

The Senate

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Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Migration (Validation of Port Appointment) Bill 2018

Purpose	This bill seeks to confirm the validity of the appointment of a proclaimed port in the Territory of Ashmore and Cartier Island contained in the Commonwealth of Australia Gazette No. GN 3, 23 January 2002
Portfolio	Home Affairs
Introduced	House of Representatives on 20 June 2018

Retrospective validation¹

1.2 Under paragraph 5(5)(a) of the *Migration Act 1958* (the Migration Act) the minister may, by notice published in the Gazette, appoint ports as proclaimed ports for the purposes of the Migration Act and fix the limits of those ports. On 23 January 2002 a notice was published purporting to appoint an area of waters within the Territory of Ashmore and Cartier Islands as a proclaimed port (2002 appointment).² The effect of this was to ensure that people arriving in boats without a valid visa who entered certain waters of the Territory of Ashmore and Cartier Islands, would be entering an 'excised offshore place' for the purposes of the Migration Act and would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' under the Migration Act.

1.3 Clause 3 seeks to retrospectively validate the 2002 appointment, as the 2002 appointment inadvertently omitted a number of details relating to the geographical coordinates.³ Subclause 3(2) provides that the 2002 appointment has, and is taken to have always had, effect as if the words identifying the geographical coordinates of the area were omitted and corrected geographical coordinates were substituted. Clause 4 also seeks to validate things done under the Migration Act at any time prior

1 Clauses 3 and 4. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 See Commonwealth of Australia Gazette, No. GN 3, 23 January 2002, p. 270, available at <https://www.legislation.gov.au/file/2002GN03>

3 Explanatory memorandum, p. 4.

to the commencement of this Act that would be invalid or ineffective directly or indirectly because of the terms of the 2002 appointment.

1.4 In addition, clause 5 seeks to provide that the Act will not affect rights or liabilities arising between parties to proceedings where judgment has been delivered by a court before these provisions commence, if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid. The statement of compatibility states that this clause is included as there are ongoing proceedings in the Federal Circuit Court and Federal Court which are currently challenging the validity of the 2002 appointment.⁴

1.5 The committee notes that if the 2002 appointment was invalidly made, it would appear that persons who entered certain waters of the Territory of Ashmore and Cartier Islands would not validly have been classified as 'offshore entry persons', or now as 'unauthorised maritime arrivals' (UMA). Whether or not a person is a UMA is of great significance to how their rights and obligations under the Migration Act are to be determined and how their applications may be processed. UMAs do not have a lawful right to travel to, enter into, or remain, in Australia.⁵ In addition, persons who entered the port between 13 August 2012 and 1 June 2013 without a valid visa also became 'fast track applicants' under the Migration Act,⁶ which resulted in a different system applying for the assessment of their applications for refugee status.

1.6 The committee considers that, in seeking to retrospectively validate the 2002 appointment, the bill is apt to adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that the impugned action or decision is invalid under the 2002 appointment. The committee expects that legislation which adversely affects individuals through its retrospective operation should be thoroughly justified in the explanatory memorandum. Such legislation can undermine values associated with the rule of law. One such value is that persons should be able to order their affairs on the basis of the law as it stands. Retrospective legislation is often thought to be particularly problematic when affected persons have relied to their detriment on a reasonable expectation that the law on which they have based their decisions will not be altered retrospectively. Another important rule of law principle is that the governors are, like the governed, bound by the law and cannot exceed their legal authority. Retrospective validation of government decisions and actions can undermine this principle.

1.7 In this instance, the statement of compatibility explains that the purpose of the bill is to ensure that there was a properly proclaimed port at Ashmore and

4 Statement of compatibility, p. 5.

5 See statement of compatibility, p. 6.

6 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

Cartier Islands at all relevant times and ensure that things done under the Migration Act, such as actions taken or decisions made, which relied directly or indirectly on the terms of the 2002 appointment are also valid and effective.⁷ The statement of compatibility also explains that the effect of the bill will be to 'maintain the status quo for unauthorised maritime arrivals and, where relevant, fast track applicants, under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.'⁸

1.8 The committee notes these explanations as to why it is considered necessary to retrospectively validate the 2002 appointment. However, it also notes that, while the bill would not apply to cases where a judgment has been delivered prior to the commencement of its provisions, it would apply to ongoing cases in which a judgment has not yet been delivered when the Act commences. The committee also notes that, as stated in the minister's second reading speech, a successful legal challenge to the 2002 appointment could mean that affected persons did not enter Australia at an excised offshore place and therefore are not UMAs under the Migration Act.⁹ The question of whether a person is or is not a UMA is of great significance with respect to how a person's rights and obligations under the Migration Act should be determined and how their applications should have proceeded. The committee therefore considers the explanatory materials do not provide a sufficiently comprehensive justification for the retrospective validation of the 2002 appointment.

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

- **the basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases;**
- **the number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:**
 - **are yet to have their asylum applications finally determined;**
 - **have been granted a protection visa;**
 - **are in offshore detention;**
 - **have had their applications refused but remain in Australia;**

7 Explanatory memorandum, p. 6.

8 Explanatory memorandum, p. 5.

9 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 8.

- **how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated; and**
- **the fairness of applying the bill to persons who have instituted proceedings but where judgment is not delivered before commencement of the Act (noting that such persons may be liable to an adverse costs order).**

Unexplained Wealth Legislation Amendment Bill 2018

<p>Purpose</p>	<p>This bill seeks to amend the <i>Proceeds of Crime Act 2002</i> (POC Act) to:</p> <ul style="list-style-type: none"> • extend the scope of the Commonwealth unexplained wealth restraining orders and unexplained wealth orders to all Territory offences and relevant offences as specified by participating States; • allow participating State and Territory agencies to access Commonwealth information gathering powers under the POC Act for the investigation or litigation of unexplained wealth matters under State or Territory unexplained wealth legislation; and • amend the way in which recovered proceeds are shared between the Commonwealth, states and territories and foreign law enforcement entities. <p>The bill also seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> to enable Commonwealth, Territory and participating states law enforcement agencies to use, communicate and record lawfully intercepted information in relation to unexplained wealth investigations and proceedings.</p>
<p>Portfolio</p>	<p>Home Affairs</p>
<p>Introduced</p>	<p>House of Representatives on 20 June 2018</p>

Exemption from disallowance¹⁰

1.10 The bill seeks to establish a national scheme for targeting unexplained wealth. States electing to participate in the scheme¹¹ would either be classified as a 'participating State' or, to participate in elements of the scheme, as a 'cooperating State'. Proposed section 14F outlines the circumstances in which a non-participating state will be considered to be a 'cooperating State' for the purposes of the scheme.

1.11 Proposed subsection 14F(4) would allow the minister, by legislative instrument, to declare that a State is not a cooperating State and proposed subsection 14F(5) provides that a declaration under subsection 14F(4) would be a

10 Schedule 1, item 2, proposed subsection 14F(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

11 In order to participate in the scheme, a State would be required to enact legislation either referring power to the Commonwealth or adopting a version of the *Proceeds of Crime Act 2002*. Territories would be automatically bound by the scheme upon the enactment of the bill.

legislative instrument, but would not be subject to disallowance under section 42 of the *Legislation Act 2003* (Legislation Act).

1.12 The committee's consistent scrutiny view is that exempting delegated legislation from disallowance is a serious matter, as to do so may remove or undermine parliamentary oversight. The committee will have particular concerns where the relevant instrument would enable the minister to alter the default position set out in the primary legislation. Consequently, where a bill seeks to exempt delegated legislation from the usual disallowance process under the Legislation Act, the committee would expect a sound justification to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

1.13 The committee requests the minister's justification for exempting declarations made under proposed subsection 14F(4) from disallowance under the *Legislation Act 2003*.

Retrospective application¹²

1.14 The bill seeks to amend the *Proceeds of Crime Act 2002* (POC Act) to provide that the Commonwealth unexplained wealth order regime will apply to certain State and Territory offences, as well as to enable participating State and Territory agencies to access Commonwealth information-gathering powers under the POC Act for the investigation or litigation of unexplained wealth matters under State or Territory unexplained wealth legislation. The effect of an unexplained wealth order is to restrict a person's ability to dispose of, or otherwise deal with, property or to require a person to make a specified payment to the Commonwealth.¹³

1.15 Schedule 1, item 7 and Schedule 3, item 10 seek to apply these amendments to unexplained wealth orders made in relation to an offence against a law of a participating State or a self-governing Territory whether or not the offence is, or is suspected of being, committed *before* or after commencement or the application relates to property or wealth acquired, derived or realised or subject to a person's effective control *before* or after commencement. In addition, Schedule 1, item 8 seeks to apply amendments relating to orders or notices for the production of documents to documents created *before* or after commencement (or to documents related to property or accounts dealt with *before* or after commencement). This has the effect that a number of the amendments made by the bill would apply retrospectively.

12 Schedule 1, items 7 and 8 and Schedule 3, item 10. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 Explanatory memorandum. pp. 6-7.

1.16 The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as this 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 relevant legislation will, or might, have a detrimental effect on individuals.

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

Retrospective operation is required to ensure that unexplained wealth action is not frustrated by requiring law enforcement agencies to obtain evidence of, and prove, the precise point in time at which certain property or wealth was derived, acquired, realised or became subject to the effective control of a person.

Such a requirement would be unnecessarily onerous and would be contrary to the objects of the Act. Further, it would be almost impossible to show the point at which wealth or property was acquired or derived in cases where a person has accumulated significant amounts of wealth and property over decades and has no apparent source of legitimate income, especially in relation to property that is portable and not subject to registration requirements or where relevant financial records have been destroyed or lost over time.

...

It is also necessary to apply these amendments retrospectively to offences against a law of a 'participating State' to ensure that the aims of the POC Act are not frustrated. It is necessary for these provisions to apply retrospectively as the criminal conduct of the person may continue over several years or may not be discovered immediately.

These amendments do not have the effect of criminalising conduct which was otherwise lawful prior to the amendments.¹⁴

1.18 The committee notes that it has previously raised concerns that the POC Act appears to trespass on the rights of persons who have neither been charged with, nor convicted of, any wrong-doing.¹⁵ The committee notes that the regime applies where it is reasonably suspected that a person's total wealth exceeds their lawfully acquired wealth by \$100,000 or more, and there are reasonable grounds to suspect a person has committed an offence or the whole or any part of the person's wealth was derived from an offence. The regime applies without any need to prove, on the

14 Explanatory memorandum, p. 31 and pp. 37-38.

15 See Scrutiny of Bills committee, *Alert Digest 14 of 2001*, p. 13.

usual criminal standard (that is, beyond reasonable doubt), that the person has committed the offence from which the unexplained wealth is suspected to be derived. Retrospectively applying amendments which widen the scope of the unexplained wealth regime therefore raises particular scrutiny concerns.

1.19 The committee reiterates its long-standing scrutiny concern that provisions that apply retrospectively challenge a basic value of the rule of law that, in general, laws should only operate prospectively, not retrospectively. The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying amendments which widen the scope of the unexplained wealth regime.

Privilege against self-incrimination¹⁶

1.20 Proposed Schedule 1 provides that a magistrate may make a production order requiring a person to produce certain documents, or make those documents available, to a relevant authorised State or Territory officer. Paragraph 5(1)(a) of that Schedule provides that a person is not excused from producing a document or making a document available pursuant to a production order on the ground that to do so would tend to incriminate the person or expose them to a penalty. This provision therefore overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.¹⁷

1.21 The committee recognises that there may be certain circumstances in which the privilege can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

1.22 In this instance, the explanatory memorandum states that it is appropriate to override the privilege against self-incrimination:

as criminals regularly seek to hide their ill-gotten gains behind a web of complex legal, contractual and business arrangements. As such, requiring the production and availability of relevant documents is necessary to enable law enforcement to effectively trace, restrain and confiscate unexplained wealth amounts.¹⁸

16 Schedule 4, item 6 proposed Schedule 1, clause 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

17 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

18 Explanatory memorandum, p. 42.

1.23 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which the use of self-incriminating evidence is limited by use or derivative use immunity provisions. A use immunity generally provides that the information or documents produced in response to the statutory requirement (in this case, in response to a production order) will not be admissible in evidence against the person that produced it. A derivative use immunity generally provides that anything obtained as a direct or indirect consequence of the production of the information or documents will not be admissible in evidence against the person that produced it.

1.24 A use immunity is included in proposed subclause 5(2) with respect to natural persons. The subclause provides that a document produced or made available pursuant to a production order is not admissible in evidence in criminal proceedings, except in relation to proceedings relating to false or misleading documents in response to the production order. However, a derivative use immunity (which prevents information or evidence indirectly obtained from being used in criminal proceedings against the person) has not been included. Indeed, proposed clause 18 provides that a person who gained information as a result of a production order may disclose that information in certain circumstances and paragraph 18(5)(b) provides that this clause does not affect the admissibility in evidence of any information, document or thing obtained as an indirect consequence of a disclosure under this clause. The explanatory memorandum states that the effect of this is that no derivative use immunity will attach to the information to which it applies.¹⁹

1.25 The explanatory memorandum provides no explanation as to why a derivative use immunity has not been included in this provision, other than to note that similar provisions overriding the privilege exist in the POC Act. However, the committee emphasises that its consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is consistent with provisions of an existing law.

1.26 As the explanatory materials do not sufficiently address this matter, the committee seeks the minister's detailed advice as to the appropriateness of abrogating the privilege against self-incrimination, including in the absence of a 'derivative use' immunity provision.

Legal professional privilege²⁰

1.27 As outlined above, proposed Schedule 1 provides that a magistrate may make a production order requiring a person to produce certain documents, or make

19 Explanatory memorandum, p. 49.

20 Schedule 4, item 6 proposed Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

those documents available, to a relevant authorised State or Territory officer. Paragraph 5(1)(c) of that Schedule provides that a person is not excused from producing a document or making a document available under a production order on the ground that producing the document or making it available would disclose information that is the subject of legal professional privilege.

1.28 As recognised by the High Court,²¹ legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. The committee therefore considers that it should only be abrogated or modified in exceptional circumstances. Where a bill seeks to abrogate legal professional privilege, the committee would expect a sound justification for any such abrogation to be included in the explanatory memorandum. In this instance, the explanatory memorandum gives no separate justification for overriding legal professional privilege (that is, separate to the justification for overriding the privilege against self-incrimination) other than noting that 'criminals regularly seek to hide their ill-gotten gains behind a web of complex legal, contractual and business arrangements' and so requiring the production and availability of relevant documents 'is necessary to enable law enforcement to effectively trace, restrain and confiscate unexplained wealth amounts'.²²

1.29 The committee considers that abrogating legal professional privilege may unduly trespass on individual rights, as to do so may interfere with legitimate, confidential communications between individuals and their legal representatives. In this regard, the committee notes that while the explanatory memorandum provides a limited policy justification for abrogating legal professional privilege, it does not provide any information about how any interference with individual rights will be addressed (for example, it does not set out any safeguards).

1.30 Additionally, the committee considers that, where legal professional privilege is abrogated, 'use' and 'derivative use' immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and individual rights. As outlined above at paragraph 1.15, a 'use' immunity is included in proposed subclause 5(2). However, the bill does not include a 'derivative use' immunity, and the explanatory memorandum provides no explanation as to why such an immunity has not been included.

21 See e.g. *Baker v Campbell* (1983) 153 CLR 52.

22 Explanatory memorandum, p. 42.

1.31 As the explanatory materials do not sufficiently address this matter, the committee seeks the minister's detailed advice as to the appropriateness of abrogating legal professional privilege, including in the absence of a 'derivative use' immunity provision.

Significant matters in delegated legislation²³

1.32 Clause 12 of proposed Schedule 1 seeks to allow certain officials of participating States and self-governing Territories to give written notices to financial institutions. Such notices would require the institution to provide to an authorised officer of the State or Territory information or documents relating to specified persons' accounts and transactions. The committee notes that the information that must be provided pursuant to a notice may include a substantial amount of personal and financial information.²⁴ A failure to comply with a notice under clause 12 would be an offence, subject to a penalty of 6 months imprisonment, 30 penalty units, or both.²⁵

1.33 Subclause 12(3) of proposed Schedule 1 sets out the officials who may give a notice under clause 12, which are mainly the Commissioner or head of the relevant police force or the Director of Public Prosecutions. However, paragraph 12(3)(d) provides that, for a self-governing Territory, a person may give a notice to a financial institution if they are a person of a kind prescribed by the regulations in relation to the Territory. The bill would therefore appear to permit the regulations to confer coercive evidence-gathering powers on a potentially broad range of persons. The bill does not set a limit on the categories of persons on whom powers may be conferred.

1.34 The committee's consistent view is that significant matters, such as the persons empowered to exercise coercive evidence-gathering powers, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.35 In this instance, the explanatory memorandum does not explain why it is necessary to leave to delegated legislation the definition of who may exercise coercive evidence-gathering powers in self-governing Territories, or who it is

23 Schedule 4, item 6, proposed Schedule 1, paragraph 12(3)(d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

24 Information that may be required under a notice includes information relevant to: whether a person holds an account with the institution, the signatory on the account, and the balance of the account; details of transactions on an account over a period of up to six months; details of related accounts; whether a stored value card was issued by the institution, and details of transactions using the card over a period of up to six months; and any transactions conducted by the institution on behalf of a specified person. See proposed Schedule 1, subclause 12(1).

intended such persons will be. It only restates the operation and effect of the relevant provisions.

1.36 The committee requests the minister's detailed justification for allowing regulations to prescribe classes of persons authorised to issue notices to financial institutions under clause 12 of proposed Schedule 1.

1.37 The committee also seeks the minister's advice as to the appropriateness of amending the bill to specify the category of persons who may be empowered under the regulations to issue notices under clause 12 of proposed Schedule 1.

Immunity from liability²⁶

1.38 As outlined above, clause 12 of proposed Schedule 1 seeks to allow certain persons to issue notices to financial institutions. Such notices would compel the institutions to provide financial information about persons holding accounts with the institution, or with whom the institution otherwise deals.

1.39 Clause 14 of proposed Schedule 1 provides that no action, suit or proceeding would lie against a financial institution, or an officer, employee or agent of the institution acting within the course of that person's employment or agency, in relation to any action taken by the institution or person under a notice under clause 12, or in the mistaken belief that action was required under the notice. This removes any common law right to bring an action to enforce legal rights. The committee notes that this applies even if the relevant action was not taken in good faith.

1.40 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 such justification, merely restating the operation and effect of the relevant provisions.

1.41 The committee requests the minister's advice as to why it is considered appropriate to confer immunity from civil and criminal liability in relation to certain actions (particularly without any requirement that the action be taken in good faith), such that persons would have no right to bring an action to enforce their legal rights.

26 Schedule 4, item 6, proposed Schedule 1, clause 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Privacy²⁷

1.42 Schedule 6 of the bill seeks to allow officers in Commonwealth, Territory and participating State agencies to use, record or communicate lawfully intercepted information or interception warrant information under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) for a purpose connected with an unexplained wealth proceeding in relation to the agency. It would also allow the chief officer of an agency to communicate lawfully intercepted information to the relevant Commissioner of Police if it relates to the unexplained wealth provisions of that jurisdiction. In effect this extends the existing disclosure laws under the TIA Act to ensure they also cover information relevant to unexplained wealth provisions. Currently there is a need to show a link to a prescribed offence before such information can be used or disclosed. The explanatory memorandum notes that this amendment will allow such information to be used in orders where, for example, a person's wealth vastly exceeds the person's known lawful income but the underlying predicate offending is not known.²⁸ Thus, it would appear that such information could be used to investigate a person's wealth despite there being no specific information as to any criminal offending. This impacts on a person's right to privacy and raises scrutiny concerns as to whether allowing such information to be used or disclosed for such purposes unduly trespasses on personal rights and liberties.²⁹

1.43 The statement of compatibility for the bill acknowledges that the amendments engage the right to privacy but states that the objective of the amendments is to ensure 'law enforcement authorities are in a position to effectively combat serious and organised crime by improving the information-sharing arrangements between law enforcement agencies that deal with unexplained wealth'.³⁰ It also notes that under the TIA Act the purposes for which disclosure can occur, and the authorities with whom information is shared, 'are strictly limited' and the information is subject to a range of protections.

1.44 However, the committee notes that the type of information that can be intercepted can include highly personal information, including potentially the content of private telephone conversations and emails. Allowing the disclosure of such information to investigate a person's wealth, without the need to provide any link to a particular offence, raises scrutiny concerns as to whether these measures risk unduly trespassing on a person's right to privacy.

27 Schedule 6. The committee draws senators' attention to this Schedule pursuant to Senate Standing Order 24(1)(a)(i).

28 Explanatory memorandum, pp. 55-56.

29 See Senate Standing Order 24(1)(a)(i).

30 Statement of compatibility, p. 12.

1.45 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding existing disclosure laws under the *Telecommunications (Interception and Access) Act 1979* to cover information relevant to unexplained wealth provisions.

Bills with no committee comment

1.46 The committee has no comment in relation to the following bills which were introduced into the Parliament between 18 – 21 June 2018:

- Animal Export Legislation Amendment (Ending Long-haul Live Sheep Exports) Bill 2018
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018
- Farm Household Support Amendment Bill 2018
- Inspector-General of Animal Welfare and Live Animal Exports Bill 2018
- Refugee Protection Bill 2018
- Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018

Commentary on amendments and explanatory materials

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

[Digests 3 & 5/18]

1.47 On 18 June 2018 the Minister for Communications (Senator Fifield) tabled a replacement explanatory memorandum relating to the bill. In responding to concerns raised by the committee in *Scrutiny Digest 3 of 2018*, the Acting Attorney-General undertook to amend the explanatory memorandum to clarify the operation and intent of a provision that would allow the minister to determine by delegated legislation certain eligibility requirements for entering into debt agreements.³¹ However, the committee notes that this replacement explanatory memorandum does not include this information.

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

- Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018;³² and
- Treasury Laws Amendment (Personal Income Tax Plan) Bill 2018.³³

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, p. 88.

32 On 19 June 2018 the House of Representatives agreed to two Government amendments, the Minister for Health (Mr Hunt) presented a supplementary explanatory memorandum and the bill was read a third time.

33 On 20 June 2018 the Senate agreed to three Opposition amendments and the bill was read a third time. On 21 June 2018 the House of Representatives disagreed to the Senate amendments, the Senate did not insist on its amendments and the bill passed both Houses.

Chapter 2

Commentary on ministerial responses

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

Water Amendment Bill 2018

Purpose	This bill seeks to amend the <i>Water Act 2007</i> to introduce a new directions power to enable the minister to direct the Murray-Darling Basin Authority to prepare an instrument that has the same effect as a previously disallowed Basin Plan amendment
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 10 May 2018
Bill status	Passed both Houses on 25 June 2018

2.2 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2018*. The minister responded to the committee's comments in a letter dated 25 June 2018. 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

Removal of consultation requirements²

Initial scrutiny – extract

2.3 The *Water Act 2007* (Water Act) aims to facilitate the management by the Commonwealth, in conjunction with Basin States,³ of the water resources of the Murray Darling Basin (the Basin) in a manner that optimises economic, social and environmental outcomes.⁴ To give effect to these objects, the Water Act requires the Murray Darling Basin Authority (the Authority) to prepare a Basin Plan and give it to

1 See correspondence relating to *Scrutiny Digest No. 7 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

2 Schedule 1, item 2, proposed subsection 49AA(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

3 'Basin State' is defined in section 4 of the Water Act to mean New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.

4 See section 3 of the Water Act.

the minister for adoption. The Basin Plan provides for the cross-jurisdictional management of the Basin, and is intended to facilitate long-term sustainable use of the Basin's water resources. The Water Act also provides for amendments to the Basin Plan to be prepared by the Authority and given to the minister for adoption.

2.4 The Basin Plan Amendment Instrument 2017 (No. 1) (NBR Instrument), which amended the Basin Plan to implement changes arising from several reviews, was disallowed by the Senate on 14 February 2018. The government has stated that this has resulted in uncertainty as to the realisation of the long-term vision for the Basin Plan, and in particular as to Basin States' capacity to have in place Basin Plan compliant water resources plans by 30 June 2019.⁵

2.5 The current bill is intended to rectify these uncertainties, by enabling the NBR Instrument, as well as future instruments that have been disallowed by the Parliament, to be remade and tabled again before Parliament as soon as practicable.⁶ To this end, the bill seeks to insert a new section 49AA into the Water Act, which would allow the minister to direct the Authority to prepare an amendment to the Basin Plan if the amendment will be the same in effect as a disallowed amendment and is given within 12 months of the earlier amendment being disallowed.

2.6 Proposed subsection 49AA(4) provides that sections 46-48 of the Water Act do not apply to an amendment of the Basin Plan that is to be prepared, or is prepared or adopted, in accordance with a ministerial direction. These sections of the Water Act contain detailed requirements for consultation on proposed Basin Plan amendments with Basin States, specified bodies, and members of the public:

- section 46 provides that the Authority must, in preparing an amendment to the Basin Plan, consult with the Basin States, the Basin Officials Committee⁷ and the Basin Community Committee.⁸ The Authority may also undertake such other consultation as it considers appropriate. In preparing an amendment of rules relating to trading of water rights, the Authority must obtain the advice of the Australian Competition and Consumer Commission;

5 Second reading speech, p. 1.

6 Second reading speech, p. 1.

7 The Basin Officials Committee was established by the Murray-Darling Basin Agreement (Schedule 1 to the Water Act). The BOC comprises one official from each of the Basin States, and is responsible for providing advice to the Ministerial Council, and for implementing policy decisions of the Ministerial Council on matters such as state water shares and the funding and delivery of natural resource management programs.

8 The Basin Community Committee (BCC) was established by the Authority pursuant to requirements in section 202 of the Water Act. Among other functions, the BCC reports on community concerns around Basin Plan implementation and provides information to Basin communities about the Authority's programs.

- section 47 provides that the Authority must prepare a plain-English summary of the proposed amendment and invite submissions on both the amendment and the summary from the Basin States and members of the public;
- section 47A provides that, after complying with section 47, the Authority must invite comments on the proposed amendment from the Murray-Darling Basin Ministerial Council;⁹ and
- section 48 provides that, after the Authority gives the minister an amendment of the Basin Plan, the minister must consider the amendment and either adopt the amendment or return the amendment to the Authority with suggestions for further consideration. Where the minister returns the amendment to the Authority, the Authority must consider the minister's suggestions, undertake such additional consultation as the Authority considers necessary or appropriate, and give the minister either an identical or an altered version of the amendment. The minister must then either adopt the amendment or direct the Authority to make further alterations.

2.7 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* (Legislation Act)) are included in the legislation and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee therefore expects a detailed justification in the explanatory memorandum should a bill seek to remove or disapply specific consultation requirements. In this instance, the explanatory memorandum states that subsection 49AA(4) 'clarifies' that sections 46 to 48 of the Water Act do not apply, but that as the amendment must be the same in effect as an earlier amendment that has been disallowed:

[T]he Authority cannot prepare an amendment that introduces new provisions that will deliver a different outcome to the earlier amendment that has not been subject to the extensive consultation process under the Water Act. There is also a 12-month limitation to ensure the previous consultation on the earlier amendment is relevant and valid.¹⁰

2.8 However, the committee notes that circumstances relevant to Basin management and associated community attitudes may change relatively quickly. It is therefore unclear that prior consultation undertaken in relation to a disallowed Basin Plan amendment would remain sufficiently relevant to justify excluding further

9 The Murray-Darling Basin Ministerial Council (MC) was established by the Murray-Darling Basin Agreement (Schedule 1 to the Water Act). It comprises ministers from each of the Basin States, and is chaired by the Commonwealth. The MC has policy and decision-making roles for matters such as state water shares and the funding and delivery of natural resource management programs.

10 Explanatory memorandum, p. 6.

consultation where the amendment is remade pursuant to a ministerial direction—particularly if the direction is issued towards the end of the applicable 12-month period.

2.9 Additionally, the committee notes that proposed subsection 49AA(6) provides that certain changes would not prevent an amendment made pursuant to a ministerial direction from being the same in effect as the earlier amendment (and therefore not subject to the consultation requirements). Clause 2 of proposed Schedule 10 also provides that certain changes would not prevent the remade NBR instrument from being the same in effect as the previous (disallowed) version of that instrument.

2.10 With respect to the NBR Instrument, the committee also notes that certain submissions to the Rural and Regional Affairs and Transport Legislation Committee highlighted concerns regarding consultation undertaken on that instrument. In particular, some submissions asserted that the disallowed NBR Instrument, as presented to the Parliament in late 2017, was substantially different to the version that was subject to public consultation in 2016, and contained changes that had never been subject to public consultation.¹¹ These submissions appear to raise additional concerns about the appropriateness of proposal to disapply the consultation requirements in the Water Act with respect to the NBR Instrument.

2.11 Finally, the committee notes that proposed subsection 49AA(5) provides that while a direction given under proposed subsection 49AA(1) would be a legislative instrument, it would not be subject to disallowance under the Legislation Act. In general, the committee will be concerned by any measures that seek to limit or remove parliamentary scrutiny of delegated legislation. However, as the ministerial direction would only direct the Authority to prepare an amendment instrument, and the amendment instrument will itself remain subject to disallowance under the Legislation Act,¹² the committee makes no comment in relation to this aspect of the bill.

2.12 The committee requests the minister's more detailed justification for disapplying the consultation requirements in sections 46-48 of the *Water Act 2007* to Basin Plan amendments prepared pursuant to a ministerial direction under proposed section 49AA.

11 Senate Rural and Regional Affairs Legislation Committee, *Water Amendment Bill 2018*, June 2018, pp. 19-20.

12 The committee also notes that a ministerial direction given to any person or body is not generally subject to disallowance: see table item 2 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

Minister's response**2.13 The minister advised:**

The Bill proposes to amend the Water Act to enable the Minister for Water to direct the Murray-Darling Basin Authority (the Authority) to prepare an amendment that will be the same in effect as a Basin Plan amendment that has been previously disallowed by the Federal Parliament, without having to undertake the consultation process requirements set out in the Water Act (Subdivision F of Division 1 of Part 2 of the Water Act). This power cannot be delegated to an executive or employee of my department.

There are a number of limitations on the proposed directions power to ensure that it is not used inappropriately.

For any Basin Plan amendment prepared by the Authority under this power, it must be the same in effect as the disallowed amendment. In this regard the Bill specifies certain minor or technical changes will not prevent a new amendment from being the same in effect as a disallowed amendment. This safeguard ensures that the Authority cannot propose changes to the disallowed amendment that have not previously been subject to the detailed process in the Water Act, including the Authority's consultations with the Basin Officials Committee, Basin Community Committee, the Basin States, the Murray-Darling Basin Ministerial Council and the public.

The proposed directions power is limited to amendments which have been disallowed in the previous 12 months. This limitation ensures that the issues raised through all consultations (including public consultation) undertaken by the Authority on the disallowed amendment under sections 46 to 48 of the Water Act remain both relevant and timely. In preparing the disallowed amendment, the Authority was required to take the issues raised during consultation into account.

In this light, the proposed directions power avoids duplication of the extensive consultation process undertaken for the disallowed instrument, thereby preserving and respecting the integrity of the original process.

I intend to use this proposed directions power to ensure the disallowed Basin Plan Amendment Instrument 2017 (No. 1) is re-made as soon as possible, thereby restoring certainty to northern Basin communities and states. In this regard I am mindful that Basin Plan compliant water resource plans must be prepared by Basin states in consultation with relevant Basin communities, for accreditation by me by 30 June 2019. In the absence of the changes proposed in this Bill, the task of restoring the outcomes of the disallowed amendment via the processes set out in sections 46 to 48 of the Water Act can be expected to take at least eight months.

Any amendment prepared under this proposed new power is required to be tabled in both Houses of Parliament and is subject to disallowance. This

provides for the same parliamentary scrutiny of the Basin Plan amendment as for the disallowed amendment. If any new amendment were subsequently disallowed (that is, disallowed a second time), the Minister will not be able to direct the Authority to prepare a further amendment under proposed section 49AA.

Committee comment

2.14 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed directions power is limited to amendments which have been disallowed in the previous 12 months, which ensures that the issues raised through consultation on the disallowed amendment remain both relevant and timely. The committee also notes the minister's advice that, in preparing the disallowed amendment, the Authority is required to take issues raised during previous rounds of consultation into account. The committee further notes the minister's advice that, in the absence of the changes proposed by the bill, the task of restoring the outcomes of the Basin Plan Amendment Instrument 2017 (No. 1) (NBR Instrument) via processes set out in sections 46 to 48 of the Water Act would be expected to take at least eight months.

2.15 The committee also notes the minister's emphasis that any amendment prepared under this new power will be subject to disallowance, and the advice that this would provide for the same level of parliamentary scrutiny with respect to a Basin Plan amendment prepared pursuant to a ministerial direction as for an amendment that was previously disallowed.

2.16 The committee reiterates that 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 legislation and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee therefore will be concerned where a bill seeks to remove or disapply specific consultation requirements.

2.17 While the committee acknowledges the practical difficulties raised by the minister regarding the consultation obligations under the Water Act in relation to the NBR Instrument, the committee notes that this bill would apply to all future instruments prepared under this directions power (and not just the NBR Instrument). The committee reiterates that it considers there may be circumstances where prior consultation undertaken in relation to a disallowed Basin Plan amendment may not remain sufficiently relevant to justify excluding further consultation, particularly where a direction to prepare a subsequent amendment is given towards the end of the 12-month period within which directions may be issued.

2.18 As set out above, the committee has scrutiny concerns regarding the disapplication of consultation requirements in sections 46-48 of the *Water Act 2007* to all Basin Plan amendments prepared pursuant to a ministerial direction under proposed section 49AA.

2.19 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- **Unexplained Wealth Legislation Amendment Bill 2018**—Schedule 5, items 1-9.

Senator John Williams
Acting 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](#).

