addressed these concerns.

Other bills for which advice is being sought from the Minister or proposer ([Alert Digest No. 6 of 2015](#))

The Senate Scrutiny of Bills Committee is also seeking advice from the relevant Minister or proposer in relation to provisions of other bills (responses will be considered and tabled in the committee's future *Reports*), including:

- **Customs Amendment (Australian Trusted Trader Programme) Bill 2015;**
- **Iron Ore Supply and Demand (Commission of Inquiry) Bill 2015;**
- **Marriage Amendment (Marriage Equality) Bill 2015;** and
- **Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015.**

This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley and Deputy Chair: Senator John Williams).

For any comments or questions, please contact:

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