The Senate

Standing Committee for the Scrutiny of Bills

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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.

Aboriginal Land Rights (Northern Territory) Amendment Bill 2017

Purpose	This bill seeks to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* to: • add areas subject to traditional land claims in the Kakadu region in the Northern Territory so that Kakadu Land can be granted as Aboriginal land; • provide for leaseback of the Kakadu Land to the Director of National Parks; and • add areas in the town of Urapunga that are subject to the Township of Urapunga Indigenous Land Use Agreement so that the Urapunga Land can be granted as Aboriginal land
Portfolio	Indigenous Affairs
Introduced	Senate on 6 December 2017

The committee has no comment on this bill.

Australian Capital Territory (Planning and Land Management) Amendment Bill 2017

Purpose	This bill seeks to amend the *Australian Capital Territory (Planning and Land Management) Act 1988* in relation to the governance of the National Capital Authority
Portfolio	Local Government and Territories
Introduced	Senate on 6 December 2017

The committee has no comment on this bill.

Broadcasting Legislation Amendment (Digital Radio) Bill 2017

Purpose	This bill seeks to amend the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* (Radiocommunications Act) to: • remove the requirement that the Australian Communications and Media Authority (ACMA) give written notice of its intention to declare a digital radio start-up day; • remove specific requirements in the Radiocommunications Act that ACMA consult before preparing or varying a digital radio channel plan; • amend timeframes associated with the formation of eligible joint venture companies and clarify the invitation and acceptance process for the formation of such companies; • amend timeframes associated with the formation of digital community radio broadcasting representative companies and clarify the invitation and acceptance process for the formation of such companies; • amend timeframes associated with issuing a foundation digital radio multiplex transmitter (DRMT) licence in accordance with a price-based allocation system; • amend timeframes associated with DRMT licensees giving the Australian Competition and Consumer Commission access undertakings; and • clarify how excess multiplex capacity on foundation DRMT licences is determined
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Consultation prior to making delegated legislation[1]

1.2 Schedule 1, item 4 of the bill seeks to repeal subsections 44A(5) and (7) of the *Radiocommunications Act 1992* (Radiocommunications Act). Repealing those provisions would remove the requirement for the Australian Communications and Media Authority (ACMA) to, before preparing or varying a digital radio channel plan, publish a draft of the plan or variation on ACMA's website, invite members of the

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

public to make submissions for a period of at least 30 days, and consider any submissions received from members of the public within that period. In explaining the repeal of those provisions, the explanatory memorandum states:

> As digital radio channel plans and variations to digital radio channel plans are legislative instruments (subsections 44A(1) and (6)), the general consultation requirements for legislative instruments in Chapter 3 of the Legislation Act also apply…
>
> Those general requirements are sufficient to ensure that the ACMA undertakes appropriate, and reasonably practicable, consultation when preparing or varying digital radio channel plans. Therefore, it is proposed to remove the separate, but duplicate, requirement in subsections 44A(5) and (7) of the Radcomms Act.[2]

1.3 However, the committee notes that section 17 of the *Legislation Act 2003* (Legislation Act) does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker be satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule-maker does not think that consultation is appropriate, there is no requirement that consultation be undertaken.

1.4 Further, although the explanatory memorandum states that the consultation requirements in subsection 44(5) and (7) of the Radiocommunications Act duplicate those in the Legislation Act, it is not apparent to the committee that the consultation requirements are equivalent. The Radiocommunications Act currently imposes specific, mandatory consultation requirements on ACMA, which provide for at least 30 days for members of the public to make submissions on a draft plan or variation and for those submissions to be considered. By contrast, the Legislation Act 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.[3]

1.5 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) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity.

1.6 The committee requests the minister's detailed justification for removing the current, specific requirements for consultation by ACMA prior to the preparation or variation of a digital radio channel plan by legislative instrument.

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2 Explanatory memorandum, p. 9.

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

Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017

Purpose	This bill seeks to amend the *Broadcasting Services Act 1992* to: • establish a Register of Foreign Ownership of Media Assets; and • introduce a new 'local content' criterion in relation to applications and renewals of community radio broadcasting licences The bill also seeks to make a minor amendment to the *Australian Communications and Media Authority Act 2005*
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Broad delegation of administrative powers[4]

1.7 Section 50 of the *Australian Communications and Media Authority Act 2005* (ACMA Act) provides that the Australian Communications and Media Authority (ACMA) may delegate any or all of its functions and powers to a Division of ACMA.[5] Section 52 of the ACMA Act provides, subject to section 53, that a Division within ACMA may delegate all or any of the functions and powers delegated to it to a member of the Division, an associate member, an ACMA staff member, or a person whose services are made available to the ACMA under subsection 55(1). Section 53 places limits on the powers that are delegable to persons other than Divisions.

1.8 Proposed paragraph 53(2)(k) seeks to amend section 53 to provide an exception to the limit on the powers that may be delegable, in effect providing that ACMA can delegate to a broad range of persons, including any ACMA staff member (who may be of any APS level), the power to issue notices under new Division 10A of the *Broadcasting Services Act 1992* (Broadcasting Act) (which would require certain foreign stakeholders in Australian media companies to notify ACMA of certain matters).

1.9 The explanatory memorandum explains that the effect of this amendment is that 'ACMA is able to delegate directly to any ACMA staff member the power to issue

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

5 Section 46 of the *Australian Communications and Media Authority Act 2005* establishes how ACMA may establish a Division, which must consist of at least three members chosen by ACMA.

notices under new Division 10A [of the Broadcasting Act]'.[6] However, it provides no information about why the power to issue notices under new Division 10A is proposed to be delegated to a broad range of persons, including any ACMA staff member.

1.10 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.

1.11 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.

1.12 The committee requests the minister's advice as to why it is considered necessary for ACMA to have a broad power to delegate the power to issue notices under new Division 10A of the *Broadcasting Services Act 1992*, and seeks the minister's advice as to the appropriateness of amending the bill to confine delegates to the holders of nominated offices or members of the Senior Executive Service.

Immunity from civil liability[7]

1.13 Proposed section 74T seeks to provide broad immunity to the Commonwealth, to the ACMA and to ACMA officials from liability for acts of omissions done in good faith in the performance or purported performance or exercise of functions or powers in administering the new Register of Foreign Owners of Media Assets. This therefore removes 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.

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6 Explanatory memorandum p. 26.

7 Schedule 1, item 5, proposed section 74T. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.14 The committee expects that if a bill seeks to provide civil immunity, particularly where such immunity could affect individual rights, this should be soundly justified. It is not clear, in particular, why it is necessary to grant immunity to the Commonwealth as an entity. In this instance, the explanatory memorandum provides little explanation for this provision, merely stating that this 'guard[s] against the risk of the ACMA (or its officers) and the Commonwealth being sued' and that it is expected that the ACMA will undertake all reasonable efforts to ensure the accuracy of the information on the Register.[8]

1.15 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth, the ACMA and ACMA officials with civil immunity 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.

8 Explanatory memorandum p. 42.

Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to communications to: • create a regulatory framework (online content service provider rules) which can be used by the Australian Communications and Media Authority (ACMA) to impose gambling promotions restrictions on online content service providers; and • provide for ACMA to (if directed by the minister) determine program standards about gambling promotional content which apply to certain broadcasters and subscription providers
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Broad delegation of administrative powers[9]

1.16 Section 51 of the *Australian Communications and Media Authority Act 2005* (ACMA Act) permits the Australian Communications and Media Authority (ACMA) to delegate any or all of its functions and powers to a member or associate member of the ACMA, a member of the ACMA's staff, or a person whose services are made available to the ACMA under subsection 55(1) of the ACMA Act. Section 52 of the ACMA Act permits a Division[10] to sub-delegate any or all of the functions and powers delegated to it by the ACMA to the same persons to whom delegation is permitted under section 51.

1.17 Section 53 of the ACMA Act provides for limits on the powers that may be delegated or sub-delegated under sections 51 and 52. Relevantly, paragraph 53(2)(k) of the ACMA Act provides that sections 51 and 52 do not apply to issuing, or extending the time for compliance with, a notice under the *Broadcasting Services Act 1992* (Broadcasting Act), other than a notice under Part 9C of that Act.

9 Schedule 1, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

10 Divisions of the ACMA are established under section 46 of the ACMA Act to deal with particular matters. Current ACMA Divisions include Communications Infrastructure, Corporate and Research, and Legal Services. Under section 50 of the ACMA Act, the ACMA may delegate any or all of its functions and powers to a Division so far as they relate to the kinds of matters the Division can deal with.

1.18 Item 23 of the bill proposes to amend paragraph 53(2)(k) to exempt notices under proposed Schedule 8 to the Broadcasting Act[11], and notices under any other provision of the Broadcasting Act so far as the provision relates to that Schedule, from the operation of paragraph 53(2)(k). The effect of the amendment made by item 23 would be to allow the ACMA to delegate, or a Division of the ACMA to sub-delegate, the power to issue notices under proposed Schedule 8 to the Broadcasting Act and related provisions to a broad range of persons, including any member of staff of the ACMA – which can be any APS level employee.[12]

1.19 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's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom those powers might be delegated. The committee's prefers that delegates be confined to the holders of nominated officers 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.

1.20 In this instance, the explanatory memorandum states that the intent of the amendment 'is to allow for greater administrative convenience for the ACMA in relation to service of notices in relation to new Schedule 8 [of the Broadcasting Act].'[13] The committee notes that it has generally not accepted a desire for administrative convenience as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level. The committee also notes that there is nothing in the bill or in either the ACMA Act or the Broadcasting Act that would limit the delegation of power to issue, or extend the time for compliance with, a notice under proposed Schedule 8 to the Broadcasting Act and related provisions, to persons with appropriate expertise, qualifications or attributes.

1.21 The committee requests the minister's more detailed justification for amending paragraph 53(2)(k) of the ACMA Act to permit the delegation to a broad class of persons of the power to issue and extend the time for compliance with notices under proposed Schedule 8 to the *Broadcasting Services Act 1992* and related provisions.

1.22 The committee considers it may be appropriate to amend the bill to require that persons authorised to issue notices under proposed Schedule 8 to the

11 Schedule 8 to the Broadcasting Act is a new Schedule, proposed to be inserted by item 22 of the bill.

12 See section 54 of the ACMA Act.

13 Explanatory memorandum, p. 25.

Broadcasting Services Act 1992 **and related provisions hold special attributes, qualifications or qualities, and seeks the minister's advice in relation to this matter.**

Limitation on merits review[14]

1.23 The bill seeks to empower the ACMA to determine gambling promotion program standards and to make online content provider rules,[15] and provides that gambling promotion program standards and online content provider rules (respectively) may make provision in relation to matter by empowering the ACMA to make decisions of an administrative character.[16]

1.24 Current section 204 of the Broadcasting Act prescribes decisions in relation to which an application for merits review may be made to the Administrative Appeals Tribunal (AAT), as well as specifying the provision under which the relevant decision is made and the person who may make the application. Item 15 of the bill proposes to amend section 204 to insert new subsections 204(3) and (4). These new provisions would provide that an application may be made to the AAT for review of a decision made by the ACMA under:

- a gambling promotion program standard, so long as the standard provides that the decision is a reviewable decision for the purposes of section 204; and
- the online content provider rules, so long as those rules provide that the decision is a reviewable decision for the purposes of section 204.

1.25 In effect, the new provisions would empower the ACMA, in determining gambling promotion program standards and making online content provider rules, to determine which of its decisions under those instruments are subject to merits review. In this regard, the explanatory memorandum states:

> As some, but not all, decisions the ACMA may empower itself to make …may be appropriate for merits review, new subsections 204(3) and (4) would enable the ACMA, in developing any standard or rules, to provide for merits review where it is appropriate. For example, it is likely that the ACMA would provide for merits review where its decision would affect the interests of a person, but that it may not be necessary to do so where decisions would be of a procedural or preliminary nature, would have no

14 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

15 Schedule 1, item 13, proposed section 125A and Schedule 1, item 22, clause 11 of proposed Schedule 8.

16 Schedule 1, item 13, proposed section 125A(15) and Schedule 1, item 22, clause 12 of proposed Schedule 8.

appropriate remedy or would have such limited impact that the costs of review cannot be justified.[17]

1.26 The committee appreciates that certain decisions may be unsuitable for merits review – including decisions that are preliminary or procedural in nature, decisions where there is no appropriate remedy, and decisions which have such limited impact that the costs of review cannot be justified.[18] However, the committee is concerned that the bill confers on the ACMA significant discretion to determine which of its decisions will or will not be reviewable.

1.27 The committee notes that the bill does not set any limits on the ACMA's power to determine which of its decisions will be subject to merits review, nor does it set out any matters that the ACMA must consider before making such a determination. The committee also notes that while the explanatory memorandum sets out broad categories of decisions that may or may not be suitable for merits review, it does not provide examples of specific decisions that would be reviewable.

1.28 **The committee seeks the minister's more detailed justification for why it is considered necessary and appropriate to permit the ACMA to determine, by delegated legislation, which decisions under gambling promotion program standards and online content provider rules will be subject to merits review, including examples of decisions that would or would not be reviewable.**

1.29 **The committee also seeks the minister's advice as to the appropriateness of amending the bill to prescribe classes of decision that must be subject to review, or to prescribe matters that the ACMA must take into account before determining whether a particular decision will be reviewable.**

Broad delegation of legislative power[19]

1.30 Clause 11 of proposed Schedule 8 seeks to empower the ACMA to make rules (online content service provider rules) prescribing matters required or permitted by the Broadcasting Act to be prescribed. Subclauses 13(1) and (2) of proposed Schedule 8 provide that the online content service provider rules may make provision for or in relation to:

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17 Explanatory memorandum, p. 35.

18 In this regard, see Administrative Review Council, *What Decisions Should be Subject to Merits Review* (1999) available online at http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview.aspx.

19 Schedule 1, item 22, clauses 15 and 16 of proposed Schedule 8 to the *Broadcasting Services Act 1992*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- prohibiting or regulating gambling promotional content provided on online content services in conjunction with live coverage of a sporting event; and
- requiring online content service providers to ensure that explanatory content relating to the application of the online content provider rules is made available in certain circumstances.

1.31 Clause 15 of proposed Schedule 8 seeks to empower the ACMA to determine that individual online content services and service providers are exempt from all or specified provisions of online content service provider rules made for the purposes of subclauses 13(1) or (2). Subclauses 15(5) and (6) also set out a number of matters to which the ACMA must have regard before making such a determination, including the likely impacts of a failure to make a determination on the financial circumstances of the relevant content service provider and on the quality of the content on the relevant service.

1.32 Clause 16 of proposed Schedule 8 similarly seeks to empower the ACMA to determine that specified classes of online content services and service providers are exempt from all or specified provisions of online content service provider rules made for the purposes of subclause 13(1) or (2). The clause does not set out any matters to which the ACMA must have regard before making such a determination.

1.33 In the view of the committee, clauses 15 and 16 of proposed Schedule 8 appear to confer a broad administrative power on the ACMA to exempt online content services and service providers from the application of the law. They are therefore akin to Henry VIII clauses, which enable delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

1.34 In this instance, the committee acknowledges that clauses 15 and 16 of proposed Schedule 8 do not enable delegated legislation to alter the operation of primary legislation, but rather enable the ACMA to override the operation of all or specified provisions of certain legislative instruments. However, the committee remains concerned about the breadth of the proposed power in those clauses, and its potential impact on parliamentary scrutiny.

1.35 In this regard, the committee notes that clause 15 would empower the ACMA to override the operation of a legislative instrument by a written determination**.** This written determination would not be a legislative instrument and, unlike a legislative instrument, would not be subject to parliamentary scrutiny. Additionally, the committee notes that, while a determination made under clause 16 of proposed Schedule 8 would be a legislative instrument (and would be subject to parliamentary scrutiny), the bill does not set out any matters to which the ACMA must have regard prior to making such a determination.

1.36 In light of these matters, the committee would expect a sound justification for the powers conferred on the ACMA under clauses 15 and 16 of proposed Schedule 8 to be provided in the explanatory memorandum. The committee notes that the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

1.37 The committee seeks the minister's detailed justification as to why it is proposed to confer on the ACMA broad powers to exempt online content services and service providers from online content service provider rules made for the purposes of subclauses 13(1) and (2) of proposed Schedule 8, including examples of when it is envisaged that such powers would be exercised.

1.38 Noting that clause 15 of proposed Schedule 8 specifies matters to which the ACMA must have regard before making a determination, the committee also seeks the minister's advice as to whether it would be appropriate to amend the bill to insert similar guidance concerning the exercise of the ACMA's powers under clause 16 of that Schedule.

Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017

Purpose	This bill seeks to amend the *Broadcasting Services Act 1992* to: • provide that the Australian Communications and Media Authority (ACMA) may make a grant of financial assistance to a publisher of a newspaper, magazine or other periodical, or a content service provider; • provide that ACMA can only make a grant of financial assistance in the financial year commencing 1 July 2018, and in the following two financial years; • require ACMA to enter into an agreement with the recipient setting out the terms and conditions of the grant; • provide authority for the Minister to constitute a committee to advise ACMA in relation to the exercise of ACMA's powers to make grants of financial assistance; and • require ACMA to include particular information in its annual report relating to the making of grants
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Significant matters in non-statutory guidelines[20]

1.39 The purpose of the bill is to establish a Regional and Small Publishers Innovation Fund, which sets up a one-off arrangement to finance grants of up to $50.1 million over three years. The bill provides that the Australian Communications and Media Authority (ACMA) may make a grant of financial assistance to a constitutional corporation that publishes a newspaper, magazine or other periodical or to a content service provider. Proposed subsection 205ZJ(2) provides that the terms and conditions on which the grant of financial assistance are to be made are to be set out in a written agreement between the Commonwealth and the recipient. As such, none of the substantive requirements and criteria for eligibility are set out in statute. Instead, the explanatory memorandum provides that it is expected that the eligibility criteria will be reflected in non-statutory Grant Guidelines to be issued by ACMA and applied by ACMA in assessing grant applications.[21] The explanatory

20 Item 1, proposed section 205ZJ. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

21 Explanatory memorandum, p. 7.

memorandum also states that it is intended that grants will be capped at a maximum of $1 million per year for any media group.[22]

1.40 It therefore appears that neither the criteria for the award of a grant nor the purposes or conditions for which grants may be awarded are included in the bill. Instead, these matters are to be determined by non-statutory policy or included in individual agreements. The practical effect of this approach is to delegate general criteria and conditions for the award of a grant to ACMA. It is also noted that if general non-statutory rules are not developed, then the legislation confers on ACMA an extremely broad discretionary power to allocate a substantial sum of money.

1.41 The committee seeks the minister's advice as to why the criteria for the award of the grants and the standard terms and conditions to be imposed are not included in the bill or subject to any other appropriate level of parliamentary scrutiny.

22 Explanatory memorandum, p. 7.

Copyright Amendment (Service Providers) Bill 2017

Purpose	This bill seeks to amend the *Copyright Act 1968* to extend the safe harbour scheme to cover a broader range of service providers, including educational institutions, libraries, archives, key cultural institutions and organisations assisting persons with a disability
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

The committee has no comment on this bill.

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to criminal law and law enforcement to: • amend the offence of bribery of a foreign public official; • introduce a new offence of failure of a body corporate to prevent foreign bribery by association; • make consequential amendments ensuring the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to foreign public official; and • implement a Commonwealth Deferred Prosecution Agreement scheme
Portfolio	Justice
Introduced	Senate on 6 December 2017

Reversal of evidential burden of proof[23]

1.42 Item 7 of the bill seeks to insert a new subsection 70.3(2A) into the *Criminal Code Act 1995* (Criminal Code). That new subsection would provide an additional offence-specific defence to the existing foreign bribery offence in section 70.2 of the Criminal Code (an offence which the bill also seeks to amend). In this regard, proposed subsection 70.3(2A) provides that a person does not commit an offence against section 70.2 if:

- the person's conduct occurred in relation to a foreign public official;
- the foreign public official is a candidate to be a *particular* foreign public official (the 'substantive foreign public official'); and
- had the conduct had occurred in relation to the substantive foreign public official, a written law in force in the jurisdiction of the substantive foreign public official (established by reference to the table in subsection 70.3(1)) would permit the provision of the relevant benefit to the foreign public official.

23 Item 7. The committee draws senators' attention to this provision pursuant to principle Senate Standing Order 24(1)(a)(i).

1.43 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.

1.44 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.

1.45 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.

1.46 The committee also notes that the *Guide to Framing Commonwealth Offences* 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.[24]

1.47 In this case, it is not apparent that the matters in proposed subsection 70.3(2) are peculiarly within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish this matter. Further, although the explanatory memorandum addresses the effect of reversing the evidential burden of proof in this case, it does not address the question of why it is appropriate to frame the matter as an offence-specific defence rather than as an element of the offence.

1.48 As the explanatory materials do not address this issue, the committee requests the Attorney General'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*.[25]

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

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

Significant matters in non-statutory guidelines[26]

1.49 Proposed section 70.5B seeks to require the minister to publish guidance on the steps that a body corporate can take to prevent an associate from bribing a foreign public official. Proposed subsection 70.5B(2) provides that such guidance will not be a legislative instrument. The explanatory memorandum states that '[the publication of guidance] is intended to assist companies in implementing appropriate measures to prevent bribery from occurring within their organisations' but that such guidance 'would not be legislative in character'.[27]

1.50 Proposed section 70.5B follows immediately on from proposed section 70.5A, which provides that a body corporate would commit an offence if an associate[28] of that body corporate commits the offence of bribing a foreign public official,[29] and the associate does so for the profit or gain of the body corporate.

1.51 Proposed subsection 70.5A(5) states that the offence in proposed section 70.5A would not apply if the body corporate had in place adequate procedures designed to prevent the commission of the offence of bribing a foreign public official by any associate, and to prevent any associate engaging in conduct outside Australia that would constitute the same offence if engaged in in Australia. The bill proposes to place a legal burden of proof on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, that it had in place adequate procedures to prevent an associate from bribing a foreign public official.

1.52 The explanatory memorandum states that what constitutes 'adequate procedures' would be determined by the courts on a case by case basis and that the concept would be 'scalable, depending on the relevant circumstances including the size and nature of the body corporate.'[30] The explanatory memorandum also states, in the context of explaining what constitutes 'adequate procedures', that proposed section 70.5B provides that the minister must publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.

1.53 It is not clear to the committee what role the guidance the minister must publish under proposed section 70.5B would have in relation to establishing the defence in proposed subsection 70.5A(5). The defence in that proposed subsection

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26 Item 8, proposed subsections 70.5A(5) and 70.5B. The committee draws senators' attention to these provisions pursuant to principle Senate Standing Order 24(1)(a)(iv).

27 Explanatory memorandum, p. 19.

28 This is defined in item 2 of the bill to mean an officer, employee, agent or contractor of the other person, a subsidiary of the other person; controlled by the other person; or otherwise performs services for or on behalf of the other person.

29 Or engages in conduct outside Australia that, if engaged in in Australia, would constitute the same offence.

30 Explanatory memorandum, p. 18.

requires the courts to consider whether the body corporate had adequate procedures in place to prevent associates from bribing a public official. The guidance relates to steps that the body corporate can take to prevent an associate from bribing public officials. It is not clear whether a body corporate that complies with guidance published by the minister would be determined to have 'adequate procedures' in place and therefore able to establish the defence in subsection 70.5A(5), or if a body corporate could comply with such guidelines but still be found by the courts to not have had adequate procedures in place.

1.54 The committee is concerned that, because the exception to the offence does not clearly articulate what would constitute 'adequate procedures', it has been left to ministerial guidance to clarify the limits of criminal liability with respect to the offence. This concern is compounded by the fact that the guidance will not be a legislative instrument.

1.55 The committee requests the Attorney-General's advice as to:

- **whether it is possible that a body corporate that complies with ministerial guidance published pursuant to proposed section 70.5B might nevertheless be convicted of an offence of failing to prevent the bribery of a foreign public official; and**
- **why the guidance published pursuant to proposed section 70.5B is not considered to be legislative in character and therefore not classified as a legislative instrument and subject to the usual disallowance process.**

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* (the Act) to: • establish public registers for key non-party political actors; • amend the current financial disclosure scheme in the Act by requiring non-financial particulars, such as senior staff and discretionary government benefits, to be reported; • prohibit donations from foreign governments and state-owned enterprises being used to finance public debate; • require wholly political actors to verify that donations over $250 come from: - an organisation incorporated in Australia, or with its head office or principal place of activity in Australia; or - an Australian citizen or Commonwealth elector or Australian permanent resident; • prohibit other regulated political actors from using donations from foreign sources to fund reportable political expenditure; • limit public election funding to demonstrated electoral spending; • amend the enforcement and compliance regime for political finance regulation; and • enable the Electoral Commissioner to prescribe certain matters by legislative instrument
Portfolio	Finance
Introduced	Senate on 7 December 2017

Significant matters in delegated legislation[31]

1.56 The bill provides that gifts of over $250 to political entities and most political campaigners must be made by 'allowable donors.' The bill also provides that, where a gift is made to a third party campaigner, or a political campaigner that is a registered charity or a registered organisation, from non-allowable donors, the gift must not be made or used for political purposes. Proposed section 287AA of the bill defines 'allowable donor' in relation to individuals and corporate entities. Proposed

31 Schedule 1, item 9, proposed section 287AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

paragraph 287AA(1)(a) provides that an individual is an allowable donor if the individual is an elector,[32] an Australian citizen, or an Australian resident – unless a determination is in force under proposed subsection 287AA(2) determining that Australian residents are not allowable donors. Proposed subsection 287AA(2) empowers the minister to, by legislative instrument, determine that Australian residents (who are not Australian citizens) are not allowable donors. This gives the minister a power to change the definition of an allowable donor by delegated legislation.

1.57 Noting that a primary objective of the bill is 'to ensure that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations',[33] the committee considers that the question of whether Australian residents who are not also citizens are, or are not, allowable donors, is a significant policy matter that is central to electoral funding reforms proposed by the bill.

1.58 In this regard, the committee notes that the question of whether a person who makes a donation is an 'allowable donor' is a core element of a number of proposed offences and civil penalty provisions in the bill. For example, proposed section 302D seeks to make it unlawful for a person, who is an agent of a political entity, or a financial controller of a political campaigner, to receive a donation from a non-allowable donor in prescribed circumstances. Contraventions of that section are punishable by 10 years imprisonment, 600 penalty units, or both, and may also attract a civil penalty of 1000 penalty units. Proposed sections 302E to 302L seek to create similar offences and civil penalty provisions for receiving or otherwise dealing with gifts from non-allowable donors.

1.59 The committee's view is that significant matters, such as key policy aspects of an electoral reform framework, and core elements of offences and significant civil penalty provisions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification for empowering the minister to change the definition of an allowable donor by delegated legislation, merely restating the operation of the relevant provisions.[34]

1.60 Additionally, where Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation obligations (beyond those in the *Legislation Act 2003*) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument. Therefore, in relation to a determination that

32 'Elector' is defined in section 4 of the *Commonwealth Electoral Act 1918* as 'any person who appears on the Roll as an elector'.

33 Second reading speech, p. 1; see also statement of compatibility, p. 7.

34 Explanatory statement, p. 12.

Australian residents are not allowable donors, if this provision remains in the bill the committee considers that it would be appropriate for consideration to be given to including specific consultation requirements on the face of the bill.

1.61 The committee's view is that significant matters, including key policy aspects of the electoral reform framework and core elements of offences, 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 empower the minister to determine, by delegated legislation, that Australian residents are not 'allowable donors';**
- **the type of consultation that it is envisaged will be undertaken prior to making such a determination; and**
- **whether specific consultation obligations (beyond those in the *Legislation Act 2003*) could be included in the bill (with compliance with such obligations a condition of the validity of a determination made under proposed subsection 287AA(2)).**

Presumption of innocence: entry in Register constitutes prima facie evidence[35]

1.62 Proposed Division 1A seeks to establish a framework for the registration of key participants in electoral campaigns. Under this framework, persons who satisfy prescribed conditions would be required to register with the Electoral Commissioner (Commissioner) as a political campaigner, third party campaigner or associated entity.[36] The Commissioner would also be required to establish and maintain a Register of Political Campaigners, a Register of Third Party Campaigners, and a Register of Associated Entities, each of which would be made publicly available.[37]

1.63 Proposed section 287R provides that an entry in any of the registers is prima facie evidence of the information contained in the entry. This means that, where an entry is recorded in one of the registers, it would be assumed that there is sufficient evidence to establish particular facts (such as whether a person is a political campaigner or third party campaigner). While a person may attempt to rebut or

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35 Schedule 1, item 11, proposed section 287R. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

36 See Schedule 1, item 11, proposed section 287F; Schedule 1, item 11, proposed section 287G; Schedule 1, item 11, proposed section 287H.

37 See Schedule 1, item 11, proposed section 287N; See Schedule 1, item 11, proposed section 287Q

dispute those facts, that person assumes the burden of adducing evidence to do so. The explanatory memorandum states that proposed section 287R is 'similar to other provisions in the Electoral Act, such as current subsection 391(2)'.[38] The committee notes that subsection 391(2) of the *Commonwealth Electoral Act 1918* (Electoral Act) provides that a record of particulars contained in a claim for enrolment or transfer of enrolment is admissible in evidence in any proceeding and is prima facie evidence of the matters it contains.

1.64 The committee is concerned that proposed section 287R would allow, in effect, a reversal of the burden of proof with respect to matters that may be central to a person's culpability under a number of proposed offences in the bill. For example, the committee notes that the majority of the offences and civil penalty provisions in proposed Division 3A (detailed further below) apply to persons who receive or otherwise deal with gifts from non-allowable donors on behalf of political campaigners and third-party campaigners. An entry in the register would purport to establish, prima facie, that a gift recipient is a political campaigner, third party campaigner or associated entity, with the defendant required to adduce evidence on the balance of probabilities to disprove that matter.

1.65 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 requiring a defendant to raise evidence to disprove one or more elements of an offence interfere with this common law right.

1.66 In this instance, the explanatory memorandum provides no explanation for the effective reversal of the burden of proof brought about by proposed section 287R, beyond noting that the proposed subsection is similar to other provisions in the Electoral Act and 'assists with efficient administration'.[39] The committee does not consider that administrative efficiency, or consistency with existing provisions, alone justifies making entry in the register prima facie evidence of the matters contained within it.

1.67 The committee also notes that proposed section 287R is akin to provisions that enable the issue of certificates (evidentiary certificates) that are admissible in court as prima facie evidence of the information they contain. In this regard, the committee draws attention to the *Guide to Framing Commonwealth Offences*, which emphasises that limits should be placed on the use of evidentiary certificates. The Guide states:

38 Explanatory memorandum, p. 25.

39 Explanatory memorandum, p. 25.

> Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[40]

1.68 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[41]

1.69 A key piece of information recorded in the registers is likely to be whether a person is a political campaigner, third party campaigner or associated entity. Given that this information is central to a number of proposed offences in the bill, the committee considers it unlikely that information in the registers would be sufficiently removed from the facts at issue in a proceeding related to one of these offences. Further, it is not apparent to the committee that the matters to which the information in the registers relates would be difficult to prove under the normal evidentiary rules. For example, it appears to the committee that whether a person or entity is a political campaigner, third party campaigner or associated entity could be established by the prosecution through reasonable enquiries, without relying on a provision that makes entries in the registers prima facie evidence of the information they contain.

1.70 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to effectively reverse the evidential burden of proof by providing that an entry in one of the Registers is prima facie evidence of the information contained in the entry.

Significant penalties[42]

1.71 Subdivisions B and C of proposed Division 3A (proposed sections 302D to 302L) seek to create a series of offences and civil penalty provisions relating to receiving and otherwise dealing with donations from non-allowable donors. The bill proposes that the following forms of conduct would be punishable by 10 years' imprisonment, 600 penalty units, or both, or would attract a civil penalty of 1000 penalty units ($210,000):

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40 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 54.

41 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

42 Schedule 1, item 33, proposed sections 302D, 302E 302F, 302G, 302H, 302J, 302K and 320L. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 23(1)(a)(i).

- receiving a gift of over $250 from a non-allowable donor on behalf of a political entity or a political campaigner (unless the recipient is a registered charity or organisation).[43]
- receiving a gift of over $250 from a non-allowable donor on behalf of a third-party campaigner, or on behalf of a political campaigner which is a registered charity or organisation, in specified circumstances.[44]
- where the recipient is a registered charity or organisation, allowing a gift from a non-allowable donor to be used for domestic political purposes.[45]
- receiving a gift on behalf of a political entity or political campaigner from a foreign bank account, or by transfer from a person in a foreign country (unless the recipient is a registered charity or organisation).[46]
- receiving a gift of over $250 on behalf of a political entity or political campaigner without verifying, before the end of six weeks after the gift is made, that the donor is an allowable donor (unless the recipient is a registered charity or organisation).[47]

1.72 Additionally, the bill proposes that the following forms of conduct would be punishable by 5 years' imprisonment, 300 penalty units, or both, or would attract a civil penalty of 500 penalty units ($105,000):

- soliciting or receiving a gift from a non-allowable donor, intending that all or part of the gift will be transferred to a political entity, political campaigner, or to another person for one or more political purposes (unless the recipient is a registered charity or organisation).[48]
- forming a body corporate solely or for the predominant purpose of avoiding the restrictions on foreign donations in proposed Division 3A.[49]

1.73 The committee notes that the offences in the bill apply to specific persons with a connection to the relevant entity, such as financial controllers of political campaigners and agents of political entities. The committee also acknowledges that a number of exceptions to the offences apply, such as where a person takes action

43 See Schedule 1, item 33, proposed section 302D.

44 See Schedule 1, item 33, proposed section 302E.

45 See Schedule 1, item 33, proposed section 302F.

46 See Schedule 1, item 33, proposed section 302K

47 See Schedule 1, item 33, proposed section 302L.

48 See Schedule 1, item 33, proposed sections 302G and 302H.

49 See Schedule 1, item 33, proposed section 302J.

('acceptable action'[50]) to mitigate any potential damage to the integrity of the political process caused by the relevant gift or donation. However, in the view of the committee the penalties proposed by the bill are significant, ranging from five to ten years imprisonment. The committee also notes that the relevant offences capture a broad range of conduct, and may apply to a variety of persons with a connection to the Australian electoral and political processes.

1.74 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation'.[51]

1.75 In this instance, the committee notes that the explanatory memorandum does not provide any specific justification for the proposed imposition of significant penalties, merely stating that the object of the offences and civil penalty provisions in proposed Division 3A is to 'secure and promote the actual and perceived integrity of the Australian election process'.[52] The committee further notes that the explanatory memorandum does not provide any information regarding penalties imposed under similar offences in other Commonwealth legislation.

1.76 It is not apparent to the committee that the penalties in proposed sections 302D to 302L of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences.*

1.77 The committee therefore seeks the minister's detailed advice as to the justification for the significant custodial penalties proposed by these provisions. In particular, the committee seeks the minister's advice as to specific examples of applicable penalties for comparable Commonwealth offence provisions.

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50 Under proposed section 302B, 'acceptable action' includes transferring an amount equal to the value of the relevant gift to the Commonwealth, or returning the relevant gift or an amount equal to that gift to the donor.

51 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 39.

52 Explanatory memorandum, p. 37.

Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017

Purpose	This bill seeks to amend the *Enhancing Online Safety Act 2015* to: • prohibit the non-consensual posting of, or threatening to post, an intimate image on a social media service or relevant electronic service including images shared by email, text or multimedia messages, or a designated internet service; • establish a complaints and objections system to be administered by the eSafety Commissioner; • introduce a civil penalty regime to be administered by the eSafety Commissioner
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Reversal of evidential burden of proof[53]

1.78 Proposed subsection 44B(1) of the bill creates a prohibition on a person of posting, or threatening to post, an intimate image[54] of another person. A civil penalty of 500 penalty units may be imposed for contravening that provision. Proposed subsections 44B(2), (3) and (4) each provide an exception to the prohibition, providing that subsection 44B(1) does not apply if:

- the intimate image is posted with the consent of the person that it depicts;
- the intimate image is covered by proposed subsection 9B(4) because it depicts, or appears to depict, a person without particular attire of religious or cultural significance; and the person posting the image did not know that the person depicted consistently wears that attire in public; or
- the post of the intimate image is, or would be, an exempt post. An exempt post is broadly defined in proposed section 44M as including a number of matters, including if the post is necessary for the enforcement of a law, for the purposes of court or tribunal proceedings or an ordinary reasonable person would consider the post acceptable on a number of grounds.

53 Schedule 1, item 26, proposed section 44B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

54 'Intimate image' is defined by proposed section 9B, and includes any still or moving visual image which depicts a person's private parts, depicts a person engaged in a private activity, or depicts a person without attire of religious or cultural significance (in certain circumstances).

1.79 Subsection 96 of the *Regulatory Powers (Standard Provisions) Act 2014* provides that a person who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating a civil penalty provision bears an evidential burden in relation to that matter. This mirrors the provisions in subsection 13.3(3) of the *Criminal Code Act 1995* relating to criminal offences.

1.80 The committee notes that the explanatory materials do not provide any justification for the reversal of the evidential burden of proof, merely stating the effect of the relevant provisions.

1.81 The committee also notes that the reversal of the burden of proof in proposed subsections 44B(2), (3) and (4) relates to a civil penalty, rather than to a criminal offence. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny,[55] as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are imposed. In this case, the committee notes that proposed subsection 44B(1) seeks to impose a penalty of what currently amounts to $105,000 on natural persons.[56]

1.82 As the explanatory materials do not address this issue, the committee requests the minister's advice as to the appropriateness of reversing the evidential burden of proof in this instance.

Broad delegation of administrative powers[57]

1.83 Proposed sections 44B, 44G and 44K of the bill seek to impose civil penalties for engaging in particular conduct. Proposed section 46A seeks to make each of those provisions subject to an infringement notice under Part 5 of the Regulatory Powers Act. Proposed subsection 46A(2) would allow the eSafety Commissioner to delegate the authority to issue infringement notices to any member of the staff of the ACMA – which can be any APS level employee.[58]

1.84 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with

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55 See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

56 See section 4AA of the *Crimes Act 1914* which defines a 'penalty unit' as $210.

57 Schedule 1, item 30, proposed subsection 46A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

58 See section 54 of the *Australian Communications and Media Authority Act 2005*.

little or no specificity as to their qualifications or attributes. Generally, the committee's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom those powers might be delegated. The committee's prefers 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.

1.85 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the legitimacy of an infringement notice scheme depends on the existence of a properly managed process for the issuing of notices and that a common approach is to require that a person issuing the notice possess specific attributes, qualifications or qualities. A provision that effectively allows any APS employee to issue a notice is likely to be inappropriate.[59]

1.86 In this instance, the explanatory memorandum provides no explanation for the broad delegation of the power to issue infringement notices, merely restating the terms of the relevant provision. Further, there is nothing in the bill that would limit the delegation of the power to issue an infringement notice to persons with appropriate expertise, qualifications or attributes.

1.87 The committee requests the minister's detailed justification for the broad delegation of power to issue infringement notices in proposed section 46A of the bill. The committee considers it may be appropriate to amend the bill to require that persons authorised to issue infringement notices be confined to officers that hold special attributes, qualifications or qualities, and seeks the minister's advice in relation to this.

Exclusion of merits review[60]

1.88 Item 39 of the bill seeks to amend section 88 of the *Enhancing Online Safety Act 2015*, to expressly provide that decisions by the eSafety Commissioner to *give* a removal notice under proposed section 44D, 44E or 44F are reviewable by the Administrative Appeals Tribunal (AAT). However, item 39 does not expressly provide for review of decisions by the eSafety Commissioner to *refuse to give* a removal notice, and it is unclear to the committee whether decisions of this type are reviewable by the AAT.

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59 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 60.

60 Schedule 1, item 39. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

1.89 In this instance, the explanatory memorandum does not clarify whether decisions by the eSafety Commissioner are reviewable in the AAT, merely restating the terms of the relevant provision. However, in relation to merits review more generally, the explanatory memorandum states:

> In relation to administrative decisions, it is good policy to provide the opportunity for independent review on the merits in relation to decisions that affect the rights and interests of individuals…[61]

1.90 The committee notes that victims of image-based abuse (that is, the sharing of intimate images without consent) often experience high levels of psychological distress, consistent with a diagnosis of moderate to severe depression and/or anxiety disorder,[62] and often the primary concern of victims is the rapid removal of the offending images. These matters are recognised in the explanatory memorandum.[63] A decision to refuse to give a removal notice may result in an offending image remaining available to viewers, particularly if the victim cannot secure the agreement of the relevant service provider or content host to remove the image.

1.91 Consequently, it appears to the committee that a decision by the eSafety Commissioner to refuse to give a removal notice could affect the rights and interests of individuals, and it may be appropriate to subject such a decision to merits review.

1.92 The committee requests the minister's advice as to whether a decision by the eSafety Commissioner to refuse to give a removal notice would be subject to merits review in the AAT, and if not, why the decision has been excluded from merits review.

61 Explanatory memorandum p. 42.

62 Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse* (Summary Report), May 2017, p. 5.

63 Explanatory memorandum p. 2.

Export Control Bill 2017

Purpose	This bill seeks to implement a new legislative framework for agricultural exports from Australian Territory
Portfolio	Agriculture and Water Resources
Introduced	Senate on 7 December 2017

Delegation of legislative powers[64]

1.93 Clause 24 provides that the minister may, by legislative instrument, determine that the export of specified goods from Australian territory, or from a part of Australian territory, is prohibited absolutely for a specified period of up to six months. The minister may also determine that the export of specified goods to a specified place is prohibited for a specified period of up to six months. Under clause 25, the minister may vary a temporary prohibition determination issued under clause 24 in order to extend the specified period for a further six months.

1.94 The committee notes that a temporary prohibition determination issued under clause 24 is a legislative instrument and would therefore be subject to parliamentary scrutiny through the usual disallowance process. However, clause 25 does not state that a variation of a temporary prohibition determination would also be a legislative instrument. The explanatory memorandum does not clarify whether such variations are to be considered legislative instruments and whether they will therefore be subject to the same level of parliamentary scrutiny.[65]

1.95 The committee requests the minister's advice as to whether a variation of a temporary prohibition determination issued under clause 25 will be a legislative instrument and, if not, why it is appropriate to exclude such a variation from the parliamentary scrutiny afforded to legislative instruments.

Broad discretionary power[66]

1.96 Part 2 of proposed Chapter 2 seeks to establish a framework for the secretary to grant exemptions from provisions of the bill in relation to particular goods. Within that framework, clause 53 provides that the occupier of an

64 Clause 25. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

65 Explanatory memorandum, pp. 54-55.

66 Clauses 53 to 55. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

establishment where export operations in relation to relevant goods[67] are carried out, or a person who wishes to export relevant goods, may apply to the secretary for an exemption from one or more provisions of the bill in relation to the goods. On receipt of an application under clause 53, the secretary would be required either to grant or refuse to grant the exemption. The secretary would also be empowered to grant exemptions subject to conditions, and to vary those conditions where the secretary considers it necessary to do so.

1.97 The committee is concerned that Part 2 of proposed Chapter 2 appears to confer on the secretary a broad administrative power to exempt persons (applicants) from the application of the law as it applies to particular classes of goods. The committee considers this power to be broadly akin to a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

1.98 In this instance, the committee notes that Part 2 of proposed Chapter 2 would not enable delegated legislation to alter the operation of primary legislation, but rather would enable the secretary to make an administrative decision overriding the operation of primary legislation with respect to specific persons and types of goods. However, the committee remains concerned about the breadth of such powers, and expects a sound justification in the explanatory memorandum for including such a power. In this instance, the explanatory memorandum provides no such justification, merely stating the operation and effect of the relevant provisions.

1.99 The committee also notes that the bill proposes to allow the rules to prescribe the circumstances in which goods are 'relevant goods'[68] (and therefore to prescribe the types of goods in relation to which an exemption may be granted) and to prescribe key elements of the exemptions process – including the matters to which the secretary must have regard in deciding whether to grant an exemption or to impose or vary conditions.[69] The committee is therefore concerned that the secretary's broad discretionary power as described above may be expanded even further through the making of delegated legislation. The committee's longstanding view is that significant matters, such as core elements of the secretary's decision-

67 Paragraphs 52(1)(a) to (e) provide that Part 2 of Chapter 2 applies to prescribed goods ('relevant goods') that are to be exported as a commercial sample, for experimental purposes, in exceptional circumstances, in special commercial circumstances and in any other circumstances prescribed by the rules. Subclause 52(2) provides that the rules may prescribe the meaning of the terms in paragraphs 52(1)(a) to (d).

68 See clause 52.

69 See subclauses 54(3) and 55(2).

making process, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.100 The explanatory memorandum states that allowing the rules to prescribe the circumstances in which goods are 'relevant goods', and to prescribe key elements of the exemptions framework, is necessary to provide flexibility and to reduce administrative burden.[70] In relation to prescribing the circumstances in which an exemption may be granted, the explanatory memorandum further states:

> These circumstances may arise for a range of matters relating to the prescribed goods, an importing country requirement or a requirement under the Bill that cannot be complied with. The ability to prescribe these circumstances will be necessary for the purposes of achieving one or more requirements of the Bill and reflects the likelihood that the circumstances prescribed will change from time to time and will need to commence at short notice.[71]

1.101 Similar explanations are provided with respect to enabling the rules to prescribe matters to which the secretary must have regard when deciding whether to grant an exemption[72] or to impose conditions.[73]

1.102 The committee appreciates that circumstances relevant to the exemptions framework, and to the administration of the export control regime more generally, may change from time to time. However, the committee does not generally consider administrative flexibility to be sufficient justification for including significant matters in delegated legislation rather than in primary legislation.

1.103 The committee also notes that the secretary's decision on an application for exemption is not subject to any form of merits review.[74]

1.104 The committee therefore requests the minister's detailed advice as to:

- **why it is proposed to confer on the secretary a broad discretionary power to exempt persons proposing to export relevant goods from provisions of the bill;**
- **why it is considered necessary and appropriate to leave core elements of the exemptions framework, particularly the matters to which the secretary must have regard before granting an exemption, to delegated legislation;**
- **the appropriateness of amending the bill to provide more specificity as to the circumstances in which a person is eligible to apply for an exemption or**

70 Explanatory memorandum, pp. 102-107.

71 Explanatory memorandum, p. 102.

72 Explanatory memorandum, p. 104.

73 Explanatory memorandum, pp. 104-105.

74 See clause 381 (which does not list an exemption decision as a 'reviewable decision').

to set out the relevant considerations the secretary must take into account in deciding whether to grant an exemption; and

- **why an exemption decision is not subject to any form of merits review.**

Broad delegation of administrative powers: to non-Commonwealth officers or bodies[75]

1.105 The bill provides that government certificates may be issued for export goods which relate to matters that other countries require certification for or are otherwise requirements that must be complied with before goods are exported. As set out in the explanatory memorandum, government certificates will 'constitute evidence that goods that are to be, or have been, exported, have been assessed as being compliant with the requirements of the Bill, and meet relevant importing country requirements.'[76] Subclause 63(1) provides that the issuing body for a government certificate in relation to a kind of goods that are to be, or have been, exported is a person or body prescribed by the rules, or if no person or body has been prescribed, the secretary. Under subclause 63(2), the rules may provide that one or more of the following is an issuing body for such government certificates:

- the secretary,
- a person or body covered by an approved arrangement that provides for the person or body to issue government certificates in relation to goods of that kind;
- a specified person or body.

1.106 The explanatory memorandum states that providing the secretary with the power to prescribe the issuing body will 'provide the Secretary with the flexibility to determine the appropriate issuing body for a particular kind of goods'.[77] The committee notes that there are no limits in the bill as to the type of person or body who may be appointed as an issuing body for government certificates, meaning that such persons or bodies may include private contractors.

1.107 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

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75 Clause 63. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

76 Explanatory memorandum, p. 2. See also definition of 'government certificate' under clause 12.

77 Explanatory memorandum, p. 111.

on the categories of people to whom those powers might be delegated. Where broad delegations are provided for, including delegations beyond the Australian Public Service (APS), the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.108 In this case, the explanatory memorandum does not explain why it is necessary to give the secretary the broad discretion to prescribe 'a specified person or body'. Neither the bill nor the explanatory memorandum contains any guidance as to what persons or bodies it would be appropriate to specify as an issuing body. The explanatory memorandum also does not address the question of why it is appropriate to allow decisions with respect to the issuing of government certificates to be made by persons or bodies outside the Australian Public Service, nor what accountability mechanisms will be put in place with respect to such persons or bodies.

1.109 The committee requests the minister's advice as to:

- **why it is appropriate to allow decisions with respect to the issuing of government certificates to be made by any person or body as specified in the rules; and**
- **what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.**

Significant matters in delegated legislation[78]

1.110 Clause 258 seeks to make it an offence for a person to engage in conduct that contravenes a rule made with respect to official marks, marks resembling official marks and official marking devices.[79] The offence carries a maximum penalty of imprisonment for five years or 300 penalty units, or both.

1.111 The committee notes that this provision effectively allows the rules to specify the details of what will constitute an offence under clause 258. The committee's view is that significant matters, such as the details of conduct that will constitute an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.112 In this instance, the explanatory memorandum states that conduct that contravenes the requirements set out in the rules may undermine the integrity of the regulatory framework provided for by the bill, impact the confidence of trading partners and adversely impact market access.[80] However, the explanatory

78 Clause 258. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

79 Clauses 255, 256 and 257 allow rules to make provisions for and in relation to these matters.

80 Explanatory memorandum, p. 290.

memorandum does not provide any justification for allowing all of the details of what will constitute an offence to be set out in the rules.

1.113 The committee therefore requests the minister's advice as to why it is appropriate to provide that all of the details as to what conduct will constitute an offence under clause 258 (which will be subject to a penalty of up to five years imprisonment) is to be set out in the rules.

Broad delegation of administrative powers: absence of training, qualification or skill requirements[81]

1.114 A number of provisions in the bill seek to allow the secretary to approve or prescribe certain persons to carry out functions or powers under the bill. However, in doing so the bill does not limit the type of persons who may be appointed and does not require that such persons delegated with such powers need possess any specific training, qualification or skill requirements.

1.115 In particular, clauses 273 and 281 provide that the secretary may, in writing, approve a person, or each person in a specified class of persons, to conduct audits or to carry out assessments of goods, and the rules may make provision for matters relating to the approval of such persons. However, the bill does not provide that the secretary may only appoint auditors and assessors that possess relevant skills, training or experience, nor does the bill require that such matters be set out in the rules.

1.116 The explanatory memorandum states that it may be necessary for the rules to 'address specific training, qualification and skill requirements that may be taken into account when approving a person to be an auditor.'[82] However, the committee notes that it is not a statutory requirement that the rules make provision for any specific matters with respect to the approval of auditors or assessors, including training, qualification and skill requirements. The committee further notes that, in the absence of the rules specifying such matters, the secretary is granted a very broad power that may be exercised without reference to any clear statutory criteria.

1.117 A similar situation exists with respect to the appointment of 'analysts' under clause 413. This clause seeks to allow the secretary to appoint a person to be an analyst for the purposes of the bill. The role of the analyst would include the taking, testing and analysis of samples as set out in clauses 410 and 412, as well as providing a written certificate as set out in clause 413. The bill provides no limitation as to who

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81 Clauses 273, 281 and 413. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

82 Explanatory memorandum, p. 304, see also pp. 308-309 with respect to the approval of assessors under clause 281.

may be appointed as an analyst, nor any guidance on the qualifications or attributes that an analyst must possess. Further, the bill does not provide that such matters may be prescribed in the rules. The explanatory memorandum provides no clarification of these matters.[83] Again, this provision appears to grant a very broad power to the secretary without any guidance as to how it should be exercised. This matter is of additional concern to the committee given the role of analysts in the preparation of evidentiary certificates, as discussed below at paragraph 1.158 to 1.164. The committee further notes that as there is no limitation in the bill on who may be appointed as an auditor, assessor or analyst, such persons may be private contractors and not bound by the same professional code of conduct or accountability measures as members of the APS are.

1.118 The committee seeks the minister's detailed advice as to:

- **why the bill does not require that the secretary only appoint auditors, assessors or analysts that possess relevant skills, training or experience;**
- **at a minimum, why there is no obligation for the rules to set out the requirements that must be met for approval of an auditor, assessor or analyst; and**
- **what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.**

Broad sub-delegation of administrative powers: to any APS level employee[84]

1.119 Proposed subclause 288(1) provides that the secretary may, in writing, delegate any of his or her functions or powers (subject to three exceptions) to a Senior Executive Service (SES) employee, or an acting SES employee, in the department.[85] Proposed subclause 288(2) provides that, if the secretary delegates a function or power to an SES employee or an acting SES employee, that employee may, in writing, sub-delegate the function or power to an authorised officer or to an APS employee within the department. Proposed subclause 288(3) then lists a number of functions and powers that may *not* be sub-delegated.

1.120 The committee has consistently drawn attention to legislation that allows for the delegation (or sub-delegation) of administrative powers to a relatively large class

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83 Explanatory memorandum, pp. 404-405.

84 Clause 288. The committee draws senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(ii).

85 Proposed paragraph 288(1)(b) sets out three exemptions to this power of delegation, providing that the secretary may not delegate the power to arrange for the use of computer programs to make certain decisions, the power to enter into particular arrangements with a State or Territory, and the power to make rules.

of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom delegation is permitted. The committee prefers that delegates (and sub-delegates) be confined to the holders of nominated offices or to members of the SES. 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 instance, the explanatory memorandum states:

> In an operational context, many of the powers that are delegated to SES staff may need to be completed by staff at a lower classification level as a matter of administrative necessity. This arises from the volume and timeliness of decision making and availability of SES officers who have broad responsibilities. For example, the Secretary must decide to either register an establishment or refuse to register an establishment in clause 112 of the Bill; however, in an operational context, officers below SES level require the ability to register an establishment.
>
> When a power is subdelegable (see subclause 288(3) for powers that will not be able to be subdelegated) there will be no limitation in the Bill on which APS employees may receive the subdelegation in order for there to be the greatest degree of flexibility. However, subclause 288(2) is not intended to allow every power to be subdelegated to every individual in every class listed; functions which may be subdelegated to each particular class of persons will be determined administratively.[86]

1.121 The committee notes the explanation provided in the explanatory memorandum for the broad sub-delegation of administrative powers proposed by the bill. However, the committee is concerned that there is no guidance on the face of the bill as to the skills, qualifications or experience that would be required of an employee or officer to undertake sub-delegated functions, nor any limitation on the level to which sub-delegation is permitted (currently, sub-delegation would be permitted to *any* level APS employee). In this regard, the committee notes that it has generally not accepted administrative flexibility as sufficient justification for allowing a broad delegation of administrative power to officials at any level.

1.122 Further, while the committee welcomes the limitations on sub-delegation set out in proposed subclause 288(3), the committee notes that the explanatory memorandum does not specify the functions and powers that *may* be sub-delegated under subclause 288(2) (as opposed to those that may not). It is therefore unclear to the committee exactly which powers are capable of sub-delegation, and so it is difficult to assess the appropriateness of delegating specific powers and functions to employees and officers at any APS level.

86 Explanatory memorandum, pp. 314-315.

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

- **each of the powers and functions under the bill that may be sub-delegated, the justification for each sub-delegation and examples of the persons to whom it is envisaged each sub-delegation would be made; and**
- **the appropriateness of amending the bill to require that persons to whom powers are sub-delegated be confined to officers or employees that hold special attributes, qualifications or expertise.**

Significant matters in non-statutory determinations[87]

1.124 Clause 291 provides for the authorisation of persons to be authorised officers. Subclause 291(7) requires the secretary to determine, in writing, training and qualification requirements for authorised officers, and subclause 291(6) prevents the secretary from authorising a person to be an authorised officer unless these training and qualification requirements are met. Similarly, subclause 324(2) provides that the secretary must also determine, in writing, training and qualification requirements for authorised officers specifically in relation to the performance of functions or duties and the exercise of powers under Chapter 10 of the Regulatory Powers Act. However, subclauses 291(8) and 324(3) provide that neither determination is a legislative instrument.

1.125 The explanatory memorandum states that subclauses 291(8) and 324(3) make statements as to the law and, as such, the determinations are not legislative instruments.[88] However, the committee notes that determinations made under subclauses 291(7) and 324(2) do appear to alter the content of the law, in that a person cannot be authorised as an authorised officer unless they satisfy the requirements set out in the relevant determination. This in turn imposes a legal obligation on the secretary to make the determinations. It is therefore not clear to the committee why the determinations are considered not to be legislative instruments and therefore not subject to disallowance.

1.126 The committee requests the minister's more detailed advice as to a why it is considered that determinations made under subclauses 291(7) and 324(2) are not legislative instruments (and therefore not subject to disallowance).

87 Subclauses 291(8) and 324(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

88 Explanatory memorandum, pp. 318, 343.

Reversal of evidential burden of proof[89]

1.127 Subclause 307(1) seeks to make it an offence for a person who has been issued with an identity card to fail to return the card with 14 days of ceasing to be an authorised officer, an approved auditor or any other person who performs functions or duties or exercises powers under the Act and is prescribed by the rules. Subclause 307(2) provides an exception (offence specific defence) to this offence, stating it does not apply to an authorised officer whose authorisation has been suspended, or if the identity card was lost or destroyed. The offence is subject to strict liability and carries a maximum penalty of one penalty unit.

1.128 In addition, subclause 308(1) seeks to make it an offence for the occupier of a registered establishment to provide goods or services to an authorised officer. Subsections (2) and (3) provide exceptions (offence-specific defences) to this offence, stating that the offence does not apply if the secretary has approved, in writing, the provision of the goods and services to the authorised officer, or in relation to goods or services that are provided to a third party authorised officer under a contract of employment or a contract for services. A parallel offence and exceptions are set out under subclauses (4) to (6) addressing authorised officers receiving goods and services from occupiers of registered establishments. These offences carry a maximum penalty of imprisonment for 12 months imprisonment or 60 penalty units, or both.

1.129 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.

1.130 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.

1.131 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 justified.

1.132 With respect to clause 308, the statement of compatibility states that reversing the evidential burden of proof is reasonable because 'the defendant will have the information or knowledge available to them, which would form evidence to support the application of the exception', and that 'requiring the prosecution to

89 Clauses 307 and 308. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

provide evidence in all cases that the Secretary had authorised the provision of a good or service, or that it was provided pursuant to a contract of employment or contract for services would also be prohibitively costly.'[90] With respect to clause 307, the statement of compatibility provides the similar justifications, but also states that the matters set out in the exception would be peculiarly within the knowledge of the defendant.[91]

1.133 However, the committee notes that the *Guide to Framing Commonwealth Offences*[92] 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.[93]

1.134 It is not apparent to the committee that the matters set out in subclauses 308(2) and (5)—as to whether the secretary has approved, in writing, the provision of the goods and services or they are provided under a contract of employment or contract for services—is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish. Similarly, it is also not apparent that the matter set out in paragraph 307(2)(a)—whether or not the defendant is an authorised person whose authorisation has been suspended—is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish. Rather, the matters appear to be matter more appropriate to be included as elements of the offence.

1.135 The committee requests the minister's detailed justification as to the appropriateness of including the matters specified in paragraph 307(2)(a) and subclauses 308(2) and (5) as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and seeks the minister's advice in relation to this.

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90 Explanatory memorandum, p. 438.

91 Explanatory memorandum, p. 437.

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

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

Broad delegation of administrative powers: to 'persons assisting'[94]

1.136 Clauses 326 and 329 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the bill. Subclauses 326(4) and 329(3) provide that an authorised person may be assisted 'by other persons' in exercising certain powers or performing certain functions or duties.

1.137 In addition, clause 366 sets out that authorised officers may be assisted by 'other persons' in performing functions or duties under proposed Parts 4 to 6, if that assistance is necessary and reasonable. These Parts provide authorised officers with the power to enter adjacent premises, enter and exercise powers on premises without a warrant or consent, and exercise powers in emergency situations.[95] Subclause 366(2) seeks to allow a person assisting to enter premises and exercise the powers available to authorised officers in these circumstances, in accordance with any direction given by the authorised officer.

1.138 As noted in the discussion below at paragraphs 1.140 to 1.146, the bill also seeks to allow persons assisting authorised officers to use such force against things as is necessary and reasonable in the circumstances when entering premises and executing warrants.[96] The explanatory memorandum acknowledges in each case that these coercive powers may be exercised by persons assisting an authorised officer.[97] However, it does not explain why it is necessary to extend the use of such powers to persons assisting authorised officers, nor does it provide any explanation as to what expertise or training, if any, such persons assisting will be required to possess.[98] The committee notes that, by contrast, the bill would require the secretary to determine, in writing, specific training and qualification requirements with respect to authorised officers who exercise compliance and enforcement powers under Chapter 10 of the bill or under the Regulatory Powers Act.[99]

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94 Clauses 326, 329 and 366. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

95 These powers are set out in Parts 4, 5 and 6 of Chapter 10.

96 See clauses 327, 330 and 349.

97 Explanatory memorandum, pp. 348, 352, 361–2.

98 Explanatory memorandum, pp. 350, 373

99 See clause 324.

1.139 The committee therefore requests the minister's advice as to why it is necessary to confer coercive powers on 'persons assisting' an authorised officer and the appropriateness of amending the bill to require that any person assisting an authorised person have specified skills, training or experience (including in the use of force).

Use of force[100]

1.140 Clauses 327 and 330 seek to modify the operation of the monitoring and investigatory provisions in Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*, as those provisions will apply to the monitoring of compliance with the bill and investigation of offences and penalty provisions under the bill. Subclauses 327(6) and 330(6) provide that, when executing a monitoring or investigation warrant, an authorised person or a person assisting an authorised person may use such force against things as is necessary and reasonable in the circumstances.

1.141 In addition, clause 340 seeks to allow an authorised officer to use such force against things as is necessary and reasonable in the circumstances when executing an adjacent premises warrant, and clause 349 seeks to allow an authorised officer or a person assisting an authorised officer to use force against things when entering premises in order to conduct offence related searches and seizures.

1.142 Finally, paragraph 354(4)(c) seeks to allow an authorised officer to use such force against things as is necessary and reasonable in the circumstances when exercising powers given under subclauses 354(2) and (3) to stop, detain and search a conveyance[101] to secure evidential material.

1.143 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. It states that a use of force power should be accompanied by an explanation and justification in the explanatory memorandum and a discussion of proposed accompanying safeguards that the agency intends to implement.[102]

1.144 In relation to clauses 327 and 330, the explanatory memorandum explains that, in the absence of these provisions, the use of force by an authorised officer or a

100 Subclauses 327(6) and 330(6), clauses 340 and 349, and paragraph 354(4)(c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

101 That is, an aircraft, vessel, vehicle or any other prescribed means of transport. See definition of 'conveyance' under clause 12.

102 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p.80.

person assisting an authorised officer 'may amount to illegally damaging someone's property.'[103] The explanatory memorandum further states that what is necessary and reasonable will depend on the circumstances in each case and that 'the use of force may be required to achieve the object of monitoring or investigating compliance with the Bill, but this needs to be balanced against the right of the occupier of the premises not to have their property destroyed unless the force is necessary and reasonable in the circumstances.'[104] The explanatory memorandum provides similar explanations in relation to clauses 340 and 349, and paragraph 354(4)(c).[105]

1.145 However, in relation to each of these provisions, the explanatory memorandum does not contain an explanation of the circumstances in which it is envisaged it will be necessary to use force against things in order to monitor and investigate compliance with the bill, the need to extend the power to use force against things to a person assisting an authorised person nor a discussion of any safeguards the agency intends to implement with respect to the use of force against things. Nor does the explanatory memorandum explain whether authorised persons will be required to have specified skills, training or experience relevant to the use of force.[106]

1.146 The committee therefore seeks the minister's detailed advice as to:

- **the circumstances in which it is envisaged it may be necessary to allow the use of force against things during the execution of monitoring, investigation, and adjacent premises warrants, when entering premises to conduct offence related searches and seizures, and when stopping, detaining and searching a conveyance;**
- **the appropriateness of amending the bill to, at a minimum, require that authorised officers and persons assisting have appropriate skills, training or experience in the exercise of use of force powers;**
- **what safeguards, if any, will be implemented to ensure these powers are used appropriately; and**
- **why it is necessary to allow persons assisting an authorised person to use force against things.**

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103 Explanatory memorandum, p. 352.

104 Explanatory memorandum, p. 352.

105 Explanatory memorandum, pp. 357, 361–2, 364–5.

106 The committee notes its discussion at paragraphs 1.136 to 1.139 above regarding the lack of any legislative requirement as to the skills, training or experience of persons assisting authorised officers.

Exclusion of merits review[107]

1.147 Subclause 381(1) provides that certain decisions made under the bill will be reviewable decisions and includes details of the 'relevant person' for each decision—that is, the person who is able to seek merits review of each decision. A 'reviewable decision' is one whereby a person can seek internal review or apply to the Administrative Appeals Tribunal.[108] The bill lists 75 reviewable decisions, and subclause 381(2) provides that the rules may specify further decisions as reviewable decisions.

1.148 The explanatory memorandum states that the 'ability to seek a review of these decisions is consistent with the Government's policy that an administrative decision that is likely to affect the interests of an individual should be reviewable on its merits unless to do so would be inappropriate, or there are factors justifying the exclusion of merits review.'[109]

1.149 The committee notes, however, that there are several decisions that are not included in the list of reviewable decisions. For example, as discussed above at paragraphs 1.96 to 1.104, clause 54 provides that the secretary must make a decision to either grant or refuse an application for an exemption made under clause 53. This decision is not included in the list of reviewable decisions under subclause 381(1) and the explanatory memorandum provides no explanation as to the reasons why allowing merits review is not appropriate in this case.[110]

1.150 In addition, clause 67 provides that, on receipt of an application made under section 65 for a government certificate in relation to a kind of goods, an issuing body must decide whether to grant or refuse the certificate. In this case, the explanatory memorandum acknowledges that this decision will not be reviewable and states by way of justification:

> Decisions regarding government certificates represent one of the final decisions to enable goods to be imported into the importing country once all other requirements and conditions have been met. Such decisions are essentially about maintaining international confidence in Australia's agricultural exports in the interests of a whole export industry, or part of that industry, and ensuring that agricultural exports achieve a consistent standard. Further, government certificates are high-volume decisions and often made in relation to perishable items. Given the specific timeframes

107 Clause 381. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

108 See clauses 383 and 385.

109 Explanatory memorandum, p. 387.

110 Explanatory memorandum, p. 104.

that an exporter may be operating under, providing for the review of a decision made under clause 67 would not be practical.[111]

1.151 It is not clear to the committee why allowing review of such a decision would diminish confidence in, or undermine the consistency of, Australia's agricultural exports. It is also unclear why high-volume decisions are not capable of being reviewed, or why more limited exceptions cannot be made in the case of perishable items.

1.152 Further, clause 132 provides that the secretary may give the occupier of a registered establishment a written direction to cease carrying out one of more kinds of export operations in relation to particular prescribed goods or a kind of prescribed goods if the secretary reasonably suspects one or more of a range of grounds exists. Again, the explanatory memorandum provides no explanation as to the reasons why allowing merits review is not appropriate in this case.[112]

1.153 In light of these examples of decisions that have been excluded from subclause 381(1) without strong justification, the committee considers that it cannot properly assess subclause 381(1) in the absence of comprehensive information about what decisions under the bill have been excluded from review and the reasons justifying exclusion in each case.

1.154 The committee therefore requests the minister's detailed advice as to:

- **what decisions under the bill have been excluded from merits review and are not included in subclause 381(1) and the reasons for this exclusion in each case;**
- **why it is appropriate that decisions made under clauses 54 and 132 are excluded from merits review; and**
- **why it is not appropriate to allow merits review of decisions made under clause 67, subject to exemptions with regard to perishable items.**

Limitation on merits review[113]

1.155 Subclause 385(1) provides that applications may be made to the Administrative Appeals Tribunal for review of a reviewable decision made by the secretary personally, or a decision of the secretary or an internal reviewer under section 383 that relates to a reviewable decision. Subsection (2) specifies that such applications may only be made by, or on behalf of, the relevant person for the

111 Explanatory memorandum, p. 115.

112 Explanatory memorandum, pp. 174-175.

113 Clause 385. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

decision. Subsection 381(1) sets out who is a relevant person for each reviewable decision. Subsection 381(3) states that this limitation of review rights to those designated as relevant persons has effect despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which would otherwise allow an application for review to be made by any person whose 'interests are affected by the decision.'

1.156 The explanatory memorandum acknowledges that this provision would have the effect of narrowing subsection 27(1) of the AAT Act but states that 'it would be burdensome to allow any member of the public who is affected by the decision to also apply for a review of the decision.'[114] However, the explanatory memorandum does not explain why the application of the normal rules set out in the AAT Act with respect to who can ask for a decision to be reviewed would be burdensome, nor does it explain why this purported burden outweighs the need to allow persons who have been adversely affected by a government decision to seek merits review of that decision.

1.157 The committee seeks the minister's detailed advice as to:

- **why it is considered it would be burdensome to allow any person whose interests are affected by a reviewable decision made under the bill to seek merits review of that decision; and**
- **why any such burden outweighs the need to allow persons who have been adversely affected by a government decision to seek merits review of that decision.**

Presumption of innocence: certificate constitutes prima facie evidence[115]

1.158 Clause 413 seeks to allow the secretary to appoint a person to be an analyst for the purposes of the bill. Clause 414 seeks to provide that if a person is alleged to have contravened the Act in relation to goods or any other thing, an analyst may give a written certificate stating a number of matters relating to the goods or any other thing. Subclause 415(1) provides that such a certificate is admissible in any proceedings in relation to a contravention of the Act as prima facie evidence of the matters in the certificate and the correctness of the result of the analysis to which the certificate relates (so long as a copy of the certificate and notice of intention to present it as evidence has been provided to the defendant at least 14 days before it is admitted into evidence).

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114 Explanatory memorandum, p. 389.

115 Clause 415. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.159 The explanatory memorandum explains that the effect of such a certificate will be that 'the information contained in the certificate will be able to be used as evidence against the defendant without the requirement to prove each piece of information contained in the certificate'.[116] The statement of compatibility explains that the objective of clause 415 is to 'ensure that all the appropriate evidence is before the court. The certificate will provide information on the state of the goods and the relevant background on how the goods were tested and samples taken.'[117] The statement of compatibility further explains that the information provided in the certificate will not be enough to prove the culpability of the defendant beyond reasonable doubt and that allowing such a certificate 'is reasonable to free up the court's time to consider the more pressing issues related to the offence.'[118]

1.160 The statement of compatibility explains that the rights of the defendant are protected by a number of safeguards, including that: the certificate is to establish prima facie evidence rather than conclusive evidence; subclause 415(2) provides that the defendant must be given a copy of the certificate at least 14 days prior to its admission as evidence; and subclause 415(3) will allow the defendant to call the analyst as a witness and cross-examine them on the certificate.[119]

1.161 The committee notes that providing that an analyst's certificate is prima facie evidence of the matters contained within it would ensure that the court could take these matters to be established facts in any offence proceedings. While a person may attempt to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. In effect, these provisions allow for a reversal of the burden of proof with respect to a range of matters. In this regard, the committee draws attention to the *Guide to Framing Commonwealth Offences*, which emphasises that limits should be placed on the use of evidentiary certificates. The Guide states:

> Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.

1.162 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[120]

1.163 In this case, the matters that can be specified in a certificate include when and from whom the goods or other thing was received, what labels or other means

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116 Explanatory memorandum, p. 405.

117 Explanatory memorandum, p. 435.

118 Explanatory memorandum, p. 435.

119 Explanatory memorandum, p. 435.

120 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

of identifying the goods or other thing accompanied the goods or other thing when it was received, and what covering the goods or other thing was in when it was received.[121] Given the bill includes provisions making it an offence to export prohibited goods (with much of the detail to be set out in the rules as to which goods are prohibited or prescribed), it is not clear whether issues relating to from whom the goods were received, what labels accompanied the goods etc, relate only to formal or technical matters that would not be in dispute, or that they are matters that would be difficult to prove under the normal evidential rules.

1.164 The committee therefore seeks the minister's detailed advice as to whether each of the matters that may be specified in an analyst's certificate will be formal or technical matters of fact that are not likely to be in dispute and would be difficult to prove under the normal evidential rules. The committee's understanding of the provision would be enhanced if a separate justification were provided in respect of each of the matters set out in paragraphs 414(1)(a) to (h).

Broad delegation of administrative powers[122]

1.165 Clause 428(1) provides that, where a person (the first person) is empowered or required to do a thing, the first person is taken to have done the thing if the first person causes another person to do the thing on behalf of the first person. Subclause 428(2) provides that, if a person is empowered or required to cause or direct a thing to be done, the person is taken to have caused or directed the thing to be done if the person does the thing himself or herself.

1.166 The explanatory memorandum explains that:

> Clause 428 will not be a delegation power and does not shift the responsibility to the person who actually performs the function. For example, the Secretary may cause another person to issue identity cards under clause 306 of the Bill. Clause 428 ensures that it is clear who is responsible and accountable for using powers under the Bill.

1.167 It appears to the committee that subclause 428 is intended to clarify that, where a person is authorised under the bill to exercise a function or power, they are taken to have validly exercised that function of power if they act through a third party as a matter of practical or administrative necessity. However, the authority to make decisions rests with the person who is, under the bill, the repository of the relevant function or power. That person also remains accountable for how the power or function is exercised. In this regard, the example in the explanatory memorandum of issuing identity cards is an apt one. Where a person is empowered to issue identity

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121 See paragraphs 414(1)(a) to (c).

122 Clause 428. The committee draws senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(ii).

cards as part of a regulatory regime, it would be unreasonable to suggest that cards have not been validly issued only because the physical acts of manufacturing and distributing those cards were undertaken by a third party.

1.168 However, the committee notes that subclause 428 is broadly drafted, and the committee considers it could foreseeably be read as conferring an express power on decision-makers to authorise agents to act on their behalf – including permitting those agents to exercise decision-making powers and functions. In this regard, the committee notes that the courts have been reluctant to allow persons authorised under legislation to exercise functions and powers to act through agents, particularly where an express power of delegation is available, and have tended only to permit such persons to act through agents where to do so is a matter of administrative necessity.

1.169 In this instance, it is not apparent to the committee that exercising the functions and powers in the bill through agents is a matter of administrative necessity. In particular, the committee notes that the majority of functions and powers in the bill may already be delegated to SES officers, with certain functions and powers also sub-delegable to more junior employees and officials[123] (see discussion at paragraphs 1.120 to 1.124 above).

1.170 The committee is concerned that if proposed clause 428 is read as enabling decision-makers to exercise powers and functions through agents, the bill does not set any limits on the powers and functions that may be exercised in this way, any restrictions on the persons who may act as agents, or any requirements that agents be 'authorised' by the person for whom they act (or otherwise). The committee notes that the explanatory memorandum does not provide any guidance in this regard, nor any explanation of why it is necessary for persons authorised to exercise powers and functions to act through others, particularly given that the bill also includes express powers of delegation.

1.171 The committee considers that clause 428, as currently drafted, may create uncertainty as to the exercise of powers and functions under the bill through third parties (agents) who are neither the repositories of such powers and functions nor their delegates. The committee therefore seeks the minister's advice as to:

- **whether proposed clause 428 is intended to allow persons authorised to exercise functions and powers to act through agents; and**
- **if so, the circumstances in which it is envisaged powers and functions under the bill would be exercised through agents, including examples of the agents (or types of agents) through which those functions and powers might be exercised.**

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123 See clause 288.

Immunity from civil liability[124]

1.172 Subclause 430(1) seeks to provide the Commonwealth and protected persons[125] with an immunity from any civil proceedings in relation to anything done, or omitted to be done, in good faith by a protected person:

- in the performance or purported performance or exercise of a function, duty or power, conferred by the Act; or
- in relation to anything done, or omitted to be done, by a person in providing assistance, information or a document to a protected person as a result of a request, direction or other requirement made by the protected person.

1.173 Subclause (2) seeks to extend the immunity from civil proceedings to persons assisting protected persons.

1.174 This clause would therefore remove any common law right to bring an action to enforce legal rights, 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 a 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.

1.175 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. The explanatory memorandum states this immunity is necessary as it will allow persons who are required to perform functions or exercise powers under the bill to do so without being obstructed by the possibility of a 'continuous stream of repeated challenges to the performance of those functions or the exercise of those powers.'[126] The explanatory memorandum also states that 'the provision would provide immunity from civil liability for conduct that may otherwise constitute a tort (for example, damage to property)' and concludes that 'persons should be able to perform functions and exercise powers under the bill without fear of being sued when they act in good faith.'[127]

1.176 The committee notes the justification for granting immunity with respect to protected persons who act in accordance, or in purported accordance, with their functions or duties or in exercising their powers. However, the committee notes that

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124 Clause 430. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

125 Clause 430(4) states that a protected person means a person who is or was the minister, the secretary, an authorised officer, or an officer or employee of the department.

126 Explanatory memorandum, p. 416.

127 Explanatory memorandum, p. 416.

the justification given with respect to protected persons—that they should be able to carry out functions under the bill in good faith without fear of being sued—does not explain why it is necessary to extend the immunity to the Commonwealth itself.

1.177 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth with civil immunity, such that affected persons would have their right to bring an action against the Commonwealth to enforce their legal rights limited to situations where a lack of good faith is shown.

Consultation prior to making delegated legislation[128]

1.178 The committee notes that the bill is structured so as to leave much of the detail regarding the regulation of the export of goods from Australia to be specified in the rules. The committee's view is that significant matters, such as the circumstances in which goods may or may not be exported, should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.179 The explanatory memorandum states that the bill sets out the 'overarching legislative framework for the Government to regulate the export of goods from Australian territory', while enabling the secretary to make rules by legislative instrument that 'set out the detailed requirements for the export of goods.'[129] The secretary's power to make rules is set out in clause 432, which provides that the secretary may make rules prescribing matters 'required or permitted by this Act to be prescribed by the rules' or 'necessary or convenient to be prescribed for carrying out or giving effect to this Act.'[130]

1.180 The explanatory memorandum provides the following justification for delegating much of the detail to the secretary to prescribe matters in the rules:

> It is appropriate that the Secretary is given the power to set the requirements for the export of goods in the rules. The combination of their technical nature, the need to rapidly respond to changes in importing country requirements, and the need to deal with a wide range of commodities mean that the Secretary is in the best position to set the requirements for the export of goods from Australia.
>
> It would not be possible or practical to set out the detailed requirements to export goods in the Bill. The Bill sets out the requirements of the regulatory scheme in as much detail as is reasonable in the circumstances,

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128 Clause 432. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

129 Explanatory memorandum, p. 7.

130 Explanatory memorandum, p. 7.

> given the breadth of goods that may be regulated and the range of reasons for their regulation. It sets boundaries on the Secretary's power to prescribe the requirements for exporting goods in the rules, while still allowing for flexibility.[131]

1.181 The explanatory memorandum further states that the secretary's rule-making power will be subject to a number of oversight mechanisms. First, as the rules will be legislative instruments, they will be tabled in Parliament and be subject to the usual disallowance process, as required by the *Legislation Act 2003*. Second, clause 289 empowers the minister to direct the secretary in relation to the exercise of the rule-making power. Finally, the secretary 'will need to comply with the ordinary processes of government in making rules', including obtaining appropriate authority for policy changes, preparing regulation impact statements where required, and 'conducting appropriate and reasonable consultation with industry and other stakeholders.'[132]

1.182 However, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that no such additional consultation requirements prior to making the rules are currently set out in the bill.

1.183 The committee also notes that these significant matters 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*.[133] 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.[134]

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131 Explanatory memorandum, p. 8.

132 Explanatory memorandum, p. 8.

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

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

1.184 Given that much of the detail regarding the requirements for the export of goods from Australia is to be set out in the rules, the committee requests the minister's advice as to:

- **the type of consultation that it is envisaged will be conducted prior to the making of the rules 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); and**
- **why it is appropriate for these significant matters to be included in rules rather than regulations.**

Incorporation of external material into the law[135]

1.185 Subclause 432(3) provides that, despite section 14(2) of the *Legislation Act 2003*, the rules may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any of the documents set out in paragraphs (a) to (g), as in force or existing from time to time.

1.186 The explanatory memorandum contains a general statement that the rule making powers provided to the secretary under clause 432 are necessary to 'accommodate the range of export operations, functions and powers to which the bill relates' and to allow the flexibility to quickly prescribe matters if required.[136] However, it does not specifically explain why it is necessary to allow the incorporation of the specified documents as in force or existing from time to time.

1.187 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).

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135 Subclause 432(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

136 Explanatory memorandum, p. 418.

1.188 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.

1.189 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.[137] 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.

1.190 Notes 1 to 4 included at the end of subclause 432(3) provide web addresses where the documents referred to in paragraphs (a), (b), (e) and (f) can be viewed. Paragraph (d) refers to the Australian New Zealand Food Standards Code, which comprises legislative instruments which can be viewed on the Federal Register of Legislation. However, no information is provided, either as notes in the bill or in the explanatory memorandum, as to whether the documents described in paragraphs (c) and (g) will be freely available and, if so, where they can be viewed.

1.191 The committee requests the minister's advice as to whether the documents described in paragraphs 432(3)(c) and (g) will be made freely available to all persons interested in the law and why it is necessary to apply the documents listed under subsection 432(3) as in force or existing from time to time, rather than when the instrument is first made.

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

Family Law Amendment (Family Violence and Other Measures) Bill 2017

Purpose	This bill seeks to amend the *Family Law Act 1975* and *Federal Circuit Court of Australia Act 1999* to: • provide for courts to be prescribed in regulations as having the same family law parenting jurisdiction as that held by state and territory courts of summary jurisdiction; • clarify the appeal pathway from decisions of prescribed courts exercising authority; • prescribe a new property value under which state and territory courts of summary jurisdiction can hear contested property matters without both parties' consent; • provide for judicial officers to deliver short form judgments in interim parenting proceedings; • remove the 21 day time limit on the revival, variation or suspension of family law orders by state and territory courts in family violence order proceedings; • provide that a breach of a family law injunction for personal protection is a criminal offence; • provide authority to the family law courts to dismiss applications which clearly have no merit; • allow judges the discretion to dispense with requirements to explain an order or injunction to a child; and • repeal a redundant provision
Portfolio	Attorney-General
Introduced	Senate on 6 December 2017

The committee has no comment on this bill.

Family Law Amendment (Parenting Management Hearings) Bill 2017

Purpose	This bill seeks to amend the *Family Law Act 1975* to establish a new forum for resolving less complex family law disputes
Portfolio	Attorney-General
Introduced	Senate on 6 December 2017

No-invalidity clauses[138]

1.192 Proposed section 11LG seeks to require parties to a parenting management hearing to inform the Parenting Management Hearings Panel (the Panel) of particular matters relating to family violence orders, child care arrangements under child welfare laws, notices, investigations and reports. The proposed section also enables persons who are not parties to a hearing to inform the Panel of those matters. The explanatory memorandum states that proposed section 11LG is necessary to ensure that the Panel 'is aware of such orders, care arrangements, notifications and investigations' to ensure that it appropriately dismisses matters under new sections 11NA and 11NB, which require the panel to dismiss an application in relation to a child if the child is under the care of a person under a child welfare law, and that 'it does not inadvertently make an order inconsistent with a family violence order'.[139]

1.193 However, proposed subsection 11LG(8) provides that a failure to inform the Panel of a matter covered by section 11LG does not affect the validity of any determination made by the Panel.

1.194 In addition, proposed section 11PB provides that the Panel must give reasons for a parenting determination, either orally or in writing, and enables parties to a parenting management hearing to request a statement of reasons from the Panel. Proposed section 11PC requires the Panel (by request or otherwise) to explain the consequences of a parenting determination to affected parties. The explanatory memorandum states that these provisions are to ensure all parties understand why the Panel has made a determination, and the consequences that flow from the determination.[140] However, proposed subsections 11PB(8) and 11PC(7) provide that a failure to comply with the requirements of proposed sections 11PB and 11PC does not affect the validity of a parenting determination.

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138 Schedule 1, item 22, proposed subsections 11LG(8), 11PB(8) and 11PC(7) The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

139 Explanatory memorandum, p. 53.

140 Explanatory memorandum, p. 73.

1.195 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. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal 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. Consequently, some of judicial review's standard remedies will not be available. The committee therefore expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.196 In relation to proposed subsections 11LG(8), 11PB(8) and 11PC(7), the explanatory memorandum states that the inclusion of no-invalidity clauses are appropriate to 'prevent technical defects after the Panel has already considered the matter.'[141] However, it is not apparent to the committee that a failure to comply with proposed section 11LG or 11PB or 11PC can aptly be described as merely technical in nature. For example, a failure to notify the Panel of a matter contemplated by proposed section 11LG could lead to substantial inconsistency between a parenting determination and other protection orders (e.g. a family violence order), and could impact on the quality of parenting determinations more generally.

1.197 Further (in relation to proposed subsections 11PB(8) and 11PC(7)), enforceable obligations to provide reasons for and to explain the consequences of a particular decision (in this case, a decision to make a parenting determination) promotes good administrative practice, guards against arbitrariness, and increases public confidence in the exercise of administrative power. There is a strong argument that a failure to provide reasons for, or the consequences of, making or a parenting determination could compromise a person's right to a fair hearing. Given the importance of Panel determinations to interested parties and affected children, it is unclear to the committee why a determination should be accepted as valid where the Panel has failed to provide reasons for making it, or failed to explain the consequences of the determination for affected parties.

1.198 The committee seeks the Attorney-General's detailed justification for including no-invalidity clauses in proposed subsections 11LG(8), 11PB(8) and 11PC(7) of the bill, which mean that a failure to inform the Panel of relevant matters, or a failure by the Panel to provide reasons for, or explain the consequences of, making a parenting determination, will not invalidate a parenting determination.

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141 Explanatory memorandum, pp. 53, 73-74.

Reversal of evidential burden of proof[142]

1.199 Proposed subsections 11PP(2), 11PQ(2), 11PR(2) and 11PS(2) create a number of offences relating to removing a child to whom a parenting management determination relates from Australia. Proposed subsections 11PP(3), 11PQ(3), 11PR(4) and 11PS(4) provide exceptions (offence-specific defences) to those offences, providing that the offences do not apply where the child leaves Australia with the consent of the parties to a parenting management hearing, in accordance with a parenting management determination or in accordance with or a court order. Proposed subsections 11PP(4) and 11PQ(4)[143] provide additional exceptions to the offences in proposed subsections 11PP(2) and 11PQ(2), providing that a person is not prohibited from taking a child outside Australia where the person reasonably believes that to do so is necessary to prevent family violence.

1.200 Proposed subsections 11PPA(2) and 11PQA(2) create offences relating to retaining a child outside Australia. Proposed subsections 11PPA(3) and 11PQA(3) provide exceptions (offence-specific defences) to those offences, providing that the offences do not apply where the person reasonably believes that to retain a child outside Australia is necessary to prevent family violence.[144]

1.201 Finally, proposed subsections 11RA(1) and (3) create offences relating to publishing accounts or lists of parenting management hearings. Proposed subsection 11RA(4) provides an exception (offence-specific defence) to those offences, providing that the offences do not apply where specified documents are communicated to particular entities, or where the publication of a specified document is authorised by the Panel.

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

1.203 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 require a

142 Schedule 1, item 22, proposed subsections 11PP(3), 11PQ(3), 11PR(4), 11PS(4), 11RA(4). Schedule 2, item 6, proposed subsection 11PP(4); item 7, proposed subsection 11PPA(3); item 9, proposed subsection 11PQ(4); and item 10, proposed subsection 11PQA(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

143 Proposed subsections 11PP(4) and 11PQ(4) are contingent on the commencement of relevant provisions of the Civil Law and Justice Legislation Amendment Act 2017, and will only take effect after the commencement of that Act.

144 Proposed sections 11PPA and 11PQA are contingent on the commencement of relevant provisions of the Civil Law and Justice Legislation Amendment Bill 2017, and will only take effect after the commencement of that bill.

defendant to disprove, or to raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.204 While in each of the instances identified 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. The committee notes that, in relation to proposed subsections 11PP(4), 11PPA(3), 11PQ(4), 11PQA(3), 11PR(2) and 11PS(2), the explanatory memorandum does not justify the reversal of the evidential burden of proof, merely restating the effect of the relevant provisions.

1.205 In relation to proposed subsections 11PP(3) and 11PQ(3), the explanatory memorandum states that the reversal of the burden of proof is appropriate, 'as the facts in relation to how the person was "authorised" to take or send the child to a place outside of Australia would be peculiarly within the knowledge of [the defendant].'[145] The explanatory memorandum suggests that the defendant may, for example, be able to show an email communication with the other parent whereby the other parent gave them permission to take the child for an overseas holiday.[146]

1.206 Regarding proposed subsection 11RA(4), the explanatory memorandum states:

> It is appropriate for the burden of proof to be placed on the [defendant] as the facts in relation to why the person has published an identifying account of a hearing, would be peculiarly within the knowledge of that person, for example, to show that they were directed by a Panel member to do so.[147]

1.207 The committee notes that the *Guide to Framing Commonwealth Offences*[148] 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.[149]

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145 Explanatory memorandum, p. 80.

146 Explanatory memorandum, pp. 79-81.

147 Explanatory memorandum, p. 90.

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

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

1.208 With regard to proposed subsections 11PP(3) and 11PQ(3), it is not apparent to the committee that a whether a person is permitted to take a child outside of Australia is a matter that is *peculiarly* within the defendant's knowledge, or that it would be significantly more costly for the prosecution to establish the matter. Moreover, the exceptions set out in proposed paragraphs 11PP(3)(b) and (c), and 11PQ(3)(b) and (c), rely on whether a parenting determination or court order has been issued. These appear to be matters of which the Panel or a relevant court would be particularly apprised, and would not appear to be matters peculiarly within the defendant's knowledge.

1.209 Similarly, it is not apparent to the committee that the matters set out in proposed subsection 11RA(5), which provide that the offences do not apply where specified documents are communicated to particular entities, or where the publication of a specified document is authorised by the Parenting Management Hearings Panel, are *peculiarly* within the knowledge of the defendant. The matters set out in that subsection appear to be primarily factual. For example, whether the Panel had issued a direction (contemplated by proposed paragraph 11RA(4)(e)) would appear to be a matter of which the Panel would be particularly apprised.

1.210 As the explanatory materials do not address, or do not adequately address, these issues, the committee requests the Attorney-General'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 the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[150]

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

Foreign Influence Transparency Scheme Bill 2017

Purpose	This bill seeks to establish the Foreign Influence Transparency Scheme to: • require registration by persons undertaking activities on behalf of a foreign principal; • contain appropriate exemptions for certain activities or classes of persons; • require registrants to disclose information about the nature of their relationship with the foreign principal and activities undertaken pursuant to that relationship; • place additional disclosure requirements on registrants during elections and other voting periods; • allow some information to be made publicly available, to serve the transparency purposes of the scheme; • set charges (for cost recovery purposes); • vest powers in the Secretary, including issuing notices to produce information or documents and collecting charges; and • introduce criminal offences for non-compliance.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2017

Reversal of evidential burden of proof[151]

1.211 The bill seeks to introduce a number of offences relating to compliance with the requirements of the proposed Foreign Influence Transparency Scheme (the Scheme). In a number of cases, the offences include offence-specific defences, which provide that the offence does not apply in certain circumstances. In doing so, the provisions reverse the evidential burden of proof, as 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.

1.212 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

151 Subclauses 34(5), 59(2), 60(2), (3), (4) and (6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.213 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 justified.

1.214 The committee notes that the *Guide to Framing Commonwealth Offences* 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.[152]

1.215 The bill contains a number of offence-specific defences that do not appear to meet these criteria, in that it does not appear that the relevant matters would be peculiarly within the knowledge of the defendant.

1.216 Subclause 34(1) provides that, if a person who is registered under the Scheme in relation to a foreign principal becomes aware that information provided to the secretary for the purposes of the registration is, or will become, misleading, or omits or will omit any matter or thing without which it is or will be misleading, that person would be required to give the secretary a notice correcting the inaccuracy or misleading impression. Failure to provide such a notice would be an offence under subclause 58(1). Subclause 34(5) states that the requirement to provide a notice to the secretary does not apply in relation to information that has already been included in a notice provided under clause 36 or 37. That the relevant information has been provided to the department by another means does not appear to the committee to be a matter that would be peculiarly within the knowledge of the defendant, as it would also be known by the department.

1.217 Subclause 59(1) seeks to make it an offence for a person to fail to comply with notices given under clauses 45 or 46. However, subclause 59(2) provides that the offence does not apply if the failure to comply occurred only because the person did not provide the information or document within the applicable period, took all reasonable steps to provide the information or document within that period, and provides the information or document as soon as practicable after the end of the period. With the exception of whether a person took reasonable steps to provide the information or document, these matters do not appear to be matters peculiarly within the knowledge of the defendant.

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

1.218 Subclause 60(1) seeks to make it an offence to give information or produce a document in response to notices given under sections 45 or 46, knowing that the information or document is false or misleading, or that the information omits any matter or thing without which it is misleading. Subclauses 60(2), (3), (4) and (6) state that the offence does not apply if:

- the information or document is not misleading in a material particular;
- the information did not omit any matter or thing without which it is misleading in a material particular;
- the Secretary did not take reasonable steps to inform the person of the existence of the offence; or
- if the document is accompanied by a signed statement to the effect that the document is known to be false or misleading in a material particular.

1.219 Again, none of the matters in these offence-specific defences appear to be matters that are peculiarly within the knowledge of the defendant.

1.220 The explanatory memorandum provides detailed information about the effect of each of these offence-specific defences, and states that reversing the evidential burden of proof is appropriate in each case as the defendant will be 'best placed' to provide relevant evidence.[153] However, the committee reiterates that the *Guide to Framing Commonwealth Offences* states 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. That a defendant may be 'best placed' to point to evidence in relation to a matter does not mean that the relevant matter is 'peculiarly' within the knowledge of the defendant.

1.221 The committee requests the Attorney-General's detailed justification as to the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

1.222 The committee also seeks the Attorney-General's advice as to the appropriateness of amending the bill to provide that the relevant matters are included as an element of the offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

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153 See explanatory memorandum, pp. 78, 134, 137–139.

Significant matters in delegated legislation[154]

1.223 The bill contains a number of provisions which would allow what is, in the committee's view, significant matters that relate to the operation of the Scheme, to be set out in rules (delegated legislation). 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. This is because a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposals forward in a bill.

1.224 Subclause 38(1) of the bill seeks to require a person, who is registered under the Scheme in relation to a foreign principal and undertakes registrable communications activity on behalf of that foreign principal, to make a disclosure about the foreign principal in accordance with rules made under subclause (2). Subclause (2) allows the rules to prescribe any or all of the following matters: instances of communications activity; when and how disclosures are to be made in relation to instances of communications activity; the content, form and manner of disclosures; and circumstances in which a person is exempt from making a disclosure. A failure to make a disclosure as required by this clause would be an offence under subclause 58(2). As a result, the content of the offence, as well as any circumstances in which a person is exempt from the requirements of an offence, are to be set out in the delegated legislation.

1.225 The explanatory memorandum provides several examples of when the disclosure requirements may apply, and also states that the rules may require that registrable written communications material contain a disclosure that identifies the foreign principal concerned and the arrangement under which the material was developed.[155] However, the explanatory memorandum does not address the question of why it is necessary to allow these significant policy matters to be determined by rules rather than being included in primary legislation.

1.226 In addition, subclause 53(1) sets out a number of purposes for which the secretary may communicate Scheme information and the person or body to whom this information may be provided. Item 4 of the table under subclause 53(1) would allow the communication of Scheme information for a purpose, and to a person, prescribed by the rules. The type of information to be communicated is information obtained by a Scheme official in the course of performing a function or exercising powers under the Scheme.[156] Subclause 52(2) requires the minister to consult the Information Commissioner before making rules for this purpose.

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154 Clauses 38 and 53. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv).

155 Explanatory memorandum, pp. 84-86.

156 See clause 50 and the definition of 'scheme information'.

1.227 The explanatory memorandum states that the power to specify in the rules further purposes for which Scheme information can be communicated is required as it may be necessary to disclose information for purposes beyond those specified in subclause 53(1) once the Scheme is established. However, it does not provide any specific examples of when and how it is envisaged this power would be exercised. [157] The explanatory memorandum further states that it is intended that 'any additional purposes and/or persons prescribed in rules would be kept narrow' and that any requests for Scheme information would need to set out how the information relates to the purpose as prescribed in the rules.[158]

1.228 The committee notes, however, that the bill does not itself limit the rule making power so as to require the prescription of any additional purposes and/or persons to be kept narrow. Similarly, although the minister will be required under subclause 53(2) to consult the Information Commissioner prior to making such rules, the bill does not require that any comments made by the Information Commissioner be taken into account before the rules are made.

1.229 The committee also notes that the two delegations of legislative power in clauses 38 and 53 (discussed 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*.[159] 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.. 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.[160]

1.230 The committee's view is that significant matters, such as the disclosure of information about a foreign principal (with non-compliance an offence) and the purposes for which Scheme information can be communicated, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.231 In this regard, the committee requests the Attorney-General's detailed advice as to:

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157 Explanatory memorandum, p. 107.

158 Explanatory memorandum, p. 107.

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

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

- **why it is considered necessary and appropriate to leave these significant aspects of the Scheme to delegated legislation; and**
- **why it is appropriate to include these matters in rules rather than regulations; and**
- **with respect to table item 4 of subclause 53(1):**
  - **what circumstances it is envisaged it may be necessary to expand the purposes for which Scheme information can be communicated; and**
  - **the appropriateness of amending the bill so as to require the minister to consider any comments made by the Information Commissioner prior to making any rules.**

Significant penalties[161]

1.232 The bill seeks to establish a scheme which includes broad registration obligations for persons or entities that have arrangements with, or undertake activities on behalf of, foreign governments or foreign principals. Failure to register carries significant criminal penalties, as outlined below. A 'foreign principal' is defined as including a foreign government, a foreign public enterprise, a foreign political organisation, a foreign business or an individual who is neither an Australian citizen nor a permanent resident.[162] Division 3 of Part 2 sets out the activities which are to be 'registrable' when done in Australia, as comprising:

- parliamentary lobbying on behalf of a foreign government;[163]
- activities on behalf of a foreign principal for the purpose of political or governmental influence[164] (which is defined as activity which has the purpose of directly or indirectly influencing a process relating to federal elections, federal government decisions, registered political parties or independent candidates or members of Parliament, political campaigners or proceedings in Parliament).[165] These registrable activities comprise:
  - parliamentary lobbying, which means lobbying a member of Parliament or their staff;[166]

161 Clause 57. The committee draws senators' attention to this provision pursuant to Standing Order 24(1)(a)(i) of the committee's terms of reference.

162 Clause 10.

163 Clause 20.

164 Clause 21.

165 See clause 12. See also amendments sought to be made to this bill by item 4 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

166 See clause 21 and the definition of 'parliamentary lobbying' in clause 10.

- general political lobbying, which means lobbying a Commonwealth public official, department, registered political party, candidate in a federal election or a political campaigner;[167]
- communications activities, which means communicating or distributing information or material;[168] and
- donor activity, which means disbursing money or things of value which is not required under the *Commonwealth Electoral Act 1918* to be disclosed;[169]

- activity by a recent Cabinet Minister on behalf of a foreign principal (who is not an individual);[170] or
- activity by recent ministers, members of parliament and other holders of senior Commonwealth positions on behalf of a foreign principal (who is not an individual), where in undertaking the activity the person contributes experience, knowledge, skills or contacts gained in their former capacity.[171]

1.233 There are a number of exemptions from registration for certain types of activities undertaken on behalf of a foreign principal, and a broad power for the rules to prescribe activities as exempt from registration.[172] The committee also notes that the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 contains amendments to this bill that would expand the definition of 'general political lobbying' to include lobbying of a person or entity registered as a political campaigner, and expand the definition of activity for the purpose of political or governmental influence to include influencing the processes of such registered political campaigners.[173]

1.234 Clause 57 of this bill seeks to establish a number of criminal offences in relation to registration obligations under the Scheme. These offences are subject to significant custodial penalties ranging from imprisonment for 12 months to imprisonment for seven years. In summary:

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167 See clause 21 and the definition of 'general political lobbying' in clause 10 and amendments sought to be made to this bill by item 3 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

168 See clause 21 and the meaning of 'communications activity' in clause 13.

169 Clause 21.

170 Clause 22.

171 Clause 23.

172 See clauses 24 to 30.

173 See items 3 to 5 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. These amendments are to commence at the same time as the *Foreign Influence Transparency Scheme Act 2017* commences (see clause 2, table item 7).

- Subclauses 57(1) and (3) seek to make it an offence for a person who knows they are required to register to intentionally or recklessly omit to apply for registration or renew their registration, where the person undertakes a registrable activity on behalf of a foreign principal. This offence is punishable by a maximum penalty of seven years imprisonment (for intentional omission) and 5 years imprisonment (for reckless omission).
- Subclause 57(2) seeks to make it an offence for a person to give notice that they are no longer liable to register under the Scheme, knowing there is a registrable arrangement in existence between the person and a foreign principal and the person undertakes a registrable activity on behalf of the foreign principal. This offence is punishable by a maximum penalty of seven years imprisonment.
- Subsection 57(4) seeks to make it an offence for a person to intentionally omit to, or be reckless as to whether he or she has omitted to, apply for registration or renew their registration. This offence is punishable by a maximum penalty of 12 months imprisonment.
- Subsection 57(5) seeks to make it an offence for a person to give notice indicating they are no longer liable to register under the Scheme, with the knowledge there is a registrable arrangement in existence between the person and a foreign principal (but no requirement that the person actually undertakes a registerable activity on behalf of a foreign principal). This offence is punishable by a maximum penalty of 12 months imprisonment.

1.235 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar penalties for similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation'.[174]

1.236 The explanatory memorandum states that the seven year maximum penalties under subclauses 57(1) and (2) are appropriate given the 'significant consequences that can flow from hidden foreign influence on Australia's political and governmental processes and the high level of culpability of the offender',[175] and

174 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 39.

175 Explanatory memorandum, pp. 112, 116.

states that these penalties are consistent with 'comparable offences that relate to conduct that negatively affects Australia's governmental and political processes, including the offence at section 951 of the United States Code (agents of foreign governments) which attracts a maximum penalty of 10 years imprisonment.'[176] However, the explanatory memorandum does not provide any specific examples of comparable offences in Commonwealth legislation.

1.237 The explanatory memorandum justifies the penalties for the remaining offences by referring variously to the serious implications that unchecked and unknown sources of foreign influence could have on Australia's system of government, the need to provide incentives to register under the Scheme, and the need to prevent behaviour that undermines the transparency objective of the Scheme.[177] Again, the explanatory memorandum does not provide specific examples of comparable offences in Commonwealth legislation.

1.238 The committee is concerned that a failure to register under the Scheme could lead to the imposition of up to seven years imprisonment, in a context where a broad range of persons would be required to register in a broad range of circumstances. In particular, the definition of 'foreign principal', 'political or governmental influence', 'lobby' and 'general political lobbying' is very broad with the effect that potentially a wide range of activities would fall within the requirement to register.

1.239 As the explanatory material does not provide any specific examples in Commonwealth legislation of similar offences that are subject to penalties of this magnitude, the committee is concerned that the penalties discussed above may be disproportionate and could unduly limit the liberty of the person.

1.240 It is not apparent to the committee that the penalties in proposed section 57 of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences.*

1.241 The committee therefore seeks the Attorney-General's detailed advice as to the justification for the significant custodial penalties proposed by clause 57, in the context of the breadth of the requirement to register under the scheme. In particular, the committee seeks the Attorney-General's advice as to specific examples of applicable penalties for comparable offences in other Commonwealth legislation.

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176 Explanatory memorandum, pp. 112, 116.

177 Explanatory memorandum, pp. 119, 122 and 124.

Absolute liability offence[178]

1.242 Clause 40 would require registrants under the Scheme to keep Scheme records in relation to a number of specified matters both while registered and for period of five years after their registration ends. Clause 61 would make it an offence to damage or destroy a Scheme record, conceal a Scheme record or prevent a registrant from keeping Scheme records with the intention of avoiding or defeating the object of the Act or any element of the Scheme. Subclause 61(2) states that absolute liability applies to paragraph 61(1)(a), which sets out the requirement for registrants to keep records. The proposed offence would be subject to a maximum penalty of imprisonment for three years.

1.243 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 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.

1.244 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.*[179]

1.245 In this instance, the explanatory memorandum states that the application of absolute liability to paragraph 61(1)(a) is appropriate as there is a need to ensure that a person does not avoid criminal liability because they claim to be unaware that a registrant is required to keep Scheme records. The explanatory memorandum further states that a registrant's obligation to keep Scheme records is clear on the face of the legislation.[180]

1.246 However, this explanation does not set out how the application of absolute liability in this instance is consistent with the *Guide to Framing Commonwealth Offences*, which states that absolute liability should only be applied where requiring proof of fault would undermine deterrence, there are legitimate grounds for

178 Clause 61. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) of the committee's terms of reference.

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

180 Explanatory memorandum, p. 140.

penalising a person lacking fault and a person who made a reasonable mistake of fact in respect of the element to which absolute liability applies, or that the element is a jurisdictional element rather than one going to the essence of the offence.[181]

1.247 In particular, it is not clear to the committee why it is necessary to apply absolute liability to this element of the offence rather than strict liability, which would allow for a defence of reasonable and honest mistake of fact.

1.248 The committee requests a detailed justification from the Attorney-General for the application of absolute liability to an element of the offence under clause 61 with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[182]

Broad delegation of administrative powers[183]

1.249 Clause 67 would allow the delegation of powers granted to the secretary under the bill to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position. The powers granted to the secretary under bill include broad information gathering powers and powers to authorise the communication of scheme information.[184]

1.250 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 SES. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.251 In this instance, the explanatory memorandum states that the delegation power has been included for administrative convenience and that it has been restricted to employees with an appropriate level of seniority, thereby ensuring that

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

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

183 Clause 67. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) of the committee's terms of reference.

184 Proposed Part 4, Divisions 3 and 4.

the powers and functions granted by the legislation would only be exercisable by senior officers with experience and judgement in matters of public administration.[185]

1.252 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 outside the SES. In this case, it is not clear to the committee why it is necessary to extend the scope of the delegation to Executive Level 2 employees. The committee is particularly concerned about the delegation to non-SES employees of powers to require persons to answer questions or produce documents (failure to comply being an offence) and the communication of scheme information as set out in Divisions 3 and 4 of Part 4.

1.253 The committee requests the Attorney-General's detailed advice as to why it is considered necessary to allow for the delegation of any or all of the secretary's functions or powers to Executive Level 2 employees, and the appropriateness of amending the bill so as to, at a minimum, limit the delegation of coercive information gathering powers and the communication of scheme information to Senior Executive Service employees.

185 Explanatory memorandum, p. 145.

Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Purpose	This bill seeks to impose a charge for applications for registration or renewal of registration under the *Foreign Influence Transparency Scheme Act 2017*
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2017

Charges in delegated legislation[186]

1.254 This bill seeks to impose a charge for applications for registration or renewal of registration under the *Foreign Influence Transparency Scheme Act 2017.* Clause 6 provides that the amount of the charge payable may be prescribed by the regulations, and the regulations may either set out the amount of the charge payable or a method for working out an amount.

1.255 The explanatory memorandum states that enabling charges to be dealt with in regulations 'provides sufficient flexibility to be able to align the amount and methodology with the [Australian Cost Recovery] Guidelines, and will reduce the need to amend the primary legislation in the future.'[187]

1.256 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[188] 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 the statement in the explanatory memorandum that enabling the charges to be prescribed in regulations reflects the cost recovery policy and processes adopted by the Australian Government.[189] However, no guidance is provided on the face of the bill limiting the imposition of the charge in this way, nor are maximum charges specified.

1.257 Where charges are to be prescribed by regulation, the committee considers that, at a minimum, some guidance in relation to the method of calculation of the

186 Clause 6. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

187 Explanatory memorandum, p. 9.

188 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'.

189 Explanatory memorandum, p. 9.

charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.258 The committee requests the Attorney-General's advice as to why there are no limits on the 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.

Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017

Purpose	This bill seeks to amend the *Great Barrier Reef Marine Park Act 1975* to implement a new governance arrangements for the Great Barrier Reef Marine Park Authority
Portfolio	Environment and Energy
Introduced	Senate on 6 December 2017

Retrospective application[190]

1.259 Part 1 of Schedule 2 to the bill seeks to amend the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) to provide that zoning plans, and plans of management, may provide in relation to a matter by providing that the regulations, or other legislative instruments, provide in relation to that matter. That part also seeks to amend the GBRMP Act to provide that zoning plans or plans of management may provide in relation to any matter in relation to which the regulations may provide.

1.260 The explanatory memorandum states that the changes proposed by Part 1 of Schedule 2 to the bill are directed at 'clarifying the relationship between zoning plans, plans of management and regulations made under the GBRMP Act; or other legislative instruments'.[191] These amendments appear to seek to address a technical defect in instruments currently made under the GBRMP Act. However, the explanatory materials do not explain the nature of that defect or the consequences that may follow from it, only stating that it addresses 'what may have been a technical defect associated with the prescription of conduct in Marine Park legislation'.[192] The explanatory materials also indicate that proceedings have commenced in the High Court relating to the operation of the legislation as it currently stands, but no detail is provided about the nature of the proceedings.[193]

1.261 Part 1 of Schedule 2 to the bill also contains application and transitional provisions which provide that the amendments in Part 1 of Schedule 2 apply in relation to any zoning plans, plan of management or regulations made before or after commencement. As such, these amendments have retrospective application. Item 8 also provides that an instrument made under the GBRMP Act before the

190 Schedule 2, Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

191 Explanatory memorandum, p. 18.

192 Statement of compatibility, p. 6.

193 Explanatory memorandum p. 22.

commencement of this bill, and anything done under such an instrument, is taken to have been valid. Item 9 also provides that the rights and liabilities of all persons are declared to be, and always to have been, the same as if instruments made under the GBRMP Act as currently in force, had always been valid.

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

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

1.264 The explanatory memorandum explains that the retrospective application of the amendments preserve the effect of actions previously taken under the existing legislation, and ensure the application of instruments made under the GBRMP Act in the past and in the future is the same, 'so that persons are not disadvantaged by any potential for inconsistent application of the existing framework'.[194] The explanatory memorandum also states that the retrospective application of the amendments 'will not adversely impact on persons due to the inclusion of a "historic shipwrecks" clause', which provides that the Commonwealth is required to pay reasonable compensation to any person whose property may be acquired otherwise than on just terms.[195]

1.265 However, while the explanatory materials give some justification as to why the retrospective application is necessary, the committee notes that the information provided lacks specificity.

1.266 The committee therefore requests the minister's advice as to:

- **the nature of the technical defect with the zoning plans, plans of management and regulations currently made under the *Great Barrier Reef Marine Park Act 1975*;**
- **the issues arising for decision in the High Court litigation; and**
- **whether any person or persons may suffer detriment from the retrospective application of the legislation,[196] and if so, the extent of that detriment.**

194 Explanatory memorandum, p. 20.

195 Explanatory memorandum p. 20.

196 The committee notes that subitem 9(3) provides that proceedings already commenced in the High Court will not be affected.

Home Affairs and Integrity Agencies Legislation Amendment Bill 2017

Purpose	This bill seeks to make consequential amendments to various Acts following the establishment of the Home Affairs portfolio
Portfolio	Prime Minister
Introduced	House of Representatives on 7 December 2017

The committee has no comment on this bill.

National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017

Purpose	This bill seeks to amend the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to require the annual reporting of employees, including on-air talent, whose combined salary and allowances are in excess of $200,000
Portfolio	Communications and the Arts
Introduced	Senate on 6 December 2017

Privacy[197]

1.267 The bill seeks to require the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) to include in its annual reports the following details relating to the remuneration of employees and contractors over the reporting period:[198]

- if an employee receives over $200,000 in salary and allowances, the report must include the employee's name, the total amount received, and the position or positions held by the employee over the reporting period; and
- if an individual receives a cumulative amount exceeding $200,000 under one or more on-air talent contracts,[199] the report must include the individual's name, the total amount received, and the nature of the services performed by the individual for the ABC or the SBS.

1.268 The explanatory memorandum states that the disclosure of the names and remuneration details of ABC and SBS employees and contractors 'is necessary to achieve the legitimate Government objective of enhanced transparency and reducing the gender salary gap.'[200] In this regard, the statement of compatibility also states:

197 Schedule 1, item 3, proposed section 80A and Schedule 2, item 3, proposed section 73A. The committee draws senators' attention to these provisions pursuant Senate Standing Order 24(1)(a)(i).

198 'Reporting period', in this instance, means the period of 12 months commencing on 1 July each year. See section 8 of the *Public Governance, Performance and Accountability Act 2013.*

199 Under proposed subsection 80A(3) of the ABC Act, and proposed subsection 73A(3) of the SBS Act, an 'on-air talent contract' is a contract, other than a contract of employment, under which an individual performs services consisting of, or including, appearing on a television program or speaking or performing on a radio program.

200 Explanatory memorandum, pp. 10 and 13.

> The publication of de-identified and potentially aggregate information about these employees' [*sic*] and salaries and allowances, and payments made to contractors in key on-air roles, is considered inadequate because it would not provide the transparency required to not only allow the public to see how its money is being spent, but also in identifying if there is a gender salary gap across similar roles or level of talent. This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.
>
> …
>
> Publication of the employee or individual's name will allow the Australian public to identify the person and the role they perform, and assess whether the national broadcasters have achieved appropriate value for money in relation to the spending of public monies.[201]

1.269 The committee acknowledges the importance of enhancing transparency in the public media sector and identifying and addressing gender salary gaps. However, the committee is concerned that disclosing the names and remuneration of employees and contractors may unduly trespass on those persons' right to privacy, as disclosure of a person's remuneration details would reveal that person's financial standing to the public at large.

1.270 Further, the committee notes that while the explanatory memorandum states that the disclosure of names and remuneration details is necessary to achieve enhanced transparency and to reduce the gender pay gap, it is unclear to the committee that this would be the only means of achieving this purpose. For example, publishing de-identified information about the number of employees and contractors receiving over $200,000 during the reporting period could also increase transparency around the expenditure of public money. Moreover, any gender pay gaps could be identified by publishing the number of female employees and contractors receiving over $200,000 over the reporting period, compared to the number of male employees and contractors in the same position or positions, without the need to name each individual. In this regard, the committee notes that Commonwealth Government departments and agencies typically publish the salaries and allowances of senior public servants employees by salary bands – and list the number of persons of each gender employed at each band, without disclosing the names or remuneration details of persons occupying individual positions.

1.271 The committee is concerned that, in publishing the names and remuneration details of ABC and SBS employees and contractors receiving more than $200,000, the bill impacts on the right to privacy of such persons and may unduly trespass on personal rights and liberties. The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of publishing such details.

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201 Statement of compatibility, pp. 6-7.

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to the criminal law to: • amend existing espionage offences; • introduce new foreign interference offences targeting covert, deceptive or threatening actions by foreign actors; • amend Commonwealth secrecy offences; • introduce comprehensive new sabotage offences; • amend various offences, including treason; • introduce a new theft of trade secrets offence; • introduce a new aggravated offence for providing false and misleading information in the context of security clearance processes; and • allow law enforcement agencies to have access to telecommunications interception powers. The bill also seeks to make amendments relevant to the Foreign Influence Transparency Scheme, including seeking to amend the *Foreign Influence Transparency Scheme Act 2017* (currently a bill before Parliament)
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2017

Broad scope of offence provisions[202]

1.272 The bill proposes reforming, and introducing, a number of key offences relating to threats to national security. The committee is concerned that a number of definitions in the bill, that are central to, or at least relate to, these offences, are broadly defined. As a result, a number of the offence provisions in the bill have a broad application. In particular:

- 'deal' is defined as doing a number of listed things in relation to information or an article, including merely receiving or obtaining it, collecting it or possessing it;[203]

202 Various provisions. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

203 See Schedule 1, item 10, section 90.1(1), proposed definition of 'deal'.

- 'foreign principal' is defined as including, amongst other things, a public international organisation, being an organisation of which two or more countries are members or a commission, council or other body established by such an organisation (thereby including all United Nations bodies);[204]
- 'national security' is defined as the national security of Australia and of a foreign country and includes the protection of the integrity of the country's territory and borders from 'serious threats' (which is not defined) or the country's political, military or economic relations with another country;[205] and
- 'inherently harmful information' is defined as including security classified information (regardless of whether the classification was appropriately made) or information that was provided by anyone to the Commonwealth in order to comply with an obligation under law or by compulsion of law.

1.273 As a result of these broad definitions, a number of offences in the bill appear to be overly broad. For example, under proposed section 91.3 a person commits an espionage offence if they deal with information or an article and this results in the information or article being made available to a foreign principal or to a person acting on their behalf and the information or article has a security classification or concerns Australia's national security. The penalty for the offence is imprisonment for up to 20 years. Because of the broad definition of 'deals' and 'national security' this could mean that a journalist who publishes security classified information online would commit the offence (as the publication would make the information available to a foreign principal), regardless of the public interest reasons for publishing it and whether the security classification was appropriately made. The broad definitions of 'deal' and 'foreign principal' could also make it an offence for a person to share unclassified information with a public international organisation, such as the World Health Organisation, if the information concerned Australia's political or economic relations with another country (with no requirement that the sharing of such information would affect those relations). The committee notes the only listed defence to the offence in proposed section 91.3 is that the person dealt with the information in accordance with a Commonwealth law, in the person's capacity as a public official or in accordance with an agreement with the Commonwealth allowing for the exchange of such information or articles.[206] There is no defence available for journalists or others acting in the public interest or even that the information had already been lawfully made publicly available.

204 See Schedule 1, item 16, proposed section 90.2.

205 See Schedule 1, item 16, proposed section 90.4.

206 See Schedule 1, item 17, proposed section 91.4.

1.274 In addition, proposed subsections 122.1(1) and (2) make it an offence for a person to communicate or deal with inherently harmful information that was made or obtained by that or any other person by reason of being, or having been, a Commonwealth officer or engaged to perform work for a Commonwealth entity. This offence is subject to a penalty of imprisonment of up to 15 years (for communicating) and 5 years (for otherwise dealing). As a result of the definitions of 'deal' and 'inherently harmful information', an offence under section 122.1could be made out if a person simply receives security classified information from a Commonwealth officer, even if they did not solicit that information and did nothing else with that information. The offences also do not distinguish between conduct committed by a Commonwealth officer or contractor in the course of their duties and third parties who have no professional obligation to maintain the confidentiality of such information. The committee also notes that the offence could be committed by a Commonwealth officer merely carrying out their everyday functions of dealing with security classified material, with the burden of proof resting with the officer to raise evidence to prove that they were acting in accordance with their duties in doing so (see paragraphs 1.276 to 1.286 below).

1.275 The committee therefore seeks the minister's detailed justification of:

- **the breadth of the definitions of 'deal', 'foreign principal', 'national security' and 'inherently harmful information' in the context of the offences in which they apply; and**
- **the breadth of the offences in proposed sections 91.3 and 122.1.**

Reversal of evidential burden of proof[207]

1.276 A number of key offences relating to threats to national security in the bill provide offence-specific defences, which provide that the offence does not apply, or it is a defence to the offence, in certain specified circumstances. In doing so, the defence provisions reverse the evidential burden of proof, as 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.

1.277 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

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207 See Schedule 1, item 4, proposed subsection 80.1AA(4); item 8, proposed section 82.10 and proposed subsections 83.3(2) and (3); item 17, proposed sections 91.4, 91.9, 91.13, 92.5 and 92.11; and Schedule 2, item 6, proposed section 122.5. The committee draws senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.278 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 justified.

1.279 The committee also notes that the *Guide to Framing Commonwealth Offences*[208] 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.[209]

1.280 In this bill, there are a number of offence-specific defences that do not appear to satisfy these criteria, particularly as knowledge of the matters specified in the defences do not appear to be matters that would be peculiar to the defendant.[210] For example, the bill provides that offences do not apply, or defences are available, in circumstances such as:

- the conduct was engaged in solely by way of, or for the purposes of, the provision of aid or assistance of a humanitarian nature;[211]
- the conduct engaged in was accessing or using a computer or other electronic system in the person's capacity as a public official;[212]
- the conduct was authorised by a written agreement to which the Commonwealth is a party;[213]
- the military-style training provided, received or participated in was as part of a person's service with the armed forces of the government of a foreign country or specified armed forces;[214]

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

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

210 See Schedule 1, item 4, proposed subsection 80.1AA(4); item 8, proposed section 82.10 and proposed subsections 83.3(2) and (3); item 17, proposed sections 91.4, 91.9, 91.13, 92.5 and 92.11; and Schedule 2, item 6, proposed section 122.5

211 See Schedule 1, item 4, proposed subsection 80.1AA(4).

212 See Schedule 1, item 8, proposed section 82.10.

213 See Schedule 1, item 8, proposed subsection 83.3(2).

214 See Schedule 1, item 8, proposed subsection 83.3(3).

- the person dealt with information or an article in accordance with the law of a Commonwealth or an arrangement or agreement to which the Commonwealth is a party; or in the person's capacity as a public official;[215]
- the information or article had already been communicated or made available to the public with the authority of the Commonwealth;[216]
- the information was disclosed to the Inspector-General of Intelligence and Security (or a person assisting them); the Commonwealth Ombudsman; or the Law Enforcement Integrity Commissioner, for the purposes of them exercising a power, or performing a function or duty;[217]
- the communication of information was in accordance with the *Public Interest Disclosure Act 2013* or was to a court or tribunal;[218]
- the person dealt with or held information in the public interest and in their capacity as a journalist engaged in fair and accurate reporting.[219]

1.281 In most cases, the explanatory memorandum gives a detailed explanation as to the effect of the provision, but the justification for reversing the evidential burden of proof is generally that the defendant 'should be readily able to point to' the relevant evidence[220] or the defendant is 'best placed' to know of the relevant evidence.[221] The committee reiterates that the *Guide to Framing Commonwealth Offences* states 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. Because a defendant is readily able to point to evidence or in a good position to do so does not mean that the relevant matter is 'peculiarly' within their knowledge. Rather, many of the matters listed above would appear to be matters that the prosecution would be best placed to establish, e.g. whether something had been done in accordance with the authority or agreement of the Commonwealth or disclosed to a specified Commonwealth entity.

1.282 In other instances, the explanatory memorandum[222] states that whether a person has lawful authority for doing something is a matter peculiarly within the

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215 See Schedule 1, item 17, proposed subsections 91.4(1), 91.9(1) and sections 91.13, 92.5 and 92.11; Schedule 2, item 6, proposed subsection 122.5(1).

216 See Schedule 1, item 17, proposed subsections 91.4(2) and 91.9(2); Schedule 2, item 6, proposed subsection 122.5(2).

217 See Schedule 2, item 6, proposed subsection 122.5(3).

218 Schedule 2, item 6, proposed subsections 122.5(4) and (5).

219 Schedule 2, item 6, proposed subsection 122.5(6).

220 See explanatory memorandum, pp. 73, 127, 148, 159, 276-283.

221 See explanatory memorandum, p. 88.

222 See explanatory memorandum, pp. 123, 145,155, 182 and 195.

knowledge of the defendant, but gives no justification as to why this is something especially within the defendant's knowledge, rather than something the prosecution would know. Rather, the explanatory memorandum states that it would be 'significantly more cost-effective for the defendant to assert the matter' than for the prosecution to disprove. It is not clear to the committee what significant difficulties the prosecution would face in proving whether or not a person acted in accordance with a law of the Commonwealth. The committee also notes the test is not whether or not it is more 'cost-effective' for the defendant (who may have limited financial resources) to raise evidence in relation to a matter, rather it is whether it is a matter peculiarly within the defendant's knowledge, and as such, it would be significantly more difficult and costly for the prosecution to disprove.

1.283 The committee also notes that proposed Division 122 sets out a number of offences for a person to communicate or deal with security classified information which was obtained by the person by reason of being a Commonwealth officer (or engaged to perform work for a Commonwealth entity). This appears to criminalise the work any public servant or engaged contractor does when dealing with security classified information. The bill relies on the existence of defences to the offence, which provide it is not an offence if a person is acting in their capacity as a Commonwealth officer or is engaged to perform the relevant work. However, this would appear to leave officials acting appropriately in the course of their employment open to a criminal charge and then places the evidential burden of proof on the officer to raise evidence to demonstrate that they were in fact acting in accordance with their employment.

1.284 The explanatory memorandum states that there are a vast range of circumstances in which Commonwealth officers and others deal with security classified information, noting that possessing or copying information concerning national security 'is a day to day occurrence in many Commonwealth departments and agencies, for Ministers and their staff, for State and Territory law enforcement agencies working on counter-terrorism investigations, and for defence contractors'.[223] It goes on to state that it is not intended to criminalise such dealings, and that the prosecution would consider the availability of defences before seeking to prosecute a person. However, the committee notes, in not making the question of whether a person is authorised to deal with such matters an element of the offence, the provisions do, in fact, criminalise such officers and impose an evidential burden of proof on such persons. The committee further notes that there may be some officers who, by reason of the sensitive national security nature of their work and

223 Explanatory memorandum, p. 275.

secrecy requirements under other legislation, may be unable to lawfully raise evidence relating to whether they were acting in the course of their duties.[224]

1.285 The committee considers that many of the matters listed above at paragraph 1.280 do not appear to be matters that are *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offences.

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

- **the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*;**
- **whether there are secrecy provisions in other legislation that might prevent public officials from discharging the evidential burden of proof as to whether they were acting in accordance with their statutory duties; and**
- **the appropriateness of amending the bill to provide that the relevant matters be included as an element of each offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.**

Broad scope of offence provision[225]

1.287 Proposed section 80.1AC seeks to make it an offence for a person to engage in conduct that involves the use of force or violence, where the person engages in such conduct with the intention of overthrowing the Constitution, the federal or a state or territory government or the lawful authority of the federal government. The offence is subject to a penalty of imprisonment for life. The explanatory memorandum explains that the offence in proposed section 80.1AC will replace an existing treachery offence, and gives an example of how the offence might be committed:

> Person B holds the strong view that Australia's constitutional democracy does not best serve the interests of the Australian people and that anarchy is preferable. Person B forms an anarchist group with a large number of like-minded people and they storm Parliament House. Using weapons and violence, the group seeks to cause harm to a large number of

224 See pp. 5-6 of submission 13 from the Inspector-General of Intelligence and Security to the Parliamentary Joint Committee on Intelligence and Security, Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

225 See Schedule 1, item 4, proposed section 80.1AC. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

> parliamentarians, intending that the anarchist movement will remove the established government.[226]

1.288 The explanatory memorandum goes on to state:

> Whether or not the overthrow of the Constitution or government occurs or the conduct is capable of bringing it about is not relevant to the defendant's culpability for the offence. For example, Person B's conduct may not be capable of defeating the security measures in place at Parliament House and therefore Person B's conduct was not capable of overthrowing the Government. The defendant could still commit the offence despite the fact that this outcome does not occur, or is not capable of occurring.[227]

1.289 The committee notes that while this offence could apply to extremely serious forms of conduct as described in the explanatory memorandum, the way the offence is drafted means it could also potentially apply to much less serious conduct. What constitutes conduct involving 'the use of force or violence' is not specified, and the committee notes that the use of force would include force against things. In addition, while the defendant would need to intend to engage in conduct, he or she would only need to be reckless as to whether the conduct involved the use of force or violence.[228] This, combined with the fact that it is not relevant whether the conduct was capable of achieving the defendant's aims, could mean, for example, that a person with a delusional aim of overthrowing the government might be liable to be sentenced to life imprisonment, despite only having engaged in conduct that resulted in minor force being applied to a government building.

1.290 The committee therefore seeks the minister's detailed justification for making the offence in proposed section 80.1AC subject to a penalty of life imprisonment when the provision does not precisely specify the nature of the offending conduct.

Strict liability offences[229]

1.291 A number of proposed offence provisions in the bill apply strict liability to elements of the offence. Those elements relate mainly to whether information or an article has a security classification (which has the meaning prescribed by the

226 Explanatory memorandum, p. 34.

227 Explanatory memorandum, pp. 35-36.

228 See explanatory memorandum, p. 35.

229 See Schedule 1, item 17, proposed sections 91.1, 91.3 and 91.6, and Schedule 2, item 6, proposed sections 122.1 and 122.3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

regulations).[230] Item 17 of Schedule 1 to the bill repeals Division 91 of the Criminal Code, and substitutes a new Division 91 – which includes a series of proposed offences relating to espionage. Proposed section 91.1 creates an offence of dealing with classified information relating to national security in a way that will make that information available to a foreign principal or to a person acting on their behalf. The offence is punishable by life imprisonment, or a prison term of 25 years, depending on whether the offence is committed intentionally or recklessly. Proposed section 91.3 of the bill creates a similar offence of dealing with security classified information, which is punishable by 20 years' imprisonment. Proposed section 91.6 creates an aggravated offence, which would apply where a person commits an offence under proposed sections 91.1, 91.2 or 91.3 (underlying offence), and an aggravating circumstance listed in proposed subsection 91.6(1) also exists.

1.292 A key element of each of the offences in proposed sections 91.1 and 91.2 is that the information with which the person deals has a security classification. The explanatory memorandum states that:

> It is anticipated that the regulations will prescribe the relevant protective markings that will denote information as being [security] classified for the purposes of these offences. At this time, these markings are listed in the *Australian Government information security management guidelines – Australian Government security classification system* (available at www.protectivesecurity.gov.au), and include:
>
> - PROTECTED
> - CONFIDENTIAL
> - SECRET
> - TOP SECRET[231]

1.293 With respect to the offences in proposed sections 91.1 and 91.3, the question of whether the relevant information is security classified is a matter of strict liability. Further, an aggravating circumstance in proposed section 91.6 is that the person dealt with five or more records or articles, each of which has a security classification. Whether the records or articles have a security classification is also a matter of strict liability.

1.294 Item 6 of Schedule 2 to the bill inserts a new Division 122 into the Criminal Code – which contains a number of offences relating to secrecy. Proposed section 122.1 creates a series of offences relating to communicating and dealing with inherently harmful information, to removing or holding inherently harmful information outside its proper place of custody, and to failing to comply with a direction in relation to inherently harmful information. The offences are punishable

230 See item 16, proposed section 90.5 for a definition of 'security classification'.

231 Explanatory memorandum, p. 105

by terms of imprisonment of between 5 and 15 years. The bill provides that where the information with which the alleged offender deals has a security classification (outlined above), whether the information is inherently harmful would be a matter of strict liability.

1.295 Proposed section 122.3 creates an aggravated offence, which would apply where a person commits an underlying offence under proposed sections 122.1 or 122.2, and an aggravating circumstance listed in proposed subsection 122.3(1) also exists. One of the aggravating circumstances in proposed section 122.3(1) is that the commission of the underlying offence involves five or more records, each of which has a security classification. Whether the records have a security classification is a matter of strict liability.

1.296 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 only imposed on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence, or an element of an offence, is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, the offence or the element of the 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's conduct was intentional, reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a justification for any imposition of strict liability, including clearly outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[232]

1.297 The statement of compatibility states:

> For the elements relevant to information or articles carrying a security classification, [the application of strict liability] is appropriate because information or articles carrying a security classification are clearly marked with the security classification and any person who has access to security classified information should easily be able to identify as such.
>
> …
>
> The application of strict liability is also necessary to ensure that a person cannot avoid criminal responsibility because they were unaware of certain circumstances for example that information was security classified information. Consistent with the Guide to Framing Commonwealth Offences, requiring knowledge of such an element in these circumstances would undermine deterrence of the offence. There are also legitimate grounds for penalising a person's lacking 'fault' in these circumstances

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

> because, with an offence of espionage for example, the person still engaged in conduct with the intention to, or reckless as to whether, that conduct would prejudice Australia's national security or advantage the national security of a foreign country [233]

1.298 However, the committee notes that the meaning of 'security classification' is to be prescribed by the regulations, with no detail set out in the bill. The committee notes the explanatory memorandum's advice that at this time the markings listed in the *Australian Government information security management guidelines* are likely to be prescribed by the regulations.[234] However, the committee notes that those guidelines provide that '[i]f information is created outside the Australian Government the person working for the government actioning this information is to determine whether it needs a protective marking'.[235] This indicates that any outside contractor or consultant working for the government can mark information with a security classification. It is not clear that in all cases the question of whether information or articles had a security classification would always be apparent to a person, particularly as there is a vast range of persons who can apply a security classification to a document. It is therefore not clear that such a classification would always be appropriately applied and made clearly apparent to persons unfamiliar with the classification process. The committee also notes that the defence of mistake of fact only applies to persons who have considered whether certain facts exist (but is under a mistaken but reasonable belief about those facts). It will not apply if a person has failed to consider the existence of a security classification.

1.299 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability to all elements of an offence 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.[236] While in this instance strict liability only applies to a discrete element of each of the identified offences, the committee notes that the offences are subject to very significant terms of imprisonment (between 5 years and life imprisonment).

1.300 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 elements of the offences in proposed sections 91.1, 91.3, 91.6, 122.1 and 122.3 (as

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233 Statement of compatibility, p. 17.

234 Explanatory memorandum, pp. 104-105.

235 Australian Government, *Information security management guidelines: Australian Government security classification system,* version 2.2, approved November 2014, amended April 2015, p. 4, paragraph 29. Available at: https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf

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

to whether information or articles have a security classification), particularly given such offences are punishable by terms of imprisonment ranging from 5 years to life imprisonment.

Right to liberty: presumption against bail[237]

1.301 Section 15AA of the *Crimes Act 1914* (Crimes Act) provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth offences unless exceptional circumstances exist. Item 38 of Schedule 1 to the bill proposes to amend section 15AA of the Crimes Act to apply the presumption against bail to the proposed offences in Divisions 80 and 91 of the Criminal Code (including offences relating to urging violence, advocating terrorism, genocide, offences relating to espionage).[238] Item 39 of Schedule 1 to the bill also proposes to amend section 15AA of the Crimes Act, in this case to apply the presumption against bail to the new foreign interference offences in circumstances where it is alleged that the defendant's conduct involved making a threat to cause serious harm of a demand with menaces.[239]

1.302 The presumption against bail applies both to those convicted of, but also those charged with, certain offences. The committee notes that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such, the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail (including extending the presumption against bail to new offences), and expects that the explanatory materials would include any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

1.303 In this instance, the explanatory memorandum states that extending the presumption against bail to the offences proposes by the bill is appropriate given the relevant conduct is similar in nature to that of an espionage offence and it is appropriate that a person being prosecuted for a foreign interference offence should only be subject to a presumption against bail in circumstances where there is a threat of harm.[240] The statement of compatibility also gives a general justification for when it may be appropriate to impose a presumption against bail, noting that the existing provisions in the Crimes Act and the amendments in the bill means the

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237 Schedule 1, items 38 and 39. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

238 See explanatory memorandum, p. 215.

239 See explanatory memorandum, p. 216.

240 Explanatory memorandum, p. 216.

presumption against bail is appropriately reserved for serious offence, and the accused nevertheless has the opportunity to rebut the presumption.

1.304 The committee reiterates its concerns that some of the espionage offences (for which there would be a presumption against bail) may be overly broad (see above at paragraphs 1.272 to 1.275) and no information has been provided as to why bail authorities and courts would not be able to adequately assess the risks posed by persons charged with such offences before setting bail. The committee further emphasises that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption.

1.305 The committee requests the minister's detailed justification as to the appropriateness of imposing a presumption against bail and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority or court must have regard to in exercising their discretion whether to grant bail.

Incorporation of external material into the law[241]

1.306 Proposed section 121.2 seeks to provide a definition of 'proper place of custody'. Proposed subsection 121.2(1) provides that 'proper place of custody' will have the meaning prescribed by the regulations. Proposed subsection 121.2(2) then provides that, despite section 14(2) of the *Legislation Act 2003*, regulations made for the purposes of the definition of 'proper place of custody' may prescribe a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

1.307 At a general level, the committee will have concerns where provisions in a bill allow legislative provisions to operate 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

241 Schedule 2, item 6, proposed section 121.2. The committee draws senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(i).

information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.308 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 or affected by the law.

1.309 The issue of access to external material incorporated into the law by reference, 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 published a detailed report on this issue,[242] which comprehensively outlines the significant concerns associated with the incorporation of material by reference – particularly where the material is not readily and freely available.

1.310 With regard to these matters, the explanatory memorandum states:

> The incorporation of the content of the definition [of 'proper place of custody'] by reference to another instrument or document is necessary to enable the definition to incorporate documents setting out Commonwealth protective security policy documents, to ensure alignment between the Commonwealth's protective security police [*sic*] as in force from time-to-time and the scope of the offences.
>
> The Commonwealth *Protective Security Policy Framework* sets out the Commonwealth protective security policy as in force from time-to-time. Tier 1, 2 and 3 documents comprising the PSPF are available free of charge online. Tier 4 documents that agencies develop to set out agency-specific protective security policies and procedures are available free of charge to all persons in agencies subject to those policies and procedures.[243]

1.311 The committee acknowledges that the explanatory memorandum states that all persons would have access to Tier 1, 2 and 3 documents within the PSPF, and that Tier 4 documents would be available to persons to whom they directly apply (that is, persons in relevant agencies). However, the committee reiterates that it is a fundamental principle of the rule of law that *every* person interested in or affected by the law should be able readily and freely access its terms. In this regard, the committee is concerned that Tier 4 documents (and potentially other documents incorporated by reference into regulations made for the purpose of proposed section 121.2) may not be freely and readily available to the public at large.

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

243 Explanatory memorandum, p. 234.

1.312 The committee requests the minister's advice as to whether, at a minimum, the bill can be amended to insert a statutory requirement that the relevant documents to be incorporated will be made freely and readily available to all persons in agencies subject to those policies and procedures.

Security of Critical Infrastructure Bill 2017

Purpose	This bill seeks to create a framework for managing critical infrastructure, including: • establishing a register of critical infrastructure assets; • providing the minister with a authority to direct a reporting entity or operator of a critical infrastructure asset to do, or refrain from doing, an act or thing within a specified period of time; • providing the secretary with the authority to request certain information from reporting entities and operators of critical infrastructure assets; • enabling a direction to be issued by the Minister to the owner or operator of a critical infrastructure asset to mitigate national security risks; and • providing that the minister can privately declare an asset to be a critical infrastructure asset in certain circumstances
Portfolio	Attorney-General
Introduced	Senate on 7 December 2017

Power for delegated legislation to amend primary legislation (Henry VIII clause)[244]

1.313 Proposed Division 3 seeks to impose requirements on reporting entities to give certain information to the secretary in specified circumstances, and sets out the manner in which that information must be given. Clause 27 provides that rules may exempt any entity, specified classes of entities or specified entities from all or specified provisions of proposed Division 3, either generally or in specified circumstances. Clause 27 therefore effectively allows the rules to amend the operation of proposed Division 3 (that is, to amend primary legislation).

1.314 A provision that enables delegated legislation to amend primary legislation (including amending the *operation* of primary legislation) is known as a Henry VIII clause. There are significant concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive. As such, the committee expects

244 Clause 27. The committee draws senators' attention to this provision pursuant to Senate Standing Order 241(a)(iv).

a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.315 In this instance, the committee notes that the explanatory memorandum provides an example of when the rules may be used to exempt entities from requirements in proposed Division 3.[245] However, the explanatory memorandum does not provide clear justification for the appropriateness of using delegated legislation to amend the operation of proposed Division 3. Further the committee notes that the bill does not appear to provide any limitations on the power to make rules under clause 27. For example, it does not set out any criteria that must be satisfied.

1.316 The committee seeks the Attorney-General's more detailed justification as to why it is proposed to allow the rules to exempt entities from all or specified requirements of proposed Division 3.

1.317 The committee also seeks the Attorney-General's advice as to whether it would be appropriate to amend the bill to insert (at least high-level) guidance concerning the making of rules under clause 27.

Reversal of evidential burden of proof[246]

1.318 Clause 45 seeks to create an offence of disclosing, making a record of or otherwise using protected information where the making of the record, the disclosure or the use is not authorised. The offence carries a maximum penalty of imprisonment for 2 years or 120 penalty units, or both.

1.319 Clause 46 creates a number of exceptions (offence specific defences) to this offence, stating that the offence does not apply if the making of the record the disclosure or the use:

- is required or authorised by or under a Commonwealth law, a law of a state or territory or prescribed by the rules;
- is done in good faith in attempting to comply with provisions relating to authorised use or disclosure; or
- is to a person to whom the protected information relates, is disclosed by the entity to itself, or it is done with the express or implied consent of the entity to whom the information relates.

245 Explanatory memorandum, p. 42.

246 Clause 46. The committee draws senators' attention to this provision pursuant to Senate Standing Order 241(a)(i).

1.320 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.

1.321 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.

1.322 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 committee notes that the explanatory memorandum does not provide a justification for the reversals of the evidential burden of proof in clause 46, merely restating the effect of the relevant provisions.

1.323 As the explanatory materials do not address this issue, the committee requests the Attorney-General'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*.[247]

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

Security of Critical Infrastructure (Consequential and Transitional Provisions) Bill 2017

Purpose	This bill seeks to amend the *Australian Security Intelligence Organisation Act 1979* and the *Foreign Acquisitions and Takeovers Act 1975* to provide for consequential and transitional provisions relating to the *Security of Critical Infrastructure Act 2017*
Portfolio	Attorney-General
Introduced	Senate on 7 December 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

Purpose	This bill seeks to amend the *Corporations Act 2001* and the *Taxation Administration Act 1953* to: • extend corporate whistleblower protections; and • introduce new protections for tax whistleblowers
Portfolio	Treasury
Introduced	Senate on 7 December 2017

Reversal of evidential burden of proof[248]

1.324 Proposed subsections 1317AAE(1) and 14ZZW(1) of the bill amend the *Corporations Act 2001* (Corporations Act) and the *Taxation Administration Act 1953* (Taxation Act) respectively, to provide that it is an offence for a person to disclose certain confidential information relating to the identity of a whistleblower.[249] Proposed subsections 1317AAE(4) and 14ZZW(3) provide exceptions (offence-specific defences) to these offences, providing that the offences do not apply if:

- the disclosure is not of the identity of the whistleblower; and
- the disclosure is reasonably necessary for the purpose of investigating certain prescribed matters; and
- the person who has disclosed the information has taken all reasonable steps to reduce the risk that the whistleblower will be identified.

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

1.326 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.

248 Schedule 1, item 2, proposed subsection 1317AAE(4) and Schedule 1, item 15, proposed subsection 14ZZW(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

249 Schedule 1, item 10 of the bill also seeks to make contraventions of proposed subsection 1317AAE(1) subject to a civil penalty.

1.327 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 committee notes that the explanatory memorandum does not provide a justification for the reversals of the evidential burden of proof in the provisions identified above, merely stating the operation and effect of those provisions.

1.328 As the explanatory materials do not address this issue, the committee requests the Treasurer'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 the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[250]

1.329 The committee also seeks the Treasurer's advice as to the appropriateness of including some or all of the offence-specific defences identified above as elements of the offences to which they apply.

Power for delegated legislation to amend primary legislation (Henry VIII clause)[251]

1.330 Proposed section 1317AI of the bill seeks to require certain classes of companies to have in place a policy for the protection and support of whistleblowers, and to make that policy available to the company's officers and employees. Proposed section 1317AJ provides that the Australian Securities and Investments Commission (ASIC) may, by legislative instrument, make an order relieving specified classes of companies from all or particular requirements of proposed section 1317AI. Proposed section 1317AJ therefore effectively allows ASIC to amend the operation of proposed section 1317AI (that is, to amend primary legislation) by legislative instrument.

1.331 A provision that enables delegated legislation to amend primary legislation (including amending the *operation* of primary legislation) is known as a Henry VIII clause. There are significant concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum states:

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

251 Schedule 1, item 9, proposed section 1317AJ. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> The rationale for providing ASIC with a power to relieve certain companies from [all or specified requirements of section 1317AI] is to provide it with flexibility in making a determination whether in some limited circumstances, the benefits of this requirement in encouraging good corporate culture and governance could be outweighed by reduced flexibility and unnecessarily high compliance costs.[252]

1.332 While the committee notes this brief explanation, the committee does not consider that it adequately explains why it is appropriate to provide ASIC with broad powers to modify the operation of proposed section 1317AJ by legislative instrument. In this regard, the committee also notes that the bill does not provide any limitations on the powers of ASIC to relieve companies from the requirement to have a whistleblower policy. For example, it does not set out any criteria that must be satisfied. Further, the explanatory memorandum does not explain the intended criteria that ASIC will follow when considering to exercise this power, and while the explanatory memorandum indicates that the power will only be exercised in 'some limited circumstances', it does not provide examples of the circumstances in which the power may be used.

1.333 The committee seeks the Treasurer's more detailed justification as to why it is proposed to provide ASIC with broad powers to exempt classes of company from the operation of proposed section 1317AI, including examples of when it is envisaged that such powers would be exercised.

1.334 The committee also seeks the Treasurer's advice as to whether it would be appropriate to amend the bill to insert (at least high-level) rules or guidance concerning the exercise of ASIC's powers under proposed section 1317AJ.

252 Explanatory memorandum, pp. 42-43.

Commentary on amendments and explanatory materials

Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017
[Digest 12 & 13/17]

1.335 On 4 December 2017 in the House of Representatives the Minister for Health (Mr Hunt) presented an addendum to the explanatory memorandum and the bill was read a third time.

1.336 The committee thanks the Minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.

Therapeutic Good (Charges) Amendment Bill 2017
[Digest 12 & 13/17]

1.337 On 4 December 2017 in the House of Representatives the Minister for Health (Mr Hunt) presented an addendum to the explanatory memorandum and the bill was read a third time.

1.338 The committee thanks the Minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.

No comments

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

- Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017;[253]
- Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017;[254]

253 On 5 December 2017 the House of Representatives agreed to three Government, the Minister for Justice presented a supplementary explanatory memorandum and the bill was read a third time.

254 On 4 December 2017 the Senate agreed to two Opposition amendments, on the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

- Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017;[255] and
- Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017.[256]

255 On 6 December 2017 the Senate agreed to 17 Government, three Australian Greens amendments and the Minister for Finance (Senator Cormann) tabled a supplementary memorandum.

256 On 5 December 2017 the Senate agreed to three Liberal Democratic Party amendments. On 7 December 2017 the House of Representatives agreed to the Senate amendments and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

Purpose	This bill seeks to amend *Corporations Act 2001* and other related legislation to introduce a new external dispute resolution framework and an internal dispute resolution framework for the financial system
Portfolio	Treasury
Introduced	Senate on 14 September 2017
Bill status	Before the Senate

2.2 The committee dealt with this bill in *Scrutiny Digest No. 12 of 2017*. The minister responded to the committee's comments in a letter dated 6 November 2017. The committee sought further information and minister responded in a letter dated 6 December 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[1]

Exclusion of judicial review[2]

Initial scrutiny – extract

2.3 Item 11 of the bill seeks to ensure that the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) does not apply to decisions or determinations made by AFCA in relation to superannuation disputes.

1 See correspondence relating to *Scrutiny Digest No. 1 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

2 Schedule 1, item 11, proposed paragraph (hba) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977.* The committee draws Senators' attention to this provision pursuant to Senate Standing Order1(a)(iii).

2.4 The committee notes that the explanatory memorandum only provides a brief justification for the exclusion of the ADJR Act review and therefore a number of scrutiny issues arise in relation to this provision.

2.5 First, the explanatory memorandum states that the approach to review rights for superannuation disputes is consistent with the existing practice for disputes handled by the Superannuation Complaints Tribunal (the SCT).[3] However, the committee notes it appears that at least some decisions of the SCT are subject to ADJR Act review.[4]

2.6 Secondly, the explanatory memorandum suggests that ADJR Act review for superannuation disputes may be inappropriate because a statutory right to appeal on questions of law to the Federal Court is provided for. The committee notes that although a statutory appeal on a question of law is sometimes a functional equivalent of an ADJR Act review, this is not necessarily so. This is because the type of errors that can constitute questions of law (and thus whether the court has jurisdiction to hear an appeal) is a question of statutory interpretation. The courts interpret the meaning of 'question of law' in the context of the particular statute in which it appears. It is therefore not clear that an appeal on a question of law would enable an aggrieved consumer to raise all of the errors that would give them a ground of review in a judicial review application brought under the ADJR Act.

2.7 Finally, while parties may appeal to the Federal Court on questions of law in relation to superannuation disputes, the AFCA also has jurisdiction over non-superannuation financial disputes. The explanatory memorandum states that the ADJR Act will not apply to determinations by AFCA in relation to non-superannuation financial disputes because those determinations would not be made under an enactment.[5] While the proposed AFCA will be a private industry body, it will play an important role in a mandatory scheme of public regulation which is set up in part through the exercise of statutory power. It is therefore unclear why it would not be appropriate for a court to have the jurisdiction to judicially review the legality of AFCA's non-superannuation decisions and determinations.

2.8 The committee therefore requests the minister's advice:

- as to the decisions or conduct of the SCT that is currently reviewable under the ADJR Act and the rationale for proposing to exclude ADJR Act review of these types of decisions made by AFCA;

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3 Explanatory memorandum, p. 44.

4 See Superannuation Complaints Tribunal, *Submission in response to the Consultation Paper: Improving dispute resolution in the financial system*, p. 10, available at https://static.treasury.gov.au/uploads/sites/1/2017/09/Superannuation-Complaints-Tribunal.pdf.

5 Explanatory memorandum, p. 44.

- in relation to superannuation disputes, whether the grounds for bringing an appeal on a 'question of law' will be narrower or more limited than those that would be available under the ADJR Act; and
- in relation to non-superannuation financial disputes:
  - whether, in the absence of ADJR Act review and a statutory right to appeal, any court would have jurisdiction to judicially review the legality of AFCA's non-superannuation decisions and determinations; and
  - the appropriateness of providing that a court of general jurisdiction have the jurisdiction, by way of appeal on a question of law or judicial review, to hear disputes about the legality of AFCA's non-superannuation decisions and determinations.

Minister's first response

2.9 The minister advised:

> *The exclusion of determinations made by AFCA from, judicial review under the ADJR Act*
>
> The Committee has sought further information about the exclusion of judicial review.
>
> Specifically, the Committee sought further information about the type of decisions that are currently reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the rationale for proposing to exclude ADJR Act review of decisions made by AFCA.
>
> Currently, decisions of the Superannuation Complaints Tribunal made under the *Superannuation (Resolution of Complaints) Act 1993* are subject to review under the ADJR Act. In practice, the most common examples of appeals under the ADJR Act are appeals of decisions by the Superannuation Complaints Tribunal to withdraw a complaint or that a complaint is outside the Superannuation Complaint Tribunal's jurisdiction.
>
> This Bill inserts a new provision in the ADJR Act which excludes decisions relating to the making of a determination under the AFCA scheme.
>
> Judicial review in the federal jurisdiction is generally available to administrative decisions made by officers of the Commonwealth (such as public servants), Ministers and their delegates. As the Superannuation Complaints Tribunal is a statutory authority established under the *Superannuation (Resolution of Complaints) Act 1993,* and as its decision-makers are considered 'officers of the Commonwealth', it is appropriate that these decisions are subject to judicial review.
>
> By contrast, AFCA is a private review mechanism arising from private rights. Its decision-makers will not be 'officers of the Commonwealth', and as a result it is not appropriate for its decisions and conduct to be subject to judicial review. This is consistent with administrative law principles.

AFCA will have internal review mechanisms and an independent assessor to manage disputes relating to the processes and operations of AFCA. Further, a determination of AFCA in relation to superannuation complaint can be appealed to the Federal Court on a question of law.

Appeals on questions of law

The Committee sought further information about whether the grounds for bringing an appeal on a 'question of law' will be narrower than those that would currently be available in relation to a superannuation dispute under the ADJR Act.

Appeals on questions of law are generally limited to questions going to the legal correctness of a decision, whereas judicial review generally provides an opportunity to test the lawfulness of an administrative decision.

The types of questions of law that may be appealed in any particular situation would depend on the particular legal context in which the decision is made, which may be broader than reviews provided by the ADJR Act as the grounds of review under the ADJR Act are expressly prescribed. Further, not all grounds of ADJR Act review would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law.

The exclusion of review under the ADJR Act is appropriate because AFCA is a private industry body, rather than a government body, and it would not be usual to allow judicial review under the ADJR Act in relation to an industry body.

The Bill recognises the importance of the judicial oversight of decision-making bodies by allowing the Federal Court to hear appeals on questions of law from determinations of AFCA in relation to superannuation complaints. This will ensure that an appropriate review process by the Federal Court will be available to parties to a superannuation complaint.

Non-superannuation financial disputes

The Committee sought further information about the appropriateness of providing a court of general jurisdiction with the jurisdiction to hear appeals in relation to non-superannuation complaints.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

The Bill does not provide a mechanism for appeals in relation to non-superannuation complaints to be heard by a court. Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

However, a member of the AFCA scheme (a financial services provider) may challenge a determination made by AFCA in court through a civil

action for breach of contract if the determination is inconsistent with AFCA's terms of reference.

A consumer can challenge a decision of a financial services provider in a court through a civil action for breach of contract. Consumers are not required to comply with a determination of AFCA and may commence a civil action independent of any determination that is made by AFCA.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

Committee's first comment

2.10 The committee thanks the minister for this response. The committee notes the minister's advice that decisions of the Superannuation Complaints Tribunal are currently subject to review under the ADJR Act because its decision-makers are officers of the Commonwealth, but that it is not appropriate to subject the decisions and conduct of the AFCA to judicial review because it will be a private review mechanism arising from private rights and its decision-makers will not be officers of the Commonwealth.

2.11 The committee also notes the minister's advice that a determination of AFCA in relation to a superannuation complaint can be appealed to the Federal Court on a question of law, and the grounds for bringing such an appeal would depend on the particular legal context. The committee notes the minister's advice that not all of the grounds of review specified under the ADJR Act would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law. The committee notes the minister's view that the exclusion of review under the ADJR Act is appropriate because AFCA is a private industry body, rather than a government body.

2.12 The committee also notes the minister's advice that currently decisions in relation to non-superannuation financial disputes cannot be appealed to a court, and that this situation would not change under the AFCA scheme.

2.13 With respect to the exclusion of decisions made by AFCA from judicial review under the ADJR Act, the committee remains concerned as to whether the right to appeal on a question of law will provide an adequate substitute to judicial review under the ADJR Act. The committee notes the minister's advice that not all grounds of ADJR Act review would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law. As such, it is not clear to the committee whether errors relating, for example, to a denial of a fair hearing (i.e those which give rise to the procedural fairness ground of review) would give rise to a question of law.

2.14 The committee also remains concerned that the bill does not provide any mechanism for appeals on a question of law (or ADJR Act judicial review) in relation to non-superannuation complaints. The committee notes the minister's justification

for this exclusion rests on the fact that AFCA will be a private body. However, the committee emphasises that AFCA, despite being a private body, will nevertheless form an important part of a broader scheme of public regulation of financial disputes and complaints as set up by legislation. In circumstances where a dispute resolution scheme is part of a broader legislative design to serve the public interest (noting the inadequacies of contractual remedies) the committee does not view the private status of AFCA as a sufficient ground for not making available appeals on questions of law. Indeed, the committee notes that in its view the private status of ACFA has, rightly, not prevented the availability of an appeal of questions of law in relation to superannuation disputes. The committee also does not view the fact that such appeals are currently not available for non-superannuation complaints as sufficient justification for not allowing them under the provisions of this bill. In the committee's view the lack of either judicial review, or a means to appeal on questions of law, means there is a risk that any legal errors made by AFCA cannot be corrected.

2.15 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*).

2.16 The committee seeks the minister's further advice as to whether it is intended that errors related to a denial of a fair hearing (that is, errors which give rise to a procedural fairness ground of review) would give rise to a question of law (and so be subject to appeal).

2.17 The committee draws its remaining scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of not providing a mechanism for appeals and excluding judicial review under the ADJR Act in relation to non-superannuation financial disputes.

Minister's final response

2.18 The minister advised:

> **Questions of law can include breaches of procedural fairness**
>
> The Bill ensures that the Australian Financial Complaints Authority (AFCA) and its determinations will be subject to the appropriate judicial oversight and scrutiny. Parties to a superannuation complaint will have the ability to appeal a determination of AFCA to the Federal Court on a question of law. This is consistent with the current treatment of determinations made by the Superannuation Complaints Tribunal.
>
> Although what constitutes a question of law will depend on the circumstances of each case and is a matter for the Federal Court, in general, it is possible that questions of law can include jurisdictional errors, such as a breach of procedural fairness. A party to a superannuation

> complaint could bring an appeal to the Federal Court on a question of law if they believe AFCA has not afforded them procedural fairness.
>
> Additionally, in considering whether to authorise AFCA as an external dispute resolution scheme, the Minister must take into account general considerations such as the independence, fairness and accountability of the scheme. AFCA will also have a legal obligation to resolve disputes in a way that is fair, efficient, timely and independent, and must comply with these mandatory requirements. These elements will also ensure the integrity and fairness of the AFCA scheme.

Committee final comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that although what constitutes a question of law will depend on the circumstances of each case, it is possible that questions of law could include jurisdictional errors, such as breaches of procedural fairness. The committee also notes the minister's advice that ACFA will have a legal obligation to resolve disputes in a way that is fair, efficient, timely and independent.

2.20 The committee notes that the courts have taken the position that what constitutes a question of law depends on an interpretation of the relevant legislation, including any requirements set out in that legislation. Such an interpretation can be aided by extraneous material, such as the explanatory memorandum.

2.21 The committee notes the minister's advice that questions of law may, in certain cases, include jurisdictional errors such as breaches of procedural fairness. The committee also notes the minister's advice that a party to a superannuation complaint could bring an appeal on question of law if they believe that AFCA has not afforded them procedural fairness. The committee requests that this key information be included in the explanatory memorandum.

2.22 The committee otherwise draws its scrutiny concerns to the attention of Senators, and leaves to the Senate as a whole the appropriateness of not providing a mechanism for appeals and excluding judicial review under the ADJR Act in relation to non-superannuation financial disputes.

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.[1] 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.[2]

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Helen Polley
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*.