

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:

- whether it unduly trespasses 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.

Aged Care Amendment (Ratio of Skilled Staff to Care Recipients) Bill 2017

Purpose	This bill seeks to amend the <i>Aged Care Act 1997</i> to introduce a mandatory ratio of skilled staff to care recipients in aged care residential facilities
Sponsor	Senator Derryn Hinch
Introduced	Senate on 6 September 2017

The committee has no comment on this bill.

A New Tax System (Goods and Services Tax) Amendment (Make Electricity GST Free) Bill 2017

Purpose	This bill seeks to make the supply of electricity GST-free
Sponsor	Senator David Leyonhjelm
Introduced	Senate on 5 September 2017

The committee has no comment on this bill.

ASIC Supervisory Cost Recovery Levy Amendment Bill 2017

Purpose	This bill seeks to amend the <i>ASIC Supervisory Cost Recovery Levy Act 2017</i> to ensure that benchmark administrator licensees are required to pay an annual supervisory levy equal to their regulatory costs under ASIC's industry funding model
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017

The committee has no comment on this bill.

Australian Grape and Wine Authority Amendment (Wine Australia) Bill 2017

Purpose	<p>This bill seeks to enable the Australian Grape and Wine Authority to:</p> <ul style="list-style-type: none"> • implement all program activities under the Wine Support Package, including for the purposes of cider and international wine tourism; • administer grant programs for wine including the Cellar Door Grant; and • change the name of the Authority from the 'Australian Grape and Wine Authority' to 'Wine Australia'
Portfolio	Agriculture and Water Resources
Introduced	Senate on 5 September 2017

The committee has no comment on this bill.

Commission of Inquiry (Coal Seam Gas) Bill 2017

Purpose	This bill seeks to establish a Commission of Inquiry into the coal seam gas industry in Australia
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 4 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Coercive powers¹

1.2 The bill seeks to establish a Commission of Inquiry (Coal Seam Gas), and clause 11 provides that the *Royal Commissions Act 1902* (the RC Act) and regulations made under that Act, apply in relation to the Commission as if the Commission were a Royal Commission.

1.3 The committee notes that the RC Act contains some significant coercive powers, including powers to summon witnesses and take evidence.² Under the RC Act, hearings may be open or closed, or restricted to certain classes of persons.³ It is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.⁴ When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.⁵ These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government. In addition, section 6O(2) of the RC Act purports to confer on certain Royal Commissioners the same powers as a judge sitting in court to determine certain forms of contempt. Section 6B(1) also provides that the President or Chair of a Royal Commission may issue a warrant for the arrest of a person, if the person has been served with a summons to attend the Commission as a witness but fails to attend the Commission in answer to the summons.

1.4 The committee generally expects that where a bill seeks to confer coercive powers on bodies, the explanatory materials should address the principles set out in

1 Clause 11. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2 *Royal Commissions Act 1902*, section 2.

3 *Royal Commissions Act 1902*, section 6D(5).

4 *Royal Commissions Act 1902*, sections 3 and 6B.

5 *Royal Commissions Act 1902*, section 6A.

chapters 7–10 of the *Guide to Framing Commonwealth Offences*.⁶ In this instance, the explanatory materials do not address the need for the proposed Commission to have each of these significant coercive powers.

1.5 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling the proposed Commission of Inquiry (Coal Seam Gas) to exercise the significant coercive powers in the *Royal Commissions Act 1902*.

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

Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Customs Act 1901</i> to implement Australia's obligations under new Chapter 3 of the Singapore-Australia Free Trade Agreement including to:</p> <ul style="list-style-type: none"> • introduce new rules of origin for goods that are imported into Australia from Singapore; • introduce new procedures to claim preferential tariff treatment for goods that are Singaporean originating goods; and • extend the record keeping obligations that apply to goods exported to Singapore that are claimed to be the produce and manufacture of Australia to also apply to Australian originating goods that are exported to Singapore
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 6 September 2017
Scrutiny principle	Standing Order 24(1)(a)(v)

Incorporation of external materials existing from time to time⁷

1.6 Proposed subsection 153XD(6) provides that regulations made for the purpose of proposed Division 1BA (relating to Singaporean originating goods) may apply, adopt or incorporate any matter contained in any other instrument or writing as in force or existing from time to time.

1.7 The explanatory memorandum notes that, in implementing other free trade agreements, provisions such as these have 'enabled the regulations to refer to the general accounting principles of a country other than Australia for the purposes of the regional value content calculations'.⁸ The committee notes this explanation and recognises that details relating to complex matters such as accounting principles are generally appropriate for inclusion in delegated legislation.

1.8 However, the committee has scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

⁷ Schedule 1, item 3, proposed subsection 153XD(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

⁸ Explanatory memorandum, p. 9.

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

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

1.10 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.⁹ 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.

1.11 Noting the above comments, the committee requests the Assistant Minister's advice as to whether the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 153XD(6), will be made freely available to all persons interested in the law.

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

Customs Tariff Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Customs Tariff Act 1995</i> (the Act) to implement Australia's obligations under new Chapter 3 of the Singapore-Australia Free Trade Agreement including to:</p> <ul style="list-style-type: none"> • provide for duty-free access entry into force of the amended Agreement for most eligible goods determined in accordance with new Division 1BA of Part VIII of the <i>Customs Act 1901</i> • amend certain concessional items in Schedule 4 to the Customs Tariff Act to maintain customs duty rates in line with the applicable concessional item; • insert new Schedule 4A to provide for excise-equivalent rates of duty on certain alcohol, tobacco, fuel and petroleum products; and • repeal provisions in Schedule 3 to the Act that provide for excise equivalent rates of duty on certain alcohol, tobacco, fuel and petroleum products after the expiration of a three-year transition period
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 6 September 2017

The committee has no comment on this bill.

First Home Super Saver Tax Bill 2017

Purpose	This bill seeks to impose first home super saver tax
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017

The committee has no comment on this bill.

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017

Purpose	This bill seeks to amend the <i>Foreign Acquisitions and Takeovers Fees Imposition Act 2015</i> to set out the fee payable by a foreign person in relation to a residential dwelling which is left vacant
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective application¹⁰

1.12 This bill is related to Schedule 3 to the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 which seeks to implement an annual vacancy fee on foreign owners of residential real estate where the residential property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

1.13 The explanatory memorandum to the bills notes that these amendments will apply to foreign persons who submit a notice or an application to acquire residential land from 7.30pm on 9 May 2017.¹¹ The committee has sought advice from the Treasurer in relation to the retrospective application of the proposed vacancy fees regime in its comments on the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017. Further detail is available at pages 21–22 of this Scrutiny Digest.

¹⁰ General comment. The committee draws Senators' attention to this bill pursuant to principle 1(a)(i) of the committee's terms of reference.

¹¹ Explanatory memorandum, p. 59.

High Speed Rail Planning Authority Bill 2017

Purpose	This bill seeks to establish a High Speed Rail Planning Authority
Sponsor	Senator Don Farrell
Introduced	Senate on 4 September 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Rule-making power¹²

1.14 Clause 29 provides for the making of rules (delegated legislation), which simply states that the Minister may make rules prescribing matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed to carry out or give effect to the Act. It does not contain any of the standard restrictions on what the rules can do, as outlined in Office of Parliamentary Counsel's *Drafting Direction No. 3.8*:¹³

If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
- (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) amend this [*Act/Ordinance*].

You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).

Alternatively, if the instructor's policy is that a [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in

12 Clause 29. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

13 See Office of Parliamentary Counsel, *Drafting Direction No. 3.8, Subordinate Legislation*, July 2017, paragraphs [27] to [29], available at: http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf.

addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

1.15 As clause 29 proposes to provide a rule-making power (rather than a regulation-making power) the committee considers it would be appropriate for the provision to be amended to include the safeguards set out in the Office of Parliamentary Counsel's *Drafting Direction No. 3.8*.

Regional Forest Agreements Legislation (Repeal) Bill 2017

Purpose	This bill seeks to repeal the <i>Regional Forest Agreements Act 2002</i>
Sponsor	Senator Janet Rice
Introduced	Senate on 7 September 2017

The committee has no comment on this bill.

Renewable Energy (Electricity) Amendment (Continuing the Energy Transition) Bill 2017

Purpose	This bill seeks to amend the <i>Renewable Energy (Electricity) Act 2000</i> to extend increases to the Renewable Energy Target until 2030
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 4 September 2017

The committee has no comment on this bill.

Telecommunications Amendment (Guaranteeing Mobile Phone Service in Bushfire Zones) Bill 2017

Purpose	This bill seeks to amend the <i>Telecommunications Act 1997</i> to require carriers to provide 24 hour standby power capability for mobile phone towers in high-risk bushfire communities
Sponsor	Ms Rebekha Sharkie MP
Introduced	House of Representatives on 4 September 2017

The committee has no comment on this bill.

Treasury Laws Amendment (2017 Measures No. 5) Bill 2017

Purpose	This bill seeks to amend the <i>Corporations Act 2001</i> to: <ul style="list-style-type: none"> • establish a new licensing regime requiring administrators of designated significant financial benchmarks to obtain a new 'benchmark administrator licence' from the Australian Securities and Investments Commission (ASIC); • provide ASIC with powers to make rules imposing a regulatory framework for licensed benchmark administrators and related matters; • make manipulation of financial benchmarks a criminal offence and subject to civil penalties
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

Significant matters in delegated legislation¹⁴

1.16 This bill proposes to establish a new licensing regime for administrators of designated significant financial benchmarks. The bill provides a framework for the new regulatory regime with much of the detail to be provided for in rules (delegated legislation). Proposed Division 3 of Part 7.5B provides that the Australian Securities and Investment Commission (ASIC) will be empowered to make the financial benchmark rules and the compelled financial benchmark rules. The type of matters that could be included in such rules include significant matters, such as:

- the responsibilities of benchmark administrator licensees;
- the manner in which benchmark administrator licensees are to provide their services, including the manner and conditions (including fees) on which they provide access to financial benchmarks;
- how conflicts of interest and complaints of benchmark administrator licensees are to be handled;
- the persons who are obliged to comply with requirements imposed by the rules and the manner and form in which those persons must comply; and

¹⁴ Schedule 1, item 1, proposed Division 3 of Part 7.5B. The committee draws Senators' attention to this Division pursuant to principle 1(a)(iv) of the committee's terms of reference.

- the power for ASIC to require, by written notice, an entity to provide certain data or information or to require a benchmark administrator to generate or administer a significant financial benchmark.¹⁵

1.17 Most significantly, proposed section 908CF provides that a person must comply with any provisions set out in the rules that apply to the person. If a person does not comply with such provisions they will be liable to a civil penalty, and proposed section 908CO provides that the rules may specify a penalty amount for a rule of up to 5,500 penalty units (\$1.155 million).

1.18 The committee's view is that significant matters, such as key details about how the financial benchmark administrator licensee scheme is to operate and the imposition of civil penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification as to why such matters are proposed to be included in delegated legislation.

1.19 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.¹⁶ In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.¹⁷ The committee further notes that OPC's Drafting Direction 3.8 states that material covering civil penalties should be included in regulations unless there is a strong justification for prescribing it in another type of legislative instrument.¹⁸

1.20 In addition, the committee notes that proposed paragraph 908CB(j) provides that the regulations may prescribe matters that may be dealt with by the rules. The committee notes it is unusual for primary legislation to provide for the making of a regulation which, in turn, provides a power to set out what matters are to be set out in rules.

15 See proposed sections 908CB, 908CC and 908CE.

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

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

18 Office of Parliamentary Counsel, *Drafting Direction 3.8, Subordinate Instruments*, July 2017, p. 3

1.21 The committee's view is that significant matters, such as key details about how the financial benchmark administrator licensee scheme is to operate and, in particular, the imposition of civil penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- why it is considered necessary and appropriate to leave most of the elements of this new scheme to delegated legislation; and
- if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations, particularly in relation to the imposition of civil penalties.

Procedural fairness¹⁹

1.22 Proposed section 908BI provides that ASIC may, by giving written notice to a benchmark administrator licensee, suspend or cancel the licensee's licence in certain listed circumstances. Unlike the process for suspension or cancellation under proposed section 908BJ, there is no requirement that ASIC give the licensee an opportunity to show cause why the licence should not be suspended or cancelled. The committee notes that procedural fairness generally requires that a person should be given an opportunity to present their case, before a decision is made by a statutory or administrative body that could affect their rights or interests. The explanatory memorandum does not explain why proposed section 908BI does not require ASIC to give affected licensees the right to be heard before their licence is cancelled.

1.23 The committee therefore requests the Treasurer's advice as to why proposed section 908BI does not require ASIC to give affected licensees the right to be heard before their licence is suspended or cancelled, and whether it is intended that ASIC will ensure that a hearing will be given where fairness requires one.

Immunity from civil or criminal liability²⁰

1.24 Proposed section 908CJ provides that no civil or criminal liability will arise from any action taken by a person providing information, allowing access to information or generating or administering a significant financial benchmark if the

19 Schedule 1, item 1, proposed section 908BJ. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

20 Schedule 1, item 1, proposed section 908CJ. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

person does so in good faith in compliance with a requirement imposed by the compelled financial benchmark rules. This therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that lack of good faith is shown. The committee notes that the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.25 The committee expects that if a bill seeks to provide immunity from civil or criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.²¹

1.26 The committee requests the Treasurer's advice as to why it is considered appropriate to provide a protected person with civil and criminal immunity so that any affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

21 See explanatory memorandum, p. 31.

Treasury Laws Amendment (Housing Tax Integrity) Bill 2017

Purpose	This bill seeks to amend the <i>Income Tax Assessment Act 1997</i> and the <i>Foreign Acquisitions and Takeovers Act 1975</i> to: <ul style="list-style-type: none"> • disallow deductions for travel costs relating to residential investment properties; • limit deductions for plant and equipment assets used for producing assessable income from residential premises to when the asset was first used for a taxable purpose; and • implement an annual vacancy fee on foreign owners of residential real estate where the residential property is not occupied or genuinely available on the rental market for at least six months in a 12 month period
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (iii)

Retrospective application²²

1.27 This bill seeks to disallow deductions for travel costs relating to residential investment properties,²³ limit depreciation deductions for plant and equipment in residential premises,²⁴ and implement an annual vacancy fee on foreign owners of residential real estate where the residential property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.²⁵ The measures in this bill relating to the proposed vacancy fees regime are complemented by the provisions of the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017 (the Fees Amendment Bill).

1.28 It is proposed that each of these measures apply retrospectively. The amendments in Schedule 1 (relating to travel costs deductions) are proposed to apply to losses or outgoings incurred on or after 1 July 2017.²⁶ The amendments in

22 Schedule 1, item 5, and Schedule 3, item 12. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

23 Schedule 1.

24 Schedule 2.

25 Schedule 3.

26 Schedule 1, item 5.

Schedule 2 (relating to depreciation deductions) are proposed to apply to income years starting on or after 1 July 2017 to assets acquired at or after the time the measure was announced (7.30pm on 9 May 2017), unless the asset was acquired under a contract entered into force before this time.²⁷ The amendments in Schedule 3 and the Fees Amendment Bill (relating to the proposed vacancy fees regime) are proposed to apply to foreign persons who submit a notice or an application to acquire residential land from the time the measure was announced (7.30pm on 9 May 2017).²⁸

1.29 The committee has a long-standing scrutiny concern about provisions that apply retrospectively, including provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release'), as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively (after they have been passed by the Parliament). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.30 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.

1.31 In this instance, the explanatory memorandum states that the retrospective application of the measures in Schedule 2 (relating to depreciation deductions) is needed 'to ensure taxpayers cannot avoid the operations of the amendments by acquiring new assets or applying existing assets between the time of announcement and application in order to take advantage of the limitations in the existing law'. The explanatory memorandum also states that any adverse impact is expected to be minor given that the fact that the measures were to apply retrospectively to the time of announcement has been widely publicised.²⁹

1.32 Noting this explanation, the committee makes no further comment in relation to the retrospective application of the measures in Schedule 2. However, the committee notes there is no explanation for the retrospective application of the measures in Schedules 1 and 3, and the Fees Amendment Bill.³⁰ The committee therefore requests the Treasurer's advice as to why it is intended to apply the measures relating to travel costs deductions and the proposed vacancy fees regime retrospectively, including whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

27 Schedule 2, item 13. See also explanatory memorandum, p. 38.

28 Schedule 3, item 12.

29 Explanatory memorandum, p. 38.

30 Explanatory memorandum, pp 17 and 15.

Review rights³¹

1.33 Division 3 of Schedule 3 provides that unpaid vacancy fees may be recovered as a debt due to the Commonwealth or by the creation of a charge over Australian land owned by the relevant foreign person.

1.34 Proposed section 115L provides that the Treasurer may declare, by notifiable instrument, that a charge applies over specified land if the Treasurer is satisfied that the declaration is necessary to secure the payment of unpaid vacancy fees or penalties. The committee notes that the Treasurer's declaration will not be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), as decisions made under the *Foreign Acquisitions and Takeovers Act 1975* are excluded from ADJR Act review.³² While the decisions would be subject to judicial review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution, the committee notes that the grounds for seeking judicial review under these provisions are limited. In addition, as there is no discussion in the explanatory memorandum about review rights, it is unclear whether these decisions will be subject to merits review.

1.35 The committee therefore requests the Treasurer's advice as to whether declarations made under proposed section 115L relating to the creation of a charge over Australian land will be subject to merits review, and if it is not to be subject to merits review, the justification for such an approach.

31 Schedule 3, item 7, proposed section 115L. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

32 See Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*.

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to taxation to: <ul style="list-style-type: none">• establish the First Home Super Saver Scheme;• allow an individual to use the proceeds in relation to one sale of their main residence to make contributions (downsizer contributions) of up to \$300,000 to their superannuation provider if they are 65 years of age or over
Portfolio	Treasury
Introduced	House of Representatives on 7 September 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

[Digest 5 & 6/17]

1.36 On 5 September 2017 the Treasurer (Mr Morrison) presented an addendum to the explanatory memorandum to the bill and the bill was read a third time.

1.37 The committee thanks the Treasurer for tabling this addendum to the explanatory memorandum which includes key information relating to the application of a legal burden of proof previously requested by the committee.³³

No comments

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

- Electoral and Other Legislation Amendment Bill 2017;³⁴
- Export Finance and Insurance Corporation Amendment (Support for Commonwealth Entities) Bill 2017;³⁵
- Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017;³⁶
- Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016.³⁷

33 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, pp 89–94.

34 On 6 September 2017 the House of Representatives agreed to three Government amendments, the Minister for Trade, Tourism and Investment (Mr Ciobo) presented a supplementary explanatory memorandum and the bill was read a third time.

35 On the 6 September 2017 the Senate agreed to five Opposition amendments, and on the same day the House of Representatives agreed to the Senate amendments and the bill passed both Houses.

36 On 4 September 2017 the Senate agreed to five Government and 10 Opposition amendments. On 5 September 2017 the House of Representatives agreed to the Senate amendments and the bill passed both Houses.

37 On 4 September 2017 the House of Representatives agreed to five Government amendments, the Minister for Veterans' Affairs (Mr Tehan) presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Imported Food Control Amendment Bill 2017

Purpose	<p>This bill seeks to amend the <i>Imported Food Control Act 1992</i> to:</p> <ul style="list-style-type: none"> • require documentary evidence from importers to demonstrate that they have effective internationally recognised food safety controls in place throughout the supply chain for certain types of food; • amend Australia's emergency powers to allow food to be held at the border where there is uncertainty about the safety of a particular food and where the scientific approach to verify its safety is not established; • provide additional powers to monitor and manage new and emerging risks; • recognise an entire foreign country's food safety regulatory system where it is equivalent to Australia's food safety system; • align the definition of 'food' with other Commonwealth legislation; • establish differentiated enforcement provisions to enable a graduated approach to non-compliance; • require all importers of food to be able to trace food one step forward and one step backward; and • make minor technical amendments
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 1 June 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(ii)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's initial comments in a letter dated 13 July 2017. The committee sought further information and the Minister responded in a letter dated 12 September 2017. Set out below are extracts from the

committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹

Broad discretionary power²

Initial scrutiny – extract

2.3 Item 10 of the bill proposes making amendments to enable the Secretary to make a holding order that states certain food imported into Australia is to be held in an approved place, on the basis that the Secretary is satisfied there are reasonable grounds for believing food of that kind may pose a risk to human health. The order can last for up to 28 days and may be extended more than once. There is no provision for merits review of the decision but the explanatory memorandum provides a detailed explanation as to why access to merits review would be inappropriate in the circumstances.³

2.4 The explanatory memorandum states that the requirement in proposed subsection 15(4) to enable the Secretary to extend the 28 day period by a further period of up to 28 days (with no limits on the number of extensions) 'has been inserted to enable continued protection of human health until the appropriate testing regime on the food for the particular hazard and/or adequate risk management strategies can be implemented in relation to the food'. It continues:

To provide a safeguard against arbitrary discretion, it is intended that the decision maker for an order under new subsection 15(3) of the Act will not be the same decision maker for, if applicable, a decision to extend the order under new subsection 15(4) of the Act.⁴

2.5 The committee notes that this safeguard will presumably be facilitated through delegating the relevant powers reposed in the Secretary to different or multiple decision-makers. However, there appears nothing on the face of the legislation to require that a different decision-maker exercise the power to extend an order.

2.6 The committee suggests that it may be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order, and seeks the Minister's response in relation to this.

1 See correspondence relating to *Scrutiny Digest No. 11 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

2 Schedule 1, item 10. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

3 Explanatory memorandum, p. 42.

4 Explanatory memorandum, p. 10.

Minister's first response

2.7 The Minister advised:

Item 10 of the Bill proposes to insert subsections 15(3) to (9) into the Act. These proposed subsections will provide for matters in relation to temporary holding orders where food poses a serious risk to human health. The proposed temporary holding orders will initially be issued for a period of 28 days, but proposed subsection 15(4) of the Act will enable the Secretary of the Department to extend that period for a further 28 days. The Secretary is not prohibited from making more than one extension of that period. However, under proposed subsection 15(5) of the Act, the Secretary must review the appropriateness of the order before making any further extension.

It is anticipated that the extension power in proposed subsection 15(4) of the Act will be exercised where, within the initial 28 day period of the order:

- appropriate testing regimes are unable to be identified or established in relation to the food; or
- where adequate risk management strategies are unable to be implemented in relation to the food.

Further, proposed subsections 15(5) and (6) of the Act seek to provide safeguards against the exercise of arbitrary discretion in the making of an order under proposed subsection 15(3) of the Act or the extension of any such order under proposed subsection 15(4) of the Act. Proposed subsection 15(5) of the Act requires the decision-maker to review the appropriateness of an order before making an extension to that order under proposed subsection 15(4) of the Act. Proposed subsection 15(6) of the Act requires the Secretary to immediately revoke an order when the circumstances specified for its revocation have occurred.

Proposed subsections 15(3), (4), (5) and (6) of the Act include powers and functions that are vested in the Secretary. Under section 41 of the Act, the Secretary may delegate any or all of his or her powers under the Act to:

- a Senior Executive Service (SES) employee, or acting SES employee in the Department; or
- an Australian Public Service (APS) employee who holds or performs the duties of an Executive Level 1 or 2 position, or an equivalent position, in the Department.

The Secretary is not required to delegate his or her powers and functions, and any such delegation may be limited to particular powers and functions or particular persons. For example, the Secretary is able to delegate his or her powers and functions in:

- proposed subsection 15(3) of the Act to appropriate Executive Level 1 employees in the Department; and

- proposed subsections 15(4), (5) and (6) to appropriate Executive Level 2 employees in the Department.

The inclusion of a legislative requirement that the decision to extend the period of a holding order under proposed subsection 15(4) of the Act must be made by a different decision-maker to that who made the original holding order would necessarily require the Secretary to delegate his or her power in order for proposed subsections 15(3) and (4) to be operational.

I consider that amending the Bill in the manner suggested by the Committee would be inconsistent with the general principles of delegation. In particular, the Secretary's discretion to delegate his or her powers and functions under section 41 of the Act would be fettered. It is appropriate that the Secretary retains the ability to determine the relevant delegate or delegates (if appropriate) for the purposes of proposed subsections 15(3) to (9) of the Act.

Committee's first comment – extract

2.8 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is anticipated that the extension power in proposed subsection 15(4) will be exercised where, within the initial 28 day period of the holding order, appropriate testing regimes are unable to be identified or established in relation to the food, or where adequate risk management strategies are unable to be implemented in relation to the food. The committee also notes the Minister's advice that proposed subsections 15(5) and (6) seek to provide safeguards against the exercise of arbitrary discretion in the making of a holding order or the extension of any such order.⁵

2.9 The Minister also stated that amending the bill to include a legislative requirement that the decision to extend the period of a holding order must be made by a different decision-maker to that who made the original holding order would fetter the Secretary's discretion to delegate his or her powers and functions and that therefore it is appropriate that the Secretary retains the ability to determine the relevant delegate or delegates (if appropriate) for the purposes of proposed subsections 15(3) to (9).

2.10 As the explanatory memorandum notes, an important safeguard against arbitrary discretion in relation to extending the 28 day holding period by further periods of up to 28 days would be to ensure that the decision-maker for an initial order under proposed subsection 15(3) is not the same decision-maker for a decision to extend the order under proposed subsection 15(4).

5 Proposed subsection 15(5) requires the decision-maker to review the appropriateness of an order before making an extension to that order and proposed subsection 15(6) requires the Secretary to immediately revoke an order when the circumstances specified for its revocation have occurred.

2.11 The committee remains of the view that it is appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order. The committee considers that such an amendment would not unduly inhibit the Secretary's discretion to delegate his or her powers as such an amendment would only constrain the Secretary's discretion in a very narrow way.

2.12 In relation to the Secretary's power to extend a holding order, in order to provide some guidance on the face of the primary legislation, the committee considers that it may be appropriate to amend proposed subsection 15(5) to ensure that before making an extension, the Secretary is satisfied that, within the initial (or preceding) 28 day period of the order:

- appropriate testing regimes were unable to be identified or established in relation to the food; or
- adequate risk management strategies were unable to be implemented in relation to the food.

2.13 Noting the significant impact that a holding order may have on importers of food, the committee considers it would be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order. The committee draws its scrutiny concerns in relation to this to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad discretionary power.

2.14 In addition, the committee requests the Minister's further advice as to the appropriateness of amending the bill to provide further statutory guidance on the exercise of the Secretary's power to extend a holding order (see paragraph [2.12] above).

Minister's further response

2.15 The Minister advised:

In response to the additional comments provided by the Committee, I intend to table a Replacement Explanatory Memorandum to address some of the comments made.

In relation to the Committee's comments on Item 10 of the bill, to provide further statutory guidance on the exercise of the Secretary's power to extend a holding order, I have decided to amend the Explanatory Memorandum to provide greater clarity on what the review undertaken by the Secretary, under new subsection 15(5), is intended to consider.

As previously advised, the Secretary, when considering a decision to extend a holding order for an additional 28 days, must take into consideration if appropriate testing regimes have been identified or adequate risk management strategies are in place.

The replacement Explanatory Memorandum will also incorporate comments raised by the Committee in relation to new subsections 22(14) and 23(11).

Committee's final comment

2.16 The committee thanks the Minister for this further response. The committee welcomes the Minister's advice that he intends to table a replacement explanatory memorandum that will clarify matters raised by the committee in *Scrutiny Digest No. 8 of 2017*.⁶

2.17 In relation to the extension of holding orders (which provide that certain food imported into Australia is to be held in an approved place), the committee had sought the Minister's advice as to the appropriateness of amending the bill to provide further statutory guidance on the exercise of this extension power. While the committee welcomes the fact that additional information will be inserted into the explanatory memorandum to provide greater clarity in relation to what a review of the appropriateness of a holding order under proposed subsection 15(5) is intended to consider prior to the extension of the order, the committee notes that this will not impose any statutory obligations on the relevant decision-maker to actually consider the relevant matters.

2.18 From a scrutiny perspective, the committee therefore remains of the view that it may be appropriate to amend the text of proposed subsection 15(5) to ensure that there is a legislative requirement that before making an extension, the Secretary is satisfied that, within the initial (or preceding) 28 day period of the order:

- **appropriate testing regimes were unable to be identified or established in relation to the food; or**
- **adequate risk management strategies were unable to be implemented in relation to the food.**

2.19 **Noting the significant impact that a holding order may have on importers of food, the committee also takes this opportunity to reiterate its scrutiny view that it may be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order.**

2.20 **The committee draws its scrutiny concerns in relation to this to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad discretionary power to extend an imported food holding order.**

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8 of 2017*, 9 August 2017, pp 73–88.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.¹ It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

3.4 The committee draws the following bill to the attention of Senators:

- Nil.

Senator Helen Polley
Chair

1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

