SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2012

20 June 2012

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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, 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2012

The Committee presents its Sixth Report of 2012 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Aviation Transport Security Amendment (Screening) Bill 2012

Introduced into the House of Representatives on 16 February 2012
Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2012*. The Minister responded to the Committee's comments in a letter dated on 22 May 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 2 of 2012 - extract

Background

This bill amends the *Aviation Transport Security Act 2004* and is designed to facilitate the introduction of body scanners at international airports. The principal measure is to provide that a person is taken to consent to any screening procedure when that person is at a screening point and must receive clearance in order to board an aircraft or to enter an area of a security-controlled airport. The explanatory memorandum contains a Statement of Compatibility with Human Rights (SOC).

Trespass on personal rights and liberties
Item 4, repeal existing section 95A

Item 4 seeks to repeal existing section 95A, which provision currently allows a person to choose a frisk search over another screening procedure. The explanatory memorandum at page 3 states that this amendment will enable the introduction of a policy whereby a person selected to pass through a body scanner may not choose an alternative screening method and that this 'will ensure that the strongest security outcome is achieved from the technology'.

This encroachment on the right to freedom of movement, to the extent an option of a frisk search is removed, is justified in the SOC on the basis that (1) body scanners offer the greatest chance of detection of security threats, those threats being asserted to be serious and continuing, and (2) a full body frisk, which may be thought to achieve a similar outcome to a body scanner, would 'involve a frisk of the entire body, including sensitive areas, as well as the possible loosening and/or removing of some clothing' (see the explanatory memorandum at page 3). Further in relation to (2) above, it is stated that 'it is unlikely that any passenger who fully understands the procedures and the technology

would opt for an enhanced full body frisk in preference to a body scan', for which a person has been randomly selected.

In the circumstances, **the Committee leaves the question of whether the right to freedom of movement has been limited in an appropriate, reasonable and proportionate manner is left to the consideration of the Senate as a whole.**

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

Insufficiently defined legislative powers
Item 4, repeal existing section 95A

As suggested above, the question of whether the overall policy approach underlying this amendment is appropriate is left to the Senate as a whole. However, the explanatory memorandum, at page 6, notes that in applying the requirement that all persons who have been selected to pass through a body scanner may not choose an alternative screening procedure, allowances 'will be made where there is a physical or medical reason that would prevent a person being screened by a body scanner'. In the SOC it is stated that the rights of persons with disability are not inappropriately affected as 'the Government is making appropriate modifications to ensure that individuals who cannot undergo a certain screening procedure due to a physical or medical condition will be screened by alternative methods that are more suitable to their circumstances' (see page 4 of the explanatory memorandum). The SOC also notes, at page 5, that preparations for the introduction of body scanners has led to an 'increased focus on the training of aviation security screening officers to ensure that people with a disability are treated in a compassionate manner'.

Although the Committee accepts these assurances, based on the proposed amendments it is unclear exactly how alternative screening procedures and compassionate treatment for persons with disabilities or medical conditions will be guaranteed in appropriate circumstances. It is not clear to the Committee whether the appropriateness of alternative procedures will be left to the discretion of security screening officers or whether the legislation can provide for guidelines to be developed. **The Committee therefore seeks a further explanation of how the application of alternative screening procedures in appropriate circumstances will be administered and regulated, and whether consideration has been given to providing in the legislation for the development of appropriate guidelines.**

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

Minister's response - extract

Item 4, repeal existing section 95A

I note that the Committee has asked the Senate as a whole to consider the question of whether repealing section *95A* is limiting the right to freedom of movement in an appropriate, reasonable and proportionate manner. For background, section 95A was originally included in the *Aviation Transport Security Act 2004* (the Act) to provide for persons who for medical reasons preferred not to be screened using technology that generates an electromagnetic field. I wish to assure the committee that passengers who, for medical reasons, are unable to be screened by a particular technology will be able to undergo special circumstances screening. Special circumstances screening involves the use of screening methods such as hand-held metal detectors, frisk searches or another screening method appropriate to the passenger's circumstances.

The Department of Infrastructure and Transport (the Department) has consulted extensively with privacy and civil interest groups, including disability groups, in developing the operational policy that will govern the use of body scanners for aviation security screening. Alternatives will be made available for those who, for a genuine medical or physical reason, cannot undergo a body scan.

Through the Office of the Australian Information Commissioner, the Department engaged groups such as Vision Australia. Disability Council NSW, Organisation Intersex International, the Australian Federation of Islamic Councils (Muslims Australia), the Australian Human Rights Commission and the Australian Catholic Bishops Conference, to ensure that these organisations were involved in the policy dialogue. Part of this consultation process involved the development of a comprehensive privacy impact assessment. A consultation draft for comment was released in 2011 during the body scanner trial at Sydney and Melbourne airports and three submissions were received. The feedback received in these submissions has been incorporated into the final assessment which was released on 28 February 2012. The assessment is publically available on the Department's TravelSECURE website and a copy has been included for your information at **Attachment A**.

Regulation 4.17 of the Aviation Transport Security Regulations 2005 allows for the methods, techniques and equipment to be used for screening to be specified in a notice. This notice outlines screening requirements for a range of special circumstances passengers, such as passengers with visual impairments, passengers who are unable to walk or stand, and passengers accompanied by a carer or an assistance animal. Provisions contained in the notice for special circumstances screening will remain and will be supplemented with any additional special circumstances that relate to body scanners. In addition, the Department has a program of ongoing consultation with disability groups through the Aviation Access Working Group to ensure that screening processes cater to the

needs of these stakeholders. This engagement has assisted the Department to develop screening practice guidelines for the screening of special circumstances passengers.

I am confident that the measures currently in place adequately protect special circumstances passengers, whilst providing the flexibility needed to refine processes as required. The protocols for screening passengers with special circumstances will not change significantly with the introduction of body scanners. Where alternative screening is required, those alternatives will consist of technology and procedures already used for screening passengers with disabilities and special circumstances.

Committee Response

The Committee thanks the Minister for this detailed response and notes the assurances given that current measures provide adequate protection while providing flexibility to refine processes as required. **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 2 of 2012 - extract

Trespass on personal rights and liberties
Schedule 1, item 1, proposed section 41A
Schedule 1, item 3, proposed paragraph 4(3)(3B)

Item 1 of Schedule 1 proposes a new section 41A. This provision deems consent to have been given to conduct screening procedures, including body scans but excluding frisk searches, unless a person expressly refuses to undergo a procedure. It is noted that the Statement of Compatibility acknowledges that screening procedures are of concern from the perspective of the protection of an individual's privacy, and the Committee adds that this concern is heightened when consent to procedures is deemed. However, the SOC, at page 3 of the explanatory memorandum, states that the Office of the Australian Information Commissioner (OAIC) has been closely involved with the development of a comprehensive privacy impact assessment to protect a passenger's right to privacy.

Particularly in relation to the introduction of body scanners, it is stated that this technology is less intrusive than the only realistic alternative that could provide similar outcomes (full frisk searches) and that the implementation of 'automatic threat recognition technology' will mean that areas of concern are only displayed on a 'generic human representation that is the same for all passengers'. This technology removes the need for a 'human operator to look at raw or detailed images, and therefore maintains the privacy and modesty of all

individuals'. Finally, it is stated that the 'body scanners that are introduced in Australia will not be capable of storing or transmitting any information or data' (also at page 3 of the explanatory memorandum).

In support of this approach, item 3 proposes a new paragraph 4(3)(3B) which provides that if body scanning equipment is used for screening a person, then any image 'must only be a generic body image that is gender-neutral and from which the person cannot be identified'. In light of the detailed explanation in the explanatory memorandum, the Committee leaves to the consideration of the Senate as a whole the general question of whether the overall approach is reasonable and proportionate.

However, the Committee is concerned that the important safeguard mentioned in the explanatory memorandum that the machines introduced into Australia won't be able to store or transmit data is not a legislative requirement. It is unclear why the legislation (properly) prohibits the use of images that are not generic, but does not take a similar approach to the use of equipment that may store or transmit data. **The Committee therefore seeks the Minister's advice as to whether the legislation can be amended to require that scanners not be capable of storing or transmitting data or that these functions are disabled or removed.**

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

Minister's response - extract

Item 1, proposed section 41A

In relation to the concerns raised about the proposed consent provision, amendments will be made to the Aviation Transport Security Regulations 2005 to mandate that airports display appropriate signage at screening points advising passengers of their rights in relation to aviation security screening. These signs will clearly state that a passenger will be assumed to have consented to a screening procedure unless they expressly state their refusal. The main purpose of the consent provision is to ensure that passenger facilitation rates are not adversely affected by the requirement for express consent to be obtained from each passenger before they undergo a body scan.

Item 1, proposed section 4(3)(38)

I note the Committee's comments about lack of legislative assurance that body scanners introduced into Australia for aviation security screening will not be able to store or transmit data from individual scans. I agree that the legislation should provide that

scanners will not be capable of storing or transmitting data obtained from individual scans, or that these functions will be disabled or removed.

I trust this information will be of assistance to the Committee.

Committee Response

The Committee thanks the Minister for this response and for his commitment to amend relevant regulations to ensure that signage is in place at screening points to advise passengers of consent provisions and their rights. The Committee also notes that the Minister agrees that legislative safeguards should be in place in relation to the functions of body scanners and thanks the Minister for taking action to introduce an amendment to this effect.

Coastal Trading (Revitalising Australian Shipping) Bill 2012

Introduced into the House of Representatives on 22 March 2012
Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 18 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill provides for:

- the regulatory framework for access by vessels to coastal trading in Australia
- three types of licences which authorise vessels to carry passengers or cargo between ports in Australia;
- the application process for licences;
- the decision-making process including criteria when granting a licence;
- condition and cancellation of licences;
- ministerial exemptions from the Act;
- appointment and enforcement of legislative requirements;
- the review of certain decisions by the Administrative Appeals Tribunal; and
- the delegation of functions and powers by the Minister and Secretary.

Self-incrimination
Clause 82

The Committee routinely comments on provisions that abrogate the common law privilege against self-incrimination. This provision removes the operation of the privilege in relation to failures to comply with a notice issued under clause 79 of the Bill. Clause 79 requires a person to provide information, produce a document or thing or to answer questions.

The Committee has, however, accepted that there may be circumstances where the abrogation of the privilege is justified. Notably, the Committee has indicated that it is easier to justify the abrogation of the privilege where the legislation provides for a use and derivative use immunity. Subclause 82(2) does provide for a use and derivative use immunity in relation to criminal proceedings and civil proceedings for a contravention of a civil penalty provision.

Nevertheless, the Committee is concerned that the explanatory memorandum does not justify the abrogation of the privilege against self-incrimination. Even where abrogation of the privilege is subject to the inclusion of a use and derivative use immunity the Committee expects that a justification for the abrogation of the privilege will be provided in the explanatory memorandum. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

Clause 79 of the Bill empowers an authorised person to require a person to give information, produce documents or things specified in the notice, or appear before an authorised person to answer questions. Under subclause 82(1), a person may not refuse to produce the information or documents or answer questions because it might incriminate them or expose them to penalty.

As noted by the Committee, subclause 82(1) is only a partial abrogation of the privilege against self-incrimination. As indicated in the Explanatory Memorandum, clauses 79 and 82 and other provisions imposing functions, powers and obligations on an authorised person in the Bill were framed in accordance with the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* These provisions were formulated in consultation with the Attorney-General's Department and similar provisions are contained in other Commonwealth statutes.

The partial abrogation by subclause 82(1) of the privilege against self-incrimination has been included to ensure an authorised person is able to seek relevant information or require the production of documents or things necessary to determine whether there is a contravention of the requirements of the legislation. The type of information expected to be requested under clause 79 might typically not be available from persons other than licence holders or associated parties and it is important that relevant information can be obtained to ensure the effective administration of the Bill. As the Committee proposed, I will include an explanation of this matter in the revised Explanatory Memorandum that will be tabled in the Senate.

Committee Response

The Committee thanks the Minister for this response and for his commitment to include relevant information in the explanatory memorandum.

Courts Legislation Amendment (Judicial Complaints) Bill 2012

Introduced into the House of Representatives on 14 March 2012
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated on 5 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2012 - extract

Background

This bill amends the *Family Law Act 1975, the Federal Court of Australia Act 1976*, and the *Federal Magistrates Act 1999* to:

- provide a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers;
- provide immunity from suit for heads of jurisdiction as well as participants assisting a head of jurisdiction in the complaints handling process.

The bill also amends the *Freedom of Information Act 1982* to exclude documents created through the complaints handling scheme from the operation of the Act.

Trespass on personal rights, natural justice
General

It is noted that although the bill provides a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers, the process for dealing with the complaints remains non-statutory. The Statement of Compatibility notes, at page 5 of the explanatory memorandum, that in gathering information in relation to a complaint, the 'courts' own internal complaints processes' would be used and that 'it would be expected that procedural fairness protocols are adopted and applied'.

The bill does not, as the Statement of Compatibility notes, enable formal disciplinary action to be taken against a judicial officer and has the focus of maintaining public confidence in federal courts. However, the legal basis on which an 'officer of the Commonwealth' exercising non-statutory administrative powers is bound by procedural

fairness obligations has not been clearly established by the High Court. Although such powers are, in principle, subject to review, the Committee would prefer that the legislation is explicit on this point. **The Committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach and requests advice as to whether the legislation can be amended to ensure that procedural fairness obligations apply to the non-statutory aspects of the complaints process.**

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

Attorney-General's response - extract

The Committee has sought advice as to the justification for the proposed approach to the Bill and whether the legislation can be amended to ensure that procedural fairness obligations apply to the non-statutory aspects of the complaints handling process.

The Bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to provide additional powers to courts' heads of jurisdiction to support their existing broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court. Review of the exercise of these powers is treated similarly to other powers a head of jurisdiction already possesses in respect of these responsibilities to the court.

The Bill provides a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers, as well as provide immunity from suit for heads of jurisdiction and participants assisting a head of jurisdiction in the complaints handling process. The Bill also gives a head of jurisdiction power to take any measures that they assess as reasonably necessary to maintain public confidence in the Court, including the ability to temporarily restrict another judge to non-sitting duties.

The central role undertaken by the Chief Justices and the Chief Federal Magistrate to respond to concerns about judicial conduct mean that most complaints about judges or federal magistrates are expected to be properly addressed through the courts internal complaints processes. The Government is working in close consultation with the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to develop a framework for the consistent and transparent approach to complaints processes.

The Bill is designed to support the implementation of this largely non-statutory framework to assist the Chief Justices of the Federal Court and Family Court and the Chief Federal Magistrate manage complaints about judicial conduct that are referred to them.

I consider a largely non-statutory approach is appropriate to provide for flexibility in dealing with the diversity of complaints received by the courts from members of the public and dissatisfied litigants. A number of complaints may actually reflect dissatisfaction with a judicial decision which is appropriately a matter for review by appeal.

The framework is intended to provide a broad and flexible model that augments complaints procedures that currently operate within the federal courts. As the seriousness and nature of a complaint may vary, a flexible approach towards complaints management by heads of jurisdiction means responses to complaints can be prompt and tailored to the relevant circumstances.

Development of the non-statutory model will address specific procedural fairness requirements in the process of dealing with a complaint. I do not therefore consider that inclusion of specific obligations under this legislation is necessary.

On this basis, I do not consider that the Bill trespasses unduly on personal rights and liberties.

Committee Response

The Committee thanks the Attorney-General for this response. The Committee notes that in its view it would be possible to state in the legislation that procedural fairness obligations apply to the non-statutory aspects of the complaints process. The rules of procedural fairness at common law are responsive to the decision-making context, so this would allow the legislation to be explicit about the principle while retaining flexibility in dealing with complaints. **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Customs Amendment (Military End-Use) Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Home Affairs

The Committee considered and commented on this bill in *Alert Digest No.14 of 2011*. The Minister responded to the committee's concerns in a letter received on 7 February 2012 which was published in the committee's *First Report of 2012*.

The Committee received a copy of a letter dated 23 May 2012 from the Minister for Home Affairs to the Minister for Defence concerning his agreement to an amendment to the bill which had been requested by the Committee.

The Minister for Home Affairs, by letter to the Committee dated 23 May 2012, confirmed that amendments to the bill have been proposed to include a provision to require the Minister for Defence to report annually to each House of Parliament on the use of discretionary power.

A copy of the letter is attached to this report.

Committee Response

The Committee thanks the Minister for the action taken and for his comprehensive response to this issue.

Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

Introduced into the Senate on 24 November 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

In *Alert Digest No.5 of 2012* the Committee commented in the amendments section on page 41 on the bill. The Minister responded to the Committee's comments in a letter dated 30 May 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2011 – amendment section extract

On 21 March 2012 the Senate agreed to 12 Government amendments and tabled a supplementary explanatory memorandum. On 22 March 2012 the House of Representatives tabled a revised explanatory memorandum and passed the bill without amendment.

One of the amendments reverses the burden of proof for an offence by requiring an 'apparent indirectly responsible entity' to pay to an outworker a specified amount, unless the entity has proved to the court's satisfaction that it is not liable to pay the outworker or that the liability is less than alleged. While the revised explanatory memorandum notes generally that the purpose of the Bill is to enhance protections for vulnerable workers, it is not clear as to the justification for reversing the onus of proof. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Minister's response - extract

In relation to the TCF Bill, the *Alert Digest* raises issues about Australian Government amendments that reversed the onus of proof in claims for unpaid amounts under new Part 6-4A of the *Fair Work Act 2009* (the FW Act).

The TCF Bill included provisions allowing an outworker to initiate a claim for recovery of an unpaid amount against entities in the supply chain. In the Government's view, the evidentiary and procedural burden placed on TCF outworkers by these provisions compromised their effectiveness, particularly given the complexity of supply chains in the TCF industry and TCF outworkers' often limited contact with or knowledge of each entity in the supply chain. The Senate Standing Committee on Education, Employment and

Workplace Relations in its majority report on the TCF Bill also identified the procedural requirements of these provisions as a concern and recommended amendments to address the issue.

The amendments that were passed by the Senate reduced the procedural and evidential burden on outworkers in making a demand for payment for unpaid amounts. Where an outworker reasonably believes an entity to be indirectly liable for an unpaid amount, the outworker can initiate a claim for payment against that entity. The entity will then be liable for payment unless it can show that it is not an indirectly responsible entity and that it does not have the requisite connection to the TCF work (or only has a connection to a lesser extent to that alleged). This approach is consistent with the approach taken in state regimes for the recovery of unpaid amounts.

It is important to note that this is not, as is stated in the *Alert Digest,* an offence provision. The provisions are about allowing an outworker to recover an unpaid amount from another entity in the supply chain for whom work is done indirectly. An entity that pays an unpaid amount will be able to recover an equivalent amount plus interest from the person directly responsible for the payment, or can offset the amount against any other amount owed by them to the person. This ensures that the liability for payment ultimately remains with the person directly responsible for the original failure to pay.

Committee Response

The Committee thanks the Minister for this detailed response.

Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012

Introduced into the House of Representatives on 14 March 2012
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated on 5 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2012 - extract

Background

This bill confers rights and liabilities on all persons who had sought or were granted orders by the Family Court of Australia or the Federal Magistrates Court of Australia in the de facto financial causes jurisdiction and the relevant appellate jurisdiction of the Family Court of Australia between the date the jurisdiction was conferred and when relevant Proclamations were made.

The bill also amends the *Family Law Act 1975* to provide that regulations may be made to provide a date from which the jurisdiction of the Family Court of Australia must not be exercised in certain circumstances.

Trespass on personal rights, retrospective application

This bill draws on precedents of earlier Commonwealth validation legislation (which have been upheld by the High Court). The bill would create 'new statutory rights and liabilities for all persons who have been affected by two Proclamations not having been made under subsection 40(2) of the *Family Law Act 1975*' (see the explanatory memorandum at page 1).

The bill aims to rectify the invalidity of a particular type of orders relating to de facto financial matters. This has resulted from the fact that, although jurisdiction was conferred to make the orders on the Family Court and Federal Magistrates' Court, Proclamations necessary to enable the exercise of this jurisdiction were not made at the appropriate time. The effect of the bill, if passed, will be to 'put persons in the same position they would have been if the Proclamations had been made at the time of conferral of jurisdiction' (see the explanatory memorandum at page 1). The bill is said to provide individuals with certainty.

A number of features of the bill should be emphasised. First, ‘affected individuals’ may seek to alter rights and obligations that were established by the orders to be validated by this legislation ‘in the same way they would have been able to if the original orders had been validly made’ (see the explanatory memorandum at pages 1 and 2). Secondly, it is argued that the bill:

> ...protects against prosecution for retrospective criminal offences as it provides that if, before the commencement of the Bill, a court purported to convict a person of an offence, nothing in the Bill is to be taken to validate or confirm that conviction.

This means that the bill will not operate to ‘validate a conviction for an offence’ which relates to the subject matter of a court order which would be validated by this amendment (see subitems 2(3) and 8(3)).

Finally, items 5 and 11 provide that the bill will not validate any order specifically declared or held to be invalid by a court prior to the commencement of the amendments.

The Committee understands the proposed approach, notes the justification provided for it and, in general, leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

However, the Committee seeks the Attorney-General's advice as to the whether any of the amendments in the bill are likely to have an adverse effect on any legal proceedings that have been initiated, but are not yet finalised.

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

Attorney-General's response - extract

The Committee has also sought advice as to whether any of the amendments in the Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012 are likely to have an adverse effect on any legal proceedings that have been initiated, but are not yet finalised.

The Bill will not have an adverse effect on any legal proceedings that have been initiated but are not yet finalised. The provisions in the Bill clearly create rights and liabilities for any orders that have been made by a court or Registrar in the absence of a subsection 40(2) Proclamation. Persons will be able to rely on these rights and liabilities in exactly the same way as if the order had been validly made. It does not impact on the validity of proceedings

currently on foot. There is no question about the validity of applications that have been filed prior to the relevant subsection 40(2) Proclamations being made, as confirmed in the Family Court of Australia judgment Sabata & Sabata [2012] FamCA 105.

I do not consider that the Bill trespasses unduly on personal rights and liberties.

Committee Response

The Committee thanks the Attorney-General for this response.

Illegal Logging Prohibition Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Agriculture, Fisheries and Forestry

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Minister responded to the Committee's comments in a letter dated on 12 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2012 - extract

Background

This bill seeks to:

- prohibit the importation of all timber products that contain illegally logged timber and the processing of domestically grown raw logs that have been illegally harvested;
- require importers of regulated timber products and processors of raw logs to undertake due diligence to mitigate the risk of products containing illegally logged timber; and
- establish a monitoring, investigation and enforcement regime.

Trespass on personal rights and liberties
Delegation of legislative power
Clauses 2 and 9

Clause 9 of the Bill creates an offence for importing illegally logged timber in regulated timber products. The fault element for one of the elements of the offence (that 'the thing is made from, or included, illegally logged timber') is negligence. The explanatory memorandum at page 12 states that 'due diligence requirements will be prescribed by regulations [see clause 14] to facilitate importers due care in reasonably mitigating the risk of importing illegally logged regulated timber products'. There is a delayed commencement of this provision to enable appropriate consultation and to enable importers to develop and test their due diligence procedures. Nevertheless the committee expects the explanatory memorandum to address the factors set out in the *Guide to Framing Commonwealth Offences* (at pages 23 to 24) in justifying the use of negligence as the standard of fault. The committee therefore **requests the Minister's advice as to whether the proposed approach is consistent with the *Guide*.**

The committee further notes that another element of the offence—that 'the thing is a regulated timber product'—is a matter to be prescribed by the regulations. The explanatory memorandum states at page 13 that work is still being undertaken to determine which timber products will be prescribed based on ongoing consultations and economic analysis and risk assessment. Nevertheless, given the heavy penalty for contravention of the offence (five years imprisonment or 500 penalty units) the committee remains concerned that important information should be included in primary legislation whenever possible. In the circumstances, **the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Minister's response - extract

The Committee seeks further advice as to whether the use of negligence as the standard of fault in clause 9 of the Bill is consistent with the *Guide to Framing Commonwealth Offences.*

The Guide states that only where it is necessary for a person to be criminally liable based in part on objective standards, rather than their subjective mental state, should negligence be specified as the fault element for an offence. The standard of care for criminal negligence is an objective one based upon the concept of a reasonable person in the same situation. Clause 14 of the Bill requires importers to be aware of the relevant risks and circumstances that may give rise to the risk of importing illegally logged regulated timber products. As importers of regulated timber products are required to comply with clause 14 of the Bill, a reasonable person, as an importer of regulated timber product, will be required to be aware of the risks and circumstances giving rise to importing illegally logged timber products. As this will be the standard of industry, it is necessary that those in the industry are held to this objective standard and be subject to criminal prosecution if they fall seriously short of the requisite standard of care. This is consistent with 2.2.5 of the Guide as they will be required, by law, to be aware of the relevant risks once the legislation is passed.

Clause 2 relates to the timing of the prohibition and due diligence requirements. There is a delay on the commencement of both clauses until two years after the day of Royal Assent specifically to allow time for industry to develop the systems and processes to comply with clauses 9 and 14 of the Bill. The development of the regulations will be the result of extensive consultation with domestic and international stakeholders to ensure the most cost efficient and effective regulations for industry and this will go to informing industry so as

to maximise the likelihood of a reasonable person being aware of the requirements as per clause 14.

As the Senate Standing Committee on Rural Affairs and Transport, in its report on the inquiry into the exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011 recommended that Australia's approach be consistent with measures being taken in the United States and European Union to combat illegal logging, the government has included a fault element that is consistent with the standard of care required by importers of timber and timber products in the United States. The European Union regulations, which come into effect in 2013, will require operators to exercise due diligence similar to the requirements under the Australian Bill.

The Guide further supports the use of negligence if it is a well-established indication of liability. In the United States *Lacey Act 1900*, it is unlawful to "import, export, transport, sell, receive, acquire, or purchase certain plants that are taken, possessed, transported or sold in violation of the laws of the United States or any foreign law that protects plants". The standard of care for this prohibition is 'due care' which means "the degree of care which a reasonable prudent person would exercise in the circumstances". Australia's equivalent is the negligence fault element as it relates to "the standard of care that a reasonable person would exercise in the circumstances".

Committee Response

The Committee thanks the Minister for this detailed response.

List of regulated timber products not in primary legislation

The Bill allows for a number of key areas to be prescribed in regulations. This allows for greater flexibility to continually improve the legislative framework for the policy over time, and to allow for adjustments to be made to the products covered, as innovation and technology improves, such as advancements in harvesting and manufacturing techniques.

The Government thanks the Committee for raising this issue and will be ensuring that it undertakes extensive consultation as it develops the list of regulated timber products.

Committee Response

The Committee thanks the Minister for the reply and notes his commitment to undertake extensive consultation.

Reversal of onus

The Government notes the Scrutiny of Bills Committee's finding that the explanations for the reversal of onus is consistent with the *Guide to Framing Commonwealth Offences* and that the Committee makes no further comment on this matter.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 1 of 2012 - extract

Coercive powers
Part 4

Part 4 of the Bill deals with monitoring, investigation and enforcement and appears to adopt a standard approach which is consistent with the principles in the *Guide to Framing Commonwealth Offences*. However, given that inspectors (appointed under clause 19) may exercise coercive powers (including the use of force against persons, see clause 53), the Committee **seeks the Minister's advice as to whether consideration has been given to the inclusion of a clause which requires the development of guidelines for the implementation of the coercive powers by inspectors and for adequate training of such officers**. **Consideration might also be given to requiring such guidelines to be tabled in Parliament and published on the Department's website**.

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

Minister's response - extract

The Committee seeks further advice as to whether consideration has been given to the inclusion of a clause which requires the development of guidelines for the implementation of the coercive powers by inspectors and for adequate training of such officers. The Committee suggested that consideration might be given to requiring such guidelines to be tabled in Parliament and published on the Department's website.

In drafting the provisions relating to the powers of inspectors it was noted that officers employed under the agriculture, fisheries and forestry portfolio currently exercise powers under existing legislative instruments that are consistent with these elements of the Bill. For example the provisions set out in clause 53 of the Bill are similar to, and consistent with, enforcement, monitoring and investigation provisions of the *Quarantine Act 1908* (section 66AK) and the *Export Control Acts 1982* (section 11).

Within the agriculture, fisheries and forestry portfolio, Quarantine and Export Control Officers are required to have the appropriate levels of training, experience and qualifications to conduct investigations and apply the use of force provisions, if necessary, when carrying out their duties.
Analogous to this, clause 19 of the Bill identifies that inspectors will have "suitable training or experience to properly exercise the powers of an inspector".

The determination of the level of training and experience which is suitable to exercise the powers of an inspector rests with existing requirements for all persons undertaking inspection and enforcement activities on behalf of the Commonwealth to comply with a number of legislative instruments, policies and guidelines when conducting an investigation, or taking any associated warrant action.

Some of the Commonwealth standards that exist include:

- Prosecution Policy of the Commonwealth
- The Legal Services Direction 2005
- The Commonwealth Fraud Control Guidelines
- Protective Security Policy Framework.
- Commonwealth Grant Guidelines
- Commonwealth Procurement Guidelines
- The Covert Surveillance in Commonwealth Administrative Guidelines
- The Commonwealth Protective Security Policy framework

Most importantly, all Commonwealth investigations are conducted in accordance with the Australian Government Investigation Standards 2011 (AGIS). AGIS is an important part of the Australian Government's fraud control policy and is the minimum standard for agencies conducting investigations in relation to the programs and legislation they administer.

The current levels of training, experience and qualifications for persons undertaking inspection and enforcement activities on behalf of the Commonwealth (including those who would be appointed as inspectors under clause 19 of the Bill), combined with the

established policies, legislative instruments, guidelines, standard operating procedures and work instructions are considered by the government to be sufficient to satisfy the concerns raised by the Committee regarding coercive powers set out in Part 4 of the Bill.

Therefore, following due consideration of the issues raised by the Committee, I do not believe the Bill needs an additional clause requiring the development of guidelines for the powers of inspectors and for training of such officers, as well as potential tabling in Parliament and publication of such guidelines.

However, I would be happy to provide links to the previously mentioned guidelines that are publically available, on the Department's website.

Committee Response

The Committee thanks the Minister for the outline of the framework relating to requirements for inspection and enforcement activities. The Committee supports the suggestion to provide links to relevant documents on the Department's website.

Alert Digest No. 1 of 2012 - extract

Strict liability
Clauses 73 and 74

The effect of clauses 73 and 74 is to make civil penalty provisions apply on the basis strict liability. This means that mistake of fact is a defence but there is an evidential burden on a person who wishes to rely on it. This is an approach which is often taken in relation to civil penalty provisions. Nevertheless, the committee usually expects that the explanatory memorandum should explain the reasons for the proposed approach rather than simply repeating the effect of the provisions.

> *In the circumstances, the Committee makes no further comment on this matter.*

Minister's response - extract

Strict liability

The Government notes that the provisions in Part 4 of the Bill, including clauses 73 and 74, are standardised provisions used by the Office of Parliamentary Counsel when drafting legislation for monitoring, investigation and enforcement. As noted by the Committee the effect of the provisions is that of strict liability, however, this is the approach which is often taken in relation to civil penalty provisions. If the Committee would like the explanatory memorandum to be amended to further clarify this, the Government would be willing to consider this further.

Committee Response

The Committee thanks the Minister for this response and notes that it would be useful to amend the explanatory memorandum to include this information if the opportunity to do so arises.

National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012

Introduced into the House of Representatives on 22 March 2012
Portfolio: Health and Ageing

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 24 May 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill amends the *National Health Reform Act 2011* to establish the Administrator of the National Health Funding Pool and the National Health Funding Body as set out in the National Health Reform Agreement agreed to by the Council of Australian Governments on 2 August 2011.

Reversal of burden of proof
Item 27, proposed subsection 268(2)

Proposed subsection 268(1) provides that a person who is or was the Administrator commits an offence if they disclose or use 'protected Administrator information'. Subsection 268(2) provides for a number of exceptions. These exceptions relate to situations in which the disclosure or use is justified by reference to Commonwealth or State or Territory law, COAG directions, the fact the disclosure is to a responsible Minister, has the consent of the person or relates to information that has already lawfully been made available to the public. The explanatory memorandum states that 'it would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure' (see the explanatory memorandum at page 8).

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. The Committee has, however, accepted that reversal of the onus of proof may be justifiable where a matter may be said to be peculiarly within the knowledge of the accused or where the proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply

provided by the accused. Nevertheless it is suggested that a blanket statement that it would be difficult for the prosecution to prove the relevant matters, which relate to nine different exceptions, does not provide a sufficient basis for the Committee to be assured that the approach is justified in each instance.

The same issue arises in relation to proposed subclause 269(2)

The Committee would prefer that placing the onus of proof on a defendant in the circumstances outlined in 268(2)(a) to 268(2)(i) was explained in more detail and **the Committee therefore seeks the Minister's further advice about this matter.**

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

Minister's response - extract

Reversal of burden of proof-Item 27, proposed subsections 268(2) and 269(2)

I note the Committee's request for further advice about the requirement in the proposed secrecy provisions in subsections 268(2) and 269(2) for a defendant to bear an evidential burden when relying on an exception to the prohibition against using or disclosing protected Administrator or Funding Body information.

Subsection 268(2) sets out the exceptions to the prohibition against the disclosure or use of 'protected Administrator information' by the Administrator of the National Health Funding Pool (or a past Administrator). 'Protected Administrator information' is defined in section 5 as information that was obtained in a person's capacity as the Administrator. This information would include, for example, sensitive information provided by a state or territory to allow the Administrator to carry out his or her statutory functions, such as the Reserve Bank Account details of a state or information to calculate the Commonwealth's funding contribution to a state pool account.

Similarly, subsection 269(2) sets out the exceptions to the prohibition for a Funding Body official (or past official) to the disclosure or use of 'protected Funding Body information'. It is envisaged that the Funding Body will have access to the same sort of information as the Administrator given the Funding Body's function in section 252 of assisting the Administrator.

The Administrator or a Funding Body official who was the subject of legal proceedings would have detailed knowledge of the protected information he or she would be alleged to have disclosed in contravention of the secrecy provisions. He or she would also have

detailed knowledge of the circumstances in which the information was obtained and the circumstances of its disclosure. In some instances, it would be possible that the defendant would be the sole repository of such information.

I therefore consider that a defendant would be best placed to assert an exception to the secrecy and disclosure offences in a wide range of circumstances, and that the defendant would not be placed in a disadvantaged position before a court compared with the prosecution because of the reversed onus of proof.

Accordingly, I consider that the reversal of the evidential burden of proof in the secrecy and disclosure provisions of the Bill is consistent with the *Guide* to *Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). As the Committee would be aware, the Guide provides that an evidential burden should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence, or where it would be more costly for the prosecution to prove.

I would also like to draw to the Committee's attention the standard of proof required under the *Criminal Code Act 1*995 (the Criminal Code) to support the Government's view that the reversal of the onus is appropriate. Under subsection 13.3(3) of the Criminal Code, the standard of proof imposed by the evidential burden requires a defendant to adduce or point to 'evidence that suggests a *reasonable possibility* that the matter exists or does not exist.' Once this is done, the onus falls back to the prosecution to refute the defendant's contention beyond reasonable doubt.

Accordingly, the evidential burden on the defendant in this case would only require the Administrator or a Funding Body official in legal proceedings to show a reasonable possibility that the disclosure of information occurred in circumstances outlined in one of the exceptions specified in subsections 268(2) or 269(2). I believe this is reasonable and appropriate, particularly in light of the Administrator's unique role where he or she will often be the sole source of information concerning the subject matter of the disclosure and the reasons for the disclosure.

Committee Response

The Committee thanks the Minister for this detailed response and requests that the key information be included in the explanatory memorandum.

Alert Digest No. 5 of 2012 - extract

Delegation of legislative power
Item 27, proposed paragraph 279(3)(c)

Proposed subsection 279(2) prohibits the publication of information which is likely to enable the identification of a particular patient by specified persons or bodies. Proposed paragraphs 279(3)(a) and (b) provide that subsection (2) does not apply if consent is obtained from the patient (if over 18 years) or the patient's surviving partner. Proposed paragraph 279(3)(c) enables the regulations to authorise other individuals who may give consent to the publication of the information. The explanatory memorandum does not state why it is not possible to specify further individuals who may appropriately give consent for the purposes of this provision. **The Committee therefore seeks the Minister's further advice as to the need to deal with this issue in the regulations.**

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

Minister's response - extract

Delegation of legislative power- item 27, proposed paragraph 279(3)(c)

I note the Committee's request for advice on the need to specify in regulations individuals who may give consent to the publication of information which is likely to enable the identification of a patient.

The proposed section 279 simply re-enacts existing section 228 in the *National Health Reform* Act 20*II* (the Act). The section was originally enacted as section 58 of the *National Health and Hospitals Network* Act *2011,* and has since been repealed and re-enacted twice: first as section 128 of the renamed Act, and then as section 228. The repeal and re-enactment has been used to maintain easy to use sequential section numbering in the Act.

Despite the fact that the section has been before the Parliament on three previous occasions in the last two years, this is the first time the Committee has raised an issue with it.

The section prevents any national health reform agency (including the Australian Commission on Safety and Quality in Health Care, the National Health Performance

Authority, the Independent Hospital Pricing Authority, the Administrator and the Funding Body) from publishing or disseminating information that is likely to enable the identification of a particular patient unless:

- the patient is aged at least 18 years and has consented; or
- the patient is dead and his or her partner (who was living with the patient before his or her death) has consented; or
- in any other case, an individual authorised under the regulations has consented.

I would like to make three points in relation to this issue.

First, it is unlikely that any of the bodies will have access to information that would identify an individual patient.

Second, if an agency did have such information, and believed it would be appropriate as part of its functions to release it, the section requires the agency to seek consent from an adult individual or a surviving partner. I believe this provision will cover the majority of cases in which an agency might wish to release information.

Finally, 1do not believe it is appropriate to include in the Act the potentially very complex drafting to provide for consent by an appropriate individual in relation to children or Single deceased adults. Rather, if a need ever emerged for the release of information in relation to these categories of patients, consent provisions could be included, more expeditiously, in the regulations. Should such a regulation ever be made, it will of course be subject to parliamentary scrutiny through the normal tabling and disallowance processes. For these reasons, I consider the use of the regulation-making power in this instance is reasonable and appropriate.

I trust that this information is of assistance to the Committee.

Committee Response

The Committee thanks the Minister for the explanation, including that the use of regulations is appropriate because if regulations are needed they could involve complex drafting.

National Vocational Education and Training Regulator (Charges) Bill 2012

Introduced into the House of Representatives on 22 March 2012
Portfolio: Tertiary Education Skills, Science and Research

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 1 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill enables the National VET Regulator, known as the Australian Skills Quality Authority, to impose charges on NVR registered training organisations for compliance audits and substantiated complaint investigations conducted by the Regulator.

Delayed commencement
Clause 2

The substantive provisions of the Bill will not commence until 1 Jan 2013. Where there is a delay in commencement of legislation longer than six months (or a possible delay, depending on when passage of the bills occurs) it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. While the Committee is aware that there are circumstances in which the proposed approach may be appropriate, it expects that the justification will be addressed in the explanatory memorandum. In this instance the explanatory memorandum does not appear to outline the justification for the proposed commencement of the bill. **The Committee therefore seeks the Minister's advice as to the rationale for the proposed commencement of the bill, and any possible delay in commencement.**

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

Minister's response - extract

As detailed in ASQA's Cost Recovery Impact Statement (June 2011), charges relating to additional monitoring activities (other than off-shore monitoring), are proposed to commence from 1 January 2013. I consider it prudent that the commencement date for the enabling provisions coincide with the date on which the charges are set to apply. This will avoid any confusion in the VET sector that is likely to arise by providing separate commencement dates.

I trust this information satisfies the Committee that the delayed commencement is justified in this circumstance.

Committee Response

The Committee thanks the Minister for his explanation of the rationale for the proposed commencement date.

Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012

Introduced into the House of Representatives on 22 March 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 1 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill introduces a new payment for eligible working fathers and partners who are caring for a child born or adopted from 1 January 2013.

The bill makes minor amendments to the *Paid Parental Leave Act 2010* to:

- amend the provisions which permit 'keeping in touch days'; and
- clarify the operation of a number of provisions, such as debt recovery, notice and the provisions relating to delegation of the Secretary's powers under the Act.

The bill also amends the *Fair Work Act 2009* to clarify unpaid parental leave arrangements where there is a stillborn or infant death.

Retrospective effect
Part 1 of Schedule 2

The explanatory memorandum states that this Schedule makes a number of minor amendments to the *Paid Parental Leave Act* to improve clarity and consistency. Part 1 of the Schedule commences retrospectively, from the time the *Paid Parental Leave Act* commenced. The explanatory memorandum states, at page 43, that 'no person's rights will be adversely affected' by this retrospective commencement.

However, the Committee is unclear about whether this is correct in relation to the operation of item 8. This item proposes to insert a new subsection 257(7) into the *Paid Parental Leave Act*. This subsection provides that a failure, by the SSAT, to comply with a requirement to notify a person who is dissatisfied with the outcome of a review, that they

may apply to the AAT for a review of the decision, does not affect the validity of the decision. The explanatory memorandum at page 45 justifies this by reference to the fact that the approach is consistent with an equivalent notification requirement in *A New Tax System (Family Assistance) (Administration) Act 1999*.

Although that may be accepted, it is conceivable that the failure to notify a person of their right to seek review (in the AAT) of an SSAT decision may contribute to them being out of time to lodge such an appeal. The effect of the amendment proposed in item 8 may impact on such a person's ability to successfully challenge the decision in judicial review proceedings, which would appear to the committee to constitute an adverse impact on a person's right. **The Committee therefore seeks the Minister's advice as to why it is necessary to provide for the retrospective commencement of this provision and confirmation that it could not conceivably adversely affect a person's rights.**

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

Minister's response - extract

The wording of item 8 is based on the wording of subsection 141 (3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act). Item 8 proposes to insert a new subsection 257(7) into the *Paid Parental Leave Act 2010* (the Paid Parental Leave Act), which provides that a failure by the Social Security Appeals Tribunal (SSAT) to comply with a requirement under subsection 257(6) to notify each party of the review that they may apply to the Administrative Appeals Tribunal (AAT) for a review of the decision does not affect the validity of the decision. The retrospective application of Item 8 fulfils the original intent of the legislation to be consistent with the approach applied in relation to SSAT decisions under the family assistance legislation.

Similar arrangements can be found in other legislation. For example, in the *Administrative Appeals Tribunal Act* 1975 (the AAT Act), subsection 27A(1) provides that a person who makes a reviewable decision must take reasonable steps to give to any person whose interests are affected by the decision a written notice of the making of the decision and the right to have the decision reviewed. Subsection 27A(3) of the AAT Act provides that a failure to do so does not affect the validity of the decision.

Under the Paid Parental Leave Act, a person's right to seek further review of an SSAT decision is found in the existing subsection 257(6) and is not affected by the proposed Item 8 which protects the validity of the SSAT decision. The retrospective application of Item 8 will ensure the completeness of the Paid Parental Leave Act from its original

commencement. A Paid Parental Leave claimant is made aware of their review and appeal rights at various stages of the appeal process. When a person is notified by the Department of Human Services of a reviewable decision under the Paid Parental Leave Act, they are notified in writing that they have the right to seek an independent Authorised Review Officer review if they disagree with the decision, to seek an SSAT review if they disagree with the Authorised Review Officer's decision, and to seek an AAT review if they disagree with the SSAT decision.

The SSAT website also provides Paid Parental Leave claimants with detailed information in relation to their further appeal rights. In addition, when the SSAT affirms, varies or sets aside a Department of Human Services decision for a Paid Parental Leave claimant, the SSAT provides written notice that if a party is dissatisfied with the SSAT decision, they may seek further review through the AAT.

Should an individual fail to apply for an AAT review of a reviewable decision within the required timeframe because they were not aware of their review rights, section 29 of the AAT Act provides that the AAT may extend the timeframe if it is satisfied that it is reasonable in all the circumstances to do so.

In short, the retrospective application of Item 8 in the Dad and Partner Pay Bill is necessary for the legislation to operate as intended from its commencement. I can confirm that the retrospective commencement of this provision could not conceivably adversely affect a person's rights.

Thank you again for writing.

Committee Response

The Committee thanks the Minister for this detailed response and her assurance that no person will be adversely affected by the proposed approach.

Road Safety Remuneration Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

In *Alert Digest No.5 of 2012* the Committee commented in the amendments section on page 41 on the bill. The Minister responded to the Committee's comments in a letter dated 30 May 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2011 – amendment section extract

Use of delegation legislation

On 15 March 2012 the House of Representatives tabled a supplementary explanatory memorandum and on 19 March 2012 agreed to 64 Government amendments. On 20 March 2012 the Senate tabled a revised explanatory memorandum and passed the bill without amendment.

Amendments 33(3) to 33(5) seek to provide that the regulations may prescribe a code of conduct 'to facilitate the effective and efficient collective bargaining for road transport collective agreements' (see paragraph 22 of the supplementary explanatory memorandum). The committee usually prefers to see important matters included in the primary act rather than in subordinate legislation. **In the absence of an explanation for the approach in the explanatory memorandum, the committee seeks the Minister's advice as to the justification for it.**

Minister's response - extract

In relation to the Road Safety Bill, the Alert Digest raises concerns about provisions in the Bill that allow regulations to prescribe a code of conduct to facilitate the effective and efficient collective bargaining for road transport collective agreements.

The *Road Safety Remuneration Act 2012* enables a hirer and owner drivers to collectively bargain and enter into collective agreements. The Government's amendments clarified the Road Safety Remuneration Tribunal's role in approving collective agreements under Part 3 and ensured that conduct by drivers and their hirers when negotiating and giving effect to these agreements will not breach competition laws.

The Government's amendments also allowed for the development of a code of conduct to provide guidance on collective bargaining to both hirers and drivers. If it is determined that guidance or assistance is required, the Government can consult the road transport industry as well as the Road Safety Remuneration Tribunal and develop a code. A code was therefore not provided for in the primary legislation. A code, if made, would be intended to assist the parties to understand their rights and obligations during negotiations for a collective agreement. The Tribunal would also use the code to decide whether the bargaining process was properly conducted prior to its consideration of a collective agreement.

I trust that this information is helpful.

Committee Response

The Committee thanks the Minister for this detailed response.

Shipping Registration Amendment (Australian International Shipping Register) Bill 2012

Introduced into the House of Representatives on 22 March 2012
Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 18 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill amends the *Shipping Registration Act 1981*:

- to establish a new Australian International Shipping Register and Australian General Register;
- to establish the administration of the International Register by providing for the application process for registration;
- relating to employment conditions for seafarers;
- relating to collective agreement negotiation processes;
- relating to enforcement powers for the Australian Maritime Safety Authority; and
- to establish a civil penalty and infringement notice regime.

The bill also makes consequential amendments to the *Australian Maritime Safety Authority Act 1990*, the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* and the *Navigation Amendment Act 2011*.

Delegation of legislative power
Item 34, proposed subsection 33B(3)

This proposed subsection enables additional requirements relating to the cancellation of registration to be prescribed by the regulations. As the committee prefers that important

matters be included in primary legislation whenever this is appropriate, given the significance of the power to cancel registration, and as this matter is not addressed in the explanatory memorandum the Committee **seeks the Minister's advice as to the rationale for the proposed approach.**

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

Minister's response - extract

The Committee also sought advice on the rationale for permitting additional requirements relating to the cancellation of registration to be prescribed by regulations under subclause 33B(3).

Australia has a strong reputation for high standards of maritime safety and environmental protection in the international maritime community. The protection of this reputation is vital and it is important that the International Register is not viewed by others as a "flag of convenience". Many of these provisions, including the ability to cancel a ship's registration for serious breaches of maritime safety, environmental and other relevant laws, are standard practice for reputable international shipping registers. The ability to cancel a ship's registration in the International Register is a crucial component of the range of measures included in the Bill to mitigate the increased risk profile expected to be posed by International Register ships.

The Government agrees with the Committee's view that, for important matters such as the power to cancel registration, it is preferable that the list of reasons be included in the primary legislation. This is why the reasons for possible cancellation listed in clause 33B are as detailed as possible. However, in order to maintain Australia's maritime reputation, it was considered prudent to include a regulation making power in clause 33B to ensure an appropriate and timely response should unforeseen circumstances that have not been contemplated to date arise.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the key information would have been useful in the explanatory memorandum.

Alert Digest No. 5 of 2012 - extract

Delegation of legislative power
Schedule 1, item 96

Proposed subsection 83(5) provides that the regulations may provide for offences and for the imposition of civil penalties. Although proposed subsection 96(5A) states that the penalties established must not be more than 50 penalty units for an individual or 250 penalty units for a body corporate, no justification is given for the need for providing for the imposition of penalties in regulations rather that in the primary act. The maximum penalties that may be imposed are consistent with the approach recommended by the *Guide to Framing Commonwealth Offences*, however, **the Committee seeks the Minister's advice as to the need for such penalties to be dealt with in regulations.**

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

Minister's response - extract

In relation to the Committee's query regarding the ability for the regulations to provide for offences and penalties under subclause 83(5), I note that the *Shipping Registration Act 1981* currently provides for the imposition of penalties in the regulations. Existing subsection 83(5) states, "The regulations may provide, in respect of an offence against the regulations, for the imposition of a fine not exceeding $500." The proposed amendments to subsection 83(5) merely update the penalty provisions that may be included in the regulations to align the Act with similar provisions in other contemporary pieces of legislation, and to be consistent with the approach recommended by the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 5 of 2012 - extract

Trespass on personal rights or liberties
Schedule 2, item 13

This item provides that employment related legislation specified in this Part of the bill, including the *Fair Work Act 2009*, does not apply to ships registered in the International Register when they are engaged in international trading. The explanatory memorandum states at page 15 that this approach reinforces 'the object of the AISR to provide an internationally competitive international register'.

The Statement of Compatibility, at page 5 of the explanatory memorandum, argues that the Bill, along with the Navigation Act, does nonetheless protect the right of workers to just and favourable conditions of work' and that the protections are in accordance with the Maritime Labour Convention (see also page 17 of the explanatory memorandum). **In these circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Minister's response - extract

The Committee also raised the issue of employment related legislation specified in the Shipping Registration Amendment (Australian International Shipping Register) Bill. The Government's policy in relation to the International Register is to provide an opportunity for Australian ship operators to increase their involvement in international trade, without the need to re-register offshore. To ensure that the International Register is competitive, international labour terms and conditions will apply to seafarers working on the vessel while engaged in international trade.

Committee Response

The Committee thanks the Minister for this additional information.

Wheat Export Marketing Amendment Bill 2012

Introduced into the House of Representatives on 21 March 2012
Portfolio: Agriculture, Fisheries and Forestry

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Minister responded to the Committee's comments in a letter dated on 18 June 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill implements the recommendations of the Productivity Commission's report into wheat export marketing arrangements by amending the *Wheat Export Marketing Act 2008* to transition the wheat export industry to full deregulation by:

- abolishing the Wheat Export Accreditation Scheme and the Wheat Export Charge on 30 September 2012;
- winding up Wheat Exports Australia on 31 December 2012; and
- removing the access test requirements for grain port terminal operators on 30 September 2014.

The bill also makes consequential amendments to the *Criminal Code Act 1995* and repeals the *Wheat Export Marketing Act 2008* on 1 October 2014.

Delayed commencement
Schedule 3

The provisions in this schedule will commence on 1 October 2014. The explanatory memorandum indicates that the delay is necessary to provide industry sufficient time to adjust to the new trading environment. It is also the case that the provisions will only commence if the Minister has made a decision to accept a self-regulatory industry code of conduct to replace the 'access test' which would be repealed by schedule 3. Overall the bill is designed to transition to a fully deregulated market for bulk wheat export. It is suggested that the delay is in commencement for Schedule 3 is a central part of this overall policy (see page 5 of the explanatory memorandum). **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Minister's response - extract

1. Delayed commencement - schedule 3

The committee has drawn senators' attention to the provisions in schedule 3, which will not commence until 1 October 2014. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The decision to retain the access test until 30 September 2014 was recommended by the Productivity Commission in its review of wheat export marketing arrangements. The government also decided to retain the link between the access test and the ability to export bulk wheat during this period. This action responds to concerns among some growers and traders about possible anti-competitive behaviour with respect to grain port terminal access. These issues were considered by the Australian Competition and Consumer Commission during negotiation of new access undertakings for those port terminal operators required to pass the access test. These undertakings came into place on 1 October 2011.

Retention of the access test during this period will give the industry sufficient time, and appropriate incentives, to adjust to the new trading environment. It will allow for some new features of the competitive environment to be institutionalised, while minimising the chances of damaging future investments or undermining reasonable returns to existing asset holders.

It will also provide sufficient time for industry to develop a code of conduct to address port terminal access issues. Implementation of the code will give growers certainty that, irrespective of which exporter they sell to, their product will gain access to grain port terminal services. It will reinforce Australia's international reputation as a reliable wheat supplier and give overseas customers certainty that all Australian exporters will be able to meet supply commitments. It will also help ensure these facilities have the necessary throughput to attract the level of return on investment required to keep them viable. This process has begun with the establishment of a Code Development Committee with representatives from all industry sectors.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 5 of 2012 - extract

Broad Delegation
Proposed subsection 7(4) and subsection 8(2)

This proposed subsection provides that the Secretary may make a written determination that the 'access test' which would otherwise be applicable does not apply in relation to a specified provider if 'there are special circumstances that justify the Secretary doing so'. The explanatory memorandum at page 7 lists a number of considerations to which the Secretary may have regard, though they are not mentioned in the bill.

The same issue arises in relation to subsection 8(2).

The Committee seeks the Minister's advice as to whether any consideration has been given to providing further legislative guidance as to how these discretions will be exercised, such as by prescribing matters which the Secretary must consider.

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

Minister's response - extract

2. Broad delegation - proposed subsection 7(4) and subsection 8(2)

The committee requested advice about the broad delegation allowing the Secretary of the Department of Agriculture, Fisheries and Forestry to make a written determination that the access test, which would otherwise be applicable, does not apply in relation to a specified provider if 'there are special circumstances that justify the Secretary doing so'. The committee has asked whether consideration has been given to providing further legislative guidance as to how this discretion will he exercised, such as by prescribing matters that the secretary must consider.

Decisions on who is required to pass the access test will be based on the same criteria that are used by Wheat Exports Australia. Given the changing nature of the industry, it is important that providers are not penalised for breaches outside their control. This could occur, for example, if there was a transfer of ownership of a port terminal and the previous provider had failed to comply with the continuous disclosure rules contained in section 9(4). At the same time, the application of the access test must ensure continuous compliance with the continuous disclosure rules and mitigate against the possibility of a provider, or an associated entity of that provider, changing their legal identity in order to avoid the access test being applied to successive exports.

Given the wide variety of circumstances that may apply, and the need for the secretary to have flexibility in reaching a decision, it is impractical to specify the circumstances in legislation. The Explanatory Memorandum provides guidance on the type of circumstances the secretary may consider.

There is also an appropriate review process if a person does not agree with a decision made by the secretary. The Explanatory Memorandum explains that a person who feels their interests have been affected by a decision of the secretary would, in the first instance, alert the secretary who would then reconsider that decision. If this reconsideration did not resolve the issue, the person would be able to apply to the Administrative Appeals Tribunal for review of the original decision under schedule I, item 54 of the Bill. The exercise of this discretion is envisaged to be of short duration given the operation of schedule 3.

Committee Response

The Committee thanks the Minister for this detailed response, and notes that decisions by the secretary are subject to review.

Alert Digest No. 5 of 2012 - extract

Reversal of Onus
Proposed subsection 8(3)

Subsection 8(3) provides for an exception in relation to an offence of exporting wheat where there has been a failure to pass the access test (subsection 8(1)). The exception is available where wheat is exported in ‘a bag’ or ‘a container’ that is capable of holding not more than 50 tonnes of wheat. The explanatory memorandum at page 8 merely repeats the effect of these provisions and does not justify them. The Committee's long-standing

expectation is that an explanation will be given for provisions which reverse the onus of proof by placing an evidential burden onto a defendant and that it will take into account the guidance provided in the Guide to formulating Commonwealth Offences published by the Attorney-General. Although the matters are would clearly be within a defendant's knowledge, it is not clear that they would 'peculiarly' be within his or her knowledge. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

3. Reversal of onus - proposed subsection 8(3)

The committee has also sought my advice on the justification for the reversal of onus relating to the exception to passing the access test contained in subsection 8(3), when wheat is exported in bags or containers capable of holding not more than 50 tonnes of wheat. A person who wishes to rely on this exception bears an evidential burden in relation to that matter rather than it being borne by the authority claiming the breach.

I consider it appropriate to reverse the burden of proof in this case because the relevant information is peculiarly within the defendant's knowledge as they are responsible for all aspects of the export arrangements. They will have ready access to, and can easily provide, the documentation required to prove that the consignment was exported in bags or containers. I confirm that the *Guide to framing Commonwealth offences, infringement notices and enforcement powers* was taken into account in developing this approach. The Explanatory Memorandum will be updated to include this information.

I trust this information satisfies the committee's requirements.

Committee Response

The Committee thanks the Minister for this detailed response and for his commitment to update the explanatory memorandum about this matter.

Senator the Hon Ian Macdonald
Chair

The Hon Anthony Albanese MP
Minister for Infrastructure and Transport
Leader of the House

Reference: 01251-2012

22 MAY 2012

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

RECEIVED
23 MAY 2012
Senate Standing C'ttee
for the Scrutiny
of Bills

Dear Senator Fifield Mitch,

Thank you for the comments contained in the Scrutiny of Bills Committee's Alert Digest No.2 of 2012, concerning the Aviation Transport Security Amendment (Screening) Bill 2012. I offer the following comments in response.

Item 4, repeal existing section 95A

I note that the Committee has asked the Senate as a whole to consider the question of whether repealing section 95A is limiting the right to freedom of movement in an appropriate, reasonable and proportionate manner. For background, section 95A was originally included in the *Aviation Transport Security Act 2004* (the Act) to provide for persons who for medical reasons preferred not to be screened using technology that generates an electromagnetic field. I wish to assure the committee that passengers who, for medical reasons, are unable to be screened by a particular technology will be able to undergo special circumstances screening. Special circumstances screening involves the use of screening methods such as hand-held metal detectors, frisk searches or another screening method appropriate to the passenger's circumstances.

The Department of Infrastructure and Transport (the Department) has consulted extensively with privacy and civil interest groups, including disability groups, in developing the operational policy that will govern the use of body scanners for aviation security screening. Alternatives will be made available for those who, for a genuine medical or physical reason, cannot undergo a body scan.

Through the Office of the Australian Information Commissioner, the Department engaged groups such as Vision Australia, Disability Council NSW, Organisation Intersex International, the Australian Federation of Islamic Councils (Muslims Australia), the Australian Human Rights Commission and the Australian Catholic Bishops Conference, to ensure that these organisations were involved in the policy dialogue. Part of this consultation process involved the development of a comprehensive privacy impact assessment. A consultation draft for comment was released in 2011 during the body scanner trial at Sydney and Melbourne airports and three submissions were received. The feedback received in these submissions has been

PARLIAMENT HOUSE CANBERRA ACT 2600
Telephone: 02 6277 7680 Facsimilie: 02 6273 4126

incorporated into the final assessment which was released on 28 February 2012. The assessment is publically available on the Department's TravelSECURE website and a copy has been included for your information at **Attachment A**.

Regulation 4.17 of the Aviation Transport Security Regulations 2005 allows for the methods, techniques and equipment to be used for screening to be specified in a notice. This notice outlines screening requirements for a range of special circumstances passengers, such as passengers with visual impairments, passengers who are unable to walk or stand, and passengers accompanied by a carer or an assistance animal. Provisions contained in the notice for special circumstances screening will remain and will be supplemented with any additional special circumstances that relate to body scanners. In addition, the Department has a program of ongoing consultation with disability groups through the Aviation Access Working Group to ensure that screening processes cater to the needs of these stakeholders. This engagement has assisted the Department to develop screening practice guidelines for the screening of special circumstances passengers.

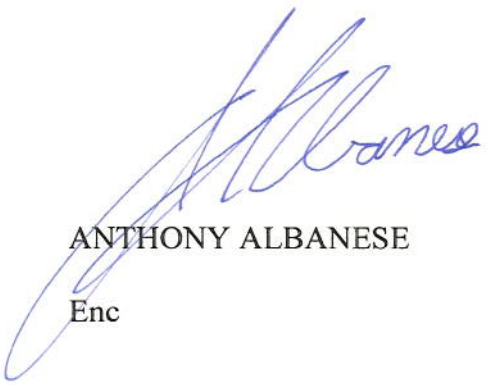
I am confident that the measures currently in place adequately protect special circumstances passengers, whilst providing the flexibility needed to refine processes as required. The protocols for screening passengers with special circumstances will not change significantly with the introduction of body scanners. Where alternative screening is required, those alternatives will consist of technology and procedures already used for screening passengers with disabilities and special circumstances.

Item 1, proposed section 41A
In relation to the concerns raised about the proposed consent provision, amendments will be made to the Aviation Transport Security Regulations 2005 to mandate that airports display appropriate signage at screening points advising passengers of their rights in relation to aviation security screening. These signs will clearly state that a passenger will be assumed to have consented to a screening procedure unless they expressly state their refusal. The main purpose of the consent provision is to ensure that passenger facilitation rates are not adversely affected by the requirement for express consent to be obtained from each passenger before they undergo a body scan.

Item 1, proposed section 4(3)(3B)
I note the Committee's comments about lack of legislative assurance that body scanners introduced into Australia for aviation security screening will not be able to store or transmit data from individual scans. I agree that the legislation should provide that scanners will not be capable of storing or transmitting data obtained from individual scans, or that these functions will be disabled or removed.

I trust this information will be of assistance to the Committee. If you would like clarification on any of the matters raised, the contact officer in the Department is Mr Peter Robertson, General Manager, Aviation Security, telephone number 02 6274 6271. The adviser in my office is Mr Craig Carmody, telephone number 02 6277 7685.

Yours sincerely



ANTHONY ALBANESE

Enc

The Hon Anthony Albanese MP
Minister for Infrastructure and Transport
Leader of the House

Reference: 02591-2012

18 JUN 2012

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator ~~MacDonald~~ Ian,

I refer to the letter dated 10 May 2012 from Toni Dawes, Committee Secretary of the Senate Standing Committee for Scrutiny of Bills, on matters raised by the Committee on the Coastal Trading (Revitalising Australian Shipping) Bill 2012 and the Shipping Registration Amendment (Australian International Shipping Register) Bill 2012.

Coastal Trading (Revitalising Australian Shipping) Bill 2012

Clause 79 of the Bill empowers an authorised person to require a person to give information, produce documents or things specified in the notice, or appear before an authorised person to answer questions. Under subclause 82(1), a person may not refuse to produce the information or documents or answer questions because it might incriminate them or expose them to penalty.

As noted by the Committee, subclause 82(1) is only a partial abrogation of the privilege against self-incrimination. As indicated in the Explanatory Memorandum, clauses 79 and 82 and other provisions imposing functions, powers and obligations on an authorised person in the Bill were framed in accordance with the Commonwealth's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. These provisions were formulated in consultation with the Attorney-General's Department and similar provisions are contained in other Commonwealth statutes.

The partial abrogation by subclause 82(1) of the privilege against self-incrimination has been included to ensure an authorised person is able to seek relevant information or require the production of documents or things necessary to determine whether there is a contravention of the requirements of the legislation. The type of information expected to be requested under clause 79 might typically not be available from persons other than licence holders or associated parties and it is important that relevant information can be obtained to ensure the effective administration of the Bill. As the Committee proposed, I will include an explanation of this matter in the revised Explanatory Memorandum that will be tabled in the Senate.

PARLIAMENT HOUSE CANBERRA ACT 2600
Telephone: 02 6277 7680 Facsimilie: 02 6273 4126

Shipping Registration Amendment (Australian International Shipping Register) Bill 2012

The Committee also sought advice on the rationale for permitting additional requirements relating to the cancellation of registration to be prescribed by regulations under subclause 33B(3).

Australia has a strong reputation for high standards of maritime safety and environmental protection in the international maritime community. The protection of this reputation is vital and it is important that the International Register is not viewed by others as a "flag of convenience". Many of these provisions, including the ability to cancel a ship's registration for serious breaches of maritime safety, environmental and other relevant laws, are standard practice for reputable international shipping registers. The ability to cancel a ship's registration in the International Register is a crucial component of the range of measures included in the Bill to mitigate the increased risk profile expected to be posed by International Register ships.

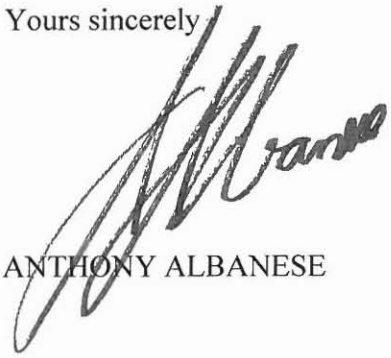
The Government agrees with the Committee's view that, for important matters such as the power to cancel registration, it is preferable that the list of reasons be included in the primary legislation. This is why the reasons for possible cancellation listed in clause 33B are as detailed as possible. However, in order to maintain Australia's maritime reputation, it was considered prudent to include a regulation making power in clause 33B to ensure an appropriate and timely response should unforeseen circumstances that have not been contemplated to date arise.

In relation to the Committee's query regarding the ability for the regulations to provide for offences and penalties under subclause 83(5), I note that the *Shipping Registration Act 1981* currently provides for the imposition of penalties in the regulations. Existing subsection 83(5) states, "The regulations may provide, in respect of an offence against the regulations, for the imposition of a fine not exceeding $500." The proposed amendments to subsection 83(5) merely update the penalty provisions that may be included in the regulations to align the Act with similar provisions in other contemporary pieces of legislation, and to be consistent with the approach recommended by the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The Committee also raised the issue of employment related legislation specified in the Shipping Registration Amendment (Australian International Shipping Register) Bill. The Government's policy in relation to the International Register is to provide an opportunity for Australian ship operators to increase their involvement in international trade, without the need to re-register offshore. To ensure that the International Register is competitive, international labour terms and conditions will apply to seafarers working on the vessel while engaged in international trade.

Should the Committee have any further queries or require additional clarification on any aspect of the shipping reform suite of Bills, please contact Pauline Sullivan, General Manager, Shipping Reform Taskforce, on 02 6274 6584.

Yours sincerely



ANTHONY ALBANESE

THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT

AG-MC12/02541; 12/4888

5 JUN 2012

Senator the Hon Ian McDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator McDonald

I thank the Senate Scrutiny of Bills Committee for drawing to my attention to comments contained in the Committee's *Alert Digest No. 4 of 2012* (21 March 2012) concerning the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012.

I am pleased to provide my response to issues identified in the Digest as they relate to the following legislation within my portfolio responsibility:

Courts Legislation Amendment (Judicial Complaints) Bill 2012

The Committee has sought advice as to the justification for the proposed approach to the Bill and whether the legislation can be amended to ensure that procedural fairness obligations apply to the non-statutory aspects of the complaints handling process.

The Bill amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to provide additional powers to courts' heads of jurisdiction to support their existing broad responsibility for ensuring the effective, orderly and expeditious discharge of the business of the Court. Review of the exercise of these powers is treated similarly to other powers a head of jurisdiction already possesses in respect of these responsibilities to the court.

The Bill provides a statutory basis for relevant heads of jurisdiction to deal with complaints about judicial officers, as well as provide immunity from suit for heads of jurisdiction and participants assisting a head of jurisdiction in the complaints handling process. The Bill also gives a head of jurisdiction power to take any measures that they assess as reasonably necessary to maintain public confidence in the Court, including the ability to temporarily restrict another judge to non-sitting duties.

The central role undertaken by the Chief Justices and the Chief Federal Magistrate to respond to concerns about judicial conduct mean that most complaints about judges or federal magistrates are expected to be properly addressed through the courts internal complaints processes. The Government is working in close consultation with the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate to develop a framework for the consistent and transparent approach to complaints processes.

The Bill is designed to support the implementation of this largely non-statutory framework to assist the Chief Justices of the Federal Court and Family Court and the Chief Federal Magistrate manage complaints about judicial conduct that are referred to them.

I consider a largely non-statutory approach is appropriate to provide for flexibility in dealing with the diversity of complaints received by the courts from members of the public and dissatisfied litigants. A number of complaints may actually reflect dissatisfaction with a judicial decision which is appropriately a matter for review by appeal.

The framework is intended to provide a broad and flexible model that augments complaints procedures that currently operate within the federal courts. As the seriousness and nature of a complaint may vary, a flexible approach towards complaints management by heads of jurisdiction means responses to complaints can be prompt and tailored to the relevant circumstances.

Development of the non-statutory model will address specific procedural fairness requirements in the process of dealing with a complaint. I do not therefore consider that inclusion of specific obligations under this legislation is necessary.

On this basis, I do not consider that the Bill trespasses unduly on personal rights and liberties.

Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012

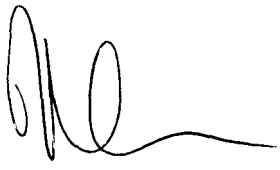
The Committee has also sought advice as to whether any of the amendments in the Family Law Amendment (Validation of Certain Orders and Other Measures) Bill 2012 are likely to have an adverse effect on any legal proceedings that have been initiated, but are not yet finalised.

The Bill will not have an adverse effect on any legal proceedings that have been initiated but are not yet finalised. The provisions in the Bill clearly create rights and liabilities for any orders that have been made by a court or Registrar in the absence of a subsection 40(2) Proclamation. Persons will be able to rely on these rights and liabilities in exactly the same way as if the order had been validly made. It does not impact on the validity of proceedings currently on foot. There is no question about the validity of applications that have been filed prior to the relevant subsection 40(2) Proclamations being made, as confirmed in the Family Court of Australia judgment Sabata & Sabata [2012] FamCA 105.

I do not consider that the Bill trespasses unduly on personal rights and liberties.

Thank you for allowing me the opportunity to address the Committee's comments.

Yours sincerely



NICOLA ROXON

THE HON JASON CLARE MP
Minister for Home Affairs
Minister for Justice

COPY

RECEIVED
29 MAY 2012
Senate Standing C'ttee
for the Scrutiny
of Bills

Ministerial No: 104816

23 MAY 2012

The Hon Stephen Smith MP
Minister for Defence
Parliament House
CANBERRA ACT 2600

Dear Minister Stephen

Thank you for your letter of 7 February 2012 seeking my agreement to amend the Customs Amendment (Military End-Use) Bill 2011 (the MEU Bill) to meet the request by the Senate Standing Committee for the Scrutiny of Bills (the Committee) to have a requirement for you to report to Parliament on the use of this discretionary power.

Attached is an amended copy of the MEU Bill which representatives from the Australian Customs and Border Protection Service (Customs and Border Protection) and the Defence Export Control Office (DECO) have worked together to prepare. This Bill now includes a provision to require you to report annually to each House of Parliament on the use of this power.

I have been advised that the Prime Minister does not need to give policy approval for this amendment and that my approval will be sufficient as the change is technical.

I have copied the Chair of the Committee into this letter, to provide the Committee with the information that meets their request.

The officer responsible for this matter in Customs and Border Protection is Ms Leanne Willson, Director Counter Proliferation who can be contacted on (02) 6275 6845.

Yours sincerely

Jason Clare

Jason Clare

Cc: Senator Mitch Fifield
Chair, Senate Scrutiny of Bills Committee

Telephone +61 2 6277 7290
mha@ag.gov.au
Parliament House, Canberra ACT 2600
Australia
Facsimile +61 2 6273 7098

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Ms Toni Dawes, Committee Secretary of the Senate Scrutiny of Bills Committee, wrote on 10 May 2012 requesting that I respond to the issues raised in *Alert Digest No.5 of 2012* about the Fair Work Amendment (Textile, Clothing and Footwear) Industry Bill 2011 (the TCF Bill) and the Road Safety Remuneration Bill 2011 (the Road Safety Bill).

In relation to the TCF Bill, the *Alert Digest* raises issues about Australian Government amendments that reversed the onus of proof in claims for unpaid amounts under new Part 6-4A of the *Fair Work Act 2009* (the FW Act).

The TCF Bill included provisions allowing an outworker to initiate a claim for recovery of an unpaid amount against entities in the supply chain. In the Government's view, the evidentiary and procedural burden placed on TCF outworkers by these provisions compromised their effectiveness, particularly given the complexity of supply chains in the TCF industry and TCF outworkers' often limited contact with or knowledge of each entity in the supply chain. The Senate Standing Committee on Education, Employment and Workplace Relations in its majority report on the TCF Bill also identified the procedural requirements of these provisions as a concern and recommended amendments to address the issue.

The amendments that were passed by the Senate reduced the procedural and evidential burden on outworkers in making a demand for payment for unpaid amounts. Where an outworker reasonably believes an entity to be indirectly liable for an unpaid amount, the outworker can initiate a claim for payment against that entity. The entity will then be liable for payment unless it can show that it is not an indirectly responsible entity and that it does not have the requisite connection to the TCF work (or only has a connection to a lesser extent to that alleged). This approach is consistent with the approach taken in state regimes for the recovery of unpaid amounts.

Parliament House Canberra ACT 2600 Telephone (02) 6277 7320 Fax (02) 6273 4115

It is important to note that this is not, as is stated in the *Alert Digest*, an offence provision. The provisions are about allowing an outworker to recover an unpaid amount from another entity in the supply chain for whom work is done indirectly. An entity that pays an unpaid amount will be able to recover an equivalent amount plus interest from the person directly responsible for the payment, or can offset the amount against any other amount owed by them to the person. This ensures that the liability for payment ultimately remains with the person directly responsible for the original failure to pay.

In relation to the Road Safety Bill, the Alert Digest raises concerns about provisions in the Bill that allow regulations to prescribe a code of conduct to facilitate the effective and efficient collective bargaining for road transport collective agreements.

The *Road Safety Remuneration Act 2012* enables a hirer and owner drivers to collectively bargain and enter into collective agreements. The Government's amendments clarified the Road Safety Remuneration Tribunal's role in approving collective agreements under Part 3 and ensured that conduct by drivers and their hirers when negotiating and giving effect to these agreements will not breach competition laws.

The Government's amendments also allowed for the development of a code of conduct to provide guidance on collective bargaining to both hirers and drivers. If it is determined that guidance or assistance is required, the Government can consult the road transport industry as well as the Road Safety Remuneration Tribunal and develop a code. A code was therefore not provided for in the primary legislation. A code, if made, would be intended to assist the parties to understand their rights and obligations during negotiations for a collective agreement. The Tribunal would also use the code to decide whether the bargaining process was properly conducted prior to its consideration of a collective agreement.

I trust that this information is helpful.

Regards

BILL SHORTEN

30 MAY 2012

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2012-00992

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fifield

I refer to the letter of 9 February 2012 from Ms Toni Dawes, Committee Secretary, Standing Committee for the Scrutiny of Bills, requesting further information regarding the Illegal Logging Prohibition Bill 2011as identified in the committee's *Alert digest No. 1.*

In particular the committee sought further advice on:

1. whether the use of negligence as a standard of fault in clause 9 of the Bill was consistent with the *Guide to framing Commonwealth offences, infringement notices and enforcement powers*
2. whether I had considered including in the Bill a clause to require the development of guidelines for the powers of inspectors and for their training, as well as to require the publication and tabling in parliament of such guidelines.

Please find enclosed my advice to the committee on these matters.

Further, I enclose my response to the questions raised by the committee on the list of regulated products not being included in the primary legislation and the reversal of onus.

I trust this information addresses the committee's concerns.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

12 June 2012

Enc.

Response to the Standing Committee for the Scrutiny of Bills - Illegal Logging Prohibition Bill 2011

The Committee seeks further advice as to whether the use of negligence as the standard of fault in clause 9 of the Bill is consistent with the *Guide to Framing Commonwealth Offences.*

The Guide states that only where it is necessary for a person to be criminally liable based in part on objective standards, rather than their subjective mental state, should negligence be specified as the fault element for an offence. The standard of care for criminal negligence is an objective one based upon the concept of a reasonable person in the same situation. Clause 14 of the Bill requires importers to be aware of the relevant risks and circumstances that may give rise to the risk of importing illegally logged regulated timber products. As importers of regulated timber products are required to comply with clause 14 of the Bill, a reasonable person, as an importer of regulated timber product, will be required to be aware of the risks and circumstances giving rise to importing illegally logged timber products. As this will be the standard of industry, it is necessary that those in the industry are held to this objective standard and be subject to criminal prosecution if they fall seriously short of the requisite standard of care. This is consistent with 2.2.5 of the Guide as they will be required, by law, to be aware of the relevant risks once the legislation is passed.

Clause 2 relates to the timing of the prohibition and due diligence requirements. There is a delay on the commencement of both clauses until two years after the day of Royal Assent specifically to allow time for industry to develop the systems and processes to comply with clauses 9 and 14 of the Bill. The development of the regulations will be the result of extensive consultation with domestic and international stakeholders to ensure the most cost efficient and effective regulations for industry and this will go to informing industry so as to maximise the likelihood of a reasonable person being aware of the requirements as per clause 14.

As the Senate Standing Committee on Rural Affairs and Transport, in its report on the inquiry into the exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011 recommended that Australia's approach be consistent with measures being taken in the United States and European Union to combat illegal logging, the government has included a fault element that is consistent with the standard of care required by importers of timber and timber products in the United States. The European Union regulations, which come into effect in 2013, will require operators to exercise due diligence similar to the requirements under the Australian Bill.

The Guide further supports the use of negligence if it is a well-established indication of liability. In the United States *Lacey Act 1900*, it is unlawful to "import, export, transport, sell, receive, acquire, or purchase certain plants that are taken, possessed, transported or sold in violation of the laws of the United States or any foreign law that protects plants". The standard of care for this prohibition is 'due care' which means "the degree of care which a reasonable prudent person would exercise in the circumstances". Australia's equivalent is the negligence fault element as it relates to "the standard of care that a reasonable person would exercise in the circumstances".

List of regulated timber products not in primary legislation

The Bill allows for a number of key areas to be prescribed in regulations. This allows for greater flexibility to continually improve the legislative framework for the policy over time, and to allow for adjustments to be made to the products covered, as innovation and technology improves, such as advancements in harvesting and manufacturing techniques.

The Government thanks the Committee for raising this issue and will be ensuring that it undertakes extensive consultation as it develops the list of regulated timber products.

Reversal of onus

The Government notes the Scrutiny of Bills Committee's finding that the explanations for the reversal of onus is consistent with the *Guide to Framing Commonwealth Offences* and that the Committee makes no further comment on this matter.

The Committee seeks further advice as to whether consideration has been given to the inclusion of a clause which requires the development of guidelines for the implementation of the coercive powers by inspectors and for adequate training of such officers. The Committee suggested that consideration might be given to requiring such guidelines to be tabled in Parliament and published on the Department's website.

In drafting the provisions relating to the powers of inspectors it was noted that officers employed under the agriculture, fisheries and forestry portfolio currently exercise powers under existing legislative instruments that are consistent with these elements of the Bill. For example the provisions set out in clause 53 of the Bill are similar to, and consistent with, enforcement, monitoring and investigation provisions of the *Quarantine Act 1908* (section 66AK) and the *Export Control Acts 1982* (section 11).

Within the agriculture, fisheries and forestry portfolio, Quarantine and Export Control Officers are required to have the appropriate levels of training, experience and qualifications to conduct investigations and apply the use of force provisions, if necessary, when carrying out their duties.

Analogous to this, clause 19 of the Bill identifies that inspectors will have "suitable training or experience to properly exercise the powers of an inspector".

The determination of the level of training and experience which is suitable to exercise the powers of an inspector rests with existing requirements for all persons undertaking inspection and enforcement activities on behalf of the Commonwealth to comply with a number of legislative instruments, policies and guidelines when conducting an investigation, or taking any associated warrant action.

Some of the Commonwealth standards that exist include:

- Prosecution Policy of the Commonwealth
- The Legal Services Direction 2005
- The Commonwealth Fraud Control Guidelines
- Protective Security Policy Framework.
- Commonwealth Grant Guidelines
- Commonwealth Procurement Guidelines
- The Covert Surveillance in Commonwealth Administrative Guidelines
- The Commonwealth Protective Security Policy framework

Most importantly, all Commonwealth investigations are conducted in accordance with the Australian Government Investigation Standards 2011 (AGIS). AGIS is an important part of the Australian Government's fraud control policy and is the minimum standard for agencies conducting investigations in relation to the programs and legislation they administer.

The current levels of training, experience and qualifications for persons undertaking inspection and enforcement activities on behalf of the Commonwealth (including those who would be appointed as inspectors under clause 19 of the Bill), combined with the established policies, legislative instruments, guidelines, standard operating procedures and work instructions are considered by the government to be sufficient to satisfy the concerns raised by the Committee regarding coercive powers set out in Part 4 of the Bill.

Therefore, following due consideration of the issues raised by the Committee, I do not believe the Bill needs an additional clause requiring the development of guidelines for the powers of inspectors and for training of such officers, as well as potential tabling in Parliament and publication of such guidelines.

However, I would be happy to provide links to the previously mentioned guidelines that are publically available, on the Department's website.

Strict liability

The Government notes that the provisions in Part 4 of the Bill, including clauses 73 and 74, are standardised provisions used by the Office of Parliamentary Counsel when drafting legislation for monitoring, investigation and enforcement. As noted by the Committee the effect of the provisions is that of strict liability, however, this is the approach which is often taken in relation to civil penalty provisions.

If the Committee would like the explanatory memorandum to be amended to further clarify this, the Government would be willing to consider this further.

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Science and Research

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr MacDonald

Thank you for your letter of 10 May 2012, concerning the delayed commencement of the substantive provisions of the National Vocational Education and Training Regulator (Charges) Bill 2012.

As detailed in ASQA's Cost Recovery Impact Statement (June 2011), charges relating to additional monitoring activities (other than off-shore monitoring), are proposed to commence from 1 January 2013. I consider it prudent that the commencement date for the enabling provisions coincide with the date on which the charges are set to apply. This will avoid any confusion in the VET sector that is likely to arise by providing separate commencement dates.

I trust this information satisfies the Committee that the delayed commencement is justified in this circumstance.

Yours sincerely

CHRIS EVANS

-1 JUN 2012

Parliament House Canberra ACT 2600 Telephone (02) 6277 7580 Fax (02) 6273 4104

The Hon Tanya Plibersek MP
Minister for Health

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

I refer to the letter of 10 May 2012 from the Committee Secretary, Ms Toni Dawes, regarding issues identified by the Senate Scrutiny of Bills Committee in its *Alert Digest No. 5 of 2012* in relation to the National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012 (the Bill). I am pleased to provide the following responses in relation to the issues raised by the Committee.

Reversal of burden of proof – Item 27, proposed subsections 268(2) and 269(2)
I note the Committee's request for further advice about the requirement in the proposed secrecy provisions in subsections 268(2) and 269(2) for a defendant to bear an evidential burden when relying on an exception to the prohibition against using or disclosing protected Administrator or Funding Body information.

Subsection 268(2) sets out the exceptions to the prohibition against the disclosure or use of 'protected Administrator information' by the Administrator of the National Health Funding Pool (or a past Administrator). 'Protected Administrator information' is defined in section 5 as information that was obtained in a person's capacity as the Administrator. This information would include, for example, sensitive information provided by a state or territory to allow the Administrator to carry out his or her statutory functions, such as the Reserve Bank Account details of a state or information to calculate the Commonwealth's funding contribution to a state pool account.

Similarly, subsection 269(2) sets out the exceptions to the prohibition for a Funding Body official (or past official) to the disclosure or use of 'protected Funding Body information'. It is envisaged that the Funding Body will have access to the same sort of information as the Administrator given the Funding Body's function in section 252 of assisting the Administrator.

Parliament House
CANBERRA ACT 2600
Telephone: 02 6277 7220
Facsimile: 02 6273 4146

The Administrator or a Funding Body official who was the subject of legal proceedings would have detailed knowledge of the protected information he or she would be alleged to have disclosed in contravention of the secrecy provisions. He or she would also have detailed knowledge of the circumstances in which the information was obtained and the circumstances of its disclosure. In some instances, it would be possible that the defendant would be the sole repository of such information.

I therefore consider that a defendant would be best placed to assert an exception to the secrecy and disclosure offences in a wide range of circumstances, and that the defendant would not be placed in a disadvantaged position before a court compared with the prosecution because of the reversed onus of proof.

Accordingly, I consider that the reversal of the evidential burden of proof in the secrecy and disclosure provisions of the Bill is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). As the Committee would be aware, the Guide provides that an evidential burden should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence, or where it would be more costly for the prosecution to prove.

I would also like to draw to the Committee's attention the standard of proof required under the *Criminal Code Act 1995* (the Criminal Code) to support the Government's view that the reversal of the onus is appropriate. Under subsection 13.3(3) of the Criminal Code, the standard of proof imposed by the evidential burden requires a defendant to adduce or point to 'evidence that suggests a *reasonable possibility* that the matter exists or does not exist.' Once this is done, the onus falls back to the prosecution to refute the defendant's contention beyond reasonable doubt.

Accordingly, the evidential burden on the defendant in this case would only require the Administrator or a Funding Body official in legal proceedings to show a reasonable possibility that the disclosure of information occurred in circumstances outlined in one of the exceptions specified in subsections 268(2) or 269(2). I believe this is reasonable and appropriate, particularly in light of the Administrator's unique role where he or she will often be the sole source of information concerning the subject matter of the disclosure and the reasons for the disclosure.

Delegation of legislative power – item 27, proposed paragraph 279(3)(c)
I note the Committee's request for advice on the need to specify in regulations individuals who may give consent to the publication of information which is likely to enable the identification of a patient.

The proposed section 279 simply re-enacts existing section 228 in the *National Health Reform Act 2011* (the Act). The section was originally enacted as section 58 of the *National Health and Hospitals Network Act 2011*, and has since been repealed and re-enacted twice: first as section 128 of the renamed Act, and then as section 228. The repeal and re-enactment has been used to maintain easy to use sequential section numbering in the Act.

Despite the fact that the section has been before the Parliament on three previous occasions in the last two years, this is the first time the Committee has raised an issue with it.

The section prevents any national health reform agency (including the Australian Commission on Safety and Quality in Health Care, the National Health Performance Authority, the Independent Hospital Pricing Authority, the Administrator and the Funding Body) from publishing or disseminating information that is likely to enable the identification of a particular patient unless:

- the patient is aged at least 18 years and has consented; or
- the patient is dead and his or her partner (who was living with the patient before his or her death) has consented; or
- in any other case, an individual authorised under the regulations has consented.

I would like to make three points in relation to this issue.

First, it is unlikely that any of the bodies will have access to information that would identify an individual patient.

Second, if an agency did have such information, and believed it would be appropriate as part of its functions to release it, the section requires the agency to seek consent from an adult individual or a surviving partner. I believe this provision will cover the majority of cases in which an agency might wish to release information.

Finally, I do not believe it is appropriate to include in the Act the potentially very complex drafting to provide for consent by an appropriate individual in relation to children or single deceased adults. Rather, if a need ever emerged for the release of information in relation to these categories of patients, consent provisions could be included, more expeditiously, in the regulations. Should such a regulation ever be made, it will of course be subject to parliamentary scrutiny through the normal tabling and disallowance processes. For these reasons, I consider the use of the regulation-making power in this instance is reasonable and appropriate.

I trust that this information is of assistance to the Committee.

Yours sincerely

Tanya Plibersek

Tanya Plibersek

24.5.12

The Hon Jenny Macklin MP
Minister for Families, Community Services and Indigenous Affairs
Minister for Disability Reform

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

MC12-005322

01 JUN 2012

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator MacDonald

Thank you for your letter of 10 May 2012 about the Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (the Dad and Partner Pay Bill).

In its *Senate Standing Committee for the Scrutiny of Bills - Alert Digest No.* 5 of *2012* (pages 23-24), the Scrutiny of Bills Committee raised concerns about the retrospective effect of item 8 in Part 1, Schedule 2 of the Dad and Partner Pay Bill.

The wording of item 8 is based on the wording of subsection 141(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act). Item 8 proposes to insert a new subsection 257(7) into the *Paid Parental Leave Act 2010* (the Paid Parental Leave Act), which provides that a failure by the Social Security Appeals Tribunal (SSAT) to comply with a requirement under subsection 257(6) to notify each party of the review that they may apply to the Administrative Appeals Tribunal (AAT) for a review of the decision does not affect the validity of the decision. The retrospective application of Item 8 fulfils the original intent of the legislation to be consistent with the approach applied in relation to SSAT decisions under the family assistance legislation.

Similar arrangements can be found in other legislation. For example, in the *Administrative Appeals Tribunal Act 1975* (the AAT Act), subsection 27A(1) provides that a person who makes a reviewable decision must take reasonable steps to give to any person whose interests are affected by the decision a written notice of the making of the decision and the right to have the decision reviewed. Subsection 27A(3) of the AAT Act provides that a failure to do so does not affect the validity of the decision.

Under the Paid Parental Leave Act, a person's right to seek further review of an SSAT decision is found in the existing subsection 257(6) and is not affected by the proposed Item 8 which protects the validity of the SSAT decision. The retrospective application of Item 8 will ensure the completeness of the Paid Parental Leave Act from its original commencement. A Paid Parental Leave claimant is made aware of their review and appeal rights at various stages of the appeal process. When a person is notified by the Department of Human Services of a reviewable decision under the Paid Parental Leave Act, they are notified in writing that they have the right to seek an independent Authorised Review Officer review if they disagree with the decision, to seek an SSAT review if they disagree with the Authorised Review Officer's decision, and to seek an AAT review if they disagree with the SSAT decision.

The SSAT website also provides Paid Parental Leave claimants with detailed information in relation to their further appeal rights. In addition, when the SSAT affirms, varies or sets aside a Department of Human Services decision for a Paid Parental Leave claimant, the SSAT provides written notice that if a party is dissatisfied with the SSAT decision, they may seek further review through the AAT.

Should an individual fail to apply for an AAT review of a reviewable decision within the required timeframe because they were not aware of their review rights, section 29 of the AAT Act provides that the AAT may extend the timeframe if it is satisfied that it is reasonable in all the circumstances to do so.

In short, the retrospective application of Item 8 in the Dad and Partner Pay Bill is necessary for the legislation to operate as intended from its commencement. I can confirm that the retrospective commencement of this provision could not conceivably adversely affect a person's rights.

Thank you again for writing.

Yours sincerely

Jenny Macklin

JENNY MACKLIN MP

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2012-03498

Senator the Hon. Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator MacDonald

I am writing in response to a letter of 10 May 2012 from Ms Toni Dawes, Secretary of the Senate Standing Committee for the Scrutiny of Bills, to my senior adviser requesting my response to issues contained in the committee's *Alert digest no.5 of 2012* about the Wheat Export Marketing Amendment Bill 2012.

1. Delayed commencement – schedule 3

The committee has drawn senators' attention to the provisions in schedule 3, which will not commence until 1 October 2014. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The decision to retain the access test until 30 September 2014 was recommended by the Productivity Commission in its review of wheat export marketing arrangements. The government also decided to retain the link between the access test and the ability to export bulk wheat during this period. This action responds to concerns among some growers and traders about possible anti-competitive behaviour with respect to grain port terminal access. These issues were considered by the Australian Competition and Consumer Commission during negotiation of new access undertakings for those port terminal operators required to pass the access test. These undertakings came into place on 1 October 2011.

Retention of the access test during this period will give the industry sufficient time, and appropriate incentives, to adjust to the new trading environment. It will allow for some new features of the competitive environment to be institutionalised, while minimising the chances of damaging future investments or undermining reasonable returns to existing asset holders.

It will also provide sufficient time for industry to develop a code of conduct to address port terminal access issues. Implementation of the code will give growers certainty that, irrespective of which exporter they sell to, their product will gain access to grain port terminal services. It will reinforce Australia's international reputation as a reliable wheat supplier and give overseas customers certainty that all Australian exporters will be able to meet supply commitments. It will also help ensure these facilities have the necessary throughput to attract the level of return on investment required to keep them viable. This process has begun with the establishment of a Code Development Committee with representatives from all industry sectors.

2. Broad delegation – proposed subsection 7(4) and subsection 8(2)

The committee requested advice about the broad delegation allowing the Secretary of the Department of Agriculture, Fisheries and Forestry to make a written determination that the access test, which would otherwise be applicable, does not apply in relation to a specified provider if 'there are special circumstances that justify the Secretary doing so'. The committee has asked whether consideration has been given to providing further legislative guidance as to how this discretion will be exercised, such as by prescribing matters that the secretary must consider.

Decisions on who is required to pass the access test will be based on the same criteria that are used by Wheat Exports Australia. Given the changing nature of the industry, it is important that providers are not penalised for breaches outside their control. This could occur, for example, if there was a transfer of ownership of a port terminal and the previous provider had failed to comply with the continuous disclosure rules contained in section 9(4). At the same time, the application of the access test must ensure continuous compliance with the continuous disclosure rules and mitigate against the possibility of a provider, or an associated entity of that provider, changing their legal identity in order to avoid the access test being applied to successive exports.

Given the wide variety of circumstances that may apply, and the need for the secretary to have flexibility in reaching a decision, it is impractical to specify the circumstances in legislation. The Explanatory Memorandum provides guidance on the type of circumstances the secretary may consider.

There is also an appropriate review process if a person does not agree with a decision made by the secretary. The Explanatory Memorandum explains that a person who feels their interests have been affected by a decision of the secretary would, in the first instance, alert the secretary who would then reconsider that decision. If this reconsideration did not resolve the issue, the person would be able to apply to the Administrative Appeals Tribunal for review of the original decision under schedule 1, item 54 of the Bill. The exercise of this discretion is envisaged to be of short duration given the operation of schedule 3.

3. Reversal of onus – proposed subsection 8(3*)*

The committee has also sought my advice on the justification for the reversal of onus relating to the exception to passing the access test contained in subsection 8(3), when wheat is exported in bags or containers capable of holding not more than 50 tonnes of wheat. A person who wishes to rely on this exception bears an evidential burden in relation to that matter rather than it being borne by the authority claiming the breach.

I consider it appropriate to reverse the burden of proof in this case because the relevant information is peculiarly within the defendant's knowledge as they are responsible for all aspects of the export arrangements. They will have ready access to, and can easily provide, the documentation required to prove that the consignment was exported in bags or containers. I confirm that the *Guide to framing Commonwealth offences, infringement notices and enforcement powers* was taken into account in developing this approach. The Explanatory Memorandum will be updated to include this information.

I trust this information satisfies the committee's requirements.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

18 June 2012