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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.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017

Purpose	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 11 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Broad scope of offence and strict liability¹

1.2 Proposed subsection 168A(1) makes it an offence to supply, or offer to supply, a thing in trade or commerce which includes an indigenous cultural expression. Proposed subsection 168A(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the thing is supplied by, or in accordance with an arrangement with a relevant indigenous community and artist. The offence carries a maximum penalty of \$25,000 for an individual (\$200,000 for a body corporate). Proposed subsection (3) seeks to make the offence in subsection (1) an offence of strict liability.

1.3 The committee notes that the statement of compatibility states that the burden sought to be imposed by proposed subsection (2) is a legal burden,² however, in light of subsection 13.3(3) of the *Criminal Code Act 1995* the committee considers the reverse burden is evidential rather than legal.

1.4 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

¹ Schedule 1, item 4, proposed section 168A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

² Statement of compatibility, p. 9.

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right. As such, the committee expects any such reversal of the evidential burden of proof to be justified. In this case the statement of compatibility states that the consent or licensing arrangements in place for the supply of art is peculiarly within the defendant's knowledge and it would be a difficult and costly exercise for the prosecution to disprove consent.³

1.5 The committee considers that these matters are likely to be peculiarly within the knowledge of the defendant. However, the committee considers that the offence itself is extremely broad, with an offence likely to be committed simply where a person supplies or offers to supply a thing, which includes indigenous cultural expression, to a consumer in trade or commerce, unless a defence can be established. It would appear that this could capture indigenous artists themselves supplying their own artwork in trade or commerce, unless they positively raised evidence in their defence. Whether an arrangement is in place with each indigenous community and indigenous artist before the thing is supplied in trade or commerce would appear to be a matter that is a key element of the offence. The committee considers this issue should more properly be included as an element of the offence itself, rather than drafted as a defence.

1.6 In addition, proposed subsection 168A(3) makes the offence in subsection 168A(1) a strict liability offence. 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*.⁴

1.7 The statement of compatibility states that the strict liability offences are consistent with other provisions of the Australian Consumer Law and the absence for the fault element is reasonable in light of the *United Nations Declaration on the Rights of Indigenous Peoples* which provides that redress should be provided to indigenous people with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent.⁵

1.8 However, the committee notes that the penalty for this offence is significantly higher than that which it has accepted is generally appropriate in relation to strict liability offences. The committee notes that the *Guide to Framing*

3 Statement of compatibility, p. 9.

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

5 Statement of compatibility, p. 7.

*Commonwealth Offences*⁶ provides that a strict liability offence is generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (or \$12,600) or 300 penalty units for a body corporate (or \$63,000). In contrast the offence in proposed section 168A is subject to a penalty of \$25,000 for an individual or \$200,000 for a body corporate.

1.9 The committee also notes the statement of compatibility states that it would not be difficult for suppliers to ensure they know whether the art they supply is made by or with the consent of an indigenous artist and indigenous community; the offence is not punishable by imprisonment; and the offence is narrow and easily capable of avoidance as suppliers can readily obtain information regarding the origin of the products they supply.⁷

1.10 As set out at paragraph [1.5] above, the committee considers that the offence as currently drafted is extremely broad. It does not consider that the offence is narrow and easily capable of avoidance, as the offence would apply whenever a person supplies or offers to supply a thing, which includes indigenous cultural expression, to a consumer in trade or commerce. There is no requirement that the supplier knows whether the art they supply is done with or without an arrangement with the indigenous artist or indigenous community. In addition, whether an object has significance of a specified type to a particular community may not be readily apparent.⁸ The origins of an expression may also be a matter of dispute.⁹ Or the question of whether a particular expression has a likeness or resemblance to an indigenous cultural expression may be contested.¹⁰ The application of strict liability would mean that there is no need to prove an intention to supply a thing that includes an indigenous cultural expression. This could mean that a person may be guilty of the offence simply by offering to sell an artwork that has a likeness to an artwork made by an indigenous artist, without any knowledge that the artwork has that likeness. While the application of strict liability may be appropriate in certain regulatory contexts, such as where the person is placed on notice to guard against the possibility of any contravention, the committee notes this offence would apply to any person selling any thing that has an indigenous cultural expression to any person, and not just to art dealers or suppliers.

1.11 From a scrutiny perspective, the committee considers that the offence as currently drafted is overly broad and the application of strict liability in the circumstances may unduly trespass on personal rights and liberties.

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

7 Statement of compatibility, pp 7-8.

8 Proposed paragraph 2(1), definition of *indigenous cultural expression*, paragraph (a).

9 Proposed paragraph 2(1), definition of *indigenous cultural expression*, paragraph (b).

10 Proposed paragraph 2(1), definition of *indigenous cultural expression*, paragraph (c).

1.12 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the breadth of the offence and the application of strict liability.

Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Coastal Trading (Revitalising Australian Shipping) Act 2012</i> (the Act) to: <ul style="list-style-type: none">• simplify coastal trading regulation;• expand coverage of the Act;• reduce the administrative impost associated with the current regime;• provide clarity on a number of minor technical matters
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives on 13 September 2017

The committee has no comment on this bill.

Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Corporations Act 2001</i> to extend the crowd-sourced funding (CSF) regime to proprietary companies by:</p> <ul style="list-style-type: none"> • expanding the eligibility for the CSF regime in section 738H to proprietary companies that meet eligibility requirements; • providing that proprietary companies with shareholders who acquire shares through a CSF offer are not subject to the takeovers rules; • adding special investor protection provisions for proprietary companies accessing the CSF regime; and • removing the temporary corporate governance concessions provided for in the <i>Corporations Amendments (Crowd-sourced Funding) Act 2017</i> for public companies that access the CSF regime
Portfolio	Treasury
Introduced	House of Representatives on 14 September 2017

The committee has no comment on this bill.

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Purpose

This bill seeks to amend various Acts relating to criminal law to:

- insert community safety as a factor that can be taken into account to revoke the parole of a federal offender without notice;
- remove the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief;
- prevent children and other vulnerable witnesses from being cross-examined at committal proceedings;
- insert new aggravated offences for child sexual abuse that involves subjecting the child to cruel, inhuman or degrading treatment, or which causes the death of the child;
- insert new offences to criminalise the grooming of third parties for the purpose of procuring a child for sexual activity and to criminalise the provision of an electronic service to facilitate dealings with child abuse material online;
- increase the maximum penalties for certain Commonwealth child sex offences and for breach of the obligation on internet service providers and internet content hosts to report child abuse material to police;
- introduce a mandatory sentencing scheme to apply to the Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender;
- insert a presumption against bail for Commonwealth child sex offences that attract the highest maximum penalties;
- revise the factors which must be taken into account when sentencing all federal offenders to ensure that considerations of a guilty pleas cover any benefit to the community, or any victim of, or witness to, the offence;
- make it an aggravating factor in sentencing if a federal offender used their standing in the community to assist in the commission of an offence;
- ensure that when sentencing a Commonwealth child sex offender, the court must have regard to the objective of rehabilitating the person, including by considering whether to impose any conditions about rehabilitation and

	<p>treatment and considering if the length of sentence is sufficient for the person to undertake a rehabilitation program while in custody;</p> <ul style="list-style-type: none"> • insert additional aggravating sentencing factors that apply when a court is sentencing for certain child sex offences, including considering the age and maturity of the victim and the number of people involved in the commission of the offence; • insert a presumption in favour of cumulative sentences for Commonwealth child sex offences; • insert a presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment; • require that if a court is releasing a Commonwealth child sex offender on a recognizance release order, the offender must be supervised in the community, and undertake such treatment and rehabilitation programs as their probation officer directs; • add 'residential treatment orders' as an additional sentencing alternative to allow intellectually disabled offenders to receive access to specialised treatment options; • allow certain information to be withheld from an offender where it affects the decision about their release to parole in national security circumstances; • reduce the amount of 'clean street time' that can be credited by a court as time served against the outstanding sentence following commission of an offence by a person on parole and license; • require a period of time to be served in custody if a federal offender's parole order is revoked; and • remove references to 'child pornography material' within Commonwealth legislation and replace with 'child abuse material'
Portfolio	Justice
Introduced	House of Representatives on 13 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

Procedural fairness and broad discretionary power¹¹

1.13 Current section 19AU of the *Crimes Act 1914* provides that the Attorney-General may revoke a parole order or licence where a person has breached, or is suspected of having breached, a condition of their parole. Currently the Attorney-General must notify the parolee of the condition alleged to have been breached, the fact that the Attorney-General proposes to revoke parole, and give a person 14 days to provide written reasons why parole should not be revoked. There are current exceptions to when notice must be given, including when there are circumstances of urgency requiring revocation without notice. Schedule 1 proposes introducing an additional exception to the requirement that notice be given where, in the opinion of the Attorney-General, it is necessary in the interests of ensuring the safety and protection of the community or another person.

1.14 The explanatory memorandum states that the person would still be afforded procedural fairness as the person could still make a written submission to the Attorney-General as to why the parole order should not be revoked. However, the person would be in custody at the time of this hearing.¹² The statement of compatibility states the current provision means that even when there are serious concerns for community safety, offenders must be given notice before their parole or licence can be revoked, thereby giving them the opportunity to reoffend or abscond as they know they may be taken back into custody.¹³

1.15 The committee notes that the proposed power in Schedule 1 confers a broad discretionary power on the Attorney-General, applying when it is the Attorney-General's 'opinion' that it is necessary to revoke without notice. The decision to remand a person in custody prior to any hearing adversely affects the person's interests before the hearing will take place, and thereby limits their right to procedural fairness. No examples are given in the explanatory materials as to whether the existing provisions have actually resulted in persons posing a risk to community safety or another person because they have been given 14 days' notice of an intention to revoke parole. It is unclear to the committee why existing paragraph 19AU(3)(b) of the *Crimes Act 1914*, which enables notification not to be given in circumstances of urgency, is insufficient to ensure that those that pose a serious and immediate safety concern are not notified in advance.

1.16 The committee emphasises that the scrutiny questions raised by the committee are separate to the overarching policy considerations underpinning this bill. Rather, each of the questions relate to how the new provisions will be exercised

11 Schedule 1. The committee draws Senators' attention to this Schedule pursuant to principles 1(a)(i) and (ii) of the committee's terms of reference.

12 Explanatory memorandum, p. 17.

13 Statement of compatibility, p. 9.

in practice and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.¹⁴

1.17 The committee requests the Minister's more detailed advice as to why it is necessary to provide the Attorney-General with a broad discretionary power not to give notice before revoking a person's parole and why the existing provisions in section 19AU of the *Crimes Act 1914* are insufficient to address any serious and immediate risks to safety.

Reversal of legal burden of proof¹⁵

1.18 Items 16, 18, 37 and 39 of Schedule 4 propose to introduce new defences or add to existing defences in relation to two new offences being introduced by this bill. The changes would make it a defence for a defendant to a prosecution for certain child sex abuse offences to prove that at the relevant time the defendant believed that the child was at least 16 years of age (or that another person was under 18). A legal burden of proof is thereby proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, their belief at the relevant time.

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

1.20 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed. The committee has consistently taken the view that applying a legal burden to displace a presumption should only be imposed in rare instances.

1.21 In this instance, the explanatory memorandum provides in relation to items 16 and 18:

It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defence applies do in fact exist. This is especially the case where it may relate to circumstances that must be proven are particularly within the knowledge of the person concerned.

...

14 See Standing Order 24(1)(a)(i).

15 Schedule 4, items 16, 18, 37 and 39. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

A legal burden is appropriate because the defences relate to a matter that is within the defendant's knowledge and not available to the prosecution.¹⁶

1.22 In relation to items 37 and 39 which expand an existing provision that reverses the legal burden of proof and inserts a new defence that reverses the legal burden of proof, the explanatory memorandum provides no reasoning as to the appropriateness of reversing the legal burden of proof.¹⁷

1.23 The committee notes that the *Guide to Framing Commonwealth Offences*¹⁸ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹⁹

1.24 The committee notes that the limited justification provided in the explanatory memorandum does not address both of these limbs, stating only that it will generally be much easier for the defendant to prove the matters, and not giving any reasons as to why the matters are peculiarly in the defendant's knowledge. The *Guide to Framing Commonwealth Offences* also states that where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden,²⁰ which has not been done in this instance.

1.25 It is also not clear to the committee how the defence provisions, which go to the defendant's belief as to the age of the relevant person, interact with the offence provisions themselves which provide that the offence applies when a relevant person is either a particular age or the defendant believes the person to be that age.²¹ This would appear to provide, for example, where a victim was 16 years old or over, that the prosecution prove beyond a reasonable doubt that the defendant believed the person was under 16 years old, but that if the defendant wished to rely on a belief that the person was at least 16, the burden of proving this would then shift to the defendant. It is unclear how these provisions would operate together in practice.

16 Explanatory memorandum p. 25.

17 See explanatory memorandum pp 34-35.

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

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

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

21 See item 5, proposed section 471.25A and item 27, proposed section 474.27AA.

1.26 As the explanatory materials do not adequately address this issue, the committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in this instance (including why it is insufficient to apply a reverse evidential burden) and how the reversal of the burden of proof interacts with the obligation on the prosecution to prove the defendant's belief about age.

Mandatory minimum sentences²²

1.27 Schedule 6 of the bill proposes to introduce mandatory minimum sentences of imprisonment if a person is convicted of certain serious child sexual abuse offences under the Commonwealth Criminal Code, or convicted of any Commonwealth child sex offences more than once.²³ The minimum sentences to be imposed range from two years to six years.

1.28 The statement of compatibility states that the objective of the measure is to ensure the courts are handing down sentences 'that reflect the gravity of these offences and ensure that the community is protected from child sex offenders', stating that current sentences 'do not sufficiently recognise the harm suffered by victims of child sex offences' or 'that the market demand for, and commercialisation of, child abuse material often leads to further physical and sexual abuse of children'.²⁴ The statement of compatibility goes on to state that courts will retain discretion as to the term of actual imprisonment because the mandatory sentencing scheme relates only to the length of the head sentence and not the term of actual imprisonment served by an offender.²⁵ This is because the courts set the non-parole period and could set that the non-parole period as lower than the mandatory minimum sentence.

1.29 However, the committee has consistently noted that mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions), and sentencing principles generally provide that a non-parole period is to be in proportion to the head sentence.

22 Schedule 6. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

23 See, Schedule 6, item 2, proposed section 16AAA. Mandatory minimum sentences would apply in relation to sections 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.10, 272.11, 272.18, 272.19, 273.7, 471.22, 474.23A, 474.25A(1), 474.25A(2), 474.25B of the Criminal Code.

24 Statement of compatibility, p. 10.

25 Statement of compatibility, p. 10.

1.30 The committee therefore requests the Minister's detailed justification as to the appropriateness of removing judicial discretion in sentencing certain child sex offenders, whether there are examples of analogous offences that carry a mandatory minimum penalty, and how mandatory minimum sentences would interact with existing sentencing principles regarding the setting of a non-parole period.

Right to liberty—presumption against bail²⁶

1.31 Schedule 7 to the bill would introduce a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences. Proposed section 15AAA provides that a bail authority must not grant bail unless satisfied by the person that circumstances exist to grant bail.

1.32 The presumption against bail applies to persons charged with, or convicted of, serious child sex offences to which mandatory minimum penalties apply. It also applies to all offences subject to a mandatory minimum penalty on a second or subsequent offence where the person has been previously convicted of child sexual abuse.

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

1.34 In this instance, the statement of compatibility provides that the presumption against bail aims to achieve the objective of community protection from Commonwealth child sex offenders while they are awaiting trial or sentencing, and where conditions of bail 'cannot mitigate the risk to the community, witnesses, and victims.'²⁷ The statement of compatibility goes on to state that the presumption is rebuttable and provides judicial discretion in determining whether a person's risk on bail can be mitigated by appropriate conditions.²⁸

26 Schedule 7, Part 2. The committee draws Senators' attention to this Part pursuant to principle 1(a)(i) of the committee's terms of reference.

27 Statement of compatibility, p. 10.

28 Statement of compatibility, p. 10.

1.35 However, no information is provided to demonstrate that the courts are currently not appropriately considering the risks posed by those accused of Commonwealth child sex offences.

1.36 The committee requests the Minister's detailed justification as to the appropriateness of imposing a presumption against bail, including information as to why the current bail requirements are insufficient, and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority must have regard to in exercising their discretion whether to grant bail.

Right to liberty—conditional release²⁹

1.37 Section 20(1)(b) of the *Crimes Act 1914* currently provides that, following conviction for an offence, the court may sentence a person to imprisonment but direct that the person be released after having given certain forms of security, such as being of good behaviour, paying compensation or paying the Commonwealth a pecuniary penalty or other conditions (known as a recognizance order or suspended sentence). Schedule 11 to the bill proposes removing this sentencing option for Commonwealth child sex offenders except in exceptional circumstances. As a result, those convicted of Commonwealth child sex offences will be required to serve a period of imprisonment that cannot be suspended, except in limited circumstances.

1.38 The statement of compatibility states that this presumption in favour of a term of actual imprisonment is necessary to ensure the courts are handing down sentences for child sex offenders that reflect the gravity of these offences and to ensure community protection.³⁰

1.39 As with mandatory minimum sentences, the committee has consistently noted that severely limiting the court's discretion to make a recognizance order (or suspend a sentence) undermines the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. The statement of compatibility states that the court retains a discretion as to how long the term of imprisonment will be. However, the committee notes that the proposed amendments in Schedule 6 would impose mandatory minimum sentences. In addition, while the court would retain a discretion to suspend a sentence in 'exceptional circumstances', the explanatory materials provide no examples of what might constitute exceptional circumstances.

1.40 The committee therefore requests the Minister's detailed justification as to the appropriateness of limiting judicial discretion in sentencing Commonwealth

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

30 Statement of compatibility, p. 11.

child sex offenders. The committee also requests the Minister's advice as to why the current sentencing options have proven ineffective in reflecting the gravity of the offences and protecting the community, and what type of matters would constitute 'exceptional circumstances' so as to justify the making of a recognizance order.

Procedural fairness—restriction of information provided to offenders³¹

1.41 Currently, section 19AL of the *Crimes Act 1914* provides that the Attorney-General must, before the end of a non-parole period for a federal offender, either make, or refuse to make, an order directing that the person be released from prison on parole. Subsection 19AL(2) provides that if the Attorney-General refuses to make a parole order the Attorney-General must give the person a written notice that includes a statement of reasons for the refusal. Schedule 13 to the bill proposes amending this so that a person would not be entitled to a copy of a report or another document (or a part of it) or any information about the content of the report of another document, if its provision to the person is, in the opinion of the Attorney-General, likely to prejudice national security.

1.42 The right to receive reasons as to why parole has been refused is an important element of the right to procedural fairness. The courts have found that procedural fairness in parole applications 'requires that an applicant's attention be drawn to the main issues or factors militating against success, so that an adequate opportunity is afforded to deal with them'.³² This does not require access to all documents but does require that 'an applicant knows of, or anticipates, the facts and matters assuming significance in a decision to decline a parole application'.³³

1.43 The explanatory memorandum recognises that this amendment 'limits the procedural fairness afforded to federal offenders', however it argues that it only does so 'to the extent necessary and proportional to protect national security and the public interest'.³⁴ The statement of compatibility states that the measure is necessary to protect confidential information, such as intelligence information, and that there is a sufficiently high bar in place as it would only apply if the Attorney-

31 Schedule 13. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(i) of the committee's terms of reference.

32 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19]. This was cited with approval by the Federal Court of Australia in relation to section 19AL of the *Crimes Act 1914*: see *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [22].

33 *Butler v Queensland Community Corrections Board* [2001] QCA 323, [19].

34 Explanatory memorandum, p. 51.

General is satisfied that disclosure of the information would be likely to prejudice national security.³⁵

1.44 However, the committee notes that the explanatory materials provide limited reasoning as to why this provision is necessary, or whether there have been any instances where information has had to be disclosed under the current provisions that would have been likely to affect national security. In addition, the committee notes that the only requirement that needs to be satisfied is that in the Attorney-General's subjective opinion the information is likely to prejudice national security. There are no grounds which the Attorney-General must have regard to when making this assessment, and there is no requirement that the assessment be made on reasonable grounds. There is also no provision for independent review of any such decision. While judicial review of decisions in relation to release on parole or licence is available under the *Administrative Decisions (Judicial Review) Act 1977*, judicial review is only available on limited grounds and if a person is unaware as to the reasons as to why parole has been refused, it would be difficult to challenge such a refusal.

1.45 The committee therefore requests the Minister's detailed advice as to:

- **why it is necessary to empower the Attorney-General to refuse to provide any reasons as to why parole has been refused, and if the absence of this provision has caused difficulties when providing reasons for parole refusals (and if so, on how many occasions);**
- **why the Attorney-General's decision is based on the Attorney's subjective 'opinion' rather than on objective criteria;**
- **why the relevant information could not, at least, be provided to the applicant's legal representative and the gist of the information provided to the offender; and**
- **why the Attorney-General's decision is not subject to merits review.**

35 Statement of compatibility, p. 12.

Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to introduce new offences and a new injunction power to prohibit and prevent conduct amounting to false representation of a Commonwealth body
Portfolio	Attorney-General
Introduced	House of Representatives on 13 September 2017

The committee has no comment on this bill.

Customs Amendment (Anti-Dumping Measures) Bill 2017

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to allow specific information to be used to determine an export price and limit the ability of Exporters to subvert the anti-dumping framework and benefit from inappropriately reduced rates of duty that do not remedy the injurious effects of dumping
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 13 September 2017

The committee has no comment on this bill.

Customs Amendment (Safer Cladding) Bill 2017

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to ban the importation of polyethylene core aluminium composite panels
Sponsor	Senator Nick Xenophon
Introduced	Senate on 11 September 2017

The committee has no comment on this bill.

Defence Legislation Amendment (Instrument Making) Bill 2017

Purpose	This bill seeks to amend the instrument making powers in the <i>Defence Act 1903</i> (the Act) to ensure that, when re-making certain instruments made under the Act in the future, the instruments can reflect policy requirements and approaches to drafting
Portfolio	Defence
Introduced	House of Representatives on 14 September 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv)

Significant matters in delegated legislation³⁶

1.46 Part 1 of Schedule 1 seeks to amend the regulation-making powers in the *Defence Act 1903* relating to inquiries. Currently the regulation-making power enables regulations to be made for or relating to the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of Defence Force commissions of inquiry and inquiry officers. The proposed amendments would instead provide for a more general power to make regulations relating to inquiries into matters concerning the Defence Force, including their appointment, procedures and powers.

1.47 The committee notes that the power to appoint a commission of inquiry and the detail of the inquiry's procedures and powers contain matters that go beyond mere technical detail. The committee notes the regulations currently made using the existing powers contain offence provisions and significant detail about how an inquiry is to be conducted.³⁷ The committee's view is that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.48 The committee notes that the explanatory memorandum simply states that the bill does not make any changes to the ability to make regulations to compel a person to appear before and answer questions at an inquiry.³⁸ It does not state whether consideration was given as to whether the details regarding commissions of inquiry would be more appropriate for inclusion in the primary legislation.

³⁶ Items 1-5 of Schedule 1 and item 7 of Schedule 2, proposed section 117AD. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

³⁷ See Defence (Inquiry) Regulations 1985.

³⁸ See explanatory memorandum, p. 8.

1.49 In addition, Part 2 of Schedule 1 provides that the regulations may prescribe matters relating to the regulation or prohibition of all types of hazards to aviation and aviation-related communications within a defence aviation area, including what objects can be brought within defence aviation areas. It also provides that provisions of the regulations are subject to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014*.³⁹ The explanatory memorandum states that consideration was given to whether the scheme as a whole should be moved into the principal Act, rather than being established in delegated legislation, but it was decided that it was appropriate to continue the scheme in delegated legislation to provide the necessary flexibility and consistency with similar legislation.⁴⁰ However, the committee notes that the regulation of all types of hazards to aviation and aviation-related communications, which includes prohibiting the construction or use of buildings, structures or objects within a defence aviation area, is a significant matter that may be more appropriate for inclusion in primary legislation, noting that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.50 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee:

- **seeks the Minister's advice as to why details regarding the appointment, procedures and powers of a defence force commission of inquiry are left to delegated legislation rather than set out in primary legislation (Part 1 of Schedule 1); and**
- **leaves to the Senate as a whole the appropriateness of leaving to delegated legislation the power to regulate or prohibit matters in defence aviation areas (Part 2 of Schedule 1).**

Broad delegation of administrative power⁴¹

1.51 Proposed section 117AE triggers the monitoring powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the regulations made for the purpose of proposed section 117AD. Proposed subsection 117AE(4) provides that an authorised person may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring. The committee notes that the powers conferred on a person assisting also include a

39 See item 7 of Schedule 2, proposed section 117AE.

40 Explanatory memorandum, p. 10.

41 Schedule 1, item 7, proposed subsection 117AE(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

power to use force against things when executing a monitoring warrant. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.52 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have specified skills, training or experience.

Use of force⁴²

1.53 Proposed subsection 117AF(3) provides that in executing a monitoring warrant for the purpose of ensuring compliance with a relevant provision of the regulations, an authorised person may use such force against persons and things, and a person assisting may use such force against things, as is necessary and reasonable in the circumstances. This goes beyond the standard powers available in relation to monitoring as provided for in the *Regulatory Powers (Standard Provisions) Act 2014*.

1.54 The explanatory memorandum explains that it is necessary to modify the relevant Part of the *Regulatory Powers (Standard Provisions) Act 2014* as it is necessary to enable authorised persons to enter land and premises for a range of purposes, including removing or marking hazardous objects, such as removing destroying or modifying a building, structure or object.⁴³ The explanatory memorandum also states that it is important to ensure there is a mechanism to deal with hazardous objects if people are unwilling to comply with requirements. Thus, it may be inferred that a provision enabling the use of force against 'things' may be necessary. However, no explanation is given as to why a provision enabling the use of force against 'persons' is necessary. The committee notes that the *Guide to Framing Commonwealth Offences* states that the use of force against persons and things should be examined and justified separately, and that generally it will be easier to demonstrate a need for a provision authorising the use of force against things to execute a warrant, than it will be to demonstrate the need for a provision authorising the use of force against persons for regulatory regimes governing compliance.⁴⁴

42 Schedule 1, item 7, proposed subsection 117AF(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

43 Explanatory memorandum, pp 12-13.

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

1.55 The committee seeks the Minister's detailed justification as to why it is necessary and appropriate to empower an authorised person to use force against persons in executing a monitoring warrant in a defence aviation area.

Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017

<p>Purpose</p>	<p>This bill seeks to amend various Acts in relation to superannuation to:</p> <ul style="list-style-type: none"> • enable the Fair Work Ombudsman to engage its authority in matters that relate to superannuation contributions; • require employers to provide notice of when contributions are made and are not made for each pay period; • remove the provision which currently allows employers to potentially claim as employer contributions, employee contributions made via salary-sacrifice; • remove the exemption that allows employers not to make superannuation contributions to employees who earn less than \$450 in a calendar month; • remove restrictions on choice of superannuation fund, as effected via certain agreements and workplace determinations, from 1 July 2018; • require the Commissioner for Taxation (the Commissioner) to conduct a review of employers' compliance with their superannuation payment obligations; • require trustees of superannuation entities to take reasonable steps to notify their members (within 28 days and by any means) when it could reasonably have expected their member to have received a contribution from an employer, but did not; and • expand the information that superannuation providers are required to provide to the Commissioner in their annual Member Information Statements
<p>Sponsor</p>	<p>Ms Rebekha Sharkie MP</p>
<p>Introduced</p>	<p>House of Representative on 11 September 2017</p>

The committee has no comment on this bill.

Fair Work Amendment (Terminating Enterprise Agreements) Bill 2017

Purpose	This bill seeks to amend the <i>Fair Work Act 2009</i> to narrow the circumstances under which an enterprise agreement that has passed its nominal expiry date can be terminated
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 11 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective application⁴⁵

1.56 Proposed subsection 226(2) would prevent the Fair Work Commission (FWC) terminating an enterprise agreement if the terms and conditions of employment of any employee covered by the agreement would, immediately after termination, be less favourable. Proposed subsection 226(3) has the effect of invalidating any decision of the FWC to terminate an agreement if taken after 22 April 2015 and the termination decision could not have been made had the proposed substantive amendment in subsection 226(2) been in force at that time.

1.57 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.

1.58 The committee notes that the retrospective application of this law could operate beneficially (in relation to employees who may as a result of the provisions in the bill be retrospectively entitled to more favourable terms and conditions of employment). However, it could also have a detrimental effect on others, such as employers. 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.

1.59 In this instance, the explanatory memorandum states that '[r]etrospectivity is sought in this way because there are likely to be many employees whose interests are affected, particularly those who were covered by agreements that had been

45 Item 2, proposed section 226(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(1) of the committee's terms of reference.

terminated under the current provisions in section 226'. The explanatory memorandum also notes that the bill responds to concerns about expired agreements being terminated by employers in order to force employees onto lower wages and conditions, a practice that emerged after a FWC decision on 22 April 2015.

1.60 The committee notes that, in general, it considers laws should only operate prospectively (not retrospectively). In this case the legislation would have a retrospective beneficial effect on certain employees; however, it may also have a retrospective detrimental effect on employers. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying the proposed amendments retrospectively.

Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017

Purpose	<p>This bill seeks to amend various Acts relating to family assistance and child support</p> <p>Schedule 1 amends the child support scheme to:</p> <ul style="list-style-type: none"> • extend the interim period that applies for recently-established court-ordered care arrangements and provide incentives for the person with increased care to take reasonable action to participate in family dispute resolution; • allow tax assessment to be taken into account for child support purposes in a broader range of circumstances; • allow for courts to set aside child support agreements made before 1 July 2008, as well as allowing all child support agreements to be set aside without having to go to court if certain circumstances change; and • amend methods in relation to recovering child support debts and make consequential amendments <p>Schedule 2 replaces the current FTB Part A immunisation requirement arrangements with new compliance arrangements</p>
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (iii)

Retrospective effect⁴⁶

1.61 A number of provisions⁴⁷ in the bill appear to operate on past events, for example, agreements which exist, or assessments which were made, prior to commencement. In addition, item 174 refers to matters for ascertaining or determining components of certain income for periods before 1 July 2008. The explanatory memorandum provides no explanation as to whether any of these provisions, which operate on past events, would have a retrospective effect on any individual. The committee has a long-standing scrutiny concern about provisions that

46 Schedule 1, item 43, new paragraph 58A(3B)(b)(iv) and 58A(3d)(c)(iii); and items 51; 74(3) and (6); 172(2) and (4); 174; 176; and 183. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

47 See Schedule 1, item 43, new paragraph 58A(3B)(b)(iv) and 58A(3d)(c)(iii); and items 51; 74(3) and (6); 172(2) and (4); 174; 176; and 183.

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.

1.62 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.

1.63 It is unclear from the bill or the explanatory materials as to whether these provisions would have a retrospective effect, and if so, if any individual would suffer any detriment as a result.

1.64 The committee therefore requests the Minister's advice as to whether any of the provisions listed above would have a retrospective effect, and if so, whether any person would suffer any detriment as a result.

Freedom of movement and access to merits review—Departure Prohibition Orders⁴⁸

1.65 Currently section 72D of the *Child Support (Registration and Collection) Act 1988* (the Child Support Act) provides that the Registrar may make a departure prohibition order (DPO) prohibiting a person from departing from Australia for a foreign country if a person has child support debts. Section 72F makes it an offence for a person to depart Australia for a foreign country if a DPO is in force.

1.66 Items 146 to 155 seek to amend the DPO provisions in the Child Support Act to provide for an additional ground on which the Registrar can make a departure prohibition order, namely if the person has 'carer liability' (a new type of debt owed to the Commonwealth as introduced by this bill)⁴⁹.

1.67 The committee has previously noted that DPOs in the context of social security legislation raise concerns regarding freedom of movement and a lack of merits review.⁵⁰ In particular, the committee is concerned that the question of whether it is appropriate to impose a DPO in individual circumstances depends on whether the Registrar is 'satisfied' of certain matters, leaving a broad discretion to the Registrar to determine if a DPO should be made.

48 Schedule 1, items 152–155. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

49 See item 101, proposed section 69B.

50 Senate Scrutiny of Bills Committee, *Fifth Report of 2016*, 3 May 2016, p. 386.

1.68 In addition, the DPO scheme does not provide for merits review of the Registrar's decision. Although section 72Q of the Child Support Act provides that an appeal from a decision to make a departure prohibition order may be made to the Federal Court of Australia or Federal Circuit Court of Australia, this is expressly made subject to Chapter III of the Constitution (and would, in any event, necessarily be read as subject to the Constitution). The result is that the appeal would be limited to questions about the legality of the decision rather than enabling the court to review the merits of the original decision. This means that the court would not be in a position to substitute its judgment for the Registrar's even if it thought the decision was not the correct or preferable decision on the established facts.

1.69 From a scrutiny perspective, the committee considers that any extension of the DPO scheme to encompass additional debts to the Commonwealth (as provided for by items 146 to 155 of Schedule 1), raises concerns about the effect of DPOs on a person's freedom of movement and the absence of merits review of the decision to make a DPO.

1.70 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of extending the Departure Prohibition Order scheme to encompass new debts to the Commonwealth.

Investigation and Prosecution Measures Bill 2017

Purpose	This bill seeks to amend various Acts relating to the Independent Commission Against Corruption and the prosecution of offences on Norfolk Island to: <ul style="list-style-type: none"> • support the restructure of the New South Wales Independent Commission Against Corruption; and • extend the functions, powers and duties of the Commonwealth Director of Public Prosecutions to laws of Norfolk Island
Portfolio	Attorney-General
Introduced	House of Representatives on 13 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective effect⁵¹

1.71 Schedule 2 to the bill seeks to amend the *Director of Public Prosecutions Act 1983* (DPP Act) to extend the functions, powers and duties of the Commonwealth Director of Public Prosecutions to Norfolk Island.

1.72 Specifically, the definition of 'laws of the Commonwealth' in subsection 3(1) of the DPP Act currently includes a law of a territory, but explicitly excludes the *Norfolk Island Act 1979* and laws made under or continued in force by that Act. The bill seeks to remove this limitation and item 3 of Schedule 2 provides that, for the purposes of the DPP Act and any instrument made under it, a reference to a law of a Territory includes a reference to 'a law in force in Norfolk Island at any time, whether before or after the commencement of this item.'

1.73 Item 4 of Schedule 2 seeks to validate things done under the *Director of Public Prosecutions Regulations 1984*, as amended by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017* (DPP Regulations), in the event that they are found to be invalid. The DPP Regulations, which came into effect on 4 August 2017, purportedly prescribed functions, powers and duties of the Director of Public Prosecutions in relation to Norfolk Island.

1.74 The committee notes that item 4 would have a retrospective effect in that it seeks to validate actions already taken in reliance on regulations in the event that the latter regulations are found to be invalid.⁵² If the DPP Regulations, as amended in

51 Schedule 2, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

52 Explanatory memorandum, p. 13.

August 2017, are invalid, any action taken by the Director of Public Prosecutions in relation to Norfolk Island is likely to have not been lawfully authorised. As such, validating any action taken by the Director of Prosecutions between August 2017 and when this bill may pass would have a retrospective effect.

1.75 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.

1.76 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.

1.77 The explanatory memorandum to the bill outlines the intended effect of item 4, but does not provide any reasons as to why such a provision is necessary. Although the statement of compatibility states that the provisions do not 'change any criminal offences, penalties or sanctions applicable to those subject to the laws of Norfolk Island',⁵³ the issue of any other possible detrimental effects the provisions may have on individuals has not been addressed in the explanatory material.

1.78 The committee therefore requests the Attorney-General's advice as to why it is necessary to validate with retrospective effect the *Director of Public Prosecutions Regulations 1984*, as amended by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017*, and whether this measure may have a detrimental effect on any individual.

53 Explanatory memorandum, p. 8.

Lands Acquisition Amendment (Public Purpose) Bill 2017

Purpose	This bill seeks to amend the <i>Lands Acquisition Act 1989</i> (the Act) to clarify the meaning of the definition 'public purpose' as defined under the Act
Sponsor	Senator Pauline Hanson
Introduced	Senate on 13 September 2017

The committee has no comment on this bill.

Marriage Law Survey (Additional Safeguards) Bill 2017

Purpose	This bill seeks to provide a range of safeguards to support the conduct of the Australian marriage law postal survey
Portfolio	Finance
Introduced	Senate on 13 September 2017
Bill status	Received the Royal Assent on 13 September 2017
Scrutiny Principles	Standing Order 24(1)(a)(i) and (iii)

Reversal of evidential burden of proof⁵⁴

1.79 Subclauses 13(1) and (2) make it an offence to receive or give bribes to another person with the intent of influencing or affecting their decision whether to provide a marriage law survey response to the Statistician, or the content of such a response. Subclause 13(3) provides an exception (an offence specific defence) to this offence, where the relevant property or a benefit is a declaration of public policy or a promise of public action.

1.80 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.

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

1.82 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified, by addressing relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁵⁵

1.83 The explanatory memorandum explains this provides a similar exception to that in operation for the electoral bribery offence in section 326 of the

54 Subclause 13(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

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

Commonwealth Electoral Act 1918 (the Electoral Act), but gives no further justification.⁵⁶

1.84 While the explanatory memorandum notes that this exception is similar to a provision in the Electoral Act, the committee has generally not accepted the fact that a provision is similar to an existing provision is, of itself, a sufficient justification for reversing the evidential burden of proof. In this instance the committee notes that this bill has already passed both Houses of the Parliament and that the Act will only be in force for a limited period. The committee therefore makes no further comment in relation to this matter.

Exclusion of judicial review⁵⁷

1.85 Clause 19 sets out how the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) applies to provisions in the bill. Subclause 19(1) provides that certain clauses⁵⁸ are enforceable under Parts 4 and 6 of the Regulatory Powers Act. Part 4 of that Act relates to the enforcement of civil penalty provisions and Part 6 relates to enforceable undertakings.

1.86 Subclause 19(3) specifies that, for clause 15 (relating to vilification), a person must not take any action under or in relation to Part 4 or 6 of the Regulatory Powers Act without the consent of the Attorney-General. While the bill provides that the Electoral Commissioner is able to apply for a civil penalty order or enforceable undertaking,⁵⁹ under subclause 19(4) the Attorney-General may also approve a notifying entity to apply for a civil penalty order in relation to a particular contravention of clauses 6, 15, 16 and 17 of the bill. Significantly, subclause 19(6) provides that the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) does not apply in relation to a decision of the Attorney-General under subclauses 19(3) and (4).

1.87 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum merely repeats the text of the provision.⁶⁰ The ADJR Act is beneficial legislation that overcomes a number of

56 Explanatory memorandum, p. 22.

57 Subclause 19(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

58 Clause 6 (authorisation of marriage law survey material), clause 15 (vilification as a result of expressing views in relation to the marriage law survey question), clause 16 (interference with marriage law survey response or discrimination on basis of donation) and clause 17 (misleading matter in relation to completing the marriage law survey).

59 See subparagraph 19(2)(a)(i) and paragraph 19(2)(b).

60 Explanatory memorandum, p. 25.

technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.88 While the committee is concerned that the explanatory memorandum did not provide a justification for the exclusion of ADJR Act review, in this instance the committee notes that this bill has already passed both Houses of the Parliament and that the Act will only be in force for a limited period. The committee therefore makes no further comment in relation to this matter.

Broad delegation of administrative powers⁶¹

1.89 Subclause 26(1) would allow the Electoral Commissioner to delegate all or any of the Electoral Commissioner's powers, duties or functions under this bill to any officer of the Australian Electoral Commission, or any other member of staff of the Commission referred to in section 29 of the *Commonwealth Electoral Act 1918*.

1.90 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated officers or to senior executive service (SES) officers. 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.

1.91 In this case, the explanatory memorandum notes that 'this delegation is required for efficiency in administering the powers, duties or functions under the Act, across various geographical locations'.⁶²

1.92 The committee notes that there is no guidance as to the relevant skills or experience that would be required to undertake delegated functions, nor is there any limitation on the level to which significant powers or functions could be delegated.

1.93 The committee takes this opportunity to reiterate that it has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

61 Subclause 26. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

62 Explanatory memorandum, p. 28.

However, in this instance, the committee notes that this bill has already passed both Houses of the Parliament and that the Act will only be in force for a limited period. The committee therefore makes no further comment in relation to this matter.

Medicinal Cannabis Legislation Amendment (Securing Patient Access) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Customs Act 1901</i> and the <i>Narcotic Drugs Act 1967</i> to:</p> <ul style="list-style-type: none">• allow access to Australian medicinal cannabis products through Special Access Scheme Category A; and• Ensure the government cannot block Special Access Scheme Category A access to imported medicinal cannabis products via import licence conditions
Sponsor	Senator Richard Di Natale
Introduced	Senate on 12 September 2017

The committee has no comment on this bill.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to prohibit narcotic drugs, mobile phones, SIM cards and other things of concern in relation to persons in immigration detention facilities The bill also amends the search and seizure powers, including the use of detector dogs for screening procedures
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 13 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iv) and (iv)

Undue trespass on personal rights and liberties⁶³

1.94 This bill seeks to amend the *Migration Act 1958* (Migration Act) to enable the Minister to determine, by legislative instrument, that any 'thing' is prohibited in an immigration detention centre, if satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.⁶⁴ A note in the bill gives examples of the things that might be considered to pose such a risk as including mobile phones; SIM cards; computers and tablets; medications or health care supplements in specified circumstances and publications or other material that could incite violence, racism or hatred.

1.95 The bill also proposes to give or extend powers to:

- search a detainee's person, clothing and property to find out whether a prohibited thing is hidden on the person, in the clothing or in their property;⁶⁵
- require a detainee, or their possessions, to be strip-searched or screened by screening equipment to find out whether a prohibited thing is hidden on the person, in their clothing or in their possession;⁶⁶ and

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

64 See item 2, proposed section 251A.

65 See items 3-7.

66 See items 10-14 and 15-18.

- enable authorised officers and their assistants to search, without a warrant, the rooms and personal effects of immigration detainees to find out if a prohibited thing, weapon or other thing capable of being used to inflict injury or help a detainee escape is in the detention facility (and to use detector dogs for this purpose).⁶⁷

1.96 The bill also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.⁶⁸

1.97 The explanatory memorandum gives the reason for the amendments as being because the profile of the detainees in immigration detention facilities has changed significantly over the past two years, with facilities now accommodating a number of higher risk detainees, including child sex offenders and members of organised crime groups.⁶⁹ The explanatory memorandum also states that evidence indicates that detainees are using mobile phones 'to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats'.⁷⁰ It also states that the existing search and seizure powers in the Migration Act are not sufficient to manage narcotic drugs, mobile phones, SIM cards or other things that are of concern in immigration detention facilities, and the amendments in the bill seek to enhance the health, safety and security of persons within the facilities.⁷¹

1.98 The committee notes that the amendments in the bill, in restricting the possessions a detainee may have inside immigration detention and empowering authorised officers to search a detainee without a warrant (including strip-searches and searches of a detainee's room and personal effects), trespass on the detainee's rights and liberties, particularly their right to privacy. The committee's terms of reference require it to consider whether provisions *unduly* trespass on rights and liberties.⁷² In this instance, the committee acknowledges the difficulties posed by detainees with serious criminal histories, and appreciates there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences.

1.99 However, the committee notes that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa. They are not detained, as is the case for those in prisons, as

67 Items 21, proposed section 252BA and 252BB.

68 Item 21, proposed subsection 252BA(6).

69 Explanatory memorandum, p. 2.

70 Explanatory memorandum, p. 2.

71 Explanatory memorandum, p. 2.

72 Senate Standing Order 24(1)(a)(i).

punishment for having committed a crime. The level of risk posed by persons detained due to the exercise of the Minister's character ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa. Yet, the proposed amendments in the bill would apply to all immigration detainees equally, despite the fact that around half the detention population is not made up of high-risk individuals.⁷³

1.100 As the amendments in the bill would apply regardless of the level of risk posed by different detainees, the committee considers that the bill, in restricting individual privacy and autonomy by denying detainees the ability to possess things, such as mobile phones or computers, and the extensive search powers (without the need to obtain a warrant), unduly trespasses on personal rights and liberties. The committee notes these scrutiny concerns are heightened by the broad power given to the Minister to prescribe any 'thing' as being prohibited so long as the Minister is satisfied that possession or use of the thing 'might' be a risk to the health, safety or security of persons in the facility or to the order of the facility (as noted below at paragraphs [1.102] to [1.106]).

1.101 The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the amendments impacting on individual liberties made by this bill.

Significant matters in delegated legislation⁷⁴

1.102 As noted above, proposed subsection 251A(2) of the bill enables the Minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility. The power can be exercised where the Minister is satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.⁷⁵ There is otherwise no limit on the type of 'things' that the Minister may prescribe as being prohibited.

1.103 The committee's view is that significant matters, such as what is prohibited in immigration detention facilities, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case the explanatory memorandum states that the instrument will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the things determined by the Minister and the things to be prohibited need to be amended'.⁷⁶

73 Statement of compatibility, p. 24.

74 Item 2, proposed subsection 251A(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

75 See item 2, proposed section 251A.

76 Explanatory memorandum, p. 6.

The explanatory memorandum also provides that it is currently intended to determine that narcotic drugs and child pornography will be prohibited using the power to prohibit unlawful things, and that the broader power to prohibit any thing that the Minister is satisfied might pose a risk is clarified by the note in the bill that gives examples of the things that might be considered to pose a risk. However, the committee notes that the bill does not directly prohibit any things; the actual things that are to be prohibited are left to be determined in delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.104 Generally the committee expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. In this case the question of what is appropriate to be prohibited in an immigration detention facility would appear to differ depending on the risk factor posed by the individual detainee. As noted above, the risk posed by a person seeking asylum or a tourist having overstayed their visa, in possessing things such as mobile phones, is likely to be much lower than the risk posed by those with serious criminal records (who have had their visa cancelled on character grounds). As such, any decision to determine that certain things are to be prohibited for possession by *all* immigration detainees appears to be an important policy consideration. From a scrutiny perspective, the committee considers that giving this power to the Minister delegates important policy, as opposed to operational, decisions, which has not been appropriately justified in the explanatory materials.

1.105 In addition, where the Parliament delegates its legislative power in relation to significant matters the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.⁷⁷

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

1.106 The committee's scrutiny view is that significant matters, such as the type of things that are prohibited within an immigration detention facility, 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 delegate to the Minister the decision as to what items are to be prohibited in immigration detention facilities, particularly where such prohibitions will apply to all detainees regardless of their risk level; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of the instrument 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).**

Broad delegation of administrative power⁷⁸

1.107 Proposed section 252BA provides that an authorised officer may, without warrant, conduct a search of a wide range of areas in immigration detention facilities, including of detainees' personal effects and rooms to find out whether certain things, including 'a prohibited thing', are at the facility. Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising these search powers if that assistance is necessary and reasonable. This is a new general statutory search power. The explanatory memorandum explains that currently common law is relied on to search for prohibited items within an immigration detention facility to ensure the safety and security of people within the facility.⁷⁹ Proposed subsection 252BA also effectively gives an authorised officer the power to use force against a person or property, but no more than is reasonably necessary in order to conduct the search.

1.108 The explanatory memorandum provides no information as to the persons that will be authorised to use these coercive powers. The committee notes that section 5 of the Migration Act defines 'authorised officer' as an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner. An 'officer' is defined in the same section as including any person, or classes of persons, authorised in writing by the Minister to be an officer. There is no requirement that these are to be government employees. In relation to an authorised officer's assistant, there appears to be no legislative guidance as to who

78 Item 21, proposed sections 252BA and 252BB. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

79 Explanatory memorandum, p. 14.

these persons are, whether they are to have any particular expertise or training, or how they are to be appointed.

1.109 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*⁸⁰ indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information.

1.110 The committee therefore requests the Minister's advice as to:

- **who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to carry out coercive searches in immigration detention facilities and whether these will include non-government employees;**
- **why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such a person is to be appointed; and**
- **what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised persons and assistants.**

80 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

Parliamentary Business Resources Amendment (Voluntary Opt-out) Bill 2017

Purpose	This bill seeks to amend the <i>Parliamentary Business Resources Act 2017</i> to allow Senators or Members to provide, by written notice, that they wish to no longer receive part or all of their entitlements
Sponsor	Senator Malcolm Roberts
Introduced	Senate on 12 September 2017

The committee has no comment on this bill.

Renewable Fuel Bill 2017

Purpose	This bill seeks to amend the <i>Fuel Quality Standards Act 2000</i> to provide for the regulation of renewable fuel content in petrol and stipulates that the renewable fuels volume percentage be mandated at 5% minimum from 1 July 2019 and 10% minimum from 1 July 2022
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 11 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Offence provision⁸¹

1.111 Proposed section 36E provides that it is an offence if a person supplies motor vehicle fuel in circumstances that do not comply with requirements for renewable fuel set out in regulations. The offence carries a maximum penalty of 10,000 penalty units (or \$2.1 million).

1.112 This offence provision raises a number of scrutiny concerning relating to:

- reversal of the evidential burden of proof;
- imposition of a significant penalty; and
- significant matters in delegated legislation.

1.113 In relation to the reversal of the evidential burden of proof, proposed subsection 36E(2) provides an exception (offence specific defence) to the offence, stating that the offence does not apply if a person believes on reasonable grounds that the fuel supplied will be further processed for the purpose of bringing the fuel into compliance with the regulations. 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. While the defendant bears the evidential burden in relation to this matter, the explanatory memorandum does not address this reversal of the onus of proof.

1.114 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.

81 Item 1, proposed subsection 36E(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

1.115 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed subsection 36E(2) has not been addressed in the explanatory materials.

1.116 In addition, as noted above, the proposed offence carries a maximum penalty of 10,000 penalty units (\$2.1 million). The committee's expectation is that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. In this case, the proposed level of penalty has not been addressed in the explanatory memorandum.

1.117 Further, the offence applies if a person supplies motor vehicle fuel in circumstances that do not comply with requirements for renewable fuel set out in regulations. The committee's view is that significant matters, such as matters that form part of an offence provision, should be included in primary legislation and not left to delegated 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.

1.118 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of:

- **the defendant bearing an evidential burden of proof;**
- **the offence carrying such a significant penalty; and**
- **the use of regulations to prescribe the volume percentage of certain ethanol in renewable fuel where this matter is central to the offence provision.**

Strict liability⁸²

1.119 Proposed section 36N(2) and 36P(5) introduce two new provisions which make it an offence for a person with certain notification obligations to omit to do an act and that omission breaches those requirements. Each offence is stated to be one of strict liability and subject to 60 penalty units. The explanatory memorandum provides no justification as to why the offences are subject to strict liability.

82 Item 1, proposed sections 36N(2) and 36P(5). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

1.120 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁸³

1.121 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the application of strict liability to two proposed offences.

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

Social Services Legislation Amendment (Housing Affordability) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to social security, family assistance and rental affordability to: <ul style="list-style-type: none">• implement an Automatic Rent Deduction Scheme; and• clarify and correct ambiguous provisions in the <i>National Rental Affordability Scheme Act 2008</i>
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2017

The committee has no comment on this bill.

Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

Purpose	<p>This bill seeks to amend various Acts in relation to superannuation</p> <p>Schedule 1 introduces new trustee arrangements requiring registrable superannuation licensees to have at least one-third independent directors and for the Chair of the Board of directors to be one of these independent directors</p> <p>Schedule 2 enables the Trustee board of the Commonwealth Superannuation Corporation to comply with the independence requirements set out in Schedule 1</p>
Portfolio	Treasury
Introduced	Senate on 14 September 2017

The committee has no comment on this bill.

Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to amend the <i>Therapeutic Goods Act 1989</i> to: <ul style="list-style-type: none"> • implement a number of recommendations of the Expert Panel Review of Medicines and Medical Devices Regulation; • clarify issues raised in relation to the processing of applications by the Department of Health, through the Therapeutic Goods Administration, by the Federal Court's decision in <i>Nicovations Australia Pty Ltd v Secretary of the Department of Health</i> [2016] FCA 394 (<i>Nicovations</i>); and • make a number of miscellaneous amendments to the Act
Portfolio	Health
Introduced	House of Representatives on 14 September 2017
Scrutiny principles	Standing Order 24(1)(a)(1) and (iii)

Review rights⁸⁴

1.122 The bill seeks to create a new class of therapeutic goods, to be known as 'provisionally registered goods', which can be registered on the Australian Register of Therapeutic Goods (Register). This would allow sponsors to apply for a time-limited provisional registration of certain prescription medicines on the basis of promising early clinical data on safety and efficacy.⁸⁵ To successfully make such a registration, a sponsor of a medicine would require approval by the Secretary of the Department of Health or their delegate of both a determination application and, subsequently, a provisional approval registration application.

1.123 Items 14 to 17 of Schedule 1 seek to amend section 60 of the *Therapeutic Goods Act 1989* (the Act), which specifies review mechanisms with respect to decisions made by the Secretary or his or her delegate. These amendments would limit the ability to request a review of decisions about provisional determinations and provisional registration to 'the person in relation to whom the medicine is registered' or is the person who made the application for registration. In contrast, section 60 of the Act currently allows 'persons whose interests are affected by an initial decision' to request a review. In addition, item 19 of Schedule 2 seeks to amend section 60 of the Act to specify that only the applicant is able to request such

84 Schedule 1, items 14–17 and Schedule 2, item 19. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iii) of the committee's terms of reference.

85 Explanatory memorandum, p. 2.

a review of the Secretary's decision to refuse to make a recommendation to the Minister that a determination be varied.

1.124 The explanatory memorandum states that this restriction on review rights is necessary in the specific case of decisions concerning provisional registration of a medicine because an 'interested party' could be either another competitor sponsor or 'a consumer with, having regard to the very nature of medicine that may use this pathway, necessarily limited information'.⁸⁶ The explanatory memorandum further states that 'providing an opportunity for one sponsor to appeal a decision made in relation to the medicine of another sponsor is antithetical to the purpose of the "Provisional Approval" Pathway of encouraging promising new medicines for a limited time to be brought to the market sooner.'⁸⁷

1.125 In relation to review of decisions to refuse an application for a recommendation to vary the permitted indications determinations,⁸⁸ the explanatory memorandum states that this restriction is necessary as the range of 'interested parties' could potentially extend to a large number of people (other than the applicant), and 'this could create significant uncertainty in the predictability in the application process'.⁸⁹

1.126 The committee accepts that preventing commercial competitors from seeking review may be justified in this context. However, the committee is concerned that the exclusion of other interested parties, such as consumers, from requesting a review has not been adequately justified in the explanatory memorandum. The explanatory memorandum suggests that the exclusion of consumers is justified on the grounds that they will have 'necessarily limited information'.⁹⁰ However, the committee notes that consumers may have a legitimate interest in whether particular medicines are provisionally registered and it is not clear that any disadvantage they may have in terms of access to relevant information is a sufficient basis on which to exclude them from requesting a review.

1.127 The committee therefore requests the Minister's detailed justification as to the appropriateness of restricting merits review in relation to decisions about provisional determinations and registrations, or determinations regarding permitted indications, so that consumers who may be affected by a decision (but who are not the applicant) would not have a right to seek review.

86 Explanatory memorandum, p. 24.

87 Explanatory memorandum, pp 24–25.

88 See item 19 of Schedule 2.

89 Explanatory memorandum, p. 35.

90 Explanatory memorandum, p. 24.

Strict liability offences⁹¹

1.128 The bill seeks to amend a large number of strict liability offences already contained in the Act and also seeks to introduce additional strict liability offences. Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent.

1.129 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.

1.130 In this instance, the explanatory memorandum gives a detailed and comprehensive justification for the imposition of strict liability for these offences. It states that the bill seeks to 'standardise most strict liability offences in the Act by reducing penalties from 2,000 penalty units to 100 penalty units and removing the "harm" element from strict liability offences throughout the Act'.⁹² The new and amended strict liability offences would form the bottom tier of a three-tiered offence regime.⁹³

1.131 The explanatory memorandum explains that the application of strict liability in this regulatory scheme is necessary given 'the importance of having an effective deterrent to action that could threaten the health and safety of the Australian public, and the importance of ensuring that sponsors and manufacturers take a high level of care in the course of engaging in commercial activities that have a direct impact on public health'.⁹⁴

1.132 The committee notes that the 100 penalty unit maximums for the proposed new and amended strict liability offences remain above the 60 penalty unit maximum suggested by the *Guide to Framing Commonwealth Offences*.⁹⁵ However,

91 Various. See items set out in tables 3 and 4 of the explanatory memorandum, pp 128–133. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

92 Explanatory memorandum, p. 100.

93 Explanatory memorandum, p. 101.

94 Explanatory memorandum, p. 103.

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

the explanatory memorandum directly addresses this matter and explains that this higher penalty unit limit is:

justified because of the potential risk to public health arising from the misuse of therapeutic goods. The conduct involved in each of these offences is sufficiently serious that, if the defendant were convicted of an equivalent fault-based offence, a much higher penalty could be imposed, including a significant term of imprisonment. Strict liability offences under the Act do not attract imprisonment, only a pecuniary penalty.⁹⁶

1.133 In light of the detailed explanation regarding the application of strict liability and the justification for setting the maximum penalty unit limit, the committee makes no further comment on this matter.

96 Explanatory memorandum, p. 103.

Therapeutic Goods (Charges) Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Therapeutic Goods (Charges) Act 1989</i> to enable regulations to be made prescribing an annual charge for Australian corporations that are covered by a conformity assessment body determination
Portfolio	Health
Introduced	House of Representatives on 14 September 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Charges in delegated legislation⁹⁷

1.134 This bill seeks to amend the *Therapeutic Goods (Charges) Act 1989* to enable regulations to be made prescribing the amount of an annual charge payable in respect of a conformity assessment body determination that is in force at any time during a financial year.

1.135 While the explanatory memorandum states that the annual charges are designed to ensure that the Department of Health is able to recover the costs of its post-market monitoring activities,⁹⁸ no guidance is provided on the face of the bill or in the explanatory memorandum as to the method of calculation (for example, there is no provision limiting the charge to cost recovery) nor is a maximum charge specified.

1.136 One of the most fundamental functions of the Parliament is to levy taxation.⁹⁹ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

1.137 Where charges are able to be prescribed by regulation the committee generally considers that some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

97 Item 5, proposed subsection 4(2A). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

98 Explanatory memorandum, p. 1.

99 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

1.138 The committee requests the Minister's advice on why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

Treasury Laws Amendment (2017 Measures No. 6) Bill 2017

Purpose	<p>This bill seeks to amend Acts in relation to taxation</p> <p>Schedule 1 amends the <i>A New Tax System (Goods and Services Tax) Act 1999</i> to ensure that supplies of digital currency receive equivalent goods and services tax treatment to supplies of money, particularly foreign currency</p> <p>Schedule 2 amends the <i>Income Tax Assessment Act 1997</i> to include the Centre For Entrepreneurial Research and Innovation on the list of deductible gift recipients</p>
Portfolio	Treasury
Introduced	House of Representatives on 14 September 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017

Purpose	<p>This bill seeks to amend various Acts in relation to superannuation</p> <p>Schedule 1 replaces the 'scale test' with a broader 'outcomes test' which MySuper trustees must consider to ensure that maximum outcomes for members</p> <p>Schedule 2 provides the Australian Prudential Regulation Authority (APRA) the power to refuse a registerable superannuation entity (RSE) licensee a new authority to offer a MySuper product or to cancel an existing authority</p> <p>Schedule 3 imposes civil and criminal penalties on directors of RSE licensees who fail to execute their responsibilities</p> <p>Schedule 4 increases APRA's supervision and enforcement powers when a change of ownership or control of an RSE licensee takes place</p> <p>Schedule 5 amends APRA's supervision and enforcement powers to include the power to issue a direction to an RSE licensee where APRA has prudential concerns</p> <p>Schedule 6 requires RSE licensees to make publically available their portfolio holdings</p> <p>Schedule 7 requires RSE licensees to hold annual members' meetings</p> <p>Schedule 8 provides APRA with the authority to obtain information on expenses incurred by RSE and RSE licensees in managing or operating the RSE</p>
Portfolio	Treasury
Introduced	House of Representatives on 14 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

Strict liability offences¹⁰⁰

1.139 Proposed section 29JCB introduces a new provision which makes it an offence of strict liability for a person to hold a controlling stake in a registrable superannuation entity (RSE) licensee without approval. The offence is subject to a maximum penalty of 400 penalty units for each day on which the person holds a controlling stake without approval. The explanatory memorandum justifies the strict liability offence by stating that it is necessary to ensure the integrity of the regulatory regime.¹⁰¹

1.140 Proposed section 131DD introduces a new provision which makes it an offence if a person fails to comply with a direction given by the Australian Prudential Regulation Authority (APRA) to an RSE licensee or a connected entity. Each offence is stated to be one of strict liability and subject to a maximum penalty of 100 penalty units. The explanatory memorandum states that the gravity of consequences following non-compliance with a direction makes it appropriate for the non-compliance to be a strict liability offence, and that 'this is also likely to significantly enhance the effectiveness of the enforcement regime in deterring the conduct'.¹⁰²

1.141 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a justification for any imposition of strict liability, including clearly outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹⁰³

1.142 In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that strict liability should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units

100 Schedule 4, item 9, proposed section 29JCB; Schedule 5, item 11, proposed section 131DD. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

101 Explanatory memorandum, p. 47.

102 Explanatory memorandum, p. 69.

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

for an individual (or 300 penalty units for a body corporate).¹⁰⁴ In this instance, the proposed offences are subject to a maximum penalty of 100 penalty units or 400 penalty units (applicable each day of the contravention). The explanatory memorandum does not explain why these proposed penalties exceed the 60 penalty unit amount set out in the *Guide to Framing Commonwealth Offences*.

1.143 The committee requests the Minister's justification as to the proposed penalty applicable to each strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.¹⁰⁵

Reversal of evidential burden of proof

Broad scope of offence

Significant matters in delegated legislation¹⁰⁶

1.144 Proposed subsection 29PA(1) makes it an offence for directors of an RSE licensee (and certain other persons) not to attend an annual members' meeting (AMM) if they had been given prior notice of the AMM. Proposed subsection 29PA(6) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if other directors would be attending and those directors would constitute a quorum of directors for a board of directors meeting.¹⁰⁷ The offence carries a maximum penalty of 50 penalty units.

1.145 Proposed subsections 29PB(2), 29PC(2), 29PD(2) and 29PE(2) make it an offence for a responsible officer of an RSE licensee, an individual trustee, an auditor or an actuary not to answer questions raised at an AMM. Proposed subsections 29PB(3), 29PC(3), 29PD(3) and 29PE(3) provide exceptions (offence-specific defence) to these offences, stating that the offence does not apply when the responsible person does not answer questions in certain circumstances.¹⁰⁸ The offence carries a maximum penalty of 50 penalty units.

1.146 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.

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

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

106 Schedule 7, item 5, proposed subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(i) and (iv) of the committee's terms of reference.

107 Explanatory memorandum, p. 94.

108 Explanatory memorandum, p. 96.

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

1.148 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3) have not been addressed in the explanatory materials.

1.149 In addition, in relation to both the obligation to attend an AMM and the requirement to answer questions at an AMM, it appears the matters contained in the defences to these broadly framed offences could be more appropriately framed as elements of the offence. The committee considers that the offence-creating provision should state the essential elements of the offence and a matter that is relevant to whether an offence has been committed should generally form part of the offence itself, and should not unnecessarily be included as an offence-specific defence. For example, the offence provision relating to the requirement to answer questions at an AMM could provide that it is a requirement to answer any questions that are relevant, that would not be in breach of the governing rules or any law, and that would not result in detriment to the members taken as a whole (rather than these matters being listed as exceptions to the offence).

1.150 In addition, the offence not to answer questions at an AMM¹⁰⁹ includes an offence-specific defence to provide that the requirement to answer questions does not apply in any circumstances prescribed by the regulations. The committee's view is that significant matters, such as exceptions to offence provisions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum does not explain why it is considered necessary to provide that the regulations may prescribe other exceptions to the offence relating to the obligation to answer questions.

1.151 The committee requests the Minister's advice as to the appropriateness of amending the bill to provide that the exceptions to these offences be included as elements of the offence, rather than as exceptions.

1.152 If this approach is not considered appropriate, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of

109 See proposed subsections 29PB(3)(d), 29PC(3)(d), 29PD(3)(d) and 29PE(3)(d).

proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.¹¹⁰

1.153 In addition, the committee also requests the Minister's advice as to why it is proposed to allow the regulations to prescribe other exceptions to the offence relating to the obligation to answer questions.

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

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Superannuation Guarantee (Administration) Act 1992</i></p> <p>Schedule 1 provides for employees under workplace determinations or enterprise agreements to have an opportunity to choose the superannuation fund for their compulsory employer contributions</p> <p>Schedule 2 ensures that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum superannuation guarantee contributions</p>
Portfolio	Treasury
Introduced	House of Representatives on 14 September 2017

The committee has no comment on this bill.

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

Purpose	This bill seeks to amend <i>Corporations Act 2001</i> and other related legislation to introduce a new external dispute resolution framework and an internal dispute resolution framework for the financial system
Portfolio	Treasury
Introduced	Senate on 14 September 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

Delegated legislation not subject to disallowance¹¹¹

1.154 Proposed subsection 1050(1) provides that the Minister may authorise an external dispute resolution (EDR) scheme, by notifiable instrument, if the Minister is satisfied that the scheme will meet certain mandatory requirements under proposed section 1051. Once an EDR scheme has been authorised, the operator of the authorised EDR scheme will be known as the Australian Financial Complaints Authority (AFCA) and the authorised EDR scheme will be known as the AFCA scheme. Proposed paragraph 1050(5)(b) provides that the Minister may specify, vary or revoke conditions relating to the authorisation. In addition, proposed subparagraph 1051(5)(a)(i) provides that the operator of the EDR scheme (i.e. AFCA) must ensure that any conditions specified under proposed paragraph 1050(5)(b) are complied with.

1.155 The committee notes that unlike legislative instruments, notifiable instruments are not subject to parliamentary disallowance or scrutiny by the Senate Standing Committee on Regulations and Ordinances, nor are they subject to sunset after 10 years.¹¹² There is no detail in the explanatory memorandum as to why it is proposed that the authorisation of the scheme, and the specification of conditions relating to the authorisation, is to be done by notifiable instrument, rather than legislative instrument. There is also no detail as to the type of conditions it is envisaged may be specified under this provision.

111 Schedule 1, item 2, proposed section 1050. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

112 See *Legislation Act 2003*.

1.156 The committee therefore requests the Minister's advice as to why it is proposed that the authorisation of the external dispute resolution scheme, and the specification of conditions relating to the authorisation, will not be subject to parliamentary disallowance. The committee also requests advice as to the type of conditions it is envisaged may be specified under this provision.

Strict liability¹¹³

1.157 Proposed section 1054A provides the Australian Financial Complaints Authority (AFCA) with the ability to obtain certain information and documents that are relevant to a superannuation complaint. Proposed subsection 1054A(4) makes it an offence of strict liability if a person fails to comply with a requirement in the written notice given by AFCA. The offence is subject to a penalty of 30 penalty units.

1.158 As it is proposed that AFCA will have a number of statutory powers that can be used to compulsorily obtain information in the case of a superannuation complaint, secrecy provisions in proposed section 1058 make it an offence to disclose or make records of information, or produce or permit access to documents, acquired by an AFCA staff member under AFCA's statutory powers in connection with a superannuation complaint. Proposed subsection 1058(2) makes it an offence of strict liability if an AFCA staff member fails to comply with the secrecy provisions and is subject to a penalty of 30 penalty units.

1.159 In both instances, the explanatory memorandum provides no justification as to why the offences are subject to strict liability.

1.160 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹¹⁴

113 Schedule 1, item 2, proposed subsections 1054A(4) and 1058(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

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

1.161 The committee requests a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.¹¹⁵

Exclusion of judicial review¹¹⁶

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

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

1.164 First, the explanatory memorandum states that the approach to review rights for superannuation disputes is consistent with the existing practice for disputes handled by the Superannuation Complaints Tribunal (the SCT).¹¹⁷ However, the committee notes it appears that at least some decisions of the SCT are subject to ADJR Act review.¹¹⁸

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

1.166 Finally, while parties may appeal to the Federal Court on questions of law in relation to superannuation disputes, the AFCA also has jurisdiction over non-

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

116 Schedule 1, item 11, proposed paragraph (hba) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

117 Explanatory memorandum, p. 44.

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

superannuation financial disputes. The explanatory memorandum states that the ADJR Act will not apply to determinations by AFCA in relation to non-superannuation financial disputes because those determinations would not be made under an enactment.¹¹⁹ While the proposed AFCA will be a private industry body, it will play an important role in a mandatory scheme of public regulation which is set up in part through the exercise of statutory power. It is therefore unclear why it would not be appropriate for a court to have the jurisdiction to judicially review the legality of AFCA's non-superannuation decisions and determinations.

1.167 The committee therefore requests the Minister's advice:

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

Privacy¹²⁰

1.168 The proposed amendments in items 13, 14 and 29 of the bill would allow officers and other staff members of APRA, ASIC and the ATO to disclose protected information to AFCA to assist it to perform its functions. The explanatory memorandum does not provide any information in relation to the type of information that may be disclosed to AFCA and whether this information is likely to include personal or confidential information. There are also no details about the safeguards that will be in place to ensure that AFCA will protect the confidentiality of any information disclosed to it under these provisions.

119 Explanatory memorandum, p. 44.

120 Items 13, 14 and 29 of Schedule 1. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

1.169 In the absence of this explanatory information, the committee considers that enabling protected information to be disclosed to a non-government body such as AFCA raises privacy scrutiny concerns.

1.170 The committee therefore requests the Minister's advice as to the type of information that it is envisaged may be disclosed to AFCA under these provisions, whether this information is likely to include personal or confidential information, and details as to the safeguards that will be in place to ensure that AFCA will protect the confidentiality of any information disclosed to it.

Significant matters in delegated legislation¹²¹

1.171 Under current section 101 of the *Superannuation Industry (Supervision) Act 1993* trustees of regulated superannuation funds and approved deposit funds are required to have an internal dispute resolution (IDR) system and to provide written reasons for decisions about complaints made by beneficiaries, former beneficiaries or other interested parties. Current section 47 of the *Retirement Savings Accounts Act 1997* specifies similar requirements for an IDR system for complaints relating to the operation or management of a Retirement Savings Account (RSA). A person who intentionally or recklessly contravenes these requirements commits an offence punishable by a fine of up to 100 penalty units.¹²²

1.172 Items 7 and 9 of Schedule 2 seek to repeal the current requirements in the primary legislation and allow ASIC to set requirements about providing written reasons for IDR decisions in a legislative instrument.¹²³ Contravening these requirements will remain an offence, subject to up to 100 penalty units (or \$21,000). The committee's view is that significant matters, such as requirements the breach of which will constitute an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum states that the amendments will 'provide ASIC with the flexibility to align the requirements around giving reasons for IDR decisions made by these trustees to those that apply for other IDR firms'.¹²⁴ While the committee notes

121 Schedule 2, items 7 and 9, proposed subsection 47(2A) of the *Retirement Savings Accounts Act 1997* and proposed subsection 101(1B) of the *Superannuation Industry (Supervision) Act 1993*. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

122 *Superannuation Industry (Supervision) Act 1993* s 101(2); *Retirement Savings Accounts Act 1997* s 47(3).

123 Proposed subsection 47(2A) of the *Retirement Savings Accounts Act 1997* and proposed subsection 101(1B) of the *Superannuation Industry (Supervision) Act 1993*.

124 Explanatory memorandum, p. 54.

this brief explanation, the committee does not consider that this adequately explains why the use of delegated legislation is appropriate in this instance.

1.173 The committee requests the Minister's more detailed justification as to the appropriateness of setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

Commentary on amendments and explanatory materials

Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

[Digest 7 & 8/17]

1.174 On 11 September 2017 the Minister for Defence (Senator Payne) tabled an addendum to the explanatory memorandum.

1.175 The committee thanks the Minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.¹²⁵

Civil Law and Justice Legislation Amendment Bill 2017

[Digest 4 & 5/17]

1.176 On 11 September 2017 the Minister for Defence (Senator Payne) tabled an addendum to the explanatory memorandum.

1.177 The committee thanks the Attorney-General for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.¹²⁶

Privacy Amendment (Re-identification Offence) Bill 2016

[Digest 8 & 10/16]

1.178 On 11 September 2017 the Minister for Defence (Senator Payne) tabled an addendum to the explanatory memorandum.

1.179 The committee thanks the Attorney-General for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.¹²⁷

125 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8 of 2017*, 9 August 2017, pp 49-51.

126 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2017*, 10 May 2017, pp 67-71.

127 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2016*, 30 November 2017, pp 664-672.

Social Services Legislation Amendment (Welfare Reform) Bill 2017

[Digest 8 & 10/17]

1.180 On 11 September 2017 the House of Representatives agreed to 22 Government amendments, the Minister for Social Services (Mr Porter) presented a supplementary explanatory memorandum and the bill was read a third time.

1.181 The committee thanks the Minister and welcomes the government amendment in relation to the Secretary's determination that a person is not to be subject to income management if it would pose a serious risk to the person's mental, physical or emotional wellbeing, which addresses the committee's scrutiny concerns in relation to this issue.¹²⁸

No comments

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

- Australian Border Force Amendment (Protected Information) Bill 2017;¹²⁹
- Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017;¹³⁰ and
- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017.¹³¹

128 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 10 of 2017*, pp 92-93.

129 On 11 September 2017 the House of Representatives agreed to two Government amendments, the Assistant Minister for Industry, Innovation and Science (Mr C. A. S. Laundry) presented a supplementary explanatory memorandum and the bill was read a third time.

130 On 14 September 2017 the Senate agreed to two Nick Xenophon Team amendments and the bill was read a third time.

131 On 11 September 2017 the Senate agreed to 20 Government and one Opposition amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum and the bill was read a third time. On 12 September 2017 the House of Representatives agreed to the Senate amendments.

Chapter 2

Commentary on ministerial responses

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

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

Purpose	<p>This bill seeks to amend the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> (the AML/CTF Act) and the <i>Financial Transaction Reports Act 1988</i> to:</p> <ul style="list-style-type: none"> • expand the objects of the AML/CTF Act to reflect the domestic objectives of AML/CTF regulation; • regulate digital currency exchange providers; • amend industry regulation requirements relating to due diligence obligations for correspondent banking relationships; the cash-in-transit sector, insurance intermediaries and general insurance providers; the term 'in the course of carrying on a business'; and sharing information between related bodies corporate; • increase the investigation and enforcement powers of the Australian Transaction Reports and Analysis Centre (AUSTRAC); • provide police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments; • provide police and customs officers broader powers to establish civil penalties for failing to comply with questioning and search powers; • revise the definitions of 'investigating officer', 'signatory' and 'stored value card' in the AML/CTF Act; and • clarify other regulatory matters relating to the powers of the AUSTRAC CEO
Portfolio	Justice
Introduced	House of Representatives on 17 August 2017

Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 10 of 2017*. The Minister responded to the committee's comments in a letter received 26 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

Strict liability offences²

Initial scrutiny – extract

2.3 Proposed section 76A seeks to establish a number of offences in relation to an unregistered person providing digital currency exchange services. The basic offence³ of breaching a requirement not to provide a digital currency exchange service unless registered is subject to a penalty of up to two years imprisonment or 500 penalty units. There are also three aggravated offences⁴ with increased penalties of up to seven years imprisonment or 2,000 penalty units for breaching this requirement in circumstances where the person has previously been given a remedial direction or has been convicted of relevant offences. For all four offences, strict liability is stated as applying to whether a person engaged in the relevant conduct and whether their conduct breached the relevant requirement.

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

1 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

2 Schedule 1, item 20, proposed section 76A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

3 See proposed subsection 76A(3).

4 See proposed subsections 76A(5), (7) and (9).

liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁵

2.5 In this instance the explanatory memorandum gives a detailed explanation for the imposition of strict liability. It states that it is appropriate to apply strict liability to ensure the integrity of the regulatory regime is maintained, and requiring proof of fault for the physical elements of the offences would undermine the deterrent effect as it would allow for entities to argue that they did not know or were reckless as to whether they had obligations under the Act.⁶

2.6 The *Guide to Framing Commonwealth Offences* states that applying strict liability may be appropriate where requiring proof of fault would undermine deterrence *and* there are legitimate grounds for penalising persons lacking fault in respect of that element.⁷ The committee notes that while the explanatory memorandum explains that requiring proof of fault may undermine deterrence, it does not explain what the legitimate grounds are for penalising persons lacking fault in respect of conduct that breaches the requirement to be registered before providing a digital currency exchange service. The committee notes that the explanatory memorandum states that requiring proof of fault 'would allow for entities to argue that they did not know or were reckless as to whether they had obligations under the Act'.⁸ However, while this may apply in relation to the question of whether a person's conduct intentionally or recklessly breaches a requirement that they be registered or comply with conditions of registration,⁹ this would not seem to apply to the question of whether a person has intentionally engaged in the relevant conduct.

2.7 The explanatory memorandum also acknowledges that the penalties that apply in the bill 'do not align with the standard fine/imprisonment ratio set out in the Guide' but states that this is justified on the basis of the need to deter high-risk digital currency exchange providers.¹⁰ The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.¹¹ In this instance, the bill proposes

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

6 Explanatory memorandum, p. 19.

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

8 Explanatory memorandum, p. 19.

9 See proposed paragraphs 76A(3)(c); (5)(c); (7)(c); and 9(c).

10 Explanatory memorandum, p. 19.

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

applying strict liability to offences that are subject to up to 7 years imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

2.8 The committee requests the Minister's advice as to the grounds for penalising persons lacking fault in respect of providing a digital currency exchange service without being registered (including providing any examples of where a person could unintentionally provide a digital currency exchange).

Minister's response

2.9 The Minister advised:

As noted in the Explanatory Memorandum and the Second Reading Speech, international organisations such as the Financial Action Task Force have identified high money laundering and terrorist financing risks associated with digital currencies. Digital currency exchanges are an emerging industry with new technologies that have been operating without any regulatory oversight since their inception. The offence for providing digital currency exchange services without being registered with AUSTRAC is an important sanction to ensure that the regulation of this sector is effective. Members of this emerging industry should not be able to avoid liability by arguing that they did not know that they had obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ('AML/CTF Act') to register with AUSTRAC.

The provisions relating to digital currency exchange providers, including the offence in proposed section 76A, have been closely modelled on the existing provisions in the AML/CTF Act relating to remittance providers. The decision to impose strict liability is not taken lightly, and there are a number of safeguards. Firstly, the defence of honest and reasonable mistake of fact is available. Secondly, AUSTRAC has a range of enforcement powers available, including infringement notices, civil penalty orders and criminal sanctions. In most cases of inadvertent non-compliance with AML/CTF obligations, AUSTRAC would seek to work with the reporting entity to encourage compliance. Thirdly, there will be a transition period before commencement of the provisions, enabling AUSTRAC and the Attorney-General's Department to educate and work with industry to adjust their existing systems and take the time to understand their obligations before the digital currency exchange provisions commence.

As noted above, where instances of non-compliance are identified, AUSTRAC would have regard to relevant facts and circumstances and consider the most appropriate mechanism to address the issue. The offence provisions are part of the available tools, and would be used sparingly to address cases of serious and/or systemic non-compliance with AML/CTF obligations.

Committee comment

2.10 The committee thanks the Minister for this response. The committee notes the Minister's advice that the offence for providing digital currency exchange services without being registered with AUSTRAC is an important sanction to effectively regulate the digital currency sector, and that members of the industry should not be able to avoid liability by arguing they did not know they had obligations to register with AUSTRAC. The committee also notes the Minister's advice that in most cases of inadvertent non-compliance with the obligations AUSTRAC would seek to work with the reporting entity to encourage compliance, AUSTRAC would have regard to relevant facts and circumstances and would consider the most appropriate mechanism to address the issue and would only use the offence provisions sparingly.

2.11 The committee notes that from a scrutiny perspective the committee considers the maximum penalty applicable to a strict liability offence and whether it is appropriate, not whether in individual circumstances it is likely that a different penalty will be imposed or that action will only be taken sparingly. The committee notes that the Minister's response did not explain what the legitimate grounds are for penalising persons lacking fault.

2.12 The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying strict liability to offences that are subject to penalties of up to seven years imprisonment.

Significant matters in delegated legislation¹²***Initial scrutiny – extract***

2.13 Proposed sections 76K and 76L provide that the rules (delegated legislation) may make provision for and in relation to the suspension and renewal of registrations by the AUSTRAC CEO. A number of important matters are thereby delegated to the rules, including the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review. The committee's view is that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this

12 Schedule 1, item 20, proposed sections 76K and 76L. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

instance, the explanatory memorandum gives no reason for including such matters in the rules as opposed to the primary legislation.

2.14 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*.¹³ 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.¹⁴

2.15 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.¹⁵

2.16 The committee's view is that significant matters, such as the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review, 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:

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

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

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

- why it is considered necessary to leave details about renewal and suspension of registrations to delegated legislation;
- if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations;
- why the bill only provides that the rules *may* provide for the review of decisions relating to suspension and applications for renewal, rather than providing that such decisions *will* be subject to merits review; and
- the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.17 The Minister advised:

As noted above, the digital currency exchange provisions are modelled closely on equivalent provisions for the registration of remittance service providers, which were considered by the Scrutiny of Bills Committee in its report dated 23 March 2011. The same considerations, set out below, apply in relation to the registration of digital currency exchange service providers.

The inclusion of detail in the AML/CTF Rules rather than the Act is consistent with the broader approach of the AML/CTF regime. The AML/CTF Rules are an important part of Australia's AML/CTF regime, which set out the details of technical and procedural matters as well as providing flexibility for the AUSTRAC CEO to consider matters that may not be possible to conclusively address through primary legislation. The techniques used by money launderers are continually changing, and services and technologies that may present a money laundering or terrorist financing risk are also constantly evolving. It is important that the AML/CTF regulatory framework is designed so that it can adapt quickly to the nature of the threat posed by these serious crimes. The AML/CTF Rules are disallowable instruments which must be tabled in Parliament and registered on the Federal Register of Legislation.

Regulations can also be made under the AML/CTF Act, but have tended to be used sparingly.¹⁶ As noted above, it is the Rules that are well-known to industry and regulated entities to be the source of the detail that sits under the AML/CTF Act. Changing the approach for the digital currency

16 Currently, there is only one regulation in operation under the AML/CTF Act: *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016*.

sector would be inconsistent with the broader framework of the AML/CTF Act.

As context, the Rules made under Chapter 59 of the AML/CTF Rules for the equivalent provision relating to suspension of remitters (under section 75H), provide for internal review and notice to be given which includes the grounds on which the decision was made.

Moreover, the decisions that have a greater effect on the operation of a digital currency exchange, such as a decision by the AUSTRAC CEO not to register a person or cancel a registration, will be subject to merits review. Decisions on suspensions are better left to the Rules to give AUSTRAC flexibility in its response.

AUSTRAC consults extensively with regulated entities during the development of the AML/CTF Rules. AUSTRAC's consultation procedures require draft AML/CTF Rules to be published on the AUSTRAC website for a minimum period of four weeks. AUSTRAC liaises with relevant industry associations during the development and implementation of AML/CTF Rules who in turn keep their members informed of the issues. If a new or amended Rule is of particular interest to a segment of AUSTRAC's regulated population, AUSTRAC sends targeted emails and letters to regulated entities it considers to be most affected.

Committee comment

2.18 The committee thanks the Minister for this response. The committee notes the Minister's advice that the rules provide flexibility for the AUSTRAC CEO to consider matters that it may not be possible to conclusively address through primary legislation, as the techniques used by money launderers are continually changing and services and technologies that may present a risk are constantly evolving. The committee also notes the Minister's advice that the regulatory framework is designed so it can adapt quickly to the nature of the threat posed by serious crimes, and rules are well-known to industry and regulated entities to be the source of detail that sits under the Act. The committee also notes the Minister's advice that the rules relating to similar provisions regarding suspension provide for internal review and that decisions that have a greater effect on the operation of a digital currency exchange will be subject to merits review, and decisions on suspensions are better left to rules to give flexibility to AUSTRAC. The Minister also advised that AUSTRAC has consultation procedures that require a certain level of consultation prior to the making of rules.

2.19 The committee appreciates the need for flexibility to address techniques and technologies that are constantly evolving. However, the committee notes that the bill does not set out any ground on which registration may be suspended or renewed, the effect of suspension, the period for which suspensions have effect or whether review of decisions relating to suspension or applications for renewal is available. It is not clear to the committee that all of these matters are continually evolving, such that it is not possible to set out some guidance in the primary

legislation. In particular, the committee remains concerned that the bill does not provide for merits review of decisions to suspend registration or refuse to renew registration. The committee notes that in response to its question as to why these matters are included in rules rather than regulations, the Minister's response simply stated that industry and regulated entities know rules are the source of detail under the Act, though the committee notes that if regulations were made this would clearly be the source that industry and regulated entities would turn to. The committee also notes the Minister's advice that consultation may be undertaken as a matter of practice; however, the committee reiterates its view that specific consultation obligations should be included in the legislation, with compliance with such obligations a condition of the validity of the legislative instrument.

2.20 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving significant matters to be dealt with by delegated legislation, particularly whether decisions to suspend or not renew registrations should be subject to merits review.

Civil penalty provisions¹⁷

Initial scrutiny – extract

2.21 The bill proposes to make four provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) into civil penalty provisions. Section 175 of the Act states that the maximum pecuniary penalty payable by an individual for a civil penalty provision is 20,000 penalty units (or \$4.2 million) and for a body corporate 100,000 penalty units (or \$21 million). The changes made by this bill would mean that an individual could be liable to a civil penalty of up to \$4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's registration;¹⁸ a failure to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia;¹⁹ or providing a registrable digital currency exchange service if not registered.²⁰ These are extremely significant penalties, yet no justification has been provided in the explanatory memorandum as to the appropriateness of making these provisions subject to such high civil penalties. The committee also notes that the equivalent financial criminal penalties in relation to two of the provisions are up to 60 penalty

17 Schedule 1, item 20, proposed subsections 76A(11) and 76P(3); item 73, proposed subsection 199(13); and item 75, proposed subsection 200(16). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

18 See Schedule 1, item 20, proposed subsection 76P(3).

19 See Schedule 1, item 73, proposed subsection 199(13) and item 75, proposed subsection 200(16).

20 See Schedule 1, item 20, proposed subsection 76A(11).

units,²¹ which is substantially lower than up to 20,000 penalty units for an individual or 100,000 for a body corporate for breach of the proposed civil penalty provisions.

2.22 The committee requests the Minister's advice as to the appropriateness of making certain provisions, including a failure to notify of a change of circumstances, subject to civil penalties of up to 20,000 penalty units for an individual (or \$4.2 million) and 100,000 penalty units (or \$21 million) for a body corporate.

Minister's response

2.23 The Minister advised:

It is well recognised that money laundering can be a very lucrative crime, and therefore penalties for behaviour that may allow money laundering to occur need to be sufficiently high to be an effective deterrent. All civil penalty provisions in the AML/CTF Act carry a maximum fine of 100,000 penalty units for corporations and 20,000 penalty units for individuals. Pursuant to section 175 of the AML/CTF Act, the Federal Court may order a person to pay a pecuniary penalty and in determining the pecuniary penalty must have regard to all relevant matters, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so-whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so-whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so-whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

The significance of the offences that have been highlighted by the Committee should not be understated. For example, failure to notify AUSTRAC of changes in circumstances that could materially affect a person's registration can have serious consequences. Changes in key

21 See sections 199 and 200 of the Act.

personnel or beneficial ownership of a digital currency exchange could expose the business to money laundering and terrorism financing risks. Notifying AUSTRAC is important to ensure that AUSTRAC has correct information to consider the ongoing suitability for that business to provide designated services, to consider whether the risk of ML/TF continues to be sufficiently mitigated and also to ensure that valuable information that may be of relevance to law enforcement and other investigatory agencies is accurate.

The proposed civil penalty provisions in the Bill are consistent with other existing provisions in the Act. This is in accordance with the Guide to Framing Commonwealth Offences (The Guide), which notes that 'a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question'. These businesses have the potential to generate significant criminal proceeds far exceeding the maximum penalties available under the standard ratio. The Guide contemplates the use of higher penalties to combat corporate or white collar crime to counter the potential financial gains from committing an offence.

Committee comment

2.24 The committee thanks the Minister for this response. The committee notes the Minister's advice that the applicable penalties need to be sufficiently high to be an effective deterrent and notes the matters that the Federal Court is to have regard to in setting the penalty. The committee also notes the Minister's advice regarding the serious consequences of failure to notify AUSTRAC of changes in circumstances, that the proposed civil penalty provisions are consistent with other existing provisions in the Act, and that the relevant businesses have the potential to generate significant criminal proceeds far exceeding the maximum penalties available under the standard ratio.

2.25 The committee reiterates that civil penalties of up to 20,000 penalty units for an individual (or \$4.2 million) and 100,000 penalty units (or \$21 million) for a body corporate are extremely significant penalties. The committee notes that while the Minister's advice stated that these penalties are consistent with other penalties in the AML/CTF Act (as existing section 175 states that all civil penalties in the AML/CTF Act are subject to the same maximum penalty), no examples were given of penalties applying to offences of the same nature in other legislation.

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

2.27 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing civil penalties of

up to 20,000 penalty units for an individual (or \$4.2 million) and 100,000 penalty units (or \$21 million) for a body corporate in these circumstances.

Immunity from civil or criminal liability²²

Initial scrutiny – extract

2.28 Proposed section 76R provides that no action, suit or proceeding (whether criminal or civil) lies against the Commonwealth, the AUSTRAC CEO or a member of the staff of AUSTRAC in relation to the publication of the Digital Currency Exchange Register or a list of the names of persons whose registration has been cancelled. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation). The committee notes that this applies even if the action taken was not done in good faith.

2.29 The committee expects that if a bill seeks to provide immunity from 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.²³

2.30 The committee requests the Minister's advice as to why it is considered appropriate to provide immunity from civil or criminal liability so that affected persons will no longer have a right to bring an action to enforce their legal rights. The committee considers it may be appropriate, at a minimum, for proposed section 76R to be amended to provide that the immunity only applies to actions taken in good faith, and requests the Minister's response in relation to this matter.

Minister's response

2.31 The Minister advised:

Publication of the Digital Currency Exchange Register, or a list of persons whose registration has been cancelled, is largely procedural and administrative. It will be a question of fact whether a person is registered or their registration has been cancelled. Specifying a requirement for "good faith" publication does not appear necessary. The matter that will have greater relevance to the person is the decision preceding publication as to whether or not to register or cancel registration as a digital currency service provider. Those decisions are subject to appropriate review mechanisms.

As with the current Remittance Sector Register, the Digital Currency Exchange Register will be a central record for AUSTRAC of registered

22 Schedule 1, item 20, proposed section 76R. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

23 See explanatory memorandum, p. 24.

entities. If appropriate, AUSTRAC may permit others to have access to the Register. For example, financial institutions use the Remittance Sector Register to confirm that a person is legally authorised to conduct a remittance business, and the Digital Currency Exchange Register may similarly be used by an exchange counterpart to know that the person it is exchanging with is registered.

Committee comment

2.32 The committee thanks the Minister for this response. The committee notes the Minister's advice that publication of the list of persons whose registration has been cancelled is largely procedural and administrative and a question of fact and as such requiring 'good faith' in publishing that information does not appear necessary, as it is the decision preceding publication as to whether or not to register or cancel registration that is of greater relevance, and those decisions are subject to appropriate review mechanisms.

2.33 However, the committee notes that while a decision to cancel registration is subject to review, proposed subsection 76J(4) provides that the AUSTRAC CEO may publish, in the manner specified in the rules, a list of the names of persons whose registration has been cancelled and the date it takes effect. This would appear to occur immediately once registration is cancelled, which may occur prior to any review of the decision. Giving immunity to the Commonwealth in relation to the publication of this list would mean that where a person's registration is cancelled and published on the Register, but the decision to cancel is later overturned, the person would have no action against the Commonwealth for any damage done to their reputation by the publication of a cancellation decision that was later overturned. The committee also notes that while the publication of the list is largely procedural and a question of fact, it would seem that not requiring, at a minimum, that the action be taken in good faith, could result in immunity being provided to the publication of names in bad faith.

2.34 The committee considers it would be appropriate if the bill were to be amended to, at a minimum, provide that the immunity from civil and criminal liability in proposed section 76R applies only to actions taken in good faith.

2.35 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of granting civil and criminal immunity in relation to the publication of a list of persons whose registration has been cancelled.

Fair hearing rights²⁴

Initial scrutiny – extract

2.36 Proposed subsection 76S(1) states that before the AUSTRAC CEO makes a decision to refuse to register a person as a digital currency exchange provider, to impose conditions on registration or to cancel a person's registration, they must give a written notice to the person, with reasons provided, allowing the affected person to make a submission in relation to the proposed decision. However, proposed subsection 76S(2) provides that the AUSTRAC CEO is not required to give this notice if satisfied that it is inappropriate to do so because of the urgency of the circumstances. This would appear to remove the fair hearing requirements in these circumstances. The explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way.

2.37 The committee notes it is unclear what circumstances may be so urgent in relation to a decision not to register a person. It is also unclear why it is necessary to remove the requirement to give notice regarding cancellation in urgent circumstances, given proposed section 76K gives a power to suspend registration, which could be used in urgent situations before a decision is made to cancel registration.

2.38 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to remove the requirement to notify an affected person before a decision is made not to register the person, to impose conditions on registration or to cancel registration.

Minister's response

2.39 The Minister advised:

The need for urgent refusal of registration or cancellation of registration of a digital currency exchange is likely to be a rare occurrence in practice. Cancellation without prior notice under equivalent provisions applicable to the remittance sector has not been done to date. However, the availability of the power of refusal or cancellation of registration without notice remains appropriate in circumstances where law enforcement agencies and AUSTRAC identify an ongoing threat of terrorism financing, money laundering or serious crime for which the circumstances require an urgent response. For example, if suspected terrorism financing or other serious offences were being carried out by the digital currency exchange at the time of the decision, and providing notice may risk the criminal activities continuing to occur and/or risk the loss of vital evidence. It should also be noted that both internal review and merits review by the Administrative

24 Schedule 1, item 20, proposed subsection 76S(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

Appeals Tribunal continue to be available for decisions made without prior notice on the basis of urgency.

Committee comment

2.40 The committee thanks the Minister for this response. The committee notes the Minister's advice that the need for urgent refusal of registration or cancellation is likely to be a rare occurrence in practice but it is appropriate for circumstances requiring an urgent response, for example where providing notice may risk the criminal activities continuing to occur and/or risk the loss of vital evidence.

2.41 It is not clear to the committee how giving notice of a decision not to register a person as a digital currency exchange provider, to impose conditions on registration or to cancel registration (in circumstances where there is also a power to first suspend registration, without notice, in urgent situations), could result in a risk that criminal activities continues to occur or risks the loss of vital evidence.

2.42 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting the right to a fair hearing in these circumstances.

Seizure powers²⁵

Initial scrutiny – extract

2.43 A number of items in the bill propose broadening the search and seizure powers currently exercisable by police and customs officers at the border. These powers would enable police and customs officers to seize physical currency and bearer negotiable instruments produced or found during a search, in certain circumstances. As recognised in the explanatory memorandum,²⁶ the *Guide to Framing Commonwealth Offences* provides that seizure should only be allowed under a warrant, noting that seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under a search warrant.²⁷ The Guide also states that there is a very limited range of circumstances where it may be appropriate to allow officers the ability to seize pending issue of a warrant, such as where reasonably necessary to

25 Schedule 1, item 67, proposed subsection 199(2A); item 71, proposed subsection 199(5); item 72, proposed subsection 199(10); and item 74, proposed subsection 200(13A). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

26 Explanatory memorandum, p. 39.

27 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 82–83.

resolve a situation of immediate emergency.²⁸ The explanatory memorandum appears to reinterpret this to say that the Guide contemplates there is a limited range of circumstances where it may be appropriate to allow for seizure, such as where it may not be possible or practical to obtain a warrant.²⁹ The committee does not consider this is the appropriate test and affirms its scrutiny view that seizure should only take place under a warrant, unless seizure is necessary to resolve a situation of immediate emergency.

2.44 The committee notes that it is possible to provide that a police or customs officer may, without a warrant, secure an item pending issue of a warrant authorising seizure. The explanatory memorandum does not explain why this approach was not adopted. The committee also notes that provisions in the Act currently give certain powers to police and customs officers to seize such items (in more limited circumstances), and notes that the fact that powers already exist in the Act to enable the seizure of certain items does not, of itself, provide a justification for including such powers in the bill currently under consideration.

2.45 The committee requests the Minister's detailed justification for provisions that give police and customs officers the power to seize physical currency and bearer negotiable instruments without a warrant. In particular, the committee seeks the Minister's advice as to:

- why the proposed power is to seize the relevant items rather than a power to secure the items pending the obtaining of a warrant;
- whether, if the seizure power remains, there could be increased accountability for the exercise of this power, such as requiring senior police or executive authorisation for the exercise of the power; and
- whether legislative requirements are in place (and if not, why not) regulating:
 - the period of time seized items can be retained;
 - the process for seized material to be reviewed on a regular basis; and
 - the procedure for the return of the seized items.

Minister's response

2.46 The Minister advised:

The provisions relating to search and seizure are intended to address the known risk of money-laundering and terrorism financing through the movement of cash and bearer negotiable instruments across the border. The primary rationale for the 'seizure without warrant' power in the Bill is

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

29 Explanatory memorandum, p. 39.

the time-sensitive nature of operations at the border. In the international airport environment, there may be only a limited opportunity between identifying physical currency/BNIs and the departure of the target on an international flight. Obtaining a warrant prior to seizure, or allowing physical currency/BNIs to be secured pending a warrant, would not be possible in these tight timeframes. If the AFP or Customs officers are not able to seize physical currency/BNIs at the time before the cross border movement is made, the money is unlikely to be able to be traced or recovered. This would undermine the very purpose of AML/CTF measures designed to prevent money laundering, terrorism financing and other serious crimes.

A power to secure an item pending obtaining a warrant is similarly problematic, because the situation is still one where time is limited, and while the money or BNI could be secured, there may be limited capacity for the person to be delayed while waiting for a warrant to be obtained. It is preferable for the search and seizure powers to be able to be exercised effectively and decisive action taken where a suspicion of money laundering or terrorist financing arises. The powers are intended to prevent funds from being used for these purposes, while also balancing the interests of legitimate travellers who may be carrying cash and BNIs for legitimate purpose and seeking to move through the border without unnecessary delay.

Committee comment

2.47 The committee thanks the Minister for this response. The committee notes the Minister's advice that the primary reason for allowing for seizure of items without a warrant is the time-sensitive nature of operations at the border and that the targeted person may be departing on an international flight. The committee also notes the Minister's advice that obtaining a warrant prior to seizure, or securing an item pending obtaining a warrant would not be possible in these tight timeframes as while the money or bearer negotiable instrument could be secured, there may be limited capacity for the person to be delayed while waiting for a warrant to be obtained.

2.48 It is not clear to the committee why it would be strictly necessary to delay a person departing on an international flight when an item is secured by a police or customs officer, as it would seem that those persons who wished to contest the issuing of a warrant could elect to delay boarding their flight while those who did not wish to contest the warrant could elect to leave. The committee also notes that the Minister's response did not address the committee's queries in relation to whether, if the seizure power remains, there could be increased accountability for the exercise of this power, such as requiring senior police or executive authorisation for the exercise of the power. It also did not address whether legislative requirements are in place (and if not, why not) regulating the period of time seized items can be retained; the process for seized material to be reviewed on a regular basis; and the procedure for the return of the seized items.

2.49 The committee reiterates its scrutiny view that seizure of items should only take place under a warrant, unless seizure is necessary to resolve a situation of immediate emergency. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of broadening the search and seizure powers currently exercisable by police and customs officers at the border.

Appropriation Bill (No. 1) 2017-2018

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 9 May 2017
Bill status	Received the Royal Assent on 23 June 2017
Scrutiny principles	Standing Order 24(1)(a)(vi) and (v)

2.50 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 15 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.³⁰

Parliamentary scrutiny—ordinary annual services of the government³¹

Initial scrutiny – extract

2.51 This bill seeks to appropriate money from the Consolidated Revenue Fund. The appropriations in this bill are said to be for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation some measures in the bill may have been inappropriately classified as ordinary annual services.

2.52 The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.³²

30 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

31 Various provisions. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

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

2.53 By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing³³ has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years.³⁴

2.54 The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government, and even-numbered bills which should contain all other appropriations (and are amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.³⁵ The Senate has not accepted this assumption.

2.55 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;

33 Now known as the Senate Standing Committee on Appropriations, Staffing and Security.

34 See Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and recent annual reports of the committee.

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

- f) items regarded as equity injections and loans; and
- g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

2.56 There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services.³⁶

2.57 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.³⁷

2.58 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government.³⁸

2.59 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills.

2.60 For example, it appears that the initial expenditure in relation to a number of measures, including the following measures, may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in

36 *Journals of the Senate*, 22 June 2010, pp 3642–3643.

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

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

Appropriation Bill (No. 1) 2017-2018 (which is not subject to amendment by the Senate):

- Cyber Security Advisory Office — establishment (\$10.7 million over four years)³⁹
- Industry Specialist Mentoring for Australian Apprentices — establishment (\$60 million over two years)⁴⁰
- Reducing Pressure on Housing Affordability — establishment of the National Housing Finance and Investment Corporation (\$63.1 million over four years).⁴¹

2.61 The committee has previously written to the Minister for Finance and considered this general matter in relation to the inappropriate classification of items in other appropriation bills on a number of occasions.⁴²

2.62 On each of these occasions, the committee noted the government's advice that it does not intend to reconsider its approach to the classification of items that constitute ordinary annual services of the government; that is, the government will continue to prepare appropriation bills in a manner consistent with the view that only appropriations for measures that require a new administered outcome not previously authorised by Parliament (rather than appropriations for expenditure on *new policies* not previously authorised by special legislation) should be included in even-numbered appropriation bills.

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

2.64 The committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in

39 Budget Paper No. 2, 2017-18, p. 139.

40 Budget Paper No. 2, 2017-18, p. 84. It appears that the appropriation for departmental expenses for this measure (\$20.2 million) may have been improperly included in Appropriation Bill (No. 1) 2017-18. However, it appears that the appropriation for capital expenses (\$0.3 million) was correctly included in Appropriation Bill (No. 2) 2017-2018.

41 Budget Paper No. 2, 2017-18, p. 169. It appears that the appropriation for departmental expenses for this measure (\$4.828 million) may have been improperly included in Appropriation Bill (No. 1) 2017-18. However, it appears that the appropriation for capital expenses (\$4.75 million) was correctly included in Appropriation Bill (No. 2) 2017-2018.

42 See Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014* at pp 402–406; *Fourth Report of 2015* at pp 267–271; *Alert Digest No. 6 of 2015* at pp 6–9, *Fourth Report of 2016* at pp 249–255; *Alert Digest No. 7 of 2016* at pp 1–4; *Scrutiny Digest No. 2 of 2017* at pp 1–5; and *Scrutiny Digest No. 3 of 2017* at pp 2–4.

particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure. The committee notes that existing outcomes are extremely broad and therefore it appears that most new policies could therefore fall within these existing outcomes.

2.65 The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

2.66 The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2017-2018 which should only contain appropriations that are not amendable by the Senate).

Appropriations for new administered outcomes

2.67 Under the current approach to the classification of items in appropriation bills, appropriations relating to 'new policies' will only be included in an even-numbered appropriation bill (which is amendable by the Senate) where the new policy requires a new administered outcome not previously authorised by the Parliament. As a result of this approach, the only appropriations for new policies included in amendable appropriation bills are those relating to new administered outcomes.

2.68 The committee notes that it appears that there are no proposed appropriations for new administered outcomes in Appropriation Bill (No. 2) 2017-2018 (and so there are no proposed appropriations relating to 'new policies' which are subject to amendment by the Senate). Noting this, the committee requests the Minister's advice as to each instance in which appropriations for new administered outcomes (which are amendable by the Senate) have been included in even-numbered appropriation bills over the past ten financial years.

Minister's response

2.69 The Minister advised:

New Administered Outcomes

As mentioned in my previous responses to the Committee and in the Senate on 17 March 2016, the allocation of measures between odd and even-numbered bills is consistent with the long-standing interpretation by

all Governments of the Senate-executive compact, as adjusted in 1999 following the introduction of accrual-based budgeting.

Examples of non-operating items (equity injections, administered assets and liabilities), State, ACT, NT and local government items and corporate entity items of new measures included in even-numbered bills from 2013-14 to 2015-16 are shown in Attachment A.⁴³ Due to the difficulty of interrogating older data in various legacy systems and the call on departmental resources, the list for the purpose of this request does not go back further.

However further examples of new measures included in even-numbered bills from 2006-07, relating in these examples to New Administered Outcomes, are at Attachment B.⁴⁴

Committee comment

2.70 The committee thanks the Minister for this detailed response and his ongoing engagement with the committee on this matter.

2.71 In particular, the committee thanks the Minister for providing examples of appropriations for non-operating items (sometimes referred to as capital costs) and payments to the States, territories and local governments which related to new measures and which were included in amendable appropriation bills. The committee acknowledges and welcomes the fact that where new measures involve an appropriation for capital costs or payments to the States, territories or local government, the appropriations for these costs are appropriately classified and therefore included in an amendable appropriation bill. In this way the Senate is able to exercise its constitutional right to amend these provisions which relate to matters not involving the ordinary annual services of the government.

2.72 However, there are many instances where new policies do not involve an appropriation for non-operating items or payments to the States, and in these circumstances (except on the rare occasion that the new measure requires an entirely new administered outcome),⁴⁵ the new measures are only included in a bill which is not amendable by the Senate. An example of such a measure was included in the committee's initial comments on this bill.⁴⁶

43 See Appendix 1.

44 See Appendix 1.

45 Attachment B to the Minister's response demonstrates that there have only been four instances since 2006-07 where an entirely new administered outcome has been included in an amendable appropriation bill. See Appendix 1.

46 Cyber Security Advisory Office — establishment (\$10.7 million over four years) [Budget Paper No. 2, 2017-18, p. 139].

2.73 The committee takes this opportunity to note that the High Court has emphasised that the interpretation of the expression 'ordinary annual services of the government' in sections 53 and 54 of the Constitution is not justiciable—that is, its interpretation is a matter for the two Houses in their dealings with each other, rather than for the Courts.⁴⁷

2.74 The committee reiterates that the long-standing approach of governments to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills.

2.75 The committee also reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure.

2.76 The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

2.77 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter; however, the committee will continue to draw this important issue to the attention of Senators where appropriate in the future.

Parliamentary scrutiny—appropriations determined by the Finance Minister⁴⁸

Initial scrutiny – extract

2.78 Clause 10 seeks to enable the Finance Minister to provide additional appropriations for items when satisfied that there is an urgent need for expenditure

47 *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [125]; Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 385.

48 Clause 10. The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and 1(a)(v) of the committee's terms of reference.

and the existing appropriation is inadequate. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

2.79 Subclause 10(1) establishes the criteria about which the Finance Minister must be satisfied before making a determination under the AFM provision. Specifically, the Finance Minister is required to be:

satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:

(a) because of an erroneous omission or understatement; or

(b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

2.80 Where the Finance Minister is satisfied that these criteria are met, subclause 10(2) enables the Minister to make a determination which has the effect of modifying the appropriations outlined in Schedule 1 to the Act. As such, this provision may be considered to be a Henry VIII clause as it, in effect, allows delegated legislation to amend primary legislation. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

2.81 Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum states that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.⁴⁹

2.82 Subclause 10(3) provides that the total amount that can be determined under the AFM provision is limited to \$295 million.

2.83 The committee notes that this issue also arises in relation to other appropriation bills.⁵⁰

2.84 Noting that one of the core functions of the Parliament is to scrutinise proposed appropriations, the committee requests the Minister's advice as to each instance in which the Advance to the Finance Minister provisions have been utilised over the past ten financial years.

49 Explanatory memorandum, p. 9.

50 For example, see clause 12 of Appropriation Bill (No. 2) 2017-2018 (the total amount that can be determined under this AFM provision is \$380 million).

Minister's response

2.85 The Minister advised:

Advance to the Finance Minister

There have been 49 Advances to the Finance Minister (AFM) (included in 48 Determinations) over the past twelve financial years from 2006-07. A summary is at [Attachment C](#). A report is tabled in Parliament for every year in which one or more AFMs is provided. The reports regarding AFMs are published on my Department's website at: http://www.finance.gov.au/publications/advance_to_the_finance_minister/.

Committee comment

2.86 The committee thanks the Minister for this detailed response and notes the Minister's advice that there have been 49 Advances to the Finance Minister (AFMs) over the past 12 financial years from 2006-07.

2.87 As detailed in Attachment C to the Minister's response,⁵¹ these Advances have provided additional appropriations of varying amounts to a wide range of portfolios and for a wide variety of purposes. The table below provides details of a selection of AFMs issued since 2006-07:

Year	Purpose	FRL No.	Amount
2006-07	To meet commitments in relation to payments to the Australian Broadcasting Corporation to provide Australian television in the Asia Pacific region	F2006L02669	\$8,989,493
2007-08	To cover funding obligations for the Mersey Community Hospital, Tasmanian Health Initiatives, Year of the Blood Donor measure and ongoing blood and organ donation services	F2007L04155	\$48,760,078
2008-09	To enable payments to local governments through the Regional and Local Community Infrastructure Program	F2009L00712	\$206,500,247
2009-10	To enable the payment of an additional contribution to the International Monetary Fund Poverty Reduction and Growth Trust	F2010L00149	\$29,675,000
2010-11	To cover payments for the 2011-12 budget measure 'Supporting football in the lead up to the 2015 Asian Cup'	F2011L01128	\$7,500,000
2011-12	To enable the Department of Regional Australia, Local Government, Arts and Sport to meet a shortfall of funding for expenditure relating to grants to arts and	F2012L01523	\$6,000,000

51 See Appendix 1.

	culture bodies		
2012-13	To enable the Department of Health and Ageing to make payments through the Local Hospital Networks Special Account to Victorian Local Hospital Networks	F2013L00558	\$107,000,000
2015-16	To enable the AEC to implement the electoral reforms in the <i>Commonwealth Electoral Amendment Act 2016</i> , as well as to bring forward election preparations for the 2016 Federal Election	F2016L00673	\$101,237,000
2017-18	To facilitate a voluntary postal plebiscite for all Australians enrolled on the Commonwealth Electoral Roll, conducted by the Australian Bureau of Statistics	F2017L01005	\$122,000,000

2.88 As noted in the committee's initial comments, one of the core functions of the Parliament is to authorise and scrutinise proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.⁵²

2.89 Given that Advance to the Finance Minister determinations are not subject to parliamentary disallowance, the primary accountability mechanism in relation to AFMs (beyond the initial passage of the authorising provision in the regular appropriation bills) is an annual report tabled in Parliament on the use of the Advance. These reports are referred to legislation committees considering estimates and are also considered in committee of the whole.⁵³ In addition, the reports are published on the Department of Finance website.⁵⁴ The committee draws these reports and the Advance to the Finance Minister provision in the regular appropriation bills to the attention of Senators.

2.90 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter; however, the committee will continue to draw this important issue to the attention of Senators where appropriate in the future.

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

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

54 See http://www.finance.gov.au/publications/advance_to_the_finance_minister/.

Appropriation Bill (No. 2) 2017-2018

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 9 May 2017
Bill status	Received Royal Assent on 23 June 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

2.91 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 15 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.⁵⁵

Parliamentary scrutiny of section 96 grants to the States⁵⁶

Initial scrutiny – extract

2.92 Clause 16 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

2.93 Clause 16 delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made;⁵⁷ and
- the amounts and timing of those payments.⁵⁸

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

55 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

56 Clause 16 and Schedules 1 and 2. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and 1(a)(v) of the committee's terms of reference.

57 Paragraph 16(2)(a).

58 Paragraph 16(2)(b).

because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.⁵⁹

2.95 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.⁶⁰

2.96 The committee takes this opportunity to reiterate that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While some information in relation to grants to the States is publicly available, the committee has previously noted that effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

2.97 The committee has previously requested that additional explanatory material be made available to Senators and others in relation to appropriations for payments to the States, Territories and local governments in the annual appropriation bills and in relation section 96 grants to the States more generally. For example, recently the committee sought the Minister's advice as to:

- whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:
 - the statutory provisions across the Commonwealth statute book which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and
 - the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and
- whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:

59 Explanatory memorandum, p. 13.

60 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015* (at pp 511–516), *Ninth Report of 2015* (at pp 611–614), *Fifth Report of 2016* (at pp 352–357), *Eighth Report of 2016* (at pp 457–460) and *Scrutiny Digest No. 3 of 2017* (at pp 51–54).

- the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);
- the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or special legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and
- the nature of the terms and conditions attached to these payments.⁶¹

2.98 The committee thanks the Minister for his ongoing engagement with the committee on this matter and welcomes the significant progress that has been made in the most recent Budget to provide additional information about section 96 grants to the States in Budget documentation (as described below).

General information about section 96 grants

2.99 In relation to the committee's request for further general information about section 96 grants to the States and the terms and conditions attaching to them, the committee welcomes the inclusion of Appendix E to Budget Paper No. 3, 2017-18 which provides details of the appropriation mechanisms for all payments to the States and the terms and conditions applying to them.⁶² The committee considers that this information is a useful reference and draws this document to the attention of Senators and others interested in the making of section 96 grants to the States.

2.100 The committee looks forward to this information being updated each year, and considers that it may be useful for a brief explanation of the constitutional background to section 96 grants to the States and the delegation of associated powers from the Parliament to the Executive to be included as an introduction to the technical information contained in the table. The committee also considers that further hyperlinks (linking to relevant sections of the Federal Financial Relations and agency websites) may assist in the accessibility and usefulness of this document.⁶³

Section 96 grants in appropriation bills

2.101 In relation to the committee's request for further information about appropriations for payments to the States, Territories and local government in the annual appropriation bills, the committee welcomes the new mandatory requirement for the inclusion of further information in portfolio budget statements

61 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp 457–460.

62 Appendix E, Budget Paper No. 3 2017-18, *Federal Financial Relations*, available at http://www.budget.gov.au/2017-18/content/bp3/download/bp3_10_appendix_e_online.pdf.

63 For example, direct hyperlinks to the Intergovernmental Agreement on Federal Financial Relations, National Partnership Agreements and the National Health Reform Agreement could be added where appropriate.

along the lines of that suggested by the committee above.⁶⁴ The committee considers that the example of the mandatory information to be included in portfolio budget statements provided in the Department of Finance's *Guide to Preparing the 2017-18 Portfolio Budget Statements* fully addresses the committee's request in relation to the provision of this additional information.⁶⁵

2.102 However, the committee notes that the implementation of this new mandatory requirement by agencies has been mixed. In this appropriation bill the Attorney-General's Department, Department of Education and Training, Department of Infrastructure and Regional Development and the Department of the Prime Minister and Cabinet are all seeking appropriations for payments to or for the States, Territories or local government.⁶⁶ However, only the Department of Infrastructure and Regional Development fully implemented the new mandatory information requirement.⁶⁷

2.103 The committee requests the Minister's advice as to whether the Department of Finance is able to draw the new mandatory information requirement regarding appropriations for payments to the States, Territories and local government to the attention of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet. The committee also requests the Minister's advice regarding the committee's suggestions at paragraph [2.100] in relation to the provision of general information in *Budget Paper No. 3* about the terms and conditions attaching to section 96 grants to the States.

2.104 In relation to this bill, the committee leaves to the Senate as a whole the appropriateness of the delegation of legislative power in clause 16 which allows the Minister to determine conditions under which payments to the States, Territories and local government may be made and the amounts and timing of those payments.

64 The committee suggested that the following information should be included in portfolio budget statements: (a) the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory); (b) the specific statutory or other provisions which detail how the terms and conditions to be attached to the particular payments will be determined; and (c) the nature of the terms and conditions attached to these payments.

65 Department of Finance, *Guide to Preparing the 2017-18 Portfolio Budget Statements*, pp 24–25, available at <http://www.finance.gov.au/sites/default/files/guidance-portfolio-budget-statements-17-18.pdf>.

66 See Schedule 1 to the bill.

67 See Infrastructure and Regional Development Portfolio, *Portfolio Budget Statements 2017-18*, pp 16–17.

Minister's response

2.105 The Minister advised:

Payments to States, ACT, NT and local government - Portfolio Budget Statements

My advice was sought as to whether my department is able to draw the new mandatory information requirement regarding appropriations for payments to the States, Territories and local government to the attention of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet.

These departments have included additional information on their websites since the Budget, as follows:

- the Attorney-General's Department at <https://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Pages/SchoolsSecurityProgramme.aspx>;
- the Department of Education and Training at <https://www.education.gov.au/funding-schools>; and
- the Department of the Prime Minister and Cabinet at <https://www.pmc.gov.au/resource-centre/pmc/portfolio-budget-statements-2017-2018>.

My Department has consulted with these departments. I am advised that the mandatory information requirements will be met in the future.

Payments to States, ACT, NT and local government - Budget Paper No. 3

The Committee also sought my advice regarding its suggestions in relation to the provision of general information in Budget Paper No. 3 about the terms and conditions attaching to section 96 grants to the States. My Department will liaise with the Department of the Treasury regarding the possible provision of additional information in Budget Paper No. 3 in the next Budget.

Committee comment

2.106 The committee thanks the Minister for this response and for his ongoing engagement with the committee on this matter.

2.107 In particular, the committee welcomes the Minister's advice that further information regarding appropriations for payments to the States, territories and local government has been included on the websites of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet. The committee also welcomes the advice that the new mandatory requirement for the inclusion of further information about these appropriations in portfolio budget statements will be met in the future.

2.108 In relation to the provision of general information in Budget Paper No. 3 about the constitutional background to section 96 grants and the terms and

conditions attaching to them,⁶⁸ the committee welcomes the Minister's indication that his Department will liaise with the Department of the Treasury regarding the possible provision of additional information in Budget Paper No. 3 in the next Budget. In this regard, the committee notes that the online 'guide to appropriations' on the Department of Finance website provides a useful example of the provision of helpful information about the background to certain financial provisions of the Constitution.⁶⁹

2.109 The committee welcomes the significant progress that has been made to provide additional information about section 96 grants to the States in Budget documentation. The committee looks forward to considering the outcome of the consultation between the Department of Finance and the Department of the Treasury regarding the provision of further general information at the time of the next Budget.

Parliamentary scrutiny of debit limits⁷⁰

Initial scrutiny – extract

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

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

- the amounts that may be debited or spent from the Education Investment Fund (EIF) special account;⁷¹ and
- the amounts that may be spent for general purpose finance assistance or national partnership payments to the States.⁷²

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

Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment

68 See paragraphs [2.999] to [2.1000] above.

69 See <http://www.finance.gov.au/resource-management/appropriations/guide-to-appropriations/>.

70 Clause 13. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

71 See section 199 of the *National-building Funds Act 2008*.

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

of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.⁷³

2.113 In this bill the following debit limits are proposed for 2017-18:

- Education Investment Fund—\$2 million;⁷⁴
- General purpose finance assistance to the States—\$5 billion;⁷⁵ and
- National partnership payments to the States—\$25 billion.⁷⁶

2.114 In relation to the \$25 billion debit limit for national partnership payments, the committee notes that the Budget papers suggest that it is expected that national partnership payments will be \$13.7 billion in 2017-18.⁷⁷ Therefore, the debit limit proposed in this bill would allow an additional \$11.3 billion in national partnership payments to be made without the need to seek further parliamentary approval.

2.115 Noting the intention of the debit limit regime to facilitate parliamentary oversight of these grant programs, the committee requests the Minister's confirmation as to how much it is currently expected will be spent in 2017-18 under each of the three grant programs identified above, and the reasons for appearing to set the debit limit for these programs well above the expected level of expenditure.

Minister's response

2.116 The Minister advised:

The Committee further sought confirmation as to how much is currently expected to be spent in 2017-18 under each of the three grant programs for which a debit limit is specified in *Appropriation Bill (No. 2) 2017-2018*, and the reasons for appearing to set the debit limit for these programs well above the expected level of expenditure.

The debit limit for the Education Investment Fund for 2017-18 has been set at \$2 million and reflects the final payment for the remaining project, Creative Futures Tasmania.

The debit limit for general purpose finance assistance for 2017-18 has been set at \$5 billion consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$0.7 billion. The debit limit has been set higher to provide for variations in payment amounts, especially for royalty payments which vary following fluctuations in prices and production levels.

73 Explanatory memorandum, p. 10.

74 Subclause 13(1).

75 Subclause 13(2).

76 Subclause 13(3).

77 *Federal Financial Relations*, Budget Paper No. 3 2017-18, p. 2.

The debit limit for national partnership payments has been set at \$25 billion, again consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$12.6 billion. The debit limit has been set above the estimated level of expenditure to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual Appropriation Bills, which could include:

- an increase to existing undertakings to the States, including movements of payments between years;
- providing for any large-scale natural disasters or other major unexpected events; or
- funding for existing programs that may be required following an estimates update.

Committee comment

2.117 The committee thanks the Minister for this response. The committee notes the Minister's advice in relation to the estimated expenditure for each of the three grant programs. The committee also notes the Minister's advice that setting the debit limits at a high level is necessary to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual Appropriation Bills, including increases to existing undertakings to the States, and provision for any large-scale natural disasters or other major unexpected events.

2.118 In relation the Education Investment Fund the committee notes that the debit limit was set at \$2 million and this reflects the final payment for the remaining project under this program. The committee therefore makes no further comment in relation to the debit limit for this program.

2.119 In relation to general purpose finance assistance, while the debit limit is set at \$5 billion, the committee notes the advice that the estimated expenditure for these grants in 2017-18 is \$0.7 billion. In relation to national partnership payments, while the debit limit is set at \$25 billion, the committee notes the advice that the estimated expenditure for these grants in 2017-18 is \$12.6 billion. These debit limits therefore allow an additional \$4.3 billion in general purpose finance assistance grants and an additional \$12.4 billion in national partnership payments to be made without the need to seek further parliamentary approval.

2.120 The committee acknowledges the information provided by the Minister in relation to why it is considered necessary to set the debit limit for these grant programs well above the expected level of expenditure. However, the committee takes this opportunity to reiterate that the debit limit regime is designed to facilitate parliamentary oversight of these grant programs and this oversight may be undermined if the debit limit is set well above the actual expected expenditure.

2.121 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this bill. However, it draws this general matter (which is relevant to Appropriation Bill (No. 2) each year) to the attention of Senators.

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

Purpose	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: <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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(v)

2.122 The committee dealt with this bill in *Scrutiny Digest No. 11 of 2017*. The Assistant Minister responded to the committee's comments in a letter dated 29 September 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Assistant Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁷⁸

Incorporation of external materials existing from time to time⁷⁹

Initial scrutiny – extract

2.123 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.

78 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

79 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.

2.124 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'.⁸⁰ 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.

2.125 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:

- 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).

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

2.127 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.⁸¹ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

2.128 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.

80 Explanatory memorandum, p. 9.

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

Assistant Minister's response

2.129 The Minister advised:

The Committee has asked my 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.

Subsection 153XD(6) is proposed to be inserted into the *Customs Act 1901* by the Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017. This provision contains the head of power to create regulations that may apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

I undertake that, should any such documents or other writing be incorporated in the regulations, their incorporation will be especially highlighted in the explanatory material for the regulations. Further, these documents and other writing would be referenced on the Department of Immigration and Border Protection website and through a Border Protection Notice that would indicate where any document(s) can be obtained.

These commitments are in addition to section 15J of the *Legislation Act 2003* which requires that an explanatory statement for an instrument that incorporates a document by reference must contain a description of such documents and indicate how they may be obtained.

Committee comment

2.130 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's undertaking that, should any such documents or other writing be incorporated by regulations made pursuant to proposed subsection 153XD(6), this fact will be highlighted in the accompanying explanatory material. Any such incorporated documents will also be referenced on the Department of Immigration and Border Protection website and a Border Protection Notice will be issued indicating where such documents can be obtained.

2.131 The Assistant Minister further noted that his undertakings go beyond the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003* that explanatory statements for legislative instruments that incorporate documents by reference must contain a description of the incorporated documents and indicate how they may be obtained.

2.132 The committee welcomes the Assistant Minister's undertakings with respect to providing information on how documents incorporated under regulations made pursuant to proposed subsection 153XD(6) can be obtained. However, the committee notes that the Assistant Minister's response does not clarify whether such documents will be made freely available to all interested persons.

2.133 The committee therefore takes this opportunity to reiterate that it is a fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

2.134 The committee also takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at a particular time. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*). The Regulations and Ordinances Committee will also ensure that the explanatory statement accompanying the instruments contains a description of the incorporated documents and indicates how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

2.135 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing material to be incorporated by reference into the law in circumstances where such material may not be freely and readily available to interested persons.

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

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> to:</p> <ul style="list-style-type: none"> • expand the automatic disqualification regime to prohibit persons that have committed serious criminal offences punishable by five or more years imprisonment from acting as an official of a registered organisation; • allow the Federal Court to prohibit certain officials from holding office who contravene a range of industrial and other relevant laws, are found in contempt of court, repeatedly fail to stop their organisation from breaking the law or are otherwise not a fit and proper person to hold office in a registered organisation; • make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once they have been disqualified; • allow the Federal Court to cancel the registration of an organisation on a range of grounds; • allow applications to be made to the Federal Court for other orders, including the suspension of rights and privileges of an organisation and individual where its officers or members are acting in a manner that is inconsistent with the rights and privileges of registration; • expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation; and • introduce a public interest test for amalgamations of registered organisations
Portfolio	Employment
Introduced	House of Representatives on 16 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

2.137 The committee dealt with this bill in *Scrutiny Digest No. 10 of 2017*. The Minister responded to the committee's comments in a letter dated 3 October 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.⁸²

Insufficiently defined disqualification powers⁸³

Initial scrutiny – extract

2.138 Schedule 1 seeks to amend the *Fair Work (Registered Organisations) Act 2009* to expand the circumstances in which a person may be disqualified from holding office in a registered organisation. Subsection 223(3) provides that, in certain circumstances, a ground for disqualification applies in relation to an officer of a registered organisation if that officer fails to prevent contraventions by the organisation of which they are an officer. Specifically, paragraph 223(3)(a) provides that a ground for disqualification applies in relation to a person if, while the person was an officer of the organisation, two findings⁸⁴ have been made against the organisation. Paragraph 223(3)(b), however, provides that this ground for disqualification will only apply if the person has 'failed to take reasonable steps to prevent the conduct'.

2.139 Given that disqualification may have a significant impact on an affected individual, it is of concern that the bill does not provide more specificity about the actions it is expected an individual officer would need to take to avoid bearing consequences of a finding which relates to an organisation, rather than to the individual themselves.

2.140 The explanatory memorandum suggests that the Final Report of the Royal Commission into Trade Union Governance and Corruption recommended this ground of disqualification on the basis of a similar ground for disqualifying a person from managing a corporation provided for in subsection 206E(1) of the *Corporations Act 2001*. While the committee notes this recommendation, the fact that a provision exists in other legislative schemes does not, of itself, address the committee's scrutiny concerns.

2.141 The committee requests the Minister's advice as to the appropriateness of including specific guidance in the primary legislation as to the type of reasonable steps that must be undertaken in order to avoid disqualification under this provision.

Minister's response

2.142 The Minister advised:

82 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

83 Schedule 1, item 9, proposed paragraph 223(3)(b). The committee draws Senators' attention to this provision pursuant to principles 1(a)(i) and (ii) of the committee's terms of reference.

84 Of the sort specified in subparagraphs 223(3)(a)(i)-(iii).

The reasonable steps defence is derived from the long-standing reasonable person test of the common law. A similar ground for disqualification from managing corporations (which relevantly includes the reasonable steps defence) applies under the *Corporations Act 2001* (Cth) (Corporations Act).⁸⁵

The reasonable steps defence entails an objective test⁸⁶ applied to the particular circumstances of the case as to whether or not the steps taken were sufficient. The test involves considering if the steps taken would be in accordance with those a 'prudent and reasonable' person.⁸⁷

It is not appropriate, nor possible, to be specific about the actions expected of an individual officer in taking reasonable steps to prevent an organisation from breaching a law. It is established that reasonable steps will vary depending on the circumstances.⁸⁸ It is also not uncommon for Commonwealth legislation to omit specific guidance as to what constitutes reasonable steps.⁸⁹ This seems to have been recognised by the Committee by not calling into question the 'reasonable steps' requirements in its recent consideration of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

In addition, even where this disqualification ground exists, it will still be a matter for the Federal Court in the exercise of its discretion, to determine if disqualification is justified in all of the circumstances.

Committee comment

2.143 The committee thanks the Minister for this response. The committee notes the Minister's advice that the reasonable steps defence entails an objective test, involving the consideration of whether the steps taken accord with those a prudent and reasonable person would take in the particular circumstances, and that as what constitutes taking reasonable steps will vary depending on the circumstances of each case, it is neither appropriate nor possible to provide specific guidance in the primary legislation as to the types of conduct that might avoid disqualification.

85 *Corporations Act 2001* (Cth), s 206E *Corporations Act 2001* (Cth), s 206E.

86 *Vaughan v Menlove* (1837) 132 ER 490; *Blyth v. Company Proprietors of the Birmingham Water Works* (1856) 156 ER 1047.

87 *Blyth v. Company Proprietors of the Birmingham Water Works* (1856) 156 ER 1047.

88 *Aldridge v Booth* (1988) 80 ALR 1.

89 For example, Australian Privacy Principle 11 in Schedule 1 to the *Privacy Act 1988* requires entities to 'take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity collects is accurate, up-to-date and complete ... [and to] take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is ... accurate, up-to-date, complete and relevant.'

2.144 The committee notes the Minister's further advice that, even in cases where grounds for disqualification exist, it will be for the Federal Court to determine whether disqualification is justified in the circumstances.

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

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

Reversal of evidential burden of proof⁹⁰

Initial scrutiny – extract

2.147 Proposed subsection 323H(5) makes it an offence if a person does not comply with a notice requiring the person to deliver to the administrator specified books that are in the person's possession. Proposed subsection 323H(6) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply to the extent that the person is entitled to retain possession of the books. The offence carries a maximum penalty of 50 penalty units or imprisonment for 12 months, or both.

2.148 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.

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

2.150 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed subsection 323H(6) has not been directly addressed in the explanatory materials. In particular, it is not clear why the question of whether a person is entitled to retain possession of the books is a matter peculiarly within the person's knowledge.

90 Schedule 3, item 4, proposed subsection 323H(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2.151 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverses 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*.⁹¹

Minister's response

2.152 The Minister advised:

Proposed section 323H of the Bill is modelled on s 438C of the Corporations Act, which adopts the same formulation of the offence and defence applicable to a person's right to retain books.

The Committee's attention is drawn to the fact that the imposition of an evidential burden does not impose a legal burden of proof upon the defendant and is consistent with the common law and the Criminal Code Act 1995 (Cth) (Criminal Code Act), which codifies the common law on this and other points. When a defendant wishes to take advantage of a defence it is always the case at common law and under the Criminal Code Act that the defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist. When the defendant discharges this evidential burden, the prosecution then has the legal burden of proof to disprove the matter beyond a reasonable doubt.

In relation to the question of whether a person is entitled to retain possession of relevant books is a matter peculiarly within the person's knowledge, the Committee's attention is drawn to the definition of 'books' in the *Fair Work (Registered Organisations Act) 2009* which is broadly framed and includes any record of information or a document. An administrator would be appointed to resolve the circumstances set out in a declaration made under proposed section 323 and therefore may require documents or information relating to the conduct which resulted in the declaration. This could include personal diaries/calendars or other records, or personal financial statements. Whether the documents required by the administrator are documents belonging to the person is a matter peculiarly within the person's knowledge. A person relying on this defence can easily adduce evidence to discharge the burden by simply pointing to the fact that the information belongs to the person or contains personal information belonging to the person.

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

Committee comment

2.153 The committee thanks the Minister for this response. The committee notes the Minister's advice that the definition of 'books' in the *Fair Work (Registered Organisations) Act 2009* is broad and includes any record of information or a document and an administrator may require documents and information which could include personal records or personal financial statements. The committee notes the Minister's advice that whether the documents required by an administrator are documents belonging to the person is a matter peculiarly within the person's knowledge, and that a person relying on this defence 'can easily adduce evidence to discharge the burden by simply pointing to the fact that the information belongs to the person or contains personal information belonging to the person'.

2.154 The committee notes that the ease with which a person may be able to produce relevant evidence is not a basis on which it is appropriate to reverse the evidential burden of proof. Rather, as set out in the *Guide to Framing Commonwealth Offences*,⁹² the question turns on the extent to which the information is peculiarly within the knowledge of the defendant and whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. Nevertheless, in this instance, as the relevant information would appear to include personal information belonging to the person, the committee considers the Minister's response has satisfied its concerns regarding the reversal of the evidential burden of proof in these circumstances.

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

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

Immunity from civil liability⁹³**Initial scrutiny – extract**

2.157 Proposed section 323K seeks to exclude an administrator, or a person acting under the direction of an administrator, from liability for acts or omissions done in

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

93 Schedule 3, item 4, proposed section 323K. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

good faith in the performance or exercise, or purported performance or exercise, of any function or power of the administrator.

2.158 In relation to the good faith requirement, the committee notes that the courts have taken the position that bad faith can only be shown in very limited circumstances.

2.159 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.⁹⁴

2.160 The committee requests the Minister's advice as to why it is considered necessary and appropriate to provide administrators with immunity which may limit the ability of persons to enforce their legal rights. The committee also requests advice as to whether it is possible that the immunity could extend to criminal proceedings and why the provision is framed to extend to the *purported* performance or exercise of any function or power of the administrator.

Minister's response

2.161 The Minister advised:

Proposed section 323K of the Bill is modelled on s 290D of the *Industrial Relations Act 1996* (NSW) (NSW IR Act), which expressly provides that any administrator appointed under that Act to a State registered organisation has immunity from liability.

Providing an administrator with immunity from liability is not an uncommon feature of a scheme of administration. Administrators appointed under the Corporations Act are liable for the debts they incur in the performance of their functions as administrators and are entitled to be indemnified out of the company's property for these debts and debts or liabilities incurred in good faith and in the performance or exercise, or purported performance or exercise, of any of their functions or powers as administrator.⁹⁵ In the context of registered organisations, and as already noted above, the NSW IR Act provides a similar immunity from liability.

Providing an administrator with immunity from liability is often considered necessary and appropriate to create an incentive to encourage individuals to agree to act as administrators. In the absence of such immunity, it would be very difficult to achieve an effective administration regime. It is not intended that the immunity cover both criminal and civil liability. As statutory immunity provisions may limit the private rights of other individuals, it is usual for a court to construe them narrowly and for immunity provisions that cover both criminal and civil liability to expressly

94 Explanatory memorandum, p. 30.

95 *Corporations Act 2001* (Cth), Part 5.3A, Div 9.

state so. The lack of express statement and the heading for the provision 'Administrator not to be sued' indicates to the Court that the provision is directed at immunity from civil proceedings only. Importantly, for any immunity to apply, it would need to be proven that the administrator was acting in good faith in the performance or exercise of their functions or powers for the immunity to apply.

The reference to 'purported' performance or exercise of any function or power reflects the indemnity provisions of the Corporations Act.⁹⁶ The reference to 'purported' performance reflects the intention that acts and omissions an administrator mistakenly thought were in the scope of their functions will be covered by the proposed immunity, provided that the administrator was acting in good faith.

Committee comment

2.162 The committee thanks the Minister for this response. The committee notes the Minister's advice that the proposed immunity for administrators is modelled on similar provisions, that it is often considered necessary and appropriate to create an incentive to encourage individuals to agree to act as administrators and that in the absence of such immunity it would be very difficult to achieve an effective administration regime. The committee also notes the Minister's advice that the proposed section seeks to provide immunity from civil proceedings only (and does not cover criminal liability) and that for the immunity to apply, it must be proven that the administrator was acting in good faith in the performance of his or her functions or powers. The committee also notes the Minister's advice that reference to the 'purported' performance or exercise of powers or functions by the administrator is intended to include acts and omissions an administrator mistakenly thought were in the scope of their functions, provided the administrator was acting in good faith.

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

2.164 In light of the detailed information provided, and the fact that the proposed immunity applies only to civil and not criminal liability, the committee makes no further comment on this matter.

96 *Corporations Act 2001* (Cth), s 443D(aa).

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.165 The committee dealt with this bill in *Scrutiny Digest No. 11 of 2017*. The Treasurer responded to the committee's comments in a letter dated 3 October 2017. A copy of the letter is available on the committee's website.⁹⁷

Retrospective application⁹⁸

2.166 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.

2.167 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 2017.⁹⁹ The committee 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. The response and the committee's final comment in relation to this issue are set out at pages 148–154 of this Scrutiny Digest.

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

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

99 Explanatory memorandum, p. 59.

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> , the <i>Income Tax Assessment Act 1936</i> , and the <i>Taxation Administration Act 1953</i> to: <ul style="list-style-type: none"> • authorise the public disclosure of sponsor sanction details; • clarify merit review rights for certain skilled visas; • enable the Department of Immigration and Border Protection to collect, record and store tax file numbers of certain visa holders for compliance and research purposes; and • address incorrect references to the <i>Regulatory Powers (Standard Provisions) Act 2014</i>
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 16 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

2.168 The committee dealt with this bill in *Scrutiny Digest No. 10 of 2017*. The Minister responded to the committee's comments in a letter dated 21 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.¹⁰⁰

Significant matters in delegated legislation¹⁰¹

Initial scrutiny – extract

2.169 Section 140K of the *Migration Act 1958* currently sets out sanctions that may be taken in relation to approved sponsors. The bill proposes introducing subsection 140K(4) to provide that the Minister must publish information, including personal information, if an action is taken under section 140K in relation to an approved (or formerly approved) sponsor who fails to satisfy applicable sponsorship

100 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

101 Schedule 1, item 1, proposed subsection 140K(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

obligations. The information to be published is information that is 'prescribed by the regulations'.

2.170 The committee's view is that significant matters, such as the type of information, including personal information, to be published, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum does not explain why it is necessary or appropriate to leave the details of what information may be published to delegated legislation. The statement of compatibility also does not explain why these matters are to be left to delegated legislation, however, it does state that 'the disclosure of information is limited to the name of the business, the Australian Business Number, [and] the relevant legal requirements that have been breached'.¹⁰² The statement of compatibility also goes on to state that the Department will publish an analogous level of detail as is currently published by the Office of the Migration Agents Registration Authority and the Fair Work Ombudsman, such as 'business names, Australian Business Numbers, and specific details of their adverse compliance outcome'.¹⁰³

2.171 However, the committee notes there is nothing in the primary legislation that limits the type of information that may be published in this way. It is not clear to the committee why, if the intention is to publish information of the kind set out in the statement of compatibility, the bill does not specify that this is the information that is to be published.

2.172 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation all details of the categories of information that may be published about actions taken against sponsors who fail to satisfy their sponsorship obligations.

Minister's response

2.173 The Minister advised:

The Government considers it appropriate to set out the technical details, regarding what information about sanctions is required to be published, in the regulations. Prescribing the information that must be disclosed in the regulations is consistent with other provisions in the *Migration Act 1958* (the Migration Act). For example, section 140ZH (also in Division 3A) allows the Minister to disclose information of a prescribed kind about a visa holder, a former visa holder, or an approved sponsor of a visa holder or former visa holder to an approved or former approved sponsor of the visa holder, or a prescribed agency of the Commonwealth or a State or Territory.

102 Statement of compatibility, p. 16.

103 Statement of compatibility, p. 16.

The scope of information that will be published is narrow. It is intended that this will be limited to information that identifies the sponsor, breach and sanction. This provides the Minister with flexibility to update the regulations in instances where, for example, there is a change of data available, without going through the legislative amendment process.

The regulations that will set out the detail of what information must be published, will be subject to Parliamentary scrutiny and disallowance when they are tabled in Parliament.

Committee comment

2.174 The committee thanks the Minister for this response. The committee notes the Minister's advice that prescribing the information that must be disclosed in the regulations is consistent with other provisions in the *Migration Act 1958* and that it is intended that the type of information to be published will be limited to information that identifies the sponsor, breach and sanction, and that this provides the Minister with the flexibility to update the regulations without going through the legislative amendment process.

2.175 The committee notes that the fact that there are other provisions in the *Migration Act 1958* that also leave significant matters to be dealt with via delegated legislation is not a justification for including these matters in delegated legislation. The committee welcomes the Minister's advice that it is intended that the information to be published will be narrow. However, the committee notes that there is nothing in the primary legislation that limits the type of information that may be published in this way. It is not clear to the committee why, if the intention is to publish information falling within such categories, the bill does not specify the categories of information to be published (with more specific detail to be left to the regulations).

2.176 The committee considers it may be appropriate if proposed subsection 140K(4) was amended to provide that the information that the Minister is to publish if an action is taken under section 140K to impose a sanction is information that identifies the sponsor, the relevant breach and the applicable sanction.

2.177 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation all details of the categories of information that may be published about actions taken against sponsors who fail to satisfy their sponsorship obligations.

Procedural fairness¹⁰⁴***Initial scrutiny – extract***

2.178 Proposed subsection 140K(5) states that in publishing information, as prescribed by the regulations, about sanctions taken against approved sponsors, the Minister is not required to observe any requirements of the natural justice hearing rule. The committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle and if it is to be abrogated this should be thoroughly justified. In this instance, the explanatory memorandum states that this is because the information will only be published once a decision has been made to take action to impose a sanction for failing to satisfy a sponsorship obligation under current section 140K and proposed subsection (5) does not limit the Minister's procedural fairness obligations in relation to that underlying decision.

2.179 The committee notes that while there may already have been a hearing in relation to whether the Minister takes an action under existing section 140K, and the decision to publish is not a discretionary power (there is an obligation to publish), the regulations may prescribe circumstances in which the Minister is not under that obligation (see proposed subsection 140K(7)). It is therefore not clear to the committee why there is no right to a hearing on whether or not any prescribed circumstances exist in a given case. The explanatory memorandum does not address this issue.

2.180 The committee also notes that the publication of the information about sanctions occurs if an action is taken under section 140K. This would therefore require the publication as soon as an action is taken to, for example, bar the sponsor, cancel the person's approval as a sponsor or apply for a civil penalty order. This would therefore be before any review has been undertaken in relation to the initial decision (or before any application for a court order under section 140K has been determined). As such, information about a sponsor may be published in circumstances where it may later be determined on review that the action taken was not justified or where an application for a court order is refused. Therefore, any existing rights of review of action taken under section 140K may not be adequate, given it may not be capable of providing adequate redress to a person who has suffered damage to their reputation.

2.181 The committee requests the Minister's advice as to why the natural justice hearing rule is being excluded in its entirety in relation to the publication by the Minister of information prescribed by the regulations in relation to sanctions taken against approved sponsors. The committee considers it may be appropriate to remove proposed subsection 140K(5) which removes the natural justice hearing rule,

104 Schedule 1, item 1, proposed subsection 140K(5). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

or at a minimum, to limit its application so it is clear an affected person is entitled to a hearing as to whether or not the Minister is not required to publish information by virtue of proposed subsection 140K(7), and requests the Minister's advice in relation to this matter.

2.182 The committee also considers it may be appropriate for the bill to be amended to require that publication be delayed until after the time limit for an application for review has expired, after a final determination of a review application, and after a decision in relation to an application for a court order under section 140K has been determined, and requests the Minister's advice in relation to this matter.

Minister's response

2.183 The Minister advised:

This measure is intended to deter businesses from breaching their obligations, allow Australians and overseas workers to inform themselves about breaches, and increase public confidence in the integrity of our visa programmes. To achieve this, it is necessary to publish all or a high percentage of breaches. This gives overseas workers and Australians confidence that they have a clear picture of any business that has breached their obligations, and serves as a warning to businesses that if they breach their obligations, they will be publically named.

Sponsors will continue to be afforded natural justice regarding whether a sponsorship obligation has been breached. Publication will only occur where it has been determined by a delegate that the breach is serious enough to warrant the imposition of a sanction under section 140K of the Migration Act.

The implementation of the measure will include a comprehensive communications package to inform sponsors, visa holders, and the Australian public of the measure. The Department will also advise individual sponsors during the sanction process that breaches will be published.

Whilst exemptions may be prescribed in the regulations, the Government has not at this point identified any appropriate exemptions, and does not intend to prescribe any at this point.

The public disclosure of details when a party breaches regulatory requirements is an existing practice within the Australian Government. The Migration Agents Registration Authority regularly publishes details of disciplinary decisions taken against migration agents on its website. This includes agent names, registration numbers, and the results of compliance investigations. Similarly, the Fair Work Ombudsman (FWO) publishes details, including business names, litigation outcomes, enforceable undertakings, and compliance partnerships on the FWO website.

The alternative in this circumstance, to not publish a sanction until the time limit for review has expired, significantly weakens the impact of the measure. This approach would leave workers uninformed of employers that have been found to have breached their obligations, exposing them to potentially exploitive circumstances known to Government.

The proportion of sanction decisions that are overturned at review is very low. In 2015-16, 372 sponsors were sanctioned (cancelled and/or barred), and 28 were issued with infringement notices.¹⁰⁵ Of the 372 sponsors who were cancelled and/or barred, only 38 sought review through the Administrative Appeals Tribunal (AAT).¹⁰⁶ In 2015-16, the AAT set aside only 11 cases.¹⁰⁷

The Department will notify sanctioned sponsors that the decision will be published, and that they are able to advise the Department if they seek review. The Department will then include this in the published information. Where a sanction decision is varied or overturned on review, the Department will respectively update or remove the sanction information from publication.

Committee comment

2.184 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is necessary to publish all, or a high percentage of, breaches to give confidence that there is a clear picture of any business that has breached their obligations and to serve as a warning to businesses. The committee notes the Minister's advice that sponsors will be advised during the sanctions process that breaches will be published. The committee also notes the advice that while exemptions (as to when the Minister will not publish information) may be prescribed in regulations, there is no intention to prescribe any circumstances at this point.

2.185 The committee notes it raised scrutiny concerns as to why there is no right to a hearing on whether or not any prescribed circumstances exist in a given case. The Minister's response, in stating that the government has no intention to prescribe any circumstances, does not address the committee's concerns regarding the removal of the natural justice hearing rule in its entirety.

2.186 The committee also notes the Minister's advice that the public disclosure of details when a party breaches regulatory requirements is an existing practice within the government, and not publishing a sanction until the time limit for review has

105 Department of Immigration and Border Protection Annual Report 2015-16, pg 43.
<http://www.border.gov.au/ReportsandPublications/Documents/annual-reports/part-3-2015-16.pdf>

106 Data from the AAT, Migration caseload summary 2015-16

107 Data from the AAT, Migration caseload summary 2015-16. These cases were lodged in 2015-16 or earlier.

expired would significantly weaken the impact of the measure as it would leave workers uninformed of employers that have been found to have breached their obligations, exposing them to potentially exploitative conduct despite it being known to government. The committee also notes the Minister's advice that the Department will notify sanctioned sponsors that the decision will be published, the sponsor will be able to advise if they seek review, and the Department will then include this in the published information (and where a sanction decision is varied or overturned on review, the sanction information will be updated or removed from publication).

2.187 The committee welcomes the Minister's advice that the Department will include in any published information, where relevant, that a person is seeking review of the decision, and will update or remove information following any successful review. However, the committee notes that there is nothing in the legislation that would require the Department to act in this way.

2.188 The committee considers it may be appropriate to limit proposed subsection 140K(5) so it is clear that the Minister is required to observe any requirements of the natural justice hearing rule in publishing information under subsection (4), as to whether or not any circumstances (as prescribed under subsection (7)) exist in a given case.

2.189 The committee also considers it may be appropriate for the bill to be amended to require that where information is published under proposed subsection 140K(4), if a time limit for an application for review has not yet expired or if a person has notified the Minister that they are seeking review of the action being taken against them, the fact that a review is pending should be included alongside the publication of the information. In addition, the committee considers it may be appropriate for the bill to be amended to include a legislative requirement that the information that has been published must be varied or removed if the action taken against the sponsor was varied or overturned following a review.

Immunity from civil liability¹⁰⁸

Initial scrutiny – extract

2.190 Proposed subsection 140K(6) provides that no civil liability will arise from any action taken by the Minister in good faith in publishing information under proposed subsection 140K(4), relating to sponsors who fail to satisfy sponsorship obligations. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack

108 Schedule 1, item 1, proposed subsection 140K(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

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.

2.191 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.¹⁰⁹

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

Minister's response

2.193 The Minister advised:

The provision of civil immunity is consistent with similar legislation, including the requirement to publish disciplinary details of registered migration agents under section 305A of the Migration Act.

The publication of sponsor sanction outcomes is in the public interest as it will assist in protecting visa holders by further reducing the potential for their exploitation, and it will allow workers to make informed decisions about potential employers. Publication will demonstrate that there are public repercussions for sponsors who breach their obligations, and act as a deterrent to a sponsor who may otherwise breach their obligations. The Government considers that it is not appropriate for the Minister to be held civilly liable in this context.

Committee comment

2.194 The committee thanks the Minister for this response. The committee notes the Minister's advice that the provision of civil immunity is consistent with similar legislation and the publication of sponsor sanction obligations is in the public interest. The committee also notes the Minister's advice that the government considers it is not appropriate for the Minister to be held civilly liable in this context.

2.195 The committee acknowledges the importance of protecting visa holders and potential workers from exploitation and deterring sponsors who might otherwise breach their obligations. However, the committee notes that a decision to take action against a sponsor who is alleged to have failed to satisfy their sponsorship obligations may be found later to have been incorrectly made, yet the publication of this information prior to that final decision could have serious implications for an employer's reputation. The committee notes that the only limitation in proposed subsection 140K(6) is that the Minister must act in good faith in publishing the information. The committee notes that in the context of judicial review, bad faith is

109 See explanatory memorandum, p. 4.

said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances. This matter has not been adequately addressed by the Minister.

2.196 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of giving the Minister immunity from civil liability in these circumstances.

Retrospective application¹¹⁰

Initial scrutiny – extract

2.197 Item 3 provides that the amendments to section 140K of the *Migration Act 1958*, as described above, apply in relation to actions taken under that section on or after 18 March 2015, making the amendments retrospective.

2.198 The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. 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.

2.199 In this instance, the explanatory memorandum states that 18 March 2015 is the date of the government's response to a report which supported a recommendation that the Department disclose greater information on its sanctions actions.¹¹¹

2.200 The committee notes that tying the commencement of legislative provisions to the timing of ministerial announcements tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

2.201 The committee therefore requests the Minister's detailed justification for the retrospective application of these amendments, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

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

111 Explanatory memorandum, p. 5.

Minister's response**2.202 The Minister advised:**

On 18 March 2015, the Government indicated its intention to publish the details of employers who breach their sponsorship obligations. The Government did this by publically accepting the recommendation in the report *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, to make sanction details public.

The Government considers that it is appropriate to apply this measure from 18 March 2015, as the measure will benefit visa holders and the wider public by further reducing the potential for exploitation, and by allowing workers to make informed decisions about potential employers. The measure will demonstrate that there are public repercussions for sponsors who breach their obligations, and will act as a deterrent to a sponsor who may otherwise breach their obligations.

The Department already undertakes a range of activities to deter businesses from breaching their sponsorship obligations, and inform visa holders and Australians about breaches. These include employer education and awareness visits, monitoring of compliance with sponsorship obligations and visa conditions, investigation of allegations, liaison with the Fair Work Ombudsman, imposition of sanctions, and publication of aggregate data on breaches.

The current framework does not allow Australians and overseas workers to sufficiently inform themselves about breaches as current information in the public domain does not identify business which have breached their legal obligations. The current framework also prevents the Department from advising persons making allegations that a sponsor has been sanctioned, which undermines public confidence in the compliance framework as complainants are unaware of any outcome of their allegation. Therefore, the Government committed to allow the public disclosure of sponsor sanctions, including information to identify the sponsor that breached their obligations.

Around 400 sponsors are sanctioned annually, therefore publishing sanction action taken since 18 March 2015 would include up to 600 sponsors. This includes sanctions for underpaying visa holders, and where the visa holder has not participated in the nominated occupation. These sanctions protect local wages and conditions, and ensure the 457 programme is only used to meet genuine skill shortages.

Publication will only occur where it has been determined by a departmental delegate that a sponsor has breached a sponsorship obligation and the breach is serious enough to warrant the imposition of a sanction under section 140K of the Migration Act.

Committee comment

2.203 The committee thanks the Minister for this response. The committee notes the Minister's advice that the government considers it is appropriate to apply this measure retrospectively as it will benefit visa holders and the wider public by reducing the potential for exploitation and allowing workers to make informed decisions about potential employers, as the current framework does not identify businesses which have breached their legal obligations. The committee also notes the Minister's advice that this measure will demonstrate there are public repercussions for sponsors who breach their obligations, will act as a deterrent to a sponsor who might otherwise breach their obligations and up to 600 sponsors are likely to be affected by this measure.

2.204 The committee notes that while it acknowledges the importance of enabling visa holders and the general public to know when actions have finally been taken against approved sponsors, it is not clear how the *retrospective* application of this law will act as a deterrent to sponsors. The committee also notes that it has taken more than two years for a bill to be brought before Parliament to implement the government's 2015 announcement, and applying these provisions retrospectively would have a detrimental impact on over 600 employers. The committee reiterates that retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

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

Significant matters in delegated legislation¹¹²***Initial scrutiny – extract***

2.206 Proposed section 506B of the *Migration Act 1958* would permit tax file numbers of visa holders to be requested, provided, used, recorded and disclosed. Subsection (7) provides that a tax file number provided under this provision may be used, recorded or disclosed by an officer 'for any purposes prescribed by the regulations'. Thus, the basis on which personal information can be used, recorded or disclosed will be set out in delegated legislation.

2.207 The committee's view is that significant matters, such as the purpose for which personal information can be used, disclosed or recorded, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum does not explain why it is

112 Schedule 1, item 8, proposed subsection 506B(7). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

necessary to include this information in delegated legislation. It states that the regulations prescribing these matters will be subject to disallowance, meaning there will be parliamentary scrutiny over the kinds of purposes.¹¹³ However, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of primary legislation.

2.208 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation the purposes for which tax file numbers may be used, recorded or disclosed.

Minister's response

2.209 The Minister advised:

The Government considers it appropriate to set out the technical details, regarding the purposes for which tax file numbers will be used, in the regulations. The scope of the regulations is limited to the facilitation of the Department of Immigration and Border Protection as specified in the Migration Act. It is intended that the regulations will limit the tax file number measure to research and compliance purposes.

The regulations will be subject to parliamentary scrutiny and disallowance when they are tabled in Parliament.

Committee comment

2.210 The committee thanks the Minister for this response. The committee notes the Minister's advice that the government considers it appropriate to set out the technical details regarding the purpose for which tax file numbers will be used in the regulations and that it is intended that the regulations will limit the tax file number measure to research and compliance purposes.

2.211 The committee notes that the Minister's response does not explain how the *purpose* for which a tax file number can be used by an officer is a 'technical detail' and therefore appropriate to be left to delegated legislation. The committee also notes that it is unclear why, if the intention is to limit the relevant purpose to research and compliance purposes, that this is not included in the primary legislation.

2.212 The committee reiterates its view that significant matters, such as the purpose for which personal information can be used, disclosed or recorded, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

113 Explanatory memorandum, p. 9.

2.213 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation the purposes for which tax file numbers may be used, recorded or disclosed.

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

Purpose	This bill seeks to amend the <i>Social Security (Administration) Act 1999</i> to remove a provision that specifies that the cashless debit card trials will end on 30 June 2018 and occur in up to three discrete locations
Portfolio	Social Services
Introduced	House of Representatives on 17 August 2017
Scrutiny principles	Standing Order 24(1)(a)(iv)

2.214 The committee dealt with this bill in *Scrutiny Digest No. 10 of 2017*. The Minister responded to the committee's comments in a letter dated 28 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.¹¹⁴

Significant matters in delegated legislation¹¹⁵

Initial scrutiny – extract

2.215 This bill seeks to remove section 124PF of the *Social Security (Administration) Act 1999* which specifies that the cashless debit card trial will occur in up to three discrete locations, include no more than 10,000 people and will end on 30 June 2018. As noted in the explanatory memorandum, removing this section will 'support the extension of arrangements in current sites, and enable the expansion of the cashless debit card to further sites'.¹¹⁶ These further sites will be determined by disallowable legislative instrument.

2.216 The effect of this bill is to convert a tightly controlled trial program into one which may be expanded so as to apply to any site chosen by the government and determined by legislative instrument. Although a level of parliamentary oversight is maintained, the legislation is no longer framed as an authorisation for a trial, to be evaluated prior to general implementation according to legislatively set criteria. Rather, the legislation now provides authority (through a legislative instrument) for the extension of cashless debit cards to as many future sites as is considered

114 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

115 Schedule 1. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(iv) of the committee's terms of reference.

116 Explanatory memorandum, p. 2.

appropriate by the government. Put simply, this bill converts authority to run a trial program into a general power to implement that program.

2.217 In this respect it may be noted that the research commissioned by the government to evaluate the initial trial sites has not yet been completed.¹¹⁷ As noted in the explanatory memorandum, the legislative instruments may specify other parameters to ensure appropriate safeguards and accountability (such as sunset dates and participant criteria).¹¹⁸ However, in converting a trial into complete authority to implement cashless debit cards, the case for enabling such matters to be provided for in delegated legislation rather than the primary legislation has not yet been established. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.218 The committee requests the Minister's detailed advice as to why the primary legislation does not include more guidance and safeguards in relation to the cashless debit card scheme, such as in relation to site selection and participant criteria, given the bill proposes that the operation of the debit card be no longer time-limited and restricted to a small-scale trial.

Minister's response

2.219 The Minister advised:

Expansion of the Cashless Debit Card

The expansion of the Cashless Debit Card is necessary to allow the Government an opportunity to build on the research findings of the evaluation (see below), to help test the card and the technology that supports it in more diverse communities and settings.

To give effect to this intention, the Bill proposes that the legislated maximums for sites, participants and the sunset date be removed, since the initial trial within these parameters has been completed. However, the Bill does not indefinitely extend or expand the Cashless Debit Card program. The legislation only removes a date beyond which the program could not continue, and allows the flexibility to test the arrangements in further sites as needed. Parliament would still retain the right to consider any expansion through legislative instruments.

Use of delegated legislation

As described in the House of Representatives Practice (6th Edition), delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for

117 See statement of compatibility, p. 3.

118 Explanatory memorandum, p. 2.

other matters such as those of technical detail. Once Parliament has laid down the principles of a new law, delegated legislation is the appropriate method through which to work out the application of the law in greater detail within, but not exceeding, those principles.

The principles around the Cashless Debit Card set out in the primary legislation include the objectives for trialling such arrangements, parameters for trial participation and guidance on the split and usage of restricted welfare payments.

Broadly, the use of delegated legislation such as legislative instruments allows the Government, with appropriate parliamentary scrutiny, to work out the application of the Cashless Debit Card on a community-by-community basis.

Site selection

The selection of sites for the Cashless Debit Card is guided by the objectives of the primary legislation. The use of legislative instruments to specify a location and define the details of how the program can operate in any particular location provides the necessary flexibility to give effect to the objectives of the program in a chosen location.

The two new locations for the Cashless Debit Card have been selected based on several factors, including community readiness and willingness, high levels of disadvantage and welfare dependence, and high levels of social harm caused by alcohol, drugs and gambling.

Details such as participant numbers and start and end dates are dependent on community needs. The use of instruments allows Government to work more closely with individual communities to tailor application of the Cashless Debit Card to meet these community needs, within the broader principles set out in the legislation.

The potential for new Cashless Debit Card sites is driven by community interest. The expansion provides for a greater number of communities to see positive outcomes as have been shown in previous communities. Many communities around the country have shown an interest in the card. There is a sense of urgency from these communities, which are looking for more tools to address the devastating impact of alcohol, drugs and gambling on their people.

In current and potential sites, engagement with community members and leaders has been ongoing, informally and formally to help Government better understand local needs and gauge interest in the program.

Participant criteria

The primary legislation does include guidance and safeguards in relation to participant criteria. The legislation specifies which social security payments can trigger a participant for the program, and that a specified trial area must be the 'usual place of residence' for a participant in that location to be triggered.

Further criteria for participation within these limitations can be specified through disallowable instruments. However, any application of the Cashless Debit Card to participants outside those specified in the legislation would be subject to the level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending Bill.

The criteria for participation set out in the legislation are directly linked to the objectives of the Cashless Debit Card. The program is testing whether restricting the amount of cash in a community can reduce the overall social harm caused by welfare-fuelled alcohol, gambling and drug misuse at the individual and community level. The community wide impacts of these harmful goods mean that the Cashless Debit Card program is most effective when a majority of people in a community who receive a welfare payment participate in the program.

However, as outlined above, these criteria can be further specified through a legislative instrument to meet a particular community's needs in addressing social harm. For example, the Cashless Debit Card could be applied to particular cohorts. In the Hinkler electorate, the intention is to roll out the Cashless Debit Card to under 35s on Newstart, Parenting Payment and Youth Allowance (Job Seeker), which will help determine whether a cohort-based approach to implementation is as effective.

Cashless Debit Card trial evaluation results

Since the introduction of the Bill on 17 August 2017, the final independent evaluation of the Cashless Debit Card trial has been finalised. The final report by ORIMA Research was released on 1 September 2017, and included results from the two initial trial sites, Ceduna, South Australia and the East Kimberley, Western Australia.

The evaluation found that it has had a "considerable positive impact" in the communities where it has operated. It also concluded the Cashless Debit Card "has been effective in reducing alcohol consumption and gambling in both trial sites and [is] also suggestive of a reduction in the use of illegal drugs", and "that there is some evidence that there has been a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling."

In particular, the evaluation reported the following findings:

- Of people surveyed who drank alcohol before the trial started, 41 per cent reported drinking alcohol less frequently (up from 25 per cent in the Wave 1 survey, which was done approximately six months into the trial); 37 per cent of binge drinkers were doing this less frequently (up from 25 per cent at Wave 1).
- A decrease in alcohol-related hospital presentations including a 37 per cent reduction in Ceduna in the first quarter of 2017 compared with first quarter of 2016 (immediately prior to the commencement of the trial).

- A 14 per cent reduction in Ceduna in the number of apprehensions under the *Public Intoxication Act* compared to the previous year.
- In the East Kimberley, decreases in the alcohol-related pick-ups by the community patrol services in Kununurra (15 per cent reduction) and Wyndham (12 per cent), and referrals to the sobering up shelter in Kununurra (8 per cent reduction).
- A decrease in the number of women in East Kimberley hospital maternity wards drinking through pregnancy.
- Qualitative evidence of a decrease in alcohol-related family violence notifications in Ceduna.
- A noticeable reduction in the number of visible or public acts of aggression and violent behaviour. Nearly 40 per cent of non-participants perceived that violence in their community had decreased.
- People are now seeking medical treatment for conditions that were previously masked by alcohol effects.
- 48 per cent of gamblers reported gambling less (up from 32 per cent at Wave 1).
- In Ceduna and surrounding local government areas (which covers a much bigger region than the card's operation), poker machine revenue was down 12 per cent. This is the equivalent of almost \$550,000 less spent on poker machines in the 12 month trial.
- The card has had "a positive impact in lowering illegal drug use" across the two sites.
- Of drug takers, 48 per cent reported using illegal drugs less often (up from 24 per cent at Wave 1).
- 40 per cent of participants who had caring responsibility reported that they had been better able to care for their children (up from 31 per cent at Wave 1).
- 45 per cent of participants have been better able to save more money (up from 31 per cent at Wave 1).
- Feedback that there has been a decrease in requests for emergency food relief and financial assistance in Ceduna.
- Merchant reports of increased purchases of baby items, food, clothing, shoes, toys and other goods for children.
- Considerable observable evidence being cited by many community leaders and stakeholders of a reduction in crime, violence and harmful behaviours over the duration of the trials.

Committee comment

2.220 The committee thanks the Minister for this response. The committee notes the Minister's advice that the expansion of the cashless debit card is necessary to

build on the research findings of the evaluation and help test the card and its supporting technology in more diverse communities and settings. The committee also notes the Minister's advice that the bill does not indefinitely extend or expand the program, rather it removes a date beyond which the program could not continue, and Parliament still retains the right to consider any expansion through legislative instruments. The Minister also advised that the selection of sites for the use of the card is guided by the objectives of the primary legislation, and the use of legislative instruments to specify a location and define details of how the program can operate in each location provides the necessary flexibility to give effect to the objectives of the program in a chosen location. The committee also notes the Minister's advice that details such as participant numbers and start and end dates are dependent on community needs, and the potential for new sites is driven by community interest. The committee also notes the Minister's advice that the cashless debit card could be applied, via a legislative instrument, to particular cohorts, such as job seekers under the age of 35.

2.221 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. However, the committee appreciates the need for flexibility and community involvement in the selection of trial sites. The committee notes that if the measures are to be applied to selected cohorts this may raise questions as to the appropriateness of distinguishing between different groups; which is an issue that may be more properly dealt with by the Parliament in the form of an amending bill.

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

2.223 In light of the detailed information provided, and the fact that the legislative instruments will be subject to disallowance, the committee makes no further comment on this matter.

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

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
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

2.225 The committee dealt with this bill in *Scrutiny Digest No. 11 of 2017*. The Minister responded to the committee's comments in a letter dated 3 October 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹¹⁹

Significant matters in delegated legislation¹²⁰

Initial scrutiny – extract

2.226 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

119 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

120 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.

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
- 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.¹²¹

2.227 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).

2.228 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.

2.229 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*.¹²² 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

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

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

lower level of executive scrutiny.¹²³ 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.¹²⁴

2.230 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.

2.231 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.

Treasurer's response

2.232 The Treasurer advised:

The Bill allows for the Australian Securities and Investments Commission (ASIC) to make financial benchmark rules and compelled financial benchmark rules and provides the parameters for matters these may address.

- The financial benchmark rules may address matters such as the responsibilities of benchmark administrator licensees and the generation and administration of financial benchmarks. Financial benchmarks and their generation and administration can be complex. As each financial benchmark is different, the flexibility of being able to quickly tailor the requirements to each financial benchmark subject to the regime is important to benchmark administrators. The appropriate operation of financial benchmarks is important to domestic and offshore users of these benchmarks and supports confidence in the Australian market.

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

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

- The compelled financial benchmark rules may be made to require an entity to provide data or information on a licensed significant financial benchmark, or to require a benchmark administrator licensee to continue to operate a significant financial benchmark specified in its licence. To effectively respond to rapid shifts or developments in the marketplace that may otherwise compromise the ongoing generation and provision of the significant financial benchmark, such rules are likely to be required at short notice, such as a few days or less. Primary legislation and regulations would not generally facilitate such a timely response. It is important to note that these rules only apply to significant financial benchmarks. That is, a benchmark that is systematically important in Australia, or a benchmark where there would be a material impact on Australian retail or wholesale investors if there was a disruption to the operation or integrity of the benchmark.

For non-compliance with the rules, a civil penalty may apply. The high maximum amount of the penalty recognises the potentially significant impact that serious misconduct in relation to financial benchmarks may have, given their widespread use in the financial system. However, as noted in the explanatory memorandum to the Bill, while the Bill imposes a high maximum amount, the primary objective of this penalty is to act as a deterrent to breaches. In practice, if a monetary penalty was to be sought, it would be proportionate to the seriousness of the breach.

In addition to responding flexibly to changing market dynamics, the obligations to be imposed on financial benchmark licensees also need to be flexible in response to international developments, including at short notice. It is important for Australia that licensed benchmark administrators and benchmark end users that Australia's regulatory regime be recognised as equivalent to key regimes overseas and that this status is maintained. Without equivalence recognition, Australian benchmarks would not be able to be used by global market participants which would cause significant market disruption. For example, Australia's largest banks may not be able to raise certain types of funding overseas as they do currently, which could negatively affect credit provision to the Australian economy. The use of rules is the most effective and timely mechanism for ensuring equivalence recognition is maintained over time.

The rules approach was also broadly supported by stakeholders in their submissions to the Council of Financial Regulator's consultation on the proposed regime, noting that this would better ensure that obligations are targeted to addressing specific risks arising from benchmark administration and continue to be aligned to global best practice, ensuring equivalence. Flexibility is also necessary so that the nature of the obligations can be tailored to apply appropriately to different benchmarks, as well as adapt to changes and emerging risks in those benchmarks. With the compelled financial benchmark rules it is particularly important that

the regime could be amended in response to rapid market developments or industry feedback.

The use of ASIC rules to prescribe much of the detail of the regime and the imposition of a civil penalty via the primary legislation for a failure to comply with the rules are both consistent with the approach taken in comparable contexts, including in relation to derivative trade reporting and market integrity rules. Checks and balances are provided in the Bill in relation to the making of the rules, including importantly the need for the Minister to consent to the making or varying of ASIC rules.

Committee comment

2.233 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that as each financial benchmark is different it is important to have flexibility to quickly tailor the requirements to each financial benchmark subject to the regime. The committee also notes the Treasurer's advice that primary legislation and regulations would not generally facilitate a timely response to rapid shifts or developments in the marketplace. The Treasurer also advised that obligations on financial benchmark licensees need to be flexible in response to international developments, including at short notice, and that it is important that Australia's regulatory regime be recognised as equivalent to key regimes overseas, and so the use of rules is the most effective and timely mechanism for ensuring equivalence recognition is maintained over time.

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

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

Procedural fairness¹²⁵

Initial scrutiny – extract

2.236 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.

125 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.

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.

2.237 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.

Treasurer's response

2.238 The Treasurer advised:

Section 908BI sets out the circumstances when ASIC may suspend or cancel a benchmark administrator licence immediately. These circumstances are narrow and are objective circumstances that would be within the knowledge of the licensee because the licensee has:

- asked ASIC for the suspension or cancellation;
- ceased carrying on a benchmark administration business for the relevant financial benchmark;
- become a Chapter 5 body corporate (meaning broadly that it is being wound up or is under administration); or
- failed to pay a levy amount that is overdue.¹²⁶

Beyond the narrow grounds set out in section 908BI, the other grounds that may give rise to a suspension or cancellation are dealt with under section 908BJ, which does require ASIC to give the licensee an opportunity to respond because the grounds under section 908BJ are less objective and more contestable. Under section 908BJ the grounds for suspension or cancellation are where ASIC considers that the licensee has breached a condition of its licence, or one of its obligations under Part 7.5B of the *Corporations Act 2001* or the associated financial benchmark rules. As the grounds are more contestable, it is appropriate in these circumstances for ASIC to be obliged to afford the licensee the opportunity to respond to the proposed grounds for suspension or cancellation at a hearing before ASIC makes a decision.

126 As outlined in the Minister's second reading speech for the ASIC Supervisory Cost Recovery Levy Bill 2017, these provisions exist to ensure the integrity of ASIC's cost recovery regime. In line with the *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017*, entities have the ability to apply for a waiver of their liability for a levy if there are exceptional circumstances justifying a waiver, or for extensions to the due date of payment.

Committee comment

2.239 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the circumstances when ASIC may suspend or cancel a licence immediately are narrow and objective and would be within the knowledge of the licensee. The committee also notes the Treasurer's advice that beyond the narrow grounds in proposed section 908BI, the bill provides that where there are more contestable grounds for suspending or cancelling a licence ASIC is obliged to afford the licensees an opportunity to respond.

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

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

Immunity from civil or criminal liability¹²⁷***Initial scrutiny – extract***

2.242 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 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.

2.243 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.¹²⁸

2.244 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.

127 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.

128 See explanatory memorandum, p. 31.

Treasurer's response

2.245 The Treasurer advised:

The immunity created by section 908CJ applies only to acts done in compliance with a requirement imposed on the person under the compelled financial benchmark rules (see above response on significant matters in delegated legislation, for a brief explanation of these rules). This protection is appropriate because if it has become necessary to compel a person to do something under the compelled financial benchmark rules, they will be doing an act necessary to support the continued existence and availability of a significant financial benchmark. This is of benefit to the Australian economy and all users of the benchmark. If the rare and exceptional circumstances have arisen such that it is necessary to compel a person to do something under the compelled financial benchmark rules, it is likely that there is a degree of abnormal market conditions and uncertainty. In recognition of the potential difficulties faced by a compelled person in these circumstances, it is appropriate to provide civil and criminal immunity so long as the person is acting in good faith in carrying out the requirement imposed compulsorily on them in order to preserve the continued availability of the significant financial benchmark.

The impact on an affected person who is not able to bring an action against a person protected under section 908CJ is less than the widespread and significant impact that would be suffered by users of a significant financial benchmark if its availability was disrupted.

Committee comment

2.246 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the immunity created by proposed section 908CJ applies only to acts done by a person where the person has been compelled to do something under the rules, and in recognition of the potential difficulties faced by a compelled person in these circumstances, it is appropriate to provide civil and criminal liability so long as the person is acting in good faith.

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

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

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)

2.249 The committee dealt with this bill in *Scrutiny Digest No. 11 of 2017*. The Treasurer responded to the committee's comments in a letter dated 3 October 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.¹²⁹

Retrospective application¹³⁰

Initial scrutiny – extract

2.250 This bill seeks to disallow deductions for travel costs relating to residential investment properties,¹³¹ limit depreciation deductions for plant and equipment in residential premises,¹³² and implement an annual vacancy fee on foreign owners of residential real estate where the residential property is not occupied or genuinely

129 See correspondence relating to *Scrutiny Digest No. 12 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

130 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.

131 Schedule 1.

132 Schedule 2.

available on the rental market for at least six months in a 12 month period.¹³³ 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).

2.251 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 2017.¹³⁴ The amendments in 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.¹³⁵ 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).¹³⁶

2.252 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.

2.253 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.

2.254 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.¹³⁷

133 Schedule 3.

134 Schedule 1, item 5.

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

136 Schedule 3, item 12.

137 Explanatory memorandum, p. 38.

2.255 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.¹³⁸ 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.

Treasurer's response

2.256 The Treasurer advised:

Retrospective application of the measures relating to travel costs deductions (Schedule 1, item 5)

The retrospective application of these amendments is consistent with the 2017-18 Budget announcement by the Government. This is necessary to ensure taxpayers could not avoid the operation of the amendments by incurring deductible travel costs prior to the Bill being passed. It will also ensure affected taxpayers who incur travel costs throughout the income tax year, beginning 1 July 2017, are treated equally. Any adverse impact is expected to be minor, given the retrospective application was included in the 2017-18 Budget announcement and has been widely publicised.

Retrospective application of the proposed vacancy fees regime for foreign persons (Schedule 3, item 12 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017)

Schedule 3 of the Bill, and the related Imposition Bill, implement an annual vacancy fee on foreign owners of residential real estate where their property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

The vacancy fee was announced as part of the 2017-18 Budget as an annual vacancy charge to take immediate effect for foreign persons who make a foreign investment application for residential property from 7.30pm on 9 May 2017. This is to ensure that foreign persons could not circumvent the operation of the amendments by lodging applications to acquire residential property between the time of the announcement and the commencement of the amendments to avoid the vacancy fee and the requirement to make properties available for occupation.

Importantly, foreign persons who made a foreign investment application before 7:30pm on 9 May 2017, but have not yet purchased a property or had not yet been notified of the outcome of their application will not be affected. Consequently the vacancy fee only applies to new applications and applicants were on notice of the new fee from the time it

138 Explanatory memorandum, pp 17 and 15.

commenced. In particular, the Foreign Investment Review Board website provided clear alerts and guidance material highlighting the new rule.

The retrospective application of the vacancy fee can also be managed by affected foreign persons as they have a full 12 month period to ensure that the property is occupied or made genuinely available for at least six of the 12 months. Foreign owners of residential real estate will be required to report annually about the use of their property in the previous 12 months - the first possible date that reporting may be required is 9 May 2018.

Furthermore, foreign owners of residential property will have the full 12 month period to gather any relevant documentation (for example, proof of occupation) required for the purpose of the vacancy fee. Noting the above timeframes, the earliest that a liability for the vacancy fee could arise is 9 May 2018.

The annual vacancy fee is intended to make more properties available to Australians, the benefits of which would outweigh possible adverse consequences of the early commencement of the amendments.

Committee comment

2.257 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the retrospective application of the measures in Schedule 1, which seek to prevent travel costs relating to residential investment properties from being claimed as income tax deductions, is necessary in order to ensure that taxpayers cannot avoid the measure by incurring travel costs prior to the passage of the bill and so that taxpayers who incur travel costs throughout 2017–18 will be treated equally. The Treasurer also stated that adverse impacts from the measure are expected to be minor, given that the retrospective nature of the measure has been widely publicised.

2.258 The committee also notes the Treasurer's advice on the retrospective application of the measures in Schedule 3 and the related Fees Amendment Bill, which seek to impose a fee on foreign owners of residential real estate in cases where their property is not occupied or available on the rental market for at least six months in a 12 month period. The Treasurer stated that it is necessary to apply the measures from the time of their announcement (7.30 pm on 9 May 2017) in order to prevent foreign investors circumventing the provisions by lodging applications prior to the commencement of the amendments.

2.259 The committee notes the Treasurer's advice that the provisions will not apply to foreign investment applications made prior to 7.30 pm on 9 May 2017 and that affected foreign persons will have a full 12 month period to respond to the new requirements before any vacancy fee liability may arise.

2.260 With respect to the Treasurer's explanation that affected persons will have 'a full 12 month period to ensure that the property is occupied or made genuinely available for at least six of the 12 months', the committee notes that a full 12 month

period would be available only if affected persons have acted on the assumption that the policy announced on 9 May 2017 will become law.

2.261 In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

2.262 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate.¹³⁹

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

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

Review rights¹⁴⁰

Initial scrutiny – extract

2.265 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.

2.266 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*

139 See Senate Resolution No. 44

140 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.

are excluded from ADJR Act review.¹⁴¹ 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.

2.267 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.

Treasurer's response

2.268 The Treasurer advised:

A decision to declare a charge over a property under section 115L of Schedule 3 to the Bill is not subject to merits review consistent with the existing treatment of decisions under the *Foreign Acquisitions and Takeovers Act 1975* (the Act), which are not afforded with merits review.

Providing for merits review would be inconsistent with the existing operation of the Act, and could adversely impact the enforcement of the annual vacancy fee. A decision to declare a charge under section 115L could not occur while a review process was underway, and the delay to declare a charge may allow for the asset to be disposed of prior to recouping unpaid vacancy fees.

Furthermore, foreign persons affected by a decision to declare a charge over the property may be based overseas with limited interaction with the Australian regulatory systems (including taxation). As such, there will be fewer avenues available to recover the amounts owed to the Commonwealth (as a result of non-payment of the vacancy fee) because there may be no other assets or income available within Australia to enforce payment. The assumption that the foreign person will be based overseas is drawn from the fact that they have incurred the vacancy fee as a result of leaving the property vacant for more than six months of a 12 month period.

While formal merits review will not be available, foreign persons will be afforded the opportunity to engage with the Australian Taxation Office (ATO) about the payment of vacancy fees prior to the ATO taking action to declare a charge over the property.

At the time foreign persons notify the ATO of the acquisition of the property, they will be notified of:

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

- the requirements to utilise the property for at least six months of a 12 month period;
- the liability to pay a vacancy fee if this requirement is not met; and
- the potential enforcement of unpaid vacancy fees through mechanisms such as declaring a charge over the land.

The ATO will also endeavour to contact foreign persons that may be subject to enforcement action and provide them the opportunity to engage with and declare any relevant information prior to commencing enforcement action. A foreign person subject to a charge under section 115L will be notified by the ATO that a charge has been declared over the property, and can seek alternative methods for meeting unpaid vacancy fees (for example, garnishee provisions).

Committee comment

2.269 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that, consistent with the existing treatment of decisions under the *Foreign Acquisitions and Takeovers Act 1975*, a decision to declare a charge under proposed section 115L would not be subject to merits review. Beyond the issue of consistency, the Treasurer states that allowing merits review of a decision to declare a charge under proposed section 115L would delay the decision and potentially allow for an asset to be disposed of prior to unpaid vacancy fees being recouped. Furthermore, foreign persons affected by such a decision may be located overseas and have no other assets or income available in Australia, thereby limiting the methods by which amounts owed to the Commonwealth could be recovered.

2.270 The committee also notes the Treasurer's advice that foreign persons will be notified of the new occupancy requirements at the time they notify the ATO of the acquisition of a property and that the ATO will seek to contact foreign persons prior to the commencement of any enforcement action.

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

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

- 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](#).

Appendix 1
Response from the Finance Minister relating to
Appropriation Bills



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS17-001088

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

Dear Senator Polley

I refer to the letter of 15 June 2017, sent to my senior adviser by Ms Anita Coles on behalf of the Senate Scrutiny of Bills Committee (the Committee) and my initial response to the Committee of 17 June 2017. I apologise for the delay in providing you with a final response.

The letter drew my attention to the Committee's *Scrutiny Digest 6 of 2017*, which requested information in relation to *Appropriation Bill (No. 1) 2017-2018*, *Appropriation Bill (No. 2) 2017-2018* and the *Government Procurement (Judicial Review) Bill 2017*. I have written to you separately on the *Government Procurement (Judicial Review) Bill 2017*.

Appropriation Bill (No. 1) 2017-2018

New Administered Outcomes

As mentioned in my previous responses to the Committee and in the Senate on 17 March 2016, the allocation of measures between odd and even-numbered bills is consistent with the long-standing interpretation by all Governments of the Senate-executive compact, as adjusted in 1999 following the introduction of accrual-based budgeting.

Examples of non-operating items (equity injections, administered assets and liabilities), State, ACT, NT and local government items and corporate entity items of new measures included in even-numbered bills from 2013-14 to 2015-16 are shown in Attachment A. Due to the difficulty of interrogating older data in various legacy systems and the call on departmental resources, the list for the purpose of this request does not go back further.

However further examples of new measures included in even-numbered bills from 2006-07, relating in these examples to New Administered Outcomes, are at Attachment B.

Advance to the Finance Minister

There have been 49 Advances to the Finance Minister (AFM) (included in 48 Determinations,) over the past twelve financial years from 2006-07. A summary is at Attachment C. A report is tabled in Parliament for every year in which one or more AFMs is provided. The reports regarding AFMs are published on my Department's website at:[http://www.finance.gov.au/publications/advance to the finance minister/](http://www.finance.gov.au/publications/advance%20to%20the%20finance%20minister/).

Appropriation Bill (No. 2) 2017-2018

Payments to States, ACT, NT and local government - Portfolio Budget Statements

My advice was sought as to whether my department is able to draw the new mandatory information requirement regarding appropriations for payments to the States, Territories and local government to the attention of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet.

These departments have included additional information on their websites since the Budget, as follows:

- the Attorney-General's Department at <https://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Pages/SchoolsSecurityProgramme.aspx>;
- the Department of Education and Training at <https://www.education.gov.au/funding-schools>; and
- the Department of the Prime Minister and Cabinet at <https://www.pmc.gov.au/resource-centre/pmc/portfolio-budget-statements-2017-2018>.

My Department has consulted with these departments. I am advised that the mandatory information requirements will be met in the future.

Payments to States, ACT, NT and local government - Budget Paper No. 3

The Committee also sought my advice regarding its suggestions in relation to the provision of general information in Budget Paper No. 3 about the terms and conditions attaching to section 96 grants to the States. My Department will liaise with the Department of the Treasury regarding the possible provision of additional information in Budget Paper No. 3 in the next Budget.

Debit Limits

The Committee further sought confirmation as to how much is currently expected to be spent in 2017-18 under each of the three grant programs for which a debit limit is specified in *Appropriation Bill (No. 2) 2017-2018*, and the reasons for appearing to set the debit limit for these programs well above the expected level of expenditure.

The debit limit for the Education Investment Fund for 2017-18 has been set at \$2 million and reflects the final payment for the remaining project, Creative Futures Tasmania.


The debit limit for general purpose finance assistance for 2017-18 has been set at \$5 billion consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$0.7 billion. The debit limit has been set higher to provide for variations in payment amounts, especially for royalty payments which vary following fluctuations in prices and production levels.

The debit limit for national partnership payments has been set at \$25 billion, again consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$12.6 billion. The debit limit has been set above the estimated level of expenditure to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual Appropriation Bills, which could include:

- an increase to existing undertakings to the States, including movements of payments between years;
- providing for any large-scale natural disasters or other major unexpected events; or
- funding for existing programs that may be required following an estimates update.

Thank you for bringing the issues raised in the Committee's *Scrutiny Digest 6 of 2017* to my attention.

I have copied this letter to the Treasurer.

 Mathias Cormann
Minister for Finance

15 September 2017

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
	Appropriation Bill (No. 2)	Aboriginal Hostels Limited - upgrades and repairs	Aboriginal Hostels Limited	4,918
		Addressing gang violence and organised crime - National Anti-Gang Taskforce, Gang Intelligence Centre and Criminal Assets Confiscation Taskforce	Australian Federal Police	1,548
		Afghanistan - Australian Embassy	Department of Foreign Affairs and Trade	9,474
		Asbestos Safety and Eradication Agency - establishment	Department of Education, Employment and Workplace Relations	183
		Australian Broadcasting Corporation - continuation of Enhanced News Services	Australian Broadcasting Corporation	1,800
		Australian Broadcasting Corporation - digital delivery of content	Australian Broadcasting Corporation	1,500
		Australian Bureau of Statistics - additional funding for Input-Output Data Tables and the Household Expenditure Survey	Australian Bureau of Statistics	80
		Australian Communications and Media Authority - frequency monitoring facilities - upgrade and relocation	Australian Communications and Media Authority	4,706
		Australian Communications and Media Authority - revenue assurance project - continuation	Australian Communications and Media Authority	1,000
		Australian Government Grants System	Department of Finance and Deregulation	228
		Australian Radiation Protection and Nuclear Safety Agency - improving Australia's capacity to deliver effective radiation protection and nuclear safety	Australian Radiation Protection and Nuclear Safety Agency	2,500
		Australian Research Council - system standardisation	Australian Research Council	1,861
		Australian Securities and Investments Commission client contact centre — National Business Names registration system	Australian Securities and Investments Commission	1,591
			Australian Transaction Reports and Analysis Centre	8,171
		Australian Transaction Reports and Analysis Centre - Establishment of new data centre		
		Better Schools - National Plan for School Improvement - continued support for students with disabilities	Department of Education, Employment and Workplace Relations	388
		Bureau of Meteorology - recommissioning of Tennant Creek radar	Bureau of Meteorology	460
		Connecting People with Jobs - extension	Department of Education, Employment and Workplace Relations	240
		Family and Parental Payments - change to rules for receiving payments overseas	Department of Human Services	2,200
		Family Tax Benefit Part A - Changes to age of eligibility	Department of Human Services	1,828
		Improving Government Efficiency - Better Procurement Price Outcomes	Department of Finance and Deregulation	3,838
		Integrated Service Delivery Framework	Department of Human Services	1,776
			Department of Immigration and Citizenship	5,000
		Job Services Australia - changed payment arrangements for volunteer job seekers	Department of Education, Employment and Workplace Relations	160
		Living Longer. Living Better - addressing workforce pressures - aged care workforce supplement	Department of Veterans' Affairs	1,481
		Mental health services - expansion	Department of Veterans' Affairs	859
		Nairobi Chancery - construction	Department of Foreign Affairs and Trade	155
				210
		National Broadband Network - shareholder and regulatory policy support - increase	Department of Broadband, Communications and the Digital Economy	
		National Drought Program Reform	Department of Human Services	5,196
		National Medical Stockpile - replenishment	Department of Health and Ageing	16,579
		Official development assistance - Enhancing Australia's Commitment to Development in the Asia-Pacific Region	AusAID	350
		Official development assistance - Enterprise Resource Planning system	AusAID	1,501
		Pension Bonus Scheme - cease late registrations	Department of Veterans' Affairs	183
		Personal income tax — net medical expenses tax offset phase out	Australian Taxation Office	416
		Regional Assistance Mission to Solomon Islands - transition	Australian Federal Police	4,424
			Department of Foreign Affairs and Trade	87
			Attorney-General's Department	16,856
		Royal Commission into Institutional Responses to Child Sexual Abuse - establishment		
		Student Start-up Scholarships - conversion to Income Contingent Loans	Australian Taxation Office	1,047
		Superannuation reforms - extending the normal deeming rules to new superannuation account-based income streams	Department of Human Services	256

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000		
2013/14	Appropriation Bill (No. 4)	Superannuation reforms — higher concessional contributions cap	Australian Taxation Office	254		
		Superannuation reforms — reforming the tax exemption for earnings on superannuation assets supporting retirement income streams	Department of Finance and Deregulation	195		
		Supporting Senior Australians - Housing Help for Seniors - pilot	Department of Human Services Department of Veterans' Affairs	1,332 1,738		
		Synthetic greenhouse gases and ozone depleting substances - implementation of destruction incentives program and reduction in regulatory burden	Department of Sustainability, Environment, Water, Population and Communities Australian Institute of Family Studies	967 196		
		Tackling Problem Gambling - establishing the Australian Gambling Research Centre				
		Tax administration — enhancing Standard Business Reporting, the Australian Business Register and Australian Business Number administration	Australian Taxation Office	18,327		
		Tax agent services licensing regime - online registration for financial advisors	Australian Securities and Investments Commission Australian Taxation Office	1,020 1,607		
		Tax compliance — improving compliance through third party reporting and data matching				
		Townsville Convention and Entertainment Centre - contribution	Department of Regional Australia, Local Government, Arts and Sport	5,000		
		Addressing the Backlog and Reintroducing Temporary Protection Visas	Department of Immigration and Border Protection	3,600		
		Enhancing Border Controls and Improving Identity Management	Department of Immigration and Border Protection	1,000		
		Green Army - establishment	Department of Employment	264		
		Job Commitment Bonus - establishment	Department of Human Services	361		
		Operation Sovereign Borders - Enhancing people smuggling intelligence gathering, disruption and joint policing	Australian Federal Police	968		
		Appropriation Bill (No. 6)	Operation Sovereign Borders - joint agency taskforce	Australian Secret Intelligence Service Australian Security Intelligence Organisation	650 100	
	Relocation Assistance to Take up a Job programme - establishment		Department of Immigration and Border Protection	1,124		
	Royal Commission into the Home Insulation Programme		Department of Employment	258		
	Seniors Employment Incentive Payment - establishment		Attorney-General's Department	100		
	Tackling Crime - increased cargo and mail screening at the border		Department of Employment	514		
	Tasmanian Jobs Programme - pilot		Australian Customs and Border Protection Service	4,245		
	Royal Commission into Trade Union Governance and Corruption - establishment		Department of Employment Attorney-General's Department	138 5,043		
	2014/15		Appropriation Bill (No. 2)	A Competitive Agriculture Sector - stronger biosecurity and quarantine arrangements	Attorney-General's Department	80
				Australia's diplomatic engagement in Afghanistan - continuation	Department of Agriculture Department of Foreign Affairs and Trade	2,042
				Baghdad Embassy - relocation	Department of Foreign Affairs and Trade	8,227
				Bureau of Meteorology - improved efficiency	Bureau of Meteorology	100
				Commonwealth Seniors Health Card - include untaxed superannuation income in the eligibility assessment	Department of Veterans' Affairs	548
				Enhancing Online Safety for Children	Department of Communications	219
				Export Finance and Insurance Corporation - capital injection	Department of Foreign Affairs and Trade	200,000
				Medicare Benefits Schedule - introducing patient contributions for general practitioner, pathology and diagnostic imaging services	Department of Human Services	5,406
		National Anti-Gang Squad		Australian Federal Police	179	
Personally Controlled Electronic Health Record System - continuation		Department of Human Services Department of Health		1,000 95		
Pharmaceutical Benefits Scheme - Medication Charts for Public and Private Hospitals						
Restart - boosting the wage subsidy for mature age job seekers		Department of Employment		1,241		
Routine Replenishment of the National Medical Stockpile		Department of Health		5,682		
Royal Commission into Trade Union Governance and Corruption - establishment		Attorney-General's Department		250		
Schools Security Programme		Attorney-General's Department		5,712		
Simplifying Medicare safety net arrangements	Department of Human Services	1,963				
Social Security Agreement with India	Australian Taxation Office	793				
Sporting Schools Initiative	Australian Sports Commission	1,500				
Stronger participation incentives for job seekers under 30	Department of Employment	4,685				
Timor-Leste Police Development Programme - continuation	Australian Federal Police	87				

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
	Appropriation Bill (No. 2)	Upholding quality - Higher Education Information Management System - expansion	Department of Education	915
		Western Front Interpretive Centre - Villers-Bretonneux, France - initial funding	Department of Veterans' Affairs	6,061
	Appropriation Bill (No. 4)	Bathurst 200 Commemorative Flagstaff Project - contribution	Department of Infrastructure and Regional Development	250
		Enhanced Public Register of Financial Advisers - establishment	Australian Securities and Investments Commission	3,415
		Higher Education Reforms - amendments	Australian Taxation Office	594
		Introduction of Temporary Protection Visas and Safe Haven Enterprise Visas	Department of Immigration and Border Protection	801
		Kyiv - interim embassy and Operation Bring Them Home	Department of Foreign Affairs and Trade	2,804
		National security - additional counter-terrorism funding	Australian Security Intelligence Organisation	15,660
			Department of Immigration and Border Protection	7,042
			Australian Crime Commission	3,422
		Pharmaceutical Benefits Scheme - new and amended listings	Department of Health	380
		Reform of the Remote Jobs and Communities Programme	Department of Employment	3,039
		Strengthening the Job Seeker Compliance Framework	Department of Employment	943
	Appropriation Bill (No. 6)	Inspector-General of Taxation - additional funding	Inspector General of Taxation	808
		Intercountry Adoption - national support service	Department of Foreign Affairs and Trade	144
	Appropriation Bill (No. 2)	Aged Care - Alignment of Aged Care Means Testing Arrangements	Department of Veterans' Affairs	151
		Australian embassy in Baghdad - continuation	Department of Foreign Affairs and Trade	10,979
		Australian Nuclear Science and Technology Organisation - interim radioactive waste storage	Australian Nuclear Science and Technology Organisation	4,668
		Australian Nuclear Science and Technology Organisation - repatriation of intermediate level radioactive waste	Australian Nuclear Science and Technology Organisation	4,543
		Australia's diplomatic engagement in Afghanistan - continuation	Department of Foreign Affairs and Trade	5,011
		Digital Transformation Agenda - Stage One and establishment of the Digital Transformation Office	Australian Taxation Office	14,776
			Department of Human Services	266
			Department of Social Services	34,187
			Department of Industry and Science	1,152
		Disability Employment - A Better Way to Work	Department of Employment	111
		Emerging International Airports	Department of Immigration and Border Protection	2,795
			Department of Agriculture	317
		Expanding Australia's Diplomatic Footprint	Department of Foreign Affairs and Trade	20,681
			Australian Securities and Investments Commission	1,352
		Growing Jobs and Small Business - crowd-sourced equity funding for public companies		
		Growing Jobs and Small Business - Engaging Early School Leavers	Department of Employment	295
		Growing Jobs and Small Business - Further Strengthening the Job Seeker Compliance Arrangements	Department of Employment	358
		Growing Jobs and Small Business - Wage Subsidies - redesign	Department of Employment	313
		Growing Jobs and Small Business - Youth Employment Strategy - Intensive Support for Vulnerable Job Seekers	Department of Employment	4,447
		Growing Jobs and Small Business - Youth Employment Strategy - Revised waiting period for youth income support	Department of Employment	798
		Growing Jobs and Small Business Package - National Work Experience Programme	Department of Employment	52
		Inspector-General of Taxation - additional funding	Inspector General of Taxation	198
		Intercountry Adoption - national support service	Department of Foreign Affairs and Trade	64
		Investment Approaches to Welfare	Department of Social Services	744
		Military Rehabilitation and Compensation Act 2004 - Single Appeal Path	Department of Veterans' Affairs	100
		National Disability Insurance Agency Full Scheme ICT	Department of Human Services	5,557
		National Immunisation Programme - new and amended listings	Department of Human Services	2,359
			Australian Secret Intelligence Service	6,891
		National Security — Australian Secret Intelligence Service — strengthening capabilities		
		National Security - Strengthen and Enhance Australia's Border Protection Services - further measures	Australian Commission for Law Enforcement Integrity	297
			Department of Immigration and Border Protection	18,472

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
		Norfolk Island Reform	Australian Taxation Office	942
			Department of Employment	65
			Department of Human Services	1,501
			Department of Immigration and Border Protection	5,359
			Department of Agriculture	961
		Reducing red tape - reforms to the Australian Taxation Office	Australian Taxation Office	18,800
			Department of Health	3,534
		Reducing the Burden of the Industrial Chemicals Regulatory Framework to Industry		
		Refugee resettlement arrangements for Illegal Maritime Arrivals in offshore processing centres	Department of Immigration and Border Protection	141,822
		Safety, Rehabilitation and Compensation Act 1988 reforms - Calculating Permanent Impairment and the Maximum Payable	Department of Veterans' Affairs	94
		Safety, Rehabilitation and Compensation Act 1988 reforms - Multiple Injuries Arising out of the One Event	Department of Veterans' Affairs	84
		Smaller Government - Immigration and Border Protection Efficiencies	Department of Immigration and Border Protection	4,265
		Streamlining and improving the sustainability of Courts	Department of Finance	7,864
		Strengthening Australia's foreign investment framework	Australian Taxation Office	9,234
			Department of the Treasury	1,700
		Strengthening the Integrity of Welfare Payments	Australian Transaction Reports and Analysis Centre	1,750
			Department of Human Services	51
		Supply and Replenishment of the National Medical Stockpile	Department of Health	6,924
		VET FEE-HELP - enhanced compliance regime	Department of Education and Training	3,600
		Welfare Payment Infrastructure Transformation — Tranche One	Department of Human Services	18,646
	Appropriation Bill (No. 4)	Addressing Welfare Reliance in Remote Communities	Department of Employment	426
			Department of Human Services	7,665
		Aged Care Provider Funding - Improved Compliance	Department of Health	10,674
		Higher Education Loan Programme - strengthened compliance	Australian Taxation Office	1,637
		National Disability Insurance Scheme - Transition to full Scheme	Department of Human Services	2,425
		Reducing red tape — improvements to data and analytics infrastructure of the Australian Taxation Office	Australian Taxation Office	11,385
		Streamlining Student Visa Processing	Department of Education and Training	308
		Syrian and Iraqi Humanitarian Crisis	Australian Security Intelligence Organisation	135
		Tax administration — Single Touch Payroll Reporting	Australian Taxation Office	59,524
		VET FEE-HELP - strengthened compliance	Department of Education and Training	243

Notes:

The information is from the Central Budget Management System (CBMS) and reflected in the relevant year's Budget Papers.

Amounts appearing in the schedules to the Bills are the proposed appropriation amount for the relevant item and further information can be found in the relevant entity Portfolio Statements.

New Administered Outcomes/Expenses

The following table shows examples of entirely New Administered Outcomes (known as New Administered Expenses prior to 2010-2011) included in even-numbered appropriation bills:

Bill	Portfolio	Entity	Outcome	Amount (\$m)
<i>Appropriation Bill (No. 2) 2012-2013</i>	Broadband, Communications and the Digital Economy	Telecommunications Universal Service Management Agency	Outcome 1 - Support the delivery of universal service and other public interest telecommunications services for all Australians in accordance with Government policy, including through the management of telecommunications service agreements and grants	45.000
<i>Appropriation Bill (No. 4) 2009-2010</i>	Treasury	Australian Prudential Regulation Authority	Outcome 1 - Enhanced public confidence in Australia's financial institutions through a framework of prudential regulation which balances financial safety and efficiency, competition, contestability and competitive neutrality	1.524
<i>Appropriation Bill (No. 2) 2007-2008</i>	Environment and Water Resources	Department of the Environment and Water Resources	Outcome 3 - More efficient and sustainable use of Australia's water resources	58.831
<i>Appropriation Bill (No. 4) 2007-2008</i>	Human Services	Medicare Australia	Outcome 1 - Improving Australia's health through payments and information	3.492

Use of Advance to the Finance Minister provisions over the past twelve financial years from 2006-07

The following table provides a summary of Advances to the Finance Minister (AFM) over the past twelve years. These are reported annually to the Parliament and published on my Department's website. The AFM's are available on the Federal Register of Legislation. A link to each Explanatory Statement is included below.

Year	Act	Qty	Description	Date	Amount (\$)
2017-18	No. 1	1	Australian Bureau of Statistics Departmental Item https://www.legislation.gov.au/Details/F2017L01005/Explanatory%20Statement/Text	09/08/2017	122,000,000.00
2016-17	-	0	-	-	-
2015-16	No. 1	1	Australian Electoral Commission Departmental Item https://www.legislation.gov.au/Details/F2016L00673/Explanatory%20Statement/Text	04/05/2016	101,237,000.00
2014-15	-	0	-	-	-
2013-14	-	0	-	-	-

Year	Act	Qty	Description	Date	Amount (\$)
2012-13	No. 1	6	Department of Education, Employment and Workplace Relations Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2013L00553/Explanatory%20Statement/Text	08/03/2013	24,117,394.97
			Department of Health and Ageing Administered Item, Outcome 13 https://www.legislation.gov.au/Details/F2013L00558/Explanatory%20Statement/Text	26/03/2013	107,000,000.00
			Administered Item, Outcome 10*	27/06/2013	12,500,000.00
			Administered Item, Outcome 14* https://www.legislation.gov.au/Details/F2013L01211/Explanatory%20Statement/Text		2,200,000.00
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2013L01045/Explanatory%20Statement/Text	18/06/2013	91,017,000.00
			Department of Regional Australia, Local Government and Sport Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2013L01265/Explanatory%20Statement/Text	28/06/2013	4,632,500.00

*This Determination included two Advances.

Year	Act	Qty	Description	Date	Amount (\$)
2011-12	No. 1	6	Department of Education, Employment and Workplace Relations Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2012L00049/Explanatory%20Statement/Text	11/01/2012	33,242,205.00
			Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2012L00774/Explanatory%20Statement/Text	22/03/2012	14,327,392.10
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2012L01521/Explanatory%20Statement/Text	10/05/2012	5,561,983.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2012L01522/Explanatory%20Statement/Text	28/06/2012	17,610,000.00
			Department of Regional Australia, Local Government, Arts and Sport Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2012L01523/Explanatory%20Statement/Text	28/06/2012	6,000,000.00
			Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2012L01529/Explanatory%20Statement/Text	28/06/2012	6,200,000.00
	No. 2	1	Department of Regional Australia, Regional Development and Local Government Payments to State, ACT, NT and local government item, Outcome 1 https://www.legislation.gov.au/Details/F2011L02712/Explanatory%20Statement/Text	05/12/2011	41,881,000.00

Year	Act	Qty	Description	Date	Amount (\$)
2010-11	No. 1	5	Department of the Prime Minister and Cabinet Administered Item, Outcome 2 https://www.legislation.gov.au/Details/F2011L00446/Explanatory%20Statement/Text	08/03/2011	30,701,000.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2011L01128/Explanatory%20Statement/Text	14/06/2011	7,500,000.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2011L01350/Explanatory%20Statement/Text	24/06/2011	3,130,000.00
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2011L01014/Explanatory%20Statement/Text	06/06/2011	14,159,000.00
			Australian Electoral Commission Departmental Item https://www.legislation.gov.au/Details/F2011L01016/Explanatory%20Statement/Text	06/06/2011	5,100,000.00

Year	Act	Qty	Description	Date	Amount (\$)
2009-10	No. 1	6	Department of the Treasury Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2010L00149/Explanatory%20Statement/Text	18/01/2010	29,675,000.00
			Department of Health and Ageing Administered Item, Outcome 14 https://www.legislation.gov.au/Details/F2010L00340/Explanatory%20Statement/Text	04/02/2010	6,440,080.00
			Department of Education, Employment and Workplace Relations Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2010L00597/Explanatory%20Statement/Text	25/02/2010	10,364,000.00
			Department of Immigration and Citizenship Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2010L01479/Explanatory%20Statement/Text	24/05/2010	72,572,000.00
			Department of Agriculture, Fisheries and Forestry Administered Item, Outcome 2 https://www.legislation.gov.au/Details/F2010L01677/Explanatory%20Statement/Text	08/06/2010	1,808,382.00
			AusAid Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2010L01790/Explanatory%20Statement/Text	22/06/2010	29,381,000.00

Year	Act	Qty	Description	Date	Amount (\$)		
2008-09	No. 1	7	Wheat Exports Australia Departmental Item https://www.legislation.gov.au/Details/F2008L04299/Explanatory%20Statement/Text	03/11/2008	1,107,000.00		
			Bureau of Meteorology Administered Item https://www.legislation.gov.au/Details/F2008L04452/Explanatory%20Statement/Text	24/11/2008	20,000,000.00		
			Department of Foreign Affairs and Trade Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L00486/Explanatory%20Statement/Text	09/02/2009	22,208,044.00		
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L02534/Explanatory%20Statement/Text	22/06/2009	2,266,200.00		
			Australian Trade Commission Administered item, Outcome 1 https://www.legislation.gov.au/Details/F2009L02450/Explanatory%20Statement/Text	16/06/2009	50,000,000.00		
			Department of Innovation, Industry, Science and Research Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L02491/Explanatory%20Statement/Text	18/06/2009	14,717,045.00		
			Department of Families, Housing, Community Services and Indigenous Affairs Administered item, Outcome 4 https://www.legislation.gov.au/Details/F2009L02600/Explanatory%20Statement/Text	25/06/2009	10,539,463.00		
			No. 2	2	Department of Infrastructure, Transport, Regional Development and Local Government State, ACT, NT and local government item, Outcome 3 https://www.legislation.gov.au/Details/F2009L00712/Explanatory%20Statement/Text	23/02/2009	206,500,247.00
					State, ACT, NT and local government item, Outcome 1 https://www.legislation.gov.au/Details/F2009L02601/Explanatory%20Statement/Text	25/06/2009	29,016,740.00

Year	Act	Qty	Description	Date	Amount (\$)
2007-08	No. 1	5	Australian Taxation Office Administered Expenses - Outcome 1 https://www.legislation.gov.au/Details/F2007L02200/Explanatory%20Statement/Text	05/07/2007	800,000.00
			Department of Health and Ageing Administered Expenses - Outcome 9 https://www.legislation.gov.au/Details/F2007L02389/Explanatory%20Statement/Text	27/07/2007	3,204,267.00
			Administered Expenses - Outcome 13 https://www.legislation.gov.au/Details/F2007L04155/Explanatory%20Statement/Text	17/10/2007	48,760,078.00
			Department of Agriculture, Fisheries and Forestry Administered Expenses - Outcome 1 https://www.legislation.gov.au/Details/F2008L00203/Explanatory%20Statement/Text	18/01/2008	90,183,625.00
			Department of Foreign Affairs and Trade Administered Expenses - Outcome 3 https://www.legislation.gov.au/Details/F2008L00647/Explanatory%20Statement/Text	25/02/2008	2,998,508.00
	No. 2	1	Department of Agriculture, Fisheries and Forestry Administered Payments to States, ACT, NT and local government - Outcome 1 https://www.legislation.gov.au/Details/F2008L00401/Explanatory%20Statement/Text	11/02/2008	73,226,278.00

Year	Act	Qty	Description	Date	Amount (\$)
2006-07	No. 1	4	Department of Foreign Affairs and Trade Administered Expenses- Outcome 3 https://www.legislation.gov.au/Details/F2006L02669/Explanatory%20Statement/Text	07/08/2006	8,989,493.00
			Administered Expenses- Outcome 3 https://www.legislation.gov.au/Details/F2007L00280/Explanatory%20Statement/Text	01/02/2007	8,989,493.00
			Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L01884/Explanatory%20Statement/Text	20/06/2007	19,527,125.00
			Department of Immigration and Citizenship Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L02027/Explanatory%20Statement/Text	27/06/2007	1,250,000.00
	No. 2	4	Department of Health and Ageing Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L01678/Explanatory%20Statement/Text	04/06/2007	12,026,000.00
			Department of Agriculture, Fisheries and Forestry Payments to States, ACT, NT and local government - Outcome 1 https://www.legislation.gov.au/Details/F2007L01934/Explanatory%20Statement/Text	22/06/2007	57,110,565.00
			Department of Transport and Regional Services Payments to States, ACT, NT and local government - Outcome 2 https://www.legislation.gov.au/Details/F2007L01925/Explanatory%20Statement/Text	22/06/2007	4,967,491.00
			Payments to States, ACT, NT and local government - Outcome 2 https://www.legislation.gov.au/Details/F2007L02028/Explanatory%20Statement/Text	27/06/2007	858,355.00

Appendix 2

Ministerial responsiveness

Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process as the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness from 1 July 2017

Bill	Portfolio	Correspondence	
		Due	Received
Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2017	Justice	27/09/17	26/09/17
Appropriation Bill (No. 1) 2017-2018	Finance	16/08/17	15/09/17+
Appropriation Bill (No. 2) 2017-2018	Finance	16/08/17	15/09/17+
Australian Border Force Amendment (Protected Information) Bill 2017	Immigration and Border Protection	31/08/17	29/08/17
Australian Education Amendment Bill 2017	Education and Training	28/06/17	11/08/17
Commercial Broadcasting (Tax) Bill 2017	Communications and the Arts	06/07/17	07/08/17
Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017	Immigration and Border Protection	04/10/17	29/09/17
Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 <i>Further response</i>	Defence Personnel	28/06/17	08/08/17
Education Services for Overseas Students (TPS Levies) Amendment Bill 2017	Education and Training	31/08/17	04/09/17

Bill	Portfolio	Correspondence	
		Due	Received
Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017	Employment	03/10/17*	03/10/17
Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017	Treasury	04/10/17	03/10/17
Imported Food Control Amendment Bill 2017 <i>Further response</i>	Agriculture and Water Resources	24/08/17	12/09/17
Public Governance and Resources Legislation Amendment Bill (No. 1) 2017	Finance	24/08/17	15/08/17
Migration Amendment (Regulation of Migration Agents) Bill 2017	Immigration and Border Protection	30/08/17*	28/08/17
Migration Amendment (Validation of Decisions) Bill 2017	Immigration and Border Protection	24/08/17	23/08/17
Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017	Immigration and Border Protection	27/09/17	21/09/17
Product Emissions Standards Bill 2017	Environment and Energy	31/08/17	04/09/17
Product Emissions Standards (Customs) Charges Bill 2017	Environment and Energy	31/08/17	04/09/17
Product Emissions Standards (Excise) Bill 2017	Environment and Energy	31/08/17	04/09/17
Social Services Legislation Amendment (Cashless Debit Card) Bill 2017	Social Services	27/09/17	28/09/17
Social Services Legislation Amendment (Payment Integrity) Bill 2017	Social Services	28/08/17*	28/08/17
Social Services Legislation Amendment (Welfare Reform) Bill 2017	Social Services	28/08/17*	28/08/17
Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017	Communications	24/08/17	24/08/17

Bill	Portfolio	Correspondence	
		Due	Received
Telecommunications (Regional Broadband Scheme) Charge Bill 2017	Communications	24/08/17	24/08/17
Treasury Laws Amendment (2017 Measures No. 5) Bill 2017	Treasury	04/10/17	03/10/17
Treasury Laws Amendment (Housing Tax Integrity) Bill 2017	Treasury	04/10/17	03/10/17

* *Revised due date*

+ *Response received after the bill had passed*

