The Senate

Standing Committee for the Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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 in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient 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 often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. 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 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.

Australian Immunisation Register and Other Legislation Amendment Bill 2017

Purpose	This bill seeks to amend *Australian Immunisation Register Act 2015* (AIR Act) to: • allow paediatricians, public health physicians, infectious diseases physicians and clinical immunologists to have their assessments of medical exemptions to immunisation recognised by the Australian Immunisation Register, in addition to general practitioners; and • make it explicit that vaccination information under paragraph 9(b) can only be provided by recognised vaccination providers, and not members of the public. The bill also seeks to amend the *New Tax System (Family Assistance) Act 1999* to expand the medical practitioners who can certify medical exemptions
Portfolio	Health
Introduced	House of Representatives on 23 March 2017

The committee has no comment on this bill.

Banking and Financial Services Commission of Inquiry Bill 2017

Purpose	This bill seeks to establish a parliamentary inquiry into the banking and financial services sector that reports to Parliament on particular matters
Sponsor	Senators Peter Whish-Wilson, Pauline Hanson, Derryn Hinch, Jacqui Lambie, Malcolm Roberts and Nick Xenophon
Introduced	Senate on 22 March 2017

Coercive powers[1]

1.2 This bill seeks to establish a parliamentary commission of inquiry into the banking and financial services sector which would report to Parliament on particular matters. Part 3 of the bill outlines the powers of the proposed Banking and Financial Services Commission of Inquiry. These powers include coercive powers such as:

- the power to summon witnesses and take evidence;
- arrest of witnesses for failing to appear before the inquiry;
- search warrants;
- access to certain material held by the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority and the Reserve Bank of Australia; and
- the power to inspect, retain and copy documents and other things.

1.3 The explanatory materials do not explicitly or separately address the need for the proposed Commission to have each of these significant coercive powers, nor do they address the question of whether or not the common law privilege against self-incrimination is abrogated by subclause 11(4) (which provides that the Commission may require a witness to answer any question).

1.4 The statement of compatibility broadly suggests that 'all of the relevant protections afforded to witnesses in Royal Commission and judicial trials are replicated in the bill'.[2] Furthermore, it is suggested that:

> Evidence that threatens the safety or reputation of witness, exposes the identity of a confidential source, would prejudice a fair trial or an investigation shall not be publicly disclosed. Similarly, the Commission has

1 Clauses 11–15.

2 Explanatory memorandum, p. 8.

> the power to hold private hearings to ensure the rights of witnesses are protected.[3]

1.5 The committee notes this information, however no further detail is provided in relation to how all of the relevant protections afforded to witnesses in Royal Commission and judicial trials are actually applied in the bill. In addition, it appears that there are provisions in the *Royal Commissions Act 1902* which are not replicated in this bill. For example, while the privilege against self-incrimination is abrogated by section 6A of the *Royal Commissions Act 1902*, there are limited protections in that Act for witnesses in relation to criminal and other proceedings already commenced. This provision does not appear to be replicated in this bill.

1.6 The committee generally expects that where a bill seeks to confer coercive powers on bodies, the explanatory materials should address the issues discussed in chapters 7–10 of the *Guide to Framing Commonwealth Offences*.[4]

1.7 The committee therefore seeks the Senators' advice as to the appropriateness of providing the proposed Parliamentary Commission of Inquiry with significant coercive powers and how all relevant protections afforded to witnesses in Royal Commissions and judicial trials (as stated in the explanatory memorandum) are replicated in the bill. The committee's consideration of the appropriateness of coercive provisions is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences.*[5]

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

Offence provisions[6]

1.8 Part 4 of the bill outlines various offences relating to the conduct of the inquiry. These offences (and the associated penalties)[7] include:

- unauthorised presence at a hearing or unauthorised publication of evidence (6 months imprisonment);
- failure of a witness to attend or produce documents (6 months imprisonment);[8]

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3 Explanatory memorandum, p. 8.

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

5 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, chapters 7–10.

6 Part 4.

7 See clauses 16–26.

- refusal to be sworn or given evidence (6 months imprisonment);
- false or misleading evidence (5 years imprisonment);
- destroying documents or other things (2 years imprisonment);
- intimidation or dismissal of witnesses (5 years imprisonment);
- preventing witnesses from attending (12 months imprisonment);
- bribery of a witness (5 years imprisonment);
- fraud on witness (2 years imprisonment); and
- contempt of the Commission (12 months imprisonment).

1.9 The explanatory materials do not explicitly address the reason for the level of penalties imposed for each of the offences, many of which are significant. In addition, some of the offences appear to place an evidential burden of proof on the defendant if they seek to rely on an exception to the offence.[9]

1.10 The committee generally expects that where a bill includes criminal offence provisions, the explanatory materials should address the issues discussed in chapters 2–4 of the *Guide to Framing Commonwealth Offences*.[10]

1.11 The committee therefore seeks the Senators' advice in relation to the appropriateness of the offence provisions in this bill, including the level of penalties and the apparent reversal of the evidential burden of proof. The committee's consideration of the appropriateness of criminal offence penalties is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences.*[11]

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

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8 Note that clause 19 provides that where a person commits an offence under clause 17, and the person does or omits to do the same thing at a hearing of the Commission held on another day, each such act or omission constitutes a separate offence.

9 See subclauses 17(2), 17(4) and 22(3).

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

11 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, chapters 2–4.

Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017

Purpose	This bill seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act) to: • address implementation issues for savanna fire management projects; • correct a drafting error; and • clarify the original intent of the Act
Portfolio	Environment and Energy
Introduced	House of Representatives on 23 March 2017

The committee has no comment on this bill.

Civil Law and Justice Legislation Amendment Bill 2017

Purpose	This bill seeks to make minor and technical amendments to various pieces of civil justice legislation
Portfolio/Sponsor	Attorney-General
Introduced	22 March 2017

Retrospective application[12]

1.12 Item 32 of Schedule 6 seeks to amend subsection 117C(2) of the *Family Law Act 1975*. The existing provision prohibits parties in certain proceedings from disclosing to the family law courts the fact that an offer of settlement has been made and the terms of any such offer, except when considering a costs order. This amendment would allow the fact that an offer has been made to be disclosed to the courts (but not the terms of the offer). The purpose of that amendment is to 'promote early settlement of matters'.[13] Item 34 provides that these amendments apply to offers made before, on or after the commencement of the Part. This therefore applies retrospectively.

1.13 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.

1.14 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.

1.15 In this instance, the explanatory memorandum argues that it is appropriate to apply this substantive change retrospectively to offers which have been made prior to commencement on the following basis:

> Where a matter is currently on foot before the family law courts, it is appropriate to allow the court to consider whether an offer to settle has been made for case management and similar purposes.
>
> It is very unlikely that parties would suffer any detriment as a result of the retrospective application of this amendment. While it would no longer be prohibited to disclose to the court that an offer of settlement has been

12 Schedule 6, item 34.

13 Explanatory memorandum, p. 43.

> made, this disclosure is already made (and will continue to be made) in the context of the court's consideration of costs. Importantly, the prohibition on disclosing the terms of the offer to the court is not amended by the Bill and would continue to apply in all cases. This strikes the appropriate balance between encouraging parties to negotiate and reach early settlement of matters on terms that are satisfactory to both parties, and the ability of the court to supervise matters. Further, given that under the existing law, disclosing the existence of an offer to the court does not disqualify the judge from sitting, there is unlikely to be any practical effect on existing cases by removing that requirement in its entirety.[14]

1.16 The committee notes that this provision was initially proposed in the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (which lapsed at the dissolution of Parliament). The committee welcomes the inclusion of this detailed explanation in the explanatory memorandum, which follows a request from the committee in its *First Report of 2016* in relation to the earlier bill.[15]

1.17 The committee notes that the explanatory memorandum explains that it is unlikely that parties would suffer any detriment as a result of applying these provisions retrospectively. However, the committee notes it is difficult to quantify any detriment that might be suffered by a party who may have refused an offer to settle on the basis of the law as it currently stands (i.e. believing that the fact of that offer could not be disclosed to the court).

1.18 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of this measure.

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

Broad delegation of administrative powers[16]

1.19 Currently section 122A of the *Family Law Act 1975* sets out the powers of entry and search for the purposes of arresting a person pursuant to that Act. The existing provision provides for any person to be authorised to exercise these coercive powers. This bill proposes inserting a new section 122A and 122AA to provide 'a more modern framework for arrests, with substantially improved safeguards'.[17] The

14 Explanatory memorandum, pp 43-44.

15 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2016*, pp 18-26, at p. 25.

16 Schedule 6, item 35, proposed paragraph 122A(1)(i) of the *Family Law Act 1975*.

17 Explanatory memorandum, p. 44.

committee welcomes the introduction of additional safeguards regarding the exercise of these coercive powers.

1.20 Proposed paragraph 122A(1)(i) sets out who is authorised to make an arrest. In addition to persons such as a Marshal, Deputy Marshal, Sheriff or Deputy Sheriff, police officer or the Australian Border Force Commissioner, the bill provides that the power to arrest another person is conferred on 'an APS employee' in the Department of Immigration and Border Protection.

1.21 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. In relation to the exercise of coercive powers such as the power to arrest another person, use force, and enter and search premises, the committee expects the person authorised to use such powers should have received appropriate training. 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.

1.22 In this instance, the explanatory memorandum explains:

> New subsection 122A(1) would explicitly set out the categories of persons, who are authorised by the Act or by a warrant issued under the Act to arrest another person, to whom the section applies. This would limit the persons who may exercise arrest powers to only appropriate people. This reflects the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which provides that 'arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police'.
>
> The list of arresters in new subsection 122A(1) would reflect the list of authorised persons in rule 21.17 of the Family Law Rules and Rule 25B.74 of the Federal Circuit Court Rules, except that it would not provide for 'any other person' to be authorised. To ensure that all the relevant officers would be authorised to exercise arrest powers under the Act, the list would also include the Australian Border Force Commissioner and an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*. This is intended to cover Australian Border Force officers who may be required to exercise powers of arrest in relation to, for example, a parent attempting to abduct their child overseas. The urgency of ensuring children are not abducted internationally warrants the extension of these powers to officers of the Australian Border Force.[18]

18 Explanatory memorandum, pp 44-45.

1.23 The committee is concerned that while it is intended that the reference to 'an APS employee' would only cover Australian Border Force officers who may be required to exercise powers of arrest, there is nothing in the legislation to limit it in this way. There is also nothing in the legislation that requires the relevant APS employee to have appropriate police-like training in order to exercise those powers of arrest, the use of force and search and entry powers.

1.24 The committee requests the Attorney-General's advice as to the appropriateness of enabling any APS employee within the Department of Immigration and Border Protection to exercise coercive powers and whether the bill can be amended to require a certain level of relevant training be undertaken by those APS employees authorised to exercise these coercive powers.

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

Retrospective application[19]

1.25 Schedule 7 seeks to make a number of amendments to section 8 of the *International Arbitration Act 1974* to clarify that a foreign award is binding between the 'parties to the award' rather than between the 'parties to the agreement'.[20] Item 5 provides that these amendments apply in relation to any arbitral proceedings 'whether commenced before or after this item commences'. The explanatory memorandum simply restates the provision without providing any explanation. Applying the amendments to proceedings which commenced before the commencement of the amending legislation has a retrospective application.

1.26 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.

1.6 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.

1.27 The committee therefore seeks the Attorney-General's advice as to why it is proposed to apply the amendments to section 8 of the *International Arbitration Act 1974* to arbitral proceedings that commenced before the commencement of

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19 Schedule 7, item 5.

20 See explanatory memorandum, p. 59.

this item of the bill and whether it is possible that any party to such proceedings may suffer any detriment due to this retrospective application.

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

Communications Legislation Amendment (Executive Remuneration) Bill 2017

Purpose	This bill seeks to amend the *Australian Postal Corporation Act 1989*, the *Remuneration Tribunal Act 1973* and the Remuneration Tribunal (Miscellaneous Provisions) Regulations 1976 to make the Remuneration Tribunal the responsible body for setting the remuneration of the Managing Director of Australia Post The bill also seeks to amend the *National Broadband Network Companies Act 2011* to make the tribunal the responsible body for setting the remuneration of the Chief Executive Officer of NBN Co
Sponsor	Senator Pauline Hanson
Introduced	Senate on 21 March 2017

The committee has no comment on this bill.

Communications Legislation Amendment (SBS Advertising Flexibility) Bill 2017

Purpose	This bill seeks to amend the *Special Broadcasting Service Act 1991* to: • allow wider use of product placement in commissioned content; and • require SBS to develop and publish guidelines on the use of product placement
Portfolio	Communications and the Arts
Introduced	House of Representatives on 22 March 2017

The committee has no comment on this bill.

Copyright Amendment (Disability Access and Other Measures) Bill 2017

Purpose	This bill seeks to amend the *Copyright Act 1968* to: • replace the current exception for persons with a disability, and others acting on their behalf, with a fair dealing exception; • replace the current statutory licences for institutions assisting persons with a print or intellectual disability with a single exception that applies to organisations assisting persons with a disability; • amend the preservation exceptions for copyright material in libraries, archives and key cultural institutions; • consolidate statutory licences that allow educational institutions to use works and broadcasts; • allow copyright material to be incorporated into educational assessments conducted online; • set new standard terms of protection for published and unpublished materials and for Crown copyright in original materials; and • make a number of minor amendments
Portfolio	Communications
Introduced	House of Representatives on 22 March 2017

The committee has no comment on this bill.

Fair Work Amendment (Corrupting Benefits) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit; • make it a criminal offence to receive or solicit a corrupting benefit; • make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; • make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment; • require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employee vote on the agreement
Portfolio	Employment
Introduced	House of Representatives on 22 March 2017

Right not to be tried or punished twice (double jeopardy)[21]

1.28 The bill proposes introducing a number of offence provisions, including in relation to the giving, receiving or soliciting of corrupting benefits or making certain payments. Proposed section 536C provides that the new Part introducing these offences does not exclude or limit the concurrent operation of a State or Territory law. It states that even if an act or omission (or similar act or omission) would constitute an offence under this proposed Part and would constitute an offence or be subject to a civil penalty under State or Territory law, these offence provisions can operate concurrently. In effect this appears to mean that a person could be liable to be tried and punished for an act or omission under a State or Territory law as well under this proposed Commonwealth law.

1.29 The explanatory memorandum explains the constitutional need for this provision, noting that this provision indicates 'the Parliament's intention that the Commonwealth law should not operate to the exclusion of state or territory laws to the extent that the laws are capable of operating concurrently'.[22] It gives an example

21 Schedule 1, item 3, proposed section 536C of the *Fair Work Act 2009*.

22 Explanatory memorandum, p. 3.

of a relevant state or territory law in this context as including 'laws criminalising secret or corrupt commissions, corrupt benefits or rewards or bribes'.[23]

1.30 Under the common law, a person who has been finally convicted or acquitted of an offence has a right not to be tried or punished again for the same offence. It is not clear if any state or territory offences (for example, criminalising corrupt benefits) may be the same or substantially the same offences as the new offences proposed (for example, the corrupting benefits offences), and if so, what effect proposed section 536C may have on the right not to be tried or punished again for the same offence.

1.31 The committee seeks the Minister's advice as to whether proposed section 536C would have the effect of limiting an individual's right not to be tried or punished for the same offence (and in particular whether there are State or Territory laws that provide for the same or substantially the same offences as those contained in this bill).

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

Reversal of evidential burden of proof[24]

1.32 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (3) lists a number of exceptions (offence specific defences) to this offence, stating that the offence does not apply if a number of conditions are met. The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

1.33 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.

1.34 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.

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23 Explanatory memorandum, p. 3.

24 Schedule 1, item 3, proposed subsection 536FC(3) of the *Fair Work Act 2009*.

1.35 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 adequately justified.

1.36 The explanatory memorandum justifies the reversal of the evidential burden of proof in respect of all of the defences:

> Whether the benefit was provided for one of the permitted purposes can be expected to be within the peculiar knowledge of the defendant. As such, it is reasonable for the defendant to bring evidence (which is most likely easily and readily available to them) to demonstrate that one of the exceptions applies, rather than requiring the prosecution to locate evidence (which is likely to be significantly more difficult and costly), to prove that the benefit was provided for a permitted purpose.[25]

1.37 However, no detail is given as to how each of the defences would be peculiarly within the knowledge of the defendant and significantly more costly and difficult for the prosecution to prove. For example, it is not clear to the committee how the following matters would be peculiarly within the knowledge of the defendant and therefore significantly more difficult for the prosecution to prove, that the cash or in kind payments were:

- gifts or contributions that are deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law (paragraph 536F(3)(c));
- payments made under or in accordance with a law of the Commonwealth or a law of a State or Territory (paragraph 536F(3)(e));
- benefits provided in accordance with an order, judgment or award of a court or tribunal (paragraph 536F(3)(f)).

1.38 It is also not clear how many of the other exceptions, while within the knowledge of the defendant, would be *peculiarly* within the defendant's knowledge.

1.39 As the explanatory materials do not adequately address this issue, the committee requests the Minister's detailed advice as to why it is appropriate to use offence-specific defences (which reverse the evidential burden of proof) in each specific instance. The committee's consideration of this would be assisted if an explanation was provided in relation to each paragraph in subsection 536F(3) as to how each matter is peculiarly within the defendant's knowledge and how it would be significantly more difficult and costly for the prosecution to disprove than for

25 Explanatory memorandum, p. 9. See also, statement of compatibility, p. viii.

the defendant to establish the matter (in line with the relevant principles as set out in the *Guide to Framing Commonwealth Offences*).[26]

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

Strict liability offences[27]

1.40 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (2) states that strict liability applies to paragraphs (1)(a), (c) and (d) of the offence, namely:

- that the defendant is a national system employer other than an employee organisation;
- that the other person (to whom cash or in kind payments are made) is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- that the defendant, a spouse, or associated entity of the defendant or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

1.41 The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

1.42 In addition, proposed section 536G makes it an offence to receive or solicit a cash or in kind payment. Proposed subsection (2) states that strict liability applies to paragraph 1(c) which provides that the offence occurs if the provider of the cash or in kind payment were to provide the benefit to the defendant or another person, the provider or another person would commit an offence against subsection 536F(1). The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

1.43 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a

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

27 Schedule 1, item 3, proposed subsection 536FC(2) and 536G(2) of the *Fair Work Act 2009*.

clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[28]

1.44 The explanatory memorandum and statement of compatibility state that the elements attracting strict liability are jurisdictional in nature.[29] They also say that the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.

1.45 The *Guide to Framing Commonwealth Offences* provides guidance in relation to the framing of offences. It defines a jurisdictional element of an offence as follows:

> A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but instead links the offence to the relevant legislative power of the Commonwealth. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence, while the circumstance that the property belongs to the Commonwealth is a jurisdictional element.[30]

1.46 Whether a person is an employee organisation or prohibited beneficiary in relation to the employee organisation; whether the employment of person who is, or is entitled to be, a member of an organisation and whose industrial interests the organisation is entitled to represent; and whether an offence would otherwise be committed, are not matters obviously designed to connect the offence to a head of Commonwealth legislative power. It is therefore not clear to the committee that the provisions stated as being jurisdictional in nature meet the definition in the *Guide to Framing Commonwealth Offences*.

1.47 The committee requests the Minister's advice as to how each element of the offences in proposed sections 536F and 536G to which strict liability applies are jurisdictional in nature, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[31]

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

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

29 Explanatory memorandum, p. 8 and statement of compatibility, p. vii.

30 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 21 (footnote 19).

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

Significant matters in delegated legislation[32]

1.48 A number of provisions of the bill leave significant detail to be prescribed in the regulations, including detail such as:

- that a person will commit an offence or be subject to a civil penalty where certain actions are taken, or benefits given, to persons with a 'prescribed connection' with the person or who are persons or bodies prescribed by the regulations;[33]
- a defence which provides that the provision of cash or in kind payments to certain persons will not constitute an offence if the cash or in kind payment is 'a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations';[34]
- where exceptions are provided to an offence, the regulations can nonetheless prescribe a cash or in kind payment that would be captured by the offence provision;[35]
- the meaning of a cash or in kind payment (the payment of which results in an offence) can be prescribed by regulations;[36]
- the definition of a 'prohibited beneficiary' (payment to whom may be an offence) includes a person who has a prescribed connection with the relevant organisation.[37]

1.49 The explanatory memorandum provides limited detail as to why significant matters that set out aspects of the content of offences or civil penalty provisions are left to delegated legislation. In one instance the explanatory memorandum provides the following explanation:

> Including offence content in regulations as provided by subsection 536F(3) is necessary in this instance as the Royal Commission did not deal comprehensively with the categories of legitimate payments. It is

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32 Schedule 1, item 3, proposed subparagraph 536D(1)(b)(iii); subparagraph 536D(2)(b)(iii); paragraph 536F(1)(d); paragraph 536F(3)(g); subsection 536F(3); paragraph 536F(4)(c); and paragraph 536F(5)(e) of the *Fair Work Act 2009*. Schedule 2, item 2, proposed paragraph 179(2)(b); paragraph 179(6)(c); paragraphs 179A(2)(a) and (b); paragraph 179A(4)(b).

33 Schedule 1, item 3, proposed subparagraphs 536D(1)(b)(iii) and 536D(2)(b)(iii); paragraph 536F(1)(d); Schedule 2, item 2, proposed paragraph 179(2)(b); and paragraphs 179A(2)(a) and (b).

34 Schedule 1, item 3, proposed paragraph 536F(3)(g).

35 Schedule 1, item 3, proposed subsection 536F(3).

36 Schedule 1, item 3, proposed paragraph 536F(4)(c).

37 Schedule 1, item 3, proposed paragraph 536F(5)(e).

> important and appropriate to provide scope to add to or remove certain types of payments as the need arises. The regulation making power is only available to exclude those benefits that are non-corrupting.[38]

1.50 In addition, the explanatory memorandum provides:

> A regulation making power to prescribe additional persons who have a connection with the organisation or a prohibited beneficiary is a necessary anti-avoidance measure to address any attempts to circumvent the application of the prohibition.[39]

1.51 The committee's view is that significant matters, such as matters that form part of an offence or civil penalty provision, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. It is particularly important, from a scrutiny perspective, for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear so those who are subject to the offence may readily ascertain their obligations.

1.52 In this regard, the committee requests the Minister's advice as to:

- **why it is considered necessary and appropriate to leave many of the elements of these offence or civil penalty provisions to delegated legislation; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of these regulations (which set out the details to be prescribed) 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).**

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

38 Explanatory memorandum, pp 8–9.

39 Explanatory memorandum, p. 9.

Fair Work Amendment (Protecting Take Home Pay) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to ensure that modern awards cannot be varied to reduce penalty rates or the hours to which penalty rates apply if the variation is likely to result in a reduction in the take home pay of an employee
Sponsor	Mr Bill Shorten MP
Introduced	House of Representatives on 20 March 2017

Retrospective application[40]

1.53 Proposed section 135A provides that a modern award cannot be varied in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award. Subsection (3) provides that a determination of the Fair Work Commission made on or after 22 February 2017 is of no effect if it would reduce, or have the effect of reducing, the take-home pay of such employees. This provision therefore will operate retrospectively in relation to any determination that is made after 22 February 2017 but prior to commencement.

1.54 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.

1.55 The committee notes that while the retrospective application of this law could operate beneficially (in relation to employees who may be retrospectively entitled to higher levels of pay), it could also have a detrimental effect on others (employers who may be required to provide back-pay from the date of passage of the bill to the date of any determination). 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. In this instance, the explanatory memorandum provides that the amendment will ensure modern awards are a safety net for the take-home pay of employees.[41] It does not set out whether any person may be detrimentally affected by applying the provisions retrospectively.

40 Schedule 1, item 3, proposed subsection 135A(3) of the *Fair Work Act 2009*.

41 Explanatory memorandum, p. 4.

1.56 The committee notes that, in general, it considers laws should only operate prospectively (not retrospectively), particularly where legislation may have a detrimental effect on individuals. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying the amendments retrospectively.

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

Fair Work Amendment (Protecting Take-Home Pay) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to ensure that modern awards cannot be varied to reduce penalty rates or the hours to which penalty rates apply if the variation is likely to result in a reduction in the take home pay of an employee
Sponsors	Senators Cameron, Di Natale and Lambie
Introduced	Senate on 21 March 2017

Retrospective application[42]

1.57 Proposed section 135A provides that a modern award cannot be varied in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award. Subsection (3) provides that a determination of the Fair Work Commission made on or after 22 February 2017 is of no effect if it would reduce, or have the effect of reducing, the take-home pay of such employees. This provision therefore will operate retrospectively in relation to any determination that is made after 22 February 2017 but prior to commencement.

1.58 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.

1.59 The committee notes that while the retrospective application of this law could operate beneficially (in relation to employees who may be retrospectively entitled to higher levels of pay), it could also have a detrimental effect on others (employers who may be required to provide back-pay from the date of passage of the bill to the date of any determination). 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. In this instance, the explanatory memorandum provides that the amendment will ensure modern awards are a safety net for the take-home pay of employees.[43] It does not set out whether any person may be detrimentally affected by applying the provisions retrospectively.

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42 Schedule 1, item 3, proposed subsection 135A(3) of the *Fair Work Act 2009*.

43 Explanatory memorandum, p. 3.

1.60 The committee notes that, in general, it considers laws should only operate prospectively (not retrospectively), particularly where legislation may have a detrimental effect on individuals. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying the amendments retrospectively.

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

Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to protect penalty rates in a modern award from being varied to make the penalty rate lower than in force under the award on 1 January 2017
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives 20 March 2017

Retrospective application[44]

1.61 Proposed subsection 135A(2) provides that a determination of the Fair Work Commission made on or after 22 February 2017 is of no effect if it would reduce a penalty rate so that the rate is lower than that in force under the award on 1 January 2017. Proposed section 135B provides that a modern award cannot be varied in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award. Subsection (3) provides that a determination of the Fair Work Commission made on or after 22 February 2017 is of no effect if it would reduce, or have the effect of reducing, the take-home pay of such employees. This provision therefore will operate retrospectively in relation to any determination that is made after 22 February 2017 but prior to commencement.

1.62 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.

1.63 The committee notes that while the retrospective application of this law could operate beneficially (in relation to employees who may be retrospectively entitled to higher levels of pay), it could also have a detrimental effect on others (employers who may be required to provide back-pay from the date of passage of the bill to the date of any determination). 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. In this instance, the explanatory materials do not set out whether any person may be detrimentally affected by applying the provisions retrospectively.

44 Schedule 1, item 3, proposed subsections 135A(2) and 135B(3) of the *Fair Work Act 2009*.

1.64 The committee notes that, in general, it considers laws should only operate prospectively (not retrospectively), particularly where legislation may have a detrimental effect on individuals. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying the amendments retrospectively.

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

Human Rights Legislation Amendment Bill 2017

Purpose	This bill seeks to amend various Acts relating to human rights to: • reform section 18C of the *Racial Discrimination Act 1975*; • amend the complaints handling processes of the Australian Human Rights Commission; and • make minor amendments to the *Australian Human Rights Commission Act 1986*
Portfolio	Attorney-General
Introduced	Senate on 22 March 2017

Parliamentary scrutiny—removing requirements to table certain documents[45]

1.65 This bill seeks to amend the mandatory obligations of the Australian Human Rights Commission (Commission) and commissioners under the *Australian Human Rights Commission Act 1986* (AHRC Act) to report certain matters to the Minister.[46] In particular, it is proposed to enable the Commission to report, on a discretionary basis, to the Minister in relation to an inquiry it has undertaken into an act or practice inconsistent with or contrary to human rights or any act or practice that may constitute discrimination.[47] Item 17 provides that any report provided to the Minister on this new discretionary basis is not required to be tabled in Parliament.

1.66 The committee notes that removing the requirement for certain reports to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are either not made public or only published online. As such, the committee expects there to be appropriate justification for removing a tabling requirement.

1.67 The explanatory memorandum explains the basis for this proposed amendment:

> It is intended that the President will publish any reports provided to the Minister as he or she sees fit. This amendment is not intended to reduce public scrutiny of Commission reports. Rather, it is intended to reduce the

45 Schedule 2, item 17.

46 See Schedule 2, items 6, 11, 12, 16, 19, 20 and 24 and Schedule 3, item 1.

47 Schedule 2, items 6, 11, 12 and 16.

> administrative and resource cost of producing reports for tabling for the Commission.[48]

1.68 The committee generally does not consider the costs involved in tabling the documents to be a sufficient basis for removing the requirement to table in Parliament.

1.69 The committee seeks the Attorney-General's detailed justification as to why it is considered appropriate to remove the requirement to table reports provided to the Minister from the Australian Human Rights Commission and if a report is not tabled whether it will otherwise be made publicly available.

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Strict liability offence[49]

1.70 Proposed section 46PJ provides that the President of the Australian Human Rights Commission may require a person, by written notice, to attend a conciliation conference. Subsection (5) provides a person commits an offence if they have been given written notice requiring attendance and the person refuses or fails to comply with the requirement. Subsection (6) makes this an offence of strict liability. The offence is subject to 10 penalty units.

1.71 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[50]

1.72 The statement of compatibility sets out the reason for the imposition of strict liability:

> The application of strict liability is necessary to ensure that, when the Commission exercises its compulsory powers to conciliate a complaint, a person may not frustrate that compulsory conciliation... It is reasonable not to require the prosecution to prove a fault element in circumstances where the individual had been given reasonable notice to attend a conference and did not attend, particularly in circumstances where Item

48 Explanatory memorandum, p. 27.

49 Schedule 2, item 49, proposed subsection 46PJ(6) of the *Australian Human Rights Commission Act 1986*.

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

> 29 of the Bill requires the Commonwealth to pay a reasonable sum for the individual's expenses of attendance. Strict liability is therefore only used where the individual is clearly aware of his or her duties and obligations. This offence is proportionate as it only applies to individuals who have received notice that they are required to attend a conference, and do not, in fact, attend. It would not apply in circumstances where a person had a reasonable and mistaken understanding of circumstances (for example, where a person did not receive the notice of the requirement to attend).[51]

1.73 Additionally, the explanatory memorandum says that the general defences under the *Criminal Code Act 1995* (Criminal Code) would apply to such an offence:

> For example, if a person who is given notice to attend a compulsory conference in person cannot attend the conference because an earthquake occurs in Sydney at the time of the conference, that person could rely upon the defence of sudden or extraordinary emergency under Division 10 of the Criminal Code.[52]

1.74 The committee notes that the general defences under the Criminal Code are extremely limited. Division 10 of Part 2.1 of the Criminal Code relevantly provides that a person will not be criminally liable for an offence that has a physical element to which strict liability applies if the person had no control over the events or there is a sudden or extraordinary emergency.

1.75 The committee notes the existing strict liability offence in the AHRC Act makes it of an offence to fail to attend as required by the direction or to fail to continue to attend 'unless excused, or released from further attendance, by the person presiding at the conference'. There is also a defence if the person had a reasonable excuse for not attending. These qualifications are no longer included in the proposed new offence provision. As such, there are very limited circumstances (such as an earthquake) which would be accepted for a failure to attend and otherwise strict liability attaches, with no requirement to prove fault.

1.76 The committee requests a detailed justification from the Attorney-General for the strict liability offence in proposed section 46PJ(6), including:

- **why the proposed provision removes the existing defence of reasonable excuse;**
- **why the proposed provision removes the existing ability of the President to excuse or release a person from further attendance;**

51 Statement of compatibility, p. 17.

52 Explanatory memorandum, p. 36.

- **why having an offence subject to 10 penalty units for failure to attend the conference is not sufficient deterrence in itself and why the imposition of strict liability (and the punishment of a person lacking 'fault') is therefore necessary.**

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

Live Animal Export Prohibition (Ending Cruelty) Bill 2017

Purpose	This bill seeks to permanently ban the export of live animals for slaughter from 1 July 2020, and puts in place steps to ensure that, in the interim, live animals are treated humanely after they are exported
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 20 March 2017

1.77 This bill is substantially similar to bills that were introduced into the House of Representatives on 20 June 2011, 27 May 2013 and 24 February 2014. This *Scrutiny Digest* includes the committee's previous comments on those bills to the extent that they are applicable to this bill.

Incorporation of external material into the law[53]

1.78 Item 4 seeks to insert a new section 9N into the *Export Control Act 1982*. Proposed subsection 9N(4) provides that live-stock for slaughter may not be exported and a permission or other consent may not be granted under the regulations unless the Secretary is satisfied that the 'live-stock will be treated satisfactorily in the country of destination'.

1.79 Proposed subsection 9N(5) provides that 'live-stock for slaughter will be treated satisfactorily in the country of destination' if they will be:

- kept in holding premises that comply with the 'Holding Standards';
- transported to slaughter, unloaded, kept in lairage and slaughtered in accordance with the 'OIE Guidelines'; and
- stunned using appropriate humane restraints immediately before slaughter.

1.80 Proposed subsection 9N(8) defines 'Holding Standards' to mean certain standards (with some modifications) drawn from version 2.3 of the *Australian Standards for the Export of Livestock*, published by the Department of Agriculture, Fisheries and Forestry. 'OIE Guidelines' is defined to mean the 'relevant sections of the current version of the *Terrestrial Animal Health Code* published by the OIE (the World Organisation for Animal Health)'.

1.81 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:

53 Schedule 1, item 4, proposed subsections 9N(5) and (8) of the *Export Control Act 1982*.

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

1.82 In relation to the incorporation of the Holding Standards, the committee notes that the incorporation relates to a specific version of the Standards and therefore the incorporated material will not change over time. The committee also notes that the Standards are currently published on the website of the Department of Agriculture and Water Resources. However, it remains the case that persons interested in the law must access an external document in order to understand the full terms of the law, and there is no legislative requirement that the Standards be made readily and freely available on the internet.

1.83 In relation to the incorporation of the OIE Guidelines, the committee notes that it is not clear on the face of the legislation which sections of the Code are being incorporated into the law. In addition, it appears that the incorporated material will change over time as the Code is updated. The provision therefore introduces uncertainty into the law and raises the prospect of changes being made to the law in the absence of parliamentary scrutiny.

1.84 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: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). 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.

1.85 Noting the above comments, the committee requests the Member's advice as to whether the relevant sections of the Holding Standards and the OIE Guidelines can be included on the face of the bill (for example, as a Schedule to the *Export Control Act 1982*).

> *Pending the Member's reply, the committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

National Land Transport Amendment (Best Practice Rail Investment) Bill 2017

Purpose	This bill seeks to amend the *National Land Transport Act 2014* to: • include additional matters which the minister must consider when approving a project as an Investment Project; and • provide for the publishing and tabling of the project approval instrument for an Investment Project and a summary of the evidence on which the minister's decision to approve the project is based
Sponsor	Ms Cathy McGowan MP
Introduced	House of Representatives on 20 March 2017

The committee has no comment on this bill.

Social Services Legislation Amendment (Seasonal Worker Incentives for Jobseekers) Bill 2017

Purpose	This bill seeks provide a social security income test incentive aimed at increasing the number of job seekers who undertake specified seasonal horticultural work, such as fruit picking. This change will be trialed for 2 years, commencing 1 July 2017
Portfolio	Social Services
Introduced	House of Representatives on 23 March 2017

The committee has no comment on this bill.

Social Services Legislation Amendment Bill 2017

Purpose	This bill seeks to amend various Acts relating to family assistance and social security to: • maintain income free areas and means test thresholds for certain payments and allowances at their current levels for three years; • allow for the automation of the regular income stream review process; • extend the ordinary waiting period for working age payments; and • maintain the current family tax benefit rates for two years from 1 July 2017
Portfolio	Social Services
Introduced	Senate on 22 March 2017

Significant matters in delegated legislation[54]

1.86 Proposed subsection 19DA(5) empowers the Secretary to prescribe, by legislative instrument, circumstances for the purpose of determining whether a person is experiencing a personal financial crisis. If a person is held to be experiencing a personal financial crisis the ordinary waiting period for receipt of certain welfare payments may be waived. There is no legislative guidance in the primary legislation as to what type of circumstances may be prescribed.

1.87 The statement of compatibility suggests that the use of a legislative instrument provides the Secretary 'with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences'. As such, the provision is said to allow the Secretary to 'consider other unforeseeable or extreme circumstances…where it would be appropriate for a person to have immediate access to income support'.[55]

1.88 While the committee remains concerned as a matter of general principle about the delegation of legislative power in relation to significant matters, in light of the explanation provided, and the fact that the legislative instrument will be subject to disallowance, the committee draws the provision to the attention of Senators and leaves to the Senate as a whole the appropriateness of this proposed approach.

54 Schedule 3, item 5, proposed subsection 19DA(5).

55 Explanatory memorandum, p. 24.

1.89 The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

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

Commentary on amendments and explanatory materials

Corporations Amendment (Crowd-sourced Funding) Bill 2016

[Alert Digest 10/16 – Scrutiny Digest 1/17]

1.90 On 20 March 2017 the Senate agreed to one Opposition amendment and the bill was read a third time.

1.91 On 22 March 2017 the House of Representatives agreed to the Senate amendment and the bill was passed.

1.92 **The committee has no comment on this amendment.**

Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016

[Alert Digest 7/16 no response required]

1.93 On 23 March 2017 the Senate agreed to 14 Derryn Hinch Justice Party amendments and the bill was read a third time.

1.94 **The committee has no comment on these amendments.**

Interactive Gambling Amendment Bill 2016

[Alert Digest 9/16 no comment]

1.95 On 20 March 2017 the Senate agreed to seven Nick Xenophon Team amendments and the following day the bill was read a third time.

1.96 **The committee has no comment on these amendments.**

Social Services Legislation Amendment (Simplifying Student Payments) Bill 2017

[Alert Digest 7/16 no comment]

1.97 On 21 March 2017 the House of Representatives agreed to two Government amendments, the Minister for Social Services (Mr Porter) presented a supplementary explanatory memorandum and the bill was read a third time.

1.98 **The committee has no comment on these amendments or the supplementary explanatory memorandum.**

Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017

[Digests 2 & 3/17]

1.99 On 21 March 2017 the House of Representatives agreed to one Government amendment, the Treasurer (Mr Morrison) presented a supplementary memorandum and the bill was read a third time.

1.100 **The committee has no comment on this amendment or the supplementary explanatory memorandum.**

Chapter 2

Commentary on ministerial responses

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

2.2 Correspondence relating to these matters is included at **Appendix 1.**

Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to make changes to requirements to control exotic mosquitoes and other disease carriers at Australia's airports and seaports, including incoming aircraft and vessels
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 15 February 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 27 March 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 at Appendix 1.

Reversal of evidential burden of proof[1]

Initial scrutiny – extract

2.4 Section 270 of the *Biosecurity Act 2015* makes it an offence where a person is in charge, or the operator, of a vessel in Australian seas and the vessel discharges ballast water. Item 30 proposes to insert an exception (offence specific defence) to this offence, stating that the offence does not apply if certain conditions are met and certain plans are in place. The offence carries an existing maximum penalty of 2,000 penalty units.

1 Item 30.

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

2.6 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof proposed to be introduced by item 30 has not been addressed in the explanatory materials.[2]

2.7 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (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, Infringement Notices and Enforcement Powers*.[3]

Minister's response

2.8 The Minister advised:

> **Right to the presumption of innocence (reverse burden provisions) - Background**
>
> Laws which shift the burden of proof to a defendant, commonly known as 'reverse burden provisions', can be considered a limitation of the presumption of innocence. This is because a defendant's failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.
>
> **Reversal of evidential burden of proof under Section 270**
>
> Section 270 of the *Biosecurity Act 2015* (the Act), as amended by item 27, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

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2 Note that the statement of compatibility, at pp 30-31, addresses other provisions which apparently reverse the evidential burden of proof but provides no justification in relation to item 30.

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

The Human Rights Compatibility Statement within the Explanatory Memorandum to the Act discussed sections 271, 276, 277, 279, 282 and 283 of that Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

The exceptions set out by item 30 are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the ship's operator) will have access to the appropriate information and documentation, such as the ship's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277), or that the discharge was part of acceptable ballast water exchange (section 282), and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the ship's operator) will have the easiest access to appropriate records to show that conditions set out by the exception has been fulfilled.

It remains necessary that the defendant (the person in charge or the ship's operator) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of evidential proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply.

Committee comment

2.9 The committee thanks the Minister for this response. The committee notes the Minister's advice that the matters will be peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove, as the defendant will have access to the appropriate information and documentation, such as ship records, to show that conditions have been fulfilled.

2.10 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

Strict liability[4]

Initial scrutiny – extract

2.12 Item 126 proposes inserting new section 299A requiring the person in charge, or the operator, of a vessel to make a report where the vessel disposes of sediment in certain circumstances. Proposed subsection (3) makes it an offence of strict liability if the person does not make a report when required. The offence is subject to 120 penalty units.

2.13 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[5]

2.14 The statement of compatibility examines a number of provisions that are said to affect or introduce some strict liability offences, including item 30, and states that the application of strict liability is necessary to prevent potentially significant damage to Australia's marine environment and adverse effects to the related industries. It states that strict liability offences are necessary 'because they are imposed in order to effectively deter contravention of ballast water obligations under the Act'. It goes on to state that the offences are only directed at persons in charge 'who can be expected to be responsible and aware of the requirements for the legislation' and the scheme is of a regulatory nature.[6]

2.15 However, the committee notes that the *Guide to Framing Commonwealth Offences* provides that the application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual.[7] In this case, the proposed strict liability offence is subject to a penalty of up to 120 penalty units. No explanation has been provided as to why the proposed penalty for the strict liability offence is double that which is generally considered appropriate.

2.16 The committee requests the Minister's advice as to why the proposed penalty for the strict liability offence in item [126] is double that which is considered appropriate in the *Guide to Framing Commonwealth Offences*.[8]

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4 Item 126, proposed subsection 299A(3).

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

6 Explanatory memorandum, statement of compatibility, p. 33.

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

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

Minister's response

2.17 The Minister advised:

Strict liability offences - Background

When 'strict liability' applies to an offence, the prosecution is only required to prove the physical elements of an offence (that is, they are not required to prove fault elements), in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code Act 1995).*

The Guide provides, relevantly, that although the penalty applied to a strict liability offence should not exceed 60 penalty units for an individual, a higher penalty is available where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.

Penalty units for strict liability offence under new section 229A (item 126)

New section 299A as inserted by item 126 provides that a person in charge or the operator of a vessel must make a report to the Director of Biosecurity if a disposal of sediment has been made to ensure the safety of the vessel or to save a life, or accidentally, or to minimise or avoid pollution. A person in charge or operator of a vessel commits a strict liability offence if a report is not made in accordance with this section.

This offence is similar to the existing strict liability offence provided by section 284, as amended by items 73 to 75 of the Bill. That section provides for an offence where a person in charge or the operator of a vessel fails to report a discharge of ballast water in similar circumstances as set out by section 299A. Current subsection 284(4) of the Act provides for a strict liability offence with a penalty of 500 units. As provided by the Human Rights Compatibility Statement to the Biosecurity Bill 2014, this penalty is in line with a similar offence provided by section 22 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (duty to report certain incidents, such as certain discharges of a liquid substance carried by the ship).

The penalty provided by current subsection 284(4) of the Act is proposed to be amended by item 75 from 500 penalty units to 120 penalty units. This approach seeks to better align with matters of similar seriousness, as the original penalty is considered too onerous for such a failure, and is inconsistent with the approach to penalties elsewhere in the same chapter in Chapter 5 of the Act.

As the new offence provided by section 299A is similar to the offence provided by section 284, it is appropriate that the two offences of similar severity be prescribed the same amount of penalty units.

Further, reporting promptly to the Director of Biosecurity enhances Australia's ability to assess any adverse consequences from the incident,

> and to take steps to minimise any cascade effects if necessary. Contravention of the offence provided by new section 299A, similar to the offence under section 284, could result in severe consequences to Australia's marine environment. A court will still be able to consider the circumstances and significance of the offence to determine whether a lesser penalty than the maximum should be applied.
>
> I trust that this information confirms that the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Committee comment

2.18 The committee thanks the Minister for this response. The committee notes the Minister's advice that the offence is similar to an existing strict liability offence which is currently subject to 500 penalty units, and it is proposed to amend this to 120 units to better align it to matters of similar seriousness. The committee also notes the Minister's advice that reporting promptly to the Director of Biosecurity enhances Australia's ability to assess any adverse consequences from the incident and take any necessary steps to minimise any cascade effects.

2.19 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	This bill seeks to amend the *Native Title Act 1993* following a decision of the Full Federal Court in *McGlade v Native Title Registrar* [2017] FCAFC 10, regarding area Indigenous Land Use Agreements (area ILUAs) to: • confirm the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); • enable registration of agreements which have been made but have not yet been registered on the Register of Indigenous Land Use Agreements; and • ensure that in the future, area ILUAs can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives on 15 February 2017
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)

2.21 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 27 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Retrospective application

Initial scrutiny – extract

2.22 In *McGlade v Native Title Registrar*[9] (*McGlade*), handed down on 2 February 2017, the Full Federal Court held that it was necessary for *all* members of a 'registered native title claimant' (RNTC) to sign an Indigenous Land Use Agreement (ILUA) for that agreement to be validly registered by the Native Title Registrar. The purpose of this bill is to expunge the consequences which flow from the decision in

9 [2017] FCAFC 10.

McGlade and to reinstate the law as previously interpreted,[10] which did not require unanimity amongst the RNTC. The explanatory memorandum does not give details about the number of ILUAs which may have been invalidly registered on the (now mistaken) basis of the law as previously understood.

2.23 As the explanatory memorandum explains, the bill makes various amendments to the Act in order to:

(a) secure existing agreements which have been registered on or before 2 February 2017 but do not comply with *McGlade*;

(b) enable registration of agreements which have been made and have been lodged for registration on or before 2 February 2017 but do not comply with *McGlade*; and

(c) clarify who must be a party to an area ILUA in the future unless the claim group determines otherwise.[11]

2.24 The amendments associated with the first two objectives operate retrospectively. The bill preserves the position prior to *McGlade* for agreements registered under the Act or that were pending registration on or before the date of the *McGlade* decision. The bill also prospectively overturns the position in *McGlade* that every person who comprises the RNTC must to be a party to an ILUA in relation to agreements. According to the explanatory memorandum:

> The amendments to ILUA requirements support the integrity of authorisation processes, by ensuring that native title claim groups can nominate who will carry out the will of the claim group and execute the agreement. The amendments also give primacy to the role of authorisation, reflecting the view that authorisation, along with other check and balances established under the Act, provides sufficient protection for the claim group.[12]

2.25 The fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, the committee recognises that when precedent is overturned this itself necessarily has a retrospective effect and may overturn legitimate expectations about what the law requires. Nevertheless, the committee considers that where Parliament acts to validate decisions which are put at risk, in circumstances where previous authority has been overturned, it is necessary for Parliament to consider:

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10 *QGC Pty Ltd v Bygrave (No 2*) [2010] 189 FCR 412.

11 Explanatory memorandum, p. 3.

12 Explanatory memorandum, p. 4.

- whether affected persons will suffer any detriment by reason of the retrospective changes to the law and, if so, whether this would lead to unfairness; and
- that too frequent resort to retrospective legislation may work to sap confidence that the Parliament is respecting basic norms associated with the rule of law.

2.26 In justifying the retrospective application of the amendments which are designed to reinstate the law as understood prior to *McGlade*, the explanatory memorandum states:

> These amendments preserve the status quo for agreements registered on or before the date of the *McGlade* decision, providing certainty about interests granted and benefit paid in reliance on the agreement. It will also allow for consideration of agreements which had been lodged for registration on or before *McGlade* and ensure that the will of the native title claim group in authorising the agreement is not frustrated only because of the effect of the *McGlade* decision.[13]

2.27 However, the explanatory materials do not sufficiently explain the necessity, appropriateness and fairness of the proposed retrospective application of amendments in this bill. No indication is given of the number of ILUAs affected or likely to be affected. No context is provided as to why the agreements challenged in *McGlade* proved controversial within the RNTC group (or whether or not there were significant factual differences between the *McGlade* case and the earlier *Bygrave* case). Nor is there any discussion of the severity of the consequences thought to arise from *McGlade* in light of any alternative means for addressing those consequences. It is noted that if the bill is held by a court to involve an acquisition of property, then the Commonwealth will be liable to pay a reasonable amount of compensation, as provided for in clause 13 of the bill.

2.28 As Justice Mortimer in the *McGlade* case noted, an area ILUA may deal with the extinguishment of native title rights and interests by their surrender to the Commonwealth, a state or a territory.[14] The committee considers the retrospective extinguishment of native title for persons who do not agree to the ILUA to be a significant consequence for such individuals.

2.29 The committee has a long-standing scrutiny concern that provisions that apply retrospectively challenge a basic value of the rule of law that, in general, laws should only operate prospectively. This bill seeks to preserve the position prior to the recent case of *McGlade* for Indigenous Land Use Agreements registered (or pending registration) on or before the date of the *McGlade* decision, in order to remove

13 Explanatory memorandum, p. 4.

14 *McGlade*, Mortimer J at [398].

uncertainty. The committee notes that the fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position.

2.30 Although the committee recognises that the appropriateness of retrospective legislation may in some cases give rise to reasonable disagreements, in considering this bill the committee considers Senators would be assisted by a more comprehensive treatment of the appropriateness of the retrospectively applied provisions. The committee therefore seeks the Attorney-General's advice as to:

- the number of ILUAs affected or likely to be affected by the amendments in this bill;
- the number of people likely to be adversely affected by the retrospective application of these amendments and how they will be affected, including the effect on the claimants in *McGlade*;
- the severity of the consequences thought to arise from *McGlade* and whether there are any alternative means for addressing those consequences.

Attorney-General's response

2.31 The Attorney-General advised:

> **The number of ILUAs affected or likely to be affected by the Bill**
>
> An estimated 126 ILUAs were registered in reliance on *QGC v Bygrave (No 2)* (2010) 189 FCR 412 *(Bygrave)* based on a preliminary audit by the National Native Title Tribunal (NNTT) and are addressed by this Bill.
>
> In addition, there may be ILUAs registered prior to the *Bygrave* decision in 2010 which do not include the signatures of all members of the Registered Native Title Claimant (RNTC) because a member was deceased. The number of ILUAs affected by this issue is unknown; the NNTT has been unable to confirm whether their records accurately reflect where this issue arose.
>
> **Adverse effects of the Bill**
>
> The claimants in *McGlade* are not affected by the retrospective provisions of the Bill. The ILUAs which were the subject of *McGlade* are carved out of the retrospective operation of the Bill, to avoid legislative interference in a judicial decision.
>
> However, those agreements are prospectively validated by the Bill. Accordingly, the parties may decide to re-apply for the registration of those agreements, which will be subject to a further objections process.
>
> The number of people adversely affected by the retrospective provisions of the Bill is not possible to ascertain. This is because it is not known why individuals did not sign the 126 ILUAs registered in reliance on *Bygrave* – whether because they were deceased, incapacitated, unavailable or did not agree with the ILUA.

In the event that the retrospective validation of existing ILUAs results in an acquisition of property, provision has been made for compensation to be available.

Severity of the consequences of *McGlade*

ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.

Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon for both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that effective alternative measures are not available.

Committee comment

2.32 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that an estimated 126 ILUAs were registered in reliance on the *Bygrave* decision, but there may be more ILUAs affected by the decision in *McGlade*. The committee also notes the advice that while the claimants in *McGlade* are not retrospectively affected by this bill, is not possible to ascertain how many other members of ILUAs may be adversely affected as it is not known why individuals did not sign the registered ILUAs. The committee notes, in particular, the Attorney-General's advice that the reasons for why agreements may not have been signed could include where people 'did not agree with the ILUA'.

2.33 The committee also notes the Attorney-General's advice that ILUAs can cover a range of matters, including agreements about the doing of acts that could affect native title, how native title and other rights will be exercised and agreements on compensation and other benefits. The Attorney-General has also advised that allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether the agreements can continue to be relied on, raises the prospect of increased costs for the sector and the potential need to re-negotiate ILUAs, and that he is satisfied that effective alternative measures are not available.

2.34 The committee notes that the retrospective validation of existing ILUAs could have significant consequences for native title claimants. In particular, where native title claimants disagree with the terms of the ILUA, the retrospective application of these amendments will remove any process for objecting to the registration of the ILUA.

2.35 As ILUAs cover agreements regarding how native title is to be exercised (including the extinguishment of native title rights and interests), the committee considers the retrospective application of these amendments could significantly and adversely affect the interests of certain native title claimants.

2.36 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.37 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of these measures.

Chapter 3

Scrutiny of standing appropriations

3.1 The committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

Bills introduced with standing appropriation clauses in the 45th Parliament since the previous Scrutiny Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Nil

Senator Helen Polley (Chair)

Appendix 1
Ministerial correspondence

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref:

27 MAR 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley Helen,

The Senate Scrutiny of Bills Committee has requested further information about measures in the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (the Bill) (Scrutiny Digest 3/17 at paragraphs 1.12 to 1.20). I have provided the relevant information below.

Request at paragraph 1.15 – Reversal of evidentiary burden of proof

On this issue, the Committee has requested my advice, as follows:

"As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (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, Infringement Notices and Enforcement Powers. "

Right to the presumption of innocence (reverse burden provisions) – Background

Laws which shift the burden of proof to a defendant, commonly known as 'reverse burden provisions', can be considered a limitation of the presumption of innocence. This is because a defendant's failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

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Reversal of evidential burden of proof under Section 270

Section 270 of the *Biosecurity Act 2015* (the Act), as amended by item 27, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

The Human Rights Compatibility Statement within the Explanatory Memorandum to the Act discussed sections 271, 276, 277, 279, 282 and 283 of that Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

The exceptions set out by item 30 are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the ship's operator) will have access to the appropriate information and documentation, such as the ship's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277), or that the discharge was part of an acceptable ballast water exchange (section 282), and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the ship's operator) will have the easiest access to appropriate records to show that conditions set out by the exception has been fulfilled.

It remains necessary that the defendant (the person in charge or the ship's operator) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of evidential proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply.

Request at paragraph 1.20 – Strict liability

On this issue, the Committee has requested my advice, as follows:

"The committee requests the Minister's advice as to why the proposed penalty for the strict liability offence in item 30 is double that which is considered appropriate in the Guide to Framing Commonwealth Offences."

Even though the Committee has asked for my advice in relation to item 30, that item does not seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. However, item 126 of the Bill, which proposes to insert new section 299A into the Act, does seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. As the Committee referred to item 126 of the Bill at paragraph 1.16 of its consideration of the Bill in Scrutiny Digest 3/17, I have answered the question from the Committee as if it referred to item 126 of the Bill.

Strict liability offences - Background

When 'strict liability' applies to an offence, the prosecution is only required to prove the physical elements of an offence (that is, they are not required to prove fault elements), in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code Act 1995*).

The Guide provides, relevantly, that although the penalty applied to a strict liability offence should not exceed 60 penalty units for an individual, a higher penalty is available where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.

Penalty units for strict liability offence under new section 229A (item 126)

New section 299A as inserted by item 126 provides that a person in charge or the operator of a vessel must make a report to the Director of Biosecurity if a disposal of sediment has been made to ensure the safety of the vessel or to save a life, or accidentally, or to minimise or avoid pollution. A person in charge or operator of a vessel commits a strict liability offence if a report is not made in accordance with this section.

This offence is similar to the existing strict liability offence provided by section 284, as amended by items 73 to 75 of the Bill. That section provides for an offence where a person in charge or the operator of a vessel fails to report a discharge of ballast water in similar circumstances as set out by section 299A. Current subsection 284(4) of the Act provides for a strict liability offence with a penalty of 500 units. As provided by the Human Rights Compatibility Statement to the Biosecurity Bill 2014, this penalty is in line with a similar offence provided by section 22 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (duty to report certain incidents, such as certain discharges of a liquid substance carried by the ship).

The penalty provided by current subsection 284(4) of the Act is proposed to be amended by item 75 from 500 penalty units to 120 penalty units. This approach seeks to better align with matters of similar seriousness, as the original penalty is considered too onerous for such a failure, and is inconsistent with the approach to penalties elsewhere in the same chapter in Chapter 5 of the Act.

As the new offence provided by section 299A is similar to the offence provided by section 284, it is appropriate that the two offences of similar severity be prescribed the same amount of penalty units.

Further, reporting promptly to the Director of Biosecurity enhances Australia's ability to assess any adverse consequences from the incident, and to take steps to minimise any cascade effects if necessary. Contravention of the offence provided by new section 299A, similar to the offence under section 284, could result in severe consequences to Australia's marine environment. A court will still be able to consider the circumstances and significance of the offence to determine whether a lesser penalty than the maximum should be applied.

I trust that this information confirms that the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP

ATTORNEY-GENERAL

CANBERRA

27 MAR 2017

MS17-000908

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Chair

I am writing in response to the letter from the Acting Committee Secretary of the Senate Scrutiny of Bills Committee, Ms Anita Coles, dated 23 March 2017. The letter refers to the Committee's *Scrutiny Digest No. 3 of 2017* and seeks my advice on a number of identified issues related to the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the Bill).

Given the retrospective nature of aspects of the Bill, the Committee has sought my further advice on:

- the number of ILUAs affected or likely to be affected by the amendments in this Bill;
- the number of people likely to be adversely affected by the retrospective application of these amendments and how they will be affected, including the effect on the claimants in *McGlade*; and
- the severity of the consequences thought to arise from *McGlade* and whether there are any alternative means for addressing those consequences.

In response to the issues raised in the Committee's *Scrutiny Digest No. 3 of 2017*, my advice is set out below.

The number of ILUAs affected or likely to be affected by the Bill

An estimated 126 ILUAs were registered in reliance on *QGC v Bygrave (No 2)* (2010) 189 FCR 412 (*Bygrave)* based on a preliminary audit by the National Native Title Tribunal (NNTT) and are addressed by this Bill.

In addition, there may be ILUAs registered prior to the *Bygrave* decision in 2010 which do not include the signatures of all members of the Registered Native Title Claimant (RNTC) because a member was deceased. The number of ILUAs affected by this issue is unknown;

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the NNTT has been unable to confirm whether their records accurately reflect where this issue arose.

Adverse effects of the Bill

The claimants in *McGlade* are not affected by the retrospective provisions of the Bill. The ILUAs which were the subject of *McGlade* are carved out of the retrospective operation of the Bill, to avoid legislative interference in a judicial decision.

However, those agreements are prospectively validated by the Bill. Accordingly, the parties may decide to re-apply for the registration of those agreements, which will be subject to a further objections process.

The number of people adversely affected by the retrospective provisions of the Bill is not possible to ascertain. This is because it is not known why individuals did not sign the 126 ILUAs registered in reliance on *Bygrave* – whether because they were deceased, incapacitated, unavailable or did not agree with the ILUA.

In the event that the retrospective validation of existing ILUAs results in an acquisition of property, provision has been made for compensation to be available.

Severity of the consequences of *McGlade*

ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.

Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon for both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that effective alternative measures are not available.

Thank you again for writing on this matter.