SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon I Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

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 2013

The committee presents its *Sixth Report of 2013* 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:

Aged Care (Living Longer Living Better) Bill 2013

Introduced into the House of Representatives on 13 March 2013
Portfolio: Health and Ageing

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter received 4 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill is part of a package of five bills. The bill amends the *Aged Care Act 1997* and related legislation to implement reforms in four key areas including:

- changes to residential care including the removal of the distinction between low level and high level residential care;
- amendments to calculations of residential care subsidies and fees for care recipients who enter residential care on or after 1 July 2014;
- additional dementia supplement and a new veterans' mental health supplement payable to providers who care for eligible care recipients;
- the establishment of a new type of care (home care);
- establishing a new Aged Care Pricing Commissioner;
- providing for an independent review of the reforms to commence in 2016 with a report to be tabled in both Houses of Parliament by 30 June 2017; and
- making minor, consequential and technical amendments.

Delegation of legislative power
Various

The bill includes numerous provisions allowing determinations to be made by way of legislative instruments. Unfortunately, however, the explanatory memorandum does not contain sufficient information to enable a consideration of the appropriateness of these delegations of legislative power. **The committee is interested in assessing whether the proposed delegations of legislative power are appropriate, including whether**

important matters are being included in subordinate legislation rather than in primary legislation. The committee therefore seeks the Minister's advice as to the rationale for the provisions which provide for the making of determinations.

> *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

The Committee has sought advice as to the rationale for the provisions which provide for the making of determinations (by way of legislative instruments). Currently the Act describes a range of circumstances in which either the Minister or the Secretary may make determinations:

- Determinations made by the Minister generally relate to the dollar value of, for example, subsidies and supplements. These Determinations are legislative instruments. The reason these matters are not included in the primary legislation is because the dollar values change with indexation and therefore need regular updating;

- Determinations made by the Secretary are legislative instruments if they state a rule that has general application, such as conditions relating to allocations of places generally (see section 14-6 of the Act). The Aged Care (Living Longer Living Better) Bill2013 does not contain any new provisions of this kind; and

- Determinations made by the Secretary are not legislative instruments if they relate to the individual circumstances of a care recipient or an approved provider and as such include information that may be protected information under the Act. A decision by the Secretary not to make a determination of this kind, or to revoke such a determination, is a reviewable decision which means that it is subject to reconsideration by the Secretary and also subject to review by the Administrative Appeals Tribunal.

Consistent with the approach currently adopted in the Act, the same approach has been adopted in relation to the amendments being made through the Aged Care (Living Longer Living Better) Bill 2013. That is, the Bill describes the circumstances in which determinations may be made by the Minister (the focus of the Committee's query).

For example the Minister may, by legislative instrument, determine:

- the basic subsidy amount;

- the maximum amount of accommodation payment that an approved provider may charge a person;

- the amount of each primary supplement and other supplement;

- the annual and lifetime caps for income tested care fees (home care) and means tested care fees (residential care);

- asset thresholds for the purposes of working out means tested care fees; and

- the maximum home value (which forms part of the calculation of the value of a person assets).

It is essential that these dollar values be reflected in determinations rather than in the primary legislation because they require regular updating. As is currently the case in relation to Ministerial determinations under the Act, different amounts are adjusted at different times.

Some amounts are linked to the CPI pension increases and are therefore changed on 20 March and 20 September each year. Other amounts are linked to wage cost indexation and are changed on 1 July of each year.

I trust this clarifies the reasoning underpinning provisions included in the Aged Care (Living Longer Living Better) Bill 2013 and the Australian Aged Care Quality Agency Bill 2013.

Committee Response

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

Australian Aged Care Quality Agency Bill 2013

Introduced into the House of Representatives on 13 March 2013
Portfolio: Health and Ageing

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter received 4 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill establishes a new Australian Aged Care Quality Agency under the *Financial Management and Accountability Act 1997* in line with the recommendations of the Uhrig Review. This body will replace the existing Aged Care Standards and Accreditation Agency from 1 January 2014.

Trespass on personal rights and liberties—privacy
Delegation of legislative power
Part 7

This Part of the bill limits the use of personal information by creating an offence with a penalty of 2 years imprisonment for recording, disclosing or otherwise using 'protected information' that was acquired in the course of administering the Act (Clause 48). (Protected information means information acquired performing the functions of the CEO or the Council and is personal information or relates to the affairs of an approved provider.) This offence, however, is subject to a number of exceptions, though a defendant bears an evidential burden of proof in establishing the relevant matters (subclause 48(2)). For example, the CEO of the Quality Agency is permitted to disclose personal information in the circumstances specified in clause 49.

The Statement of Compatibility appears to conclude that the overall approach to personal information does limit the human right to protection against arbitrary interference with privacy but that any limitations 'are reasonable, necessary and proportionate'. However, it appears to the committee that there is insufficient information included in the explanatory memorandum (at pages 15 to 17) to adequately assess this conclusion. In particular, the defences available to the offence for disclosing protected information in clause 48 are not explained. Similarly, the necessity of authorising the disclosure of protected information for other purposes pursuant to clause 48 is not elaborated. In addition, the bill envisages

that important matters, in the form of further instances of authorised disclosure, will be able to be included in delegated legislation rather than being included in the primary act.

The committee therefore requests additional information from the Minister's about these matters and, in particular, about the appropriateness of allowing for the creation of further instances of authorised disclosure of personal information through the Quality Agency Principles (ie regulations) as envisaged by paragraph 49(j).

> *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

Trespass on personal rights and liberties- privacy- Part 7

The Committee has requested additional information about the provisions relating to the use of personal information and the appropriateness of allowing for the creation of further instances of authorised disclosure of personal information through the Quality Agency Principles.

The Australian Aged Care Quality Agency Bill 2013 establishes a new, independent quality agency responsible for, among other things, accreditation of approved providers of residential aged care.

While the Quality Agency is independent of the Secretary, there is and must be a similarity between the way the Secretary and the CEO of the Quality Agency collect, use and disclose protected information. This is the case particularly because it is the Secretary who may take compliance action against an approved provider on the basis of evidence collected by the Quality Agency. Given the complementary roles, the provisions relating to protected information that are included in the Australian Aged Care Quality Agency Bill are based on those contained in the *Aged Care Act I997* (refer Division 86).

Section 86-3 of the *Aged Care Act I997* enables the Secretary to disclose protected information to a person of a kind specified in the *Information Principles I997.* Similarly, the Bill (section 49) also enables the CEO to disclose protected information to a person of a kind specified in the Quality Agency Principles.

It is important that the Australian Aged Care Quality Agency Bill includes a provision of this kind:

- to maintain consistency with the *Aged Care Act I997;*

- to enable additional purposes (for disclosure) to be specified. For example, in the case of the *Aged Care Act 1997*, the *Information Principles 1997* have been amended over time to include additional circumstances in which disclosure is authorised. This has been necessary as new legislation is introduced which interacts with the *Aged Care Act 1997*. For example the *Information Principles 1997* were amended to enable disclosure of information to the Secretary of the Department of Families, Housing and Community Services and Indigenous Affairs for working out the payment of rent assistance. Disclosure of this type ensures the seamless operation of related legislation enabling the payment of aged care subsidies, pensions and other Government payments.

An important safeguard, however, is the requirement that both the *Information Principles 1997* under the *Aged Care Act 1997* and the Quality Agency Principles under the Australian Aged Care Quality Agency Bill are disallowable instruments. This enables the Senate Standing Committee on Regulations and Ordinances to review any proposed disclosures to ensure that they do not trespass on rights and liberties.

Committee Response

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

Alert Digest No. 5 of 2013 - extract

Delegation of legislative power—important matters in regulations
Clause 53

The functions of the CEO (set out in clause 12 of the bill) include a number of functions which are to be undertaken in accordance with the Quality Agency Principles. For example subclause 12(a) provides that it is a function of the CEO to accredit residential care services in accordance with the Quality Agency Principles. Clause 53 provides that the Minister may, by legislative instrument, make quality Agency Principles providing for matters required or permitted by the Act or necessary or convenient to be provided in order to implement the Act.

The justification for including important matters in delegated legislation rather than in the primary act is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach and whether**

it is appropriate to include the Quality Agency Principles in the primary legislation rather than in delegated legislation.

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- Clause 53

The Committee has sought advice as to the rationale for the proposed approach to including information in delegated legislation and whether it would be more appropriate to include the matters that it is proposed to cover in the Quality Agency Principles in primary legislation rather than in delegated legislation.

Currently, the detailed matters relating to the accreditation process are described in the Accreditation Grant Principles 2011 made under the Aged Care Act 1997. Similarly, it is proposed that detailed matters relating to the new Quality Agency's process of accreditation be detailed in new Quality Agency Principles.

The rationale for including this detail in delegated legislation is:

- the administrative processes surrounding accreditation are quite detailed and therefore more appropriately contained in delegated legislation (or administrative guidelines) rather than primary legislation;

- information that is currently included in the *Accreditation Grant Principles 2011* (and will, in future, be included in the Quality Agency Principles) includes application fees, fees charged for the provision of manuals, documents and other items, as well as the maximum fees able to be charged for seminars and conferences. As this information needs regular updating, it is not appropriate for inclusion in primary legislation; and

- as an organisation focused on continuous improvement, the Quality Agency is likely to adjust its internal processes over time, as more efficient and effective ways are identified for administering the accreditation of residential aged care services. By describing the detailed processes in delegated legislation, there is greater capacity to make such adjustments. These types of adjustments have been made over the last few years in relation to the Accreditation Grant Principles. When this has occurred, the proposed changes have been subject to examination by the Office of Best Practice Regulation and public consultation including with approved providers. This practice is proposed to continue in relation to any proposed changes to the Quality Agency

Principles. The Quality Agency Principles will also be subject to consideration by the Senate Standing Committee on Regulations and Ordinances Committee.

I trust this clarifies the reasoning underpinning provisions included in the Aged Care (Living Longer Living Better) Bill 2013 and the Australian Aged Care Quality Agency Bill 2013.

Committee Response

The committee thanks the Minister for this response and the rationale for the use of delegated legislation. The committee particularly notes the public consultation and the role of the Office of Best Practice Regulation and notes that this information would have been useful in the explanatory memorandum.

Aviation Transport Security Amendment (Inbound Cargo Security Enhancement Bill 2013

Introduced into the House of Representatives on 21 March 2013
Portfolio: Infrastructure and Transport

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter dated 4 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill amends the *Aviation Transport Security Act 2004* to enable the minister to prohibit the carriage of certain air cargo into Australian territory on an aircraft and also make a technical amendment.

Undue trespass on personal rights and liberties—strict liability; Delegation of legislative power—content of offence to be defined by regulation
Schedule 1, item 5

Proposed subsection 65B(1) empowers the Minister to prohibit, by legislative instrument, the entry of specified kinds of cargo into Australian territory on aircraft. The power must be 'for the purposes of safeguarding against unlawful interferences with aviation'. Before making an instrument the Minister must consult the Foreign Affairs Minister and the Trade Minister (proposed subsection 65B(3)). Proposed section 65C makes failure to comply with such an instrument an offence of strict liability, with a penalty of 200 units for an aircraft operator and 100 penalty units for any other aviation industry participant. Two interrelated scrutiny issues arise in relation to these provisions in relation to strict liability and the delegation of power

First, the committee expects that strict liability will only be introduced after careful consideration and that the justification for its use will be addressed in detail in explanatory memoranda. Further, in relation to strict liability offences, the committee has expressed the view that a penalty for an individual of 60 penalty units is a reasonable maximum (and this is consistent with the Commonwealth *Guide to drafting Commonwealth Offences*).

The explanatory memorandum and statement of compatibility do provide a justification for the imposition of strict liability and for setting penalties in excess of 60 penalty units for

individuals. Strict liability is justified on the basis that an effective mechanism to respond to the serious threat caused by certain types of inbound air cargo. The explanatory memorandum (at page 1) argues that existing mechanisms to regulate security threats presented by inbound air cargo have proved cumbersome or are ill-suited to threats which extend beyond the 'short term'. It is argued that a 'strict liability offence is an appropriate deterrent against acts or omissions committed by aviation industry participants that may contribute to the success of [a 'catastrophic'] attack' (statement of compatibility, 2). The level of risk is said to justify the conclusion that non-intentional lack of compliance should also be punished (explanatory memorandum, 5). In addition to pointing to the serious risks associated with failure to comply with an instrument prohibiting specified cargo, it is argued that it would be difficult to prove fault in most instances as:

- extensive documentation regarding examination, handling and treatment of cargo is required to establish the fault element of the applicable business'; and
- 'significant resources would be needed for enforcement and this will significantly impact on the resources available to ensure the security of the air cargo supply chain' (explanatory memorandum, 5).

Finally, it is argued that aviation industry participants are 'familiar with the regulatory land scape to know their compliance requirements' (explanatory memorandum, 5) and thus 'can be reasonably expected to know their duties and obligations under the Act' (statement of compatibility, 2).

Although it should be emphasised that, considered alone, costs savings would not be sufficient to justify the imposition of strict liability, they may be relevant when combined with other considerations. It may be accepted that the risks to be avoided by the creation of these offences and the other factors mentioned in justifying strict liability are relevant considerations.

On the other hand, it may be considered that the appropriateness of strict liability attaching to prohibitions of the entry of specified kinds of cargo will depend upon how that cargo is specified. Without knowing the nature of how prohibited cargo is specified[1] it is difficult to know how likely it is that reasonable and non-intentional errors in allowing prohibited cargo into Australian territory may be made or the extent to which it is reasonable to expect industry participants to put in place systems that can effectively minimise the risk of contravention.

This gives rise to an additional scrutiny concern, which arises through the principle that important matters should not generally be included in regulations rather than primary legislation. More particularly, the committee has previously taken the view that, as a general rule, strict liability should be provided for by primary legislation, with regulations used only for genuine administrative detail.

[1] It should be noted that proposed subsection 65B(2) does, without limiting the generality of the power to make a legislative instrument, provide that an instrument may relate to all or any of a number of criteria.

Given that the appropriateness of strict liability may depend on how prohibited cargo is specified in the regulations, in this instance it does not appear that the use of regulations is limited to what may be considered genuine administrative details. In light of the use of regulations and, as it is difficult to assess the appropriateness of strict liability without knowing how prohibited cargo is to be specified, the committee is concerned about the proposed provision. **The committee therefore seeks the Minister's further justification of the proposed approach. In particular, the committee is interested in whether consideration has been given to expressing limits on the regulation-making power that will better ensure that the use of strict liability is appropriate.**

> *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 and it may also 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

Undue trespass on personal rights and liberties- strict liability; delegation of legislation

While the Committee noted the reasoning provided for the strict liability offence in the Explanatory Memorandum, a concern was raised about its appropriateness in relation to how prohibited cargo is to be specified in an instrument, and the appropriate delegation of legislative powers.

I acknowledge the Committee's reference to the catastrophic nature of a successful attack using prohibited air cargo cited in the explanatory memorandum, and reiterate the dangers of allowing prohibited cargo into Australia. It is imperative that aviation industry participants remain vigilant and take the appropriate actions to guard against threats to security. The threat of air cargo being used for unlawful interference with aviation is real, and successful attacks could achieve devastating results and significantly damage Australia's economy. The need to protect Australians and Australian interests justifies the application of the strict liability offence to ensure that aviation industry participants do their utmost to prevent prohibited cargo from entry into Australia.

However, I also recognise that any such imposition must be proportionate and subject to appropriate safeguards. In that context, it is important to note that the power the Bill provides the Minister is a power to make a disallowable instrument, meaning that Parliament retains the opportunity to scrutinise each and every exercise of the power created under the Bill, and assess its reasonableness in the context of the strict liability offence.

Therefore, Parliament will be able to take direct action to prevent any inappropriate ambiguities leading to the unreasonable or uncertain burdens being placed on aviation industry participants. This is a significant safeguard which should allay concerns about the Bill potentially causing undue trespass on personal rights and liberties.

Whilst the broad nature of the prohibitions which may be contained within an instrument created under the Bill is acknowledged, the Bill was specifically drafted to address the difficulty in accurately predicting the precise nature of the risks that must be mitigated. It is intended to provide the Minister with the necessary flexibility to draft an instrument which will have the greatest effect in mitigating risks to national security whilst having the minimum necessary impact on aviation industry participants and international trade.

To place any additional limitations on the way in which any prohibition may be structured could defeat the purpose of introducing such a power, and inadvertently lead to unnecessary impositions on industry. The use of a disallowable instrument is intended as a way of maintaining a democratically scrutinised balance between mitigating an unpredictable risk to Australia's national security, and protecting individuals from the inappropriate imposition of a strict liability offence.

I believe that this Bill is an appropriate and proportionate way to address potential security threats posed by air cargo. The unpredictable nature of the security risk environment means that it would be impractical to specifically prescribe provisions in the Act to address all emerging threats. Attacks may occur at any time, and require a swift response from the government to put in place adequate security measures. Therefore it is appropriate that matters relating to the prohibition of certain kinds of cargo be included in a legislative instrument rather than the Act to allow the government the flexibility to respond in a timely manner with due reference to the rights and liberties of aviation industry participants.

Committee Response

The committee thanks the Minister for this response and notes that the legislative instruments will be disallowable. **However, the committee remains concerned about including important matters in delegated legislation and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 5 of 2013 - extract

Undue trespass on personal rights and liberties—penalties
Schedule 1, item 5

In relation to strict liability offences, the committee has expressed the view that a penalty for an individual of 60 penalty units is usually a reasonable maximum (and this is consistent with the Commonwealth *Guide to drafting Commonwealth Offences*). The explanatory memorandum argues that although the offences are ones of strict liability it is appropriate that a penalty greater than 60 penalty units (200 units) be applied regardless of whether the offender is an individual person or a business on the grounds of the seriousness of the potential risks associated with non-compliance and the penalties being 'consistent with similar existing penalties for strict liability offences committed by aircraft operators or any other aviation industry participant under the Act' (at 5). While this argument might be acceptable in some circumstances, **in light of the committee's request to the Minister in relation to the justification of the use of strict liability, the committee defers its consideration of the level of penalty until it has had the opportunity to consider any response from the Minister.**

> *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

Undue trespass on personal rights and liberties – penalties

The committee has also indicated a concern about the level of penalty contained within the Bill. Whilst I note that it has deferred its consideration on this matter until it has had the opportunity to consider the response to the previous issues, I do want to make a brief comment about the applicability of the penalty.

The penalties for an offence under the Bill apply to aircraft operators and other aviation participants. 'Aviation industry participants' is a defined term under section 9 of the *Aviation Transport Security Act 2004.*

The *Aviation Transport Security Act 2004* and the Aviation Transport Security Regulations 2005 both contain penalties for offences committed by aviation industry participants.

These have been consistently assessed with reference to applicable rates for bodies corporate recommended by the Commonwealth Guide to drafting Commonwealth offences.

I trust this response satisfactorily addresses the Committee's concerns.

Committee Response

The committee thanks the Minister for the additional information, which is relevant to the committee's consideration. The committee notes that defendants will be 'aviation industry participants' and makes no further comment on this matter.

Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013

Introduced into the House of Representatives on 20 March 2013 *(passed the House of Representatives 15 May 2013 and the Senate 16 May 2013)*
Portfolio: Home Affairs

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter dated 12 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill amends the *Customs Act 1901*, the *AusCheck Act 2007* and the *Law Enforcement Integrity Commissioner Act 2006* to:

- place obligations on cargo terminal operators and handlers that load and unload cargo;
- create new offences for using information from the Integrated Cargo System to aid a criminal organisation;
- enable the Chief Executive Officer of Customs and Border Protection to consider the refusal, suspension or cancellation of aviation and maritime security identification cards;
- align aspects of the customs broker licensing scheme with that of depots and warehouses, and adjust controls and sanctions;
- enable the secretary to suspend, or suspend processing of an application for, an aviation or maritime security identification card; and
- to provide that the Deputy Speaker of the House of Representatives and the Deputy President and Chair of Committees of the Senate are eligible for appointment to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.

Trespass on personal rights and liberties—capacity to comply with legal obligations
Schedule 1, subitem 42(3)

Part 1 of Schedule 1 makes a range of amendments to the Customs Act related to requirements that certain persons be considered 'fit and proper' persons. Among the requirements that are affected are requirements that the CEO be notified (by, for example, a warehouse licence holder) of a refusal, cancellation or suspension of an ASIC or MSIC (i.e. an aviation or maritime security identification card).

Subitem 42(2) is an application provision which provides that the amendments made in Part 1 will, subject to subitem 42(3), apply in relation to a refusal, suspension or cancellation of a transport security identification card whether the refusal, suspension or cancellation occurs before, on or after the commencement of this item. Given that the notification requirements may relate to refusal, suspension and cancellation decisions that occur before commencement, subitem 42(3) provides that a person under a notification obligation will have 90 days in which to comply with the obligation.

Although the timeframe of 90 days may be accepted as reasonable, an obligation under the bill requiring notification of past events raises questions about whether appropriate records will exist to enable the obligation to be fulfilled. In addition, it is not clear whether it is intended that measures will be taken to ensure those under the obligations will be aware of precisely what information must be notified. **The committee therefore seeks the Minister's advice on these matters.**

> *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

Trespass on personal rights and liberties- capacity to comply with legal obligations
Schedule 1, subitem 42(3)

The Committee has requested further information regarding the ability of persons to comply with the obligations imposed by Schedule 1, subitems 42(2) and (3) of the Organised Crime Act. In particular, the Committee sought advice on whether appropriate records will exist to enable the obligation to be fulfilled and what measures will be taken to ensure licence holders are aware of what information should be provided to the Australian Customs and Border Protection Service (ACBPS).

The amendments to the Customs Act provide those subject to the notification obligation with a period of 90 days from the commencement of the obligation to comply. Where the relevant person does not already hold that information, 90 days is considered a reasonable period to make inquiries and to obtain the necessary information. If ACBPS subsequently identifies noncompliance with the obligation, ACBPS decision-makers are required to determine responses to non-compliance based on all the available information. Decision-makers can also exercise some discretion in determining an appropriate response. That response could range from education and warnings, administrative action such as the suspension and revocation of licences and the application of infringement notices, through to prosecution. Relevant factors in exercising that discretion include, for example, the significance of the breach, efforts to comply, any relevant remedial or risk mitigation action, compliance history and reasons beyond the person's control.

ACBPS has and will continue to provide information to those subject to the various obligations under the amendments to the Customs Act to promote awareness and compliance.

Committee Response

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

Alert Digest No. 5 of 2013 - extract

Broad discretionary power
Schedule 1, item 43, proposed paragraph 102CJ(c)

Proposed section 102CJ provides that the CEO 'may, by legislative instrument impose additional obligations on cargo terminal operators generally if the CEO considers the obligations to be necessary or desirable:

(a) for the protection of the revenue; or
(b) for the purpose of ensuring compliance with the Customs Acts, any other law of the Commonwealth prescribed by the regulations or a law of a State or Territory prescribed by the regulations; or
(c) for any other purpose'.

The explanatory memorandum states that this section will 'provide Customs greater flexibility in dealing with new and emerging threats in this domain' (at 23). The explanatory memorandum adds that the reference to 'any other purpose is 'limited to purposes of the Customs Act'. While it is true that discretionary powers are read in the context of the scope, purposes and structure of the legislation, the broader the discretionary power the more difficult it is to do this. In the context of the Customs Act it might be difficult to identify a clear set of unifying purposes which would limit broad discretionary power. **Given that 'any other purpose' is capable of being read broadly, the committee therefore seeks the Minister's advice as to whether the intended limited meaning of this phrase can be expressly incorporated into paragraph 102CJ(c) to better reflect the intended limitations on the exercise of this discretionary power. It is desirable to clearly circumscribe the limits of the discretion to impose additional obligations given that breach of these obligations will be (pursuant to proposed section 102CK) an offence of strict liability.**

> *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

Broad discretionary power
Schedule 1, item 43, proposed paragraph 102CJ(c)

The Committee notes that new section 102CJ of the Customs Act enables the CEO to impose additional obligations on cargo terminal operators (CTOs) generally where the CEO considers the obligations to be necessary or desirable to protect revenue, to ensure compliance with certain laws, or for any other purpose. The Committee has sought advice as to whether the intended meaning of the expression 'any other purpose' could be expressly incorporated into paragraph 102CJ(c) to better reflect the intended limitations on the exercise of the relevant power.

The limitation 'for any other purpose' is consistent with the licensing schemes under the Customs Act, such as subsection 77Q(1), which enables the CEO to impose additional conditions on the holder of a depot licence. Further, as noted in the explanatory memorandum, the reference to "any other purpose" in section 102CJ is limited to purposes of the Customs Act.

Committee Response

The committee thanks the Minister for this response and notes the similar example to which the Minister referred. **The committee notes that it remains concerned about the scope of this broad discretionary power and leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 5 of 2013 - extract

Trespass on personal rights and liberties—strict liability
Schedule 1, item 43, proposed subsection 102CK(2) and 102DE(2)

This subsection creates a strict liability offence where a CTO fails to comply with an obligation or requirement set out in the new Division 2 or in a legislative instrument made under new section 102CJ. The explanatory memorandum notes the following:

- in developing the offence, consideration was given to the Committee's Sixth Report of 2002 on Application of Absolute and Strict Liability Offences and A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers;
- the regulatory nature of the offence; and
- the fact that the penalty is 60 penalty units (which is the maximum recommended for strict liability offences committed by individuals by the *Guide*).

The statement of compatibility makes similar points in relation to this new offence, and adds that this and other strict liability penalties 'significantly enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and collection of revenue' (at 9).

The same issue and approach can be taken in relation to proposed subsection 102DE(2).

While these factors are relevant to considering whether an offence of strict liability is appropriate, in light of the committee's request to the Minister in relation to appropriately confining the discretionary power to add further obligations or requirements by legislative instrument under new section 102CJ (see item above), the committee defers its consideration of whether strict liability is appropriate until a reply is received.

> *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.

Committee Response

The Minister's reply above identified an existing customs scheme that includes an 'any other purpose' formulation and notes that the scope of the proposed power is limited to the functions of the Customs Act**.** While it is true that discretionary powers are read in the context of the scope, purposes and structure of the legislation, in the committee's view the broader the discretionary power the more difficult it is to do this. **The committee also remains concerned that new offences of strict liability can be created through the use of legislative instruments (by imposing additional obligations on cargo terminal operators). The committee seeks the Minister's advice as to how operators will be made aware of any new obligations (and of the consequences for non-compliance) arising from these provisions.**

Alert Digest No. 5 of 2011 - extract

Trespass on personal rights and liberties—search without warrant
Schedule 1, item 43, proposed section 102E

This sections confers powers on an authorised officer to enter a cargo terminal to inspect documents, take extracts or copies from such documents and to access electronic equipment and use storage devices at a terminal if the officer has reasonable grounds for suspecting that the electronic equipment or storage device is, or contains, information relating to specified matters. These provisions allow authorised customs officers to enter, search and access information without a warrant.

The explanatory memorandum includes a detailed justification for this approach, as is expected in relation to provisions that confer entry and search powers in the absence of a warrant. The explanatory memorandum (at 25) accepts that the committee has stated that entry without consent or warrant should only be allowed in limited circumstances. It is stated that 'one of these circumstances is if a person obtains a licence or registration for the premises, which can be taken to accept entry by an inspector for the purpose of ensuring compliance with licence or registration conditions'. The argument made is that 'while the proposed provisions do not establish a licensing scheme for cargo terminal operators…, the obligations imposed on these parties are of a similar nature to a licence including those imposed under customs licensing arrangements for depots and warehouses'. Further, it is argued that 'section 102DC could be taken to be a requirement for cargo terminals to

register with Customs'. That provision requires cargo handlers to use 'his, her or its correct establishment identification for the port, airport or wharf' when 'communicating electronically with Customs about activities undertaken at a port, airport or wharf'.

In light of the explanation, the overall appropriateness of these powers may be left to the Senate as a whole.

However, it is a matter of concern that the safeguards that may attend the exercise of these powers are not explained in the explanatory memorandum. For example, it is not clear whether there are general restrictions on the manner in which the powers are exercised, such as restrictions on the times at which an authorised officer may enter premises to exercise these power or limitations on the use of the powers. Nor does the explanatory memorandum identify the availability of any accountability mechanisms (eg reporting requirements) or what measures are in place to ensure that the powers will be exercised in a mature and proportionate way by officers with the appropriate qualifications and experience. The committee, and the Senate, will be better able to assess the case made in support of the entry and search powers if these issues are addressed in detail. **The committee therefore seeks the Minister's further information about these matters.**

> *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

Trespass on personal rights and liberties- search without warrant Schedule 1, item 43, proposed section 102E

The Committee has requested further advice on the general restrictions on the manner in which the powers in section 102E are exercised.

The powers in new section 102E build on the existing powers that can be exercised by Customs officers at ports, wharfs or airports appointed under section 15 of the Customs Act. Authorised officers execute their powers under the Customs Act in line with the public sector *Privacy Act 1988* (Privacy Act) provisions, which require information containing personal information to be collected for a lawful purpose that relates directly to the function or activity of the collector. Under new subsection 102E(1), an authorised officer has powers to enter a cargo terminal to inspect and extract copies of documents and take equipment and material into a cargo terminal.

Authorised officers may only exercise these powers for the purpose of determining compliance with any Customs-related law. The powers of accessing electronic equipment

and storage devices at subsection 102E(2) are also subject to a reasonable suspicion threshold, that the information relates to the matters set out in subsection 102E(3). All ACBPS employees are bound by section 16 of the *Customs Administration Act 1985*, which prohibits the unauthorised recording and disclosure of certain information held by ACBPS. Further, authorised officers executing powers under new section 102E will undertake training regarding their new powers and the new obligations placed on CTOs and cargo handlers.

These powers will give ACBPS greater control over the movement and safekeeping of goods at cargo terminals and greater visibility of persons entering and operating in cargo terminals. Placing a higher level of accountability on CTOs and cargo handlers is reasonable, necessary and proportionate to the need to eliminate vulnerabilities in the cargo supply chain and maritime and aviation sectors that organised crime may exploit.

Committee Response

The committee thanks the Minister for this response, notes the structures, safeguards and proposed training for customs officers and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as whole.**

Alert Digest No. 5 of 2013 - extract

Trespass on personal rights and liberties—time to respond
Schedule 1, item 43, proposed section 102EA

This provision empowers authorised officers to make requests to CTOs and cargo handlers for documentation and records to be provided and for information relevant to the question of whether the operator or handler is a fit and proper person. As noted in the explanatory memorandum, the provision does not 'provide a minimum timeframe a CTO will have to comply with a request made by an authorised officer'. The basis for not providing the standard 14 days minimum time for responding to requests for information is to 'allow the maximum amount of flexibility in the provision'.

Although the explanatory memorandum asserts that authorised officer will, when issuing a notice, 'have regard to what a reasonable timeframe to provide the requested information is in the circumstances', there is no explanation as to why 'maximum' flexibility. is required in the context of these powers. **The committee therefore seeks further information from the Minister's as to the justification for this 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

Trespass on personal rights and liberties-time to respond
Schedule 1, item 43, proposed section 102EA

The Committee notes that new section 1 02EA enables authorised officers to request CTOs and cargo handlers to provide documentation and records to support an assessment for a fit and proper person test. The Committee has sought advice as to why section 1 02EA does not provide a minimum timeframe for compliance with such a request, and why maximum flexibility is necessary in the context of these powers.

Section 102CF provides a maximum of 30 days for compliance with a request for information to support an assessment that a CTO is a fit and proper person. Section 102D provides that section I02CF applies to cargo handlers in the same way that it does to CTOs. Accordingly, subsection 102EA, which provides the power for an authorised officer to make a request for information from a CTO or a cargo handler for information to support an assessment for a fit and proper person test, requires the information to be provided within 30 days of the request. Thirty days is considered a reasonable timeframe for CTOs and cargo handlers to comply with such a request.

Committee Response

The committee thanks the Minister for the advice that information will be required within 30 days, which addresses the committee's concern.

Alert Digest No. 5 of 2013 - extract

Strict liability
Items 59 and 60

There are currently 3 similar offences in the Customs Act relating to requirements for 'boarding stations' for ships and aircraft, but they are treated slightly differently, as summarised below:

- 60(1) relates to ships: the whole offence attracts strict liability and the penalty is 100 units;

- 60(2) relates to aircraft landing in Australia from another country: strict liability applies only to the physical elements of the offence, a defence for stress of weather or other cause is available and the penalty is 100 units; and

- 60(3) relates to aircraft on a service from Australia to another country: no elements of strict liability apply, a defence for stress of weather or other cause is available and the penalty is also 100 units.

Items 59 and 60 of the bill propose making all 3 offences of strict liability with the same penalty of 100 units. The arguments in the explanatory memorandum in support of this approach are that:

- it will 'ensure consistency across the like offences in section 60 of the Customs Act' (though, note that the defence relating to weather does not apply to ships (60(1));

- an additional defence balances the higher than usual penalty (though not for ships – but this is not changing the status quo); and

- the matters are peculiarly within the knowledge of the defendant.

It is clear that in seeking to apply strict liability some consideration has been given to matters in the *Guide*, however, the explanatory memorandum does not clearly explain why strict liability is appropriate for these offences. While the committee can appreciate that an offence in these terms might arise in situations in which it would be difficult for the prosecution to prove relevant matters because they are peculiarly within the knowledge of the defendant, the committee expects a clear justification for the application of strict liability. **The committee therefore seeks the Minister's advice as to why strict liability is appropriate for these offences and why the weather defence does not, and will not, apply to ships.**

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

Strict liability
Items 59 and 60

The Committee has sought advice as to why strict liability is appropriate for the offences in subsections 60(1), 60(2) and 60(3), and why the weather defence does not apply to the offences relating to ships in subsection 60(1).

The explanatory memorandum notes that it is appropriate to apply strict liability to the offences for a number of reasons, including:

- to enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border
- that the offences are regulatory in nature, and
- to ensure consistency across like offences in section 60 of Customs Act.

The retention of the additional defence, where weather or other reasonable cause prevents compliance, balances the higher than usual penalty of 100 penalty units for the offences in subsections 60(2) and 60(3).

The reasons outlined in the explanatory memorandum and the special defence justify the application of strict liability to the offences in subsections 60(2) and (3).

Prior to these legislative amendments, subsection 60(1) was already an offence of strict liability. The defence regarding stress of weather or other reasonable cause does not currently, and will not, apply to subsection 60(1) following commencement of the relevant measures in the Act. The amendments apply strict liability to subsections 60(2) and 60(3), but retain the weather defence to balance the application of strict liability.

Committee Response

The committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 5 of 2013 - extract

Delegation of legislative power—important matters in regulations
Part 1, Schedule 2—General

These amendments introduce a regulatory framework designed to strengthen the ability of the ASIC and MSIC schemes to mitigate national security threats by authorising the Secretary, through AusCheck, to suspend a person's ASIC or MSIC identification card if the person is charged with a serious offence. A key feature of this scheme is that suspension of a card or an application for a card should be 'automatic' following a charge for a serious offence (statement of compatibility at 11). Suspension carries with it serious consequences in terms of an individual's capacity to undertake various sorts of work (see statement of compatibility at 10).

As noted in the explanatory memorandum, many of the 'details of this framework will be implemented through regulations made under the AusCheck Act, including by creating offences for conduct such as failing to report a charge for a serious offence' (at 36, see also statement of compatibility at 12).

Unfortunately the explanatory memorandum does not clearly explain why it is necessary to contain important elements of the scheme in the regulations. For example, it is not clear why the serious aviation-security-relevant or maritime-security-relevant offences are to be determined in the regulations (see proposed subsection 4(1)). The statement of compatibility (at 11) appears to suggest that the limitation of the Secretary's power to suspend a person's card or application to only those offences that are prescribed in the regulations may in some way ameliorate the automatic suspension of an application or card. Although the statement of compatibility states that the 'list of offences prescribed in the regulations will be targeted and limited to offences involving conduct demonstrating that they pose a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity' (11), no explanation is given as to why these details should not be provided for in primary legislation.

It is also of concern that it is difficult to assess the discussion in the statement of compatibility justifying how the 'suspension on charge measure will interact with the right to privacy' (at 11-13): the discussion of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information appears to be insufficiently detailed as it does not specify exactly which arrangements will be provided for in existing or proposed regulations and how the regulation-making power is appropriately limited to ensure that there will be adequate protections.

The committee therefore seeks the Minister's explanation as to why the important elements of the regulatory framework to facilitate the suspension of a person's ASIC or MSIC if they are charged with a serious offence are to be included in the regulations rather than in the primary legislation. This matter is of particular concern given the significant consequences that follow from a suspension of an ASIC or MSIC card. In addition, the committee seeks a fuller explanation as to the discussion of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information as outlined above.

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

AusCheck Act Amendments

You have also sought advice in relation to amendments to the *AusCheck Act 2007* (the AusCheck Act). The amendments to the AusCheck Act provide the framework to allow suspension of a person's Aviation Security Identification Card (ASIC) or Maritime Security Identification Card (MSIC) or application for an ASIC or MSIC (a card). where the card holder or applicant has been charged with a serious offence.

Delegation of legislative power - important matters in regulations Part 1, Schedule 2

The committee has requested an explanation as to why important elements of the regulatory framework to facilitate the suspension of a person's card (or application for a card) are to be included in the regulations rather than in the primary legislation.

The ASIC and MSIC schemes are administered by the Transport Secretary and are set out in the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations). AusCheck undertakes background checking for the ASIC and MSIC schemes.

To ensure consistency with those schemes, and to ensure necessary and appropriate amendments can be made in short timeframes, appropriate elements of the suspension on charge scheme that interact with the ASIC and MSIC schemes, will be set out in the *AusCheck Regulations 2007* (AusCheck Regulations).

For example, the lists of aviation-security-relevant offences (ASROs) and maritime-security relevant offences (MSROs) that are applied when determining whether an individual is eligible to hold a card are set out in the Aviation and Maritime Regulations. The A us Check Act provides that the serious offences for the purposes of the suspension on charge measure will be a subset of the ASROs and MSROs in the Aviation and Maritime Regulations. Placing the list of serious offences in the AusCheck Regulations will facilitate the timely making of necessary changes to that list to reflect changes to the lists of ASROs and MSROs in the Aviation and Maritime Regulations.

In addition, the existing processes for suspending or cancelling a card in specified circumstances are set out in the Aviation and Maritime Regulations. Consistent with this, the processes for suspending a person's card or application following charge with a serious offence will be set out in the AusCheck Regulations.

The Aviation and Maritime Regulations also contain criminal offences for failing to comply with relevant obligations with respect to the ASIC and MSIC schemes. For example, offences relating to failing to report a new conviction for an ASRO or MSRO are contained in the Aviation and Maritime Regulations. Consistent with this, the offences relevant to the suspension on charge measure will be set out in the AusCheck Regulations. Co-locating offences with the relevant obligations assists readers in understanding the possible implications of non-compliance. Consistent with the offences in the Aviation and Maritime Regulations, the new offences in the AusCheck Regulations will only carry pecuniary penalties.

The committee has also requested a fuller explanation of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information.

The AusCheck Act sets out a range of requirements and protections for the personal information obtained under the AusCheck Act. For example, the AusCheck Act contains offences, punishable by two years imprisonment, for AusCheck officers and/or other persons who unlawfully disclose personal information. AusCheck personal information is also protected by the Privacy Act.

AusCheck currently collects, uses, stores and shares a range of personal information relating to applicants and card holders, including, where applicable, current name, any other names previously used, date of birth, place of birth, gender, current residential address, all other previous residential addresses for the past 10 years, employment details, a list of all criminal convictions, security assessment information, photo and, if an immigration check is requested, a range of immigration related information.

AusCheck has a range of secure systems in place to protect that information, including obtaining information with consent, secure electronic links with checking partners, and secure filing systems with access limited to those with a legitimate need to access the information.

To implement the suspension on charge measure, AusCheck will collect, use, store and, where necessary, share basic details about a charge for a serious offence in relation to applicants and card holders. Those basic details might include the individual's name, date of birth, residential address, card number, as well as details of the offence(s) with which the person was charged, where the charge was laid, and the date of the charge.

Committee Response

The committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 5 of 2013 - extract

Possible Trespass—fair hearing
Part 1, Schedule 2

As noted in the above comment, it is envisaged that the regulatory scheme to be developed under this Part envisages the 'automatic' suspension of an ASIC or MSIC card or application following a charge for a serious offence (statement of compatibility at 11). It appears to be intended that the details of the scheme will not entitle a person to any sort of hearing prior to a suspension decision being made. Although an affected person will, of course, be given a fair hearing before being convicted of the offence for which they have been charged, it is noted that no hearing will occur prior to the imposition of the significant consequences that flow from the suspension of a card or application for a card—see statement of compatibility 10-11).

The reason given for 'automatic' suspension is that 'the Government has decided it is not appropriate for a person charged with a serious offence to access secure areas where they may continue to pose a security or organised crime risk' (statement of compatibility 11). It is also stated that the 'suspension of charge measure is part of the Government's response to operational law enforcement advice that organised criminals are successfully targeting and exploiting airports, seaports and the cargo supply chain to facilitated their criminal activities' and that the measure is a response to the PJCLE June 2011 report on its *Inquiry into the Adequacy of Aviation*.

While the committee understands the justification provided for the proposed approach, in light of the wide definition of restricted information the committee seeks the Minister's advice as to the intended fault requirements for each of the elements of the offences (noting that the Minister's response to committee's concern above about important matters being included in subordinate legislation may be relevant to 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

Possible Trespass - fair hearing
Part 1, Schedule 2

The committee notes suspension will be 'automatic', and expressed concern that no hearing will occur prior to suspension.

Suspension will occur immediately where the Secretary of the Attorney-General's Department (the Secretary) considers on reasonable grounds that the individual has been charged with a serious offence. It is necessary and appropriate for suspension to be immediate to remove the high risk individual from security sensitive aviation or maritime areas.

Where the Secretary suspends a card or an application, AusCheck will, in all cases, follow processes consistent with existing practices for advising individuals of decisions affecting them under the AusCheck scheme. This includes writing to the applicant or card holder to inform them of both the suspension and the details of the charges that resulted in the decision to suspend the application or card. The individual will then have the opportunity to make any representations in relation to the suspension. Once AusCheck is advised that an individual whose application or card has been suspended has been acquitted, the charges have been discontinued, or the individual has been found guilty of an offence that is not an ASRO or MSRO, AusCheck will be required to determine whether the person is eligible to hold a card. Where AusCheck determines the applicant or holder of the suspended card is eligible, A us Check will be required to advise the relevant issuing body it can issue or re-issue the card, as the case may be.

In addition, in line with existing review and appeal mechanisms under the AusCheck Act, a person whose application or card has been suspended will have access to both merits

review and judicial review with respect to AusCheck's decision to categorise an offence as a serious offence.

The Committee has also requested advice regarding the intended fault elements for each element of the offences to be included in the regulations.

The new offences contemplated to support the suspension on charge measure will mirror existing offences in the Aviation and Maritime Regulations. The fault elements for those offences will be consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

The offence provisions in the AusCheck Regulations relating to the suspension on charge measure and the requirement to self report will be drafted in such a way to ensure adequate protections are provided to individuals where the individual had no knowledge of the charge. This could include, for example, where an arrest warrant has been issued in relation to an applicant or card holder but that person has no knowledge of the issue of the warrant or laying of the charges.

Committee Response

The committee thanks the Minister for his detailed reply and **requests that the key information be included in the explanatory memorandum. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013 [No. 2]

Introduced into the Senate on 28 February 2013
By: Senator Cash

Introduction

The committee dealt with this bill in *Alert Digest No.3 of 2013*. The Senator provided a copy of a letter addressed to Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights, dated 2 May 2013 to the committee which addressed similar concerns the committee had also raised. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2013 - extract

This bill is in identical terms to the bill introduced into the House of Representatives on 11 February 2013 by Mr Morrison. The committee repeats the comments it made about the bill in *Alert Digest No. 2 of 2013*.

Background

This bill amends the *Migration Act 1958* to restore two classes of temporary protection visas to provide safe haven and protection to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the Refugee Convention.

Delegation of legislative power—important matters contained in regulations Schedule 1, item 4, proposed subsections 76D(2) and 76H(2)

This subsection provides that regulations made for the purposes of providing for access to social security and other benefits, to be prescribed in the regulations as visa conditions (for a temporary protection (offshore entry)) visa), 'must ensure that the holder of the visa must participate in a mutual obligation program specified in the regulations in order to access relevant social security benefits'. The same issue arises in proposed subsection 76H(2) in relation to conditions of temporary protection for a 'secondary movement offshore entry' visa.

The committee's long-standing view is that important matters should be included in primary legislation whenever possible. As the explanatory memorandum does not elucidate the nature of the 'mutual obligations' that may be mandated by the regulations **the committee seeks an explanation as to what obligations are envisaged and why it is appropriate that they be provided for in the regulations.**

Pending the Senator'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.

Senator's response - extract

These Bills will restore two classes of temporary protection visas (TPV) to provide safe haven and protection to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the nation's international obligations.

A number of important principles underpin these Bills.

First, circumstances in source countries for asylum seekers are constantly changing and the need for ongoing protection under the Refugee Convention needs therefore to be regularly tested. The Refugee Convention reflects the temporary nature of refugee status in the cessation clauses of article 1C, especially paragraph 5.

For this reason, under the Bills, TPVs will be granted for no more than three years. At the end of the period set out for the visa, continuing claims can be re-tested through a further TPV application.

Mutual obligation is a long established principle underpinning income support arrangements in Australia. It refers to the principle that it is fair and reasonable to expect unemployed people receiving income support to do their best to find work, undertake activities that will improve their skills and increase their employment prospects and, in some circumstances, contribute to their community in return for income support. The Bills provide for similar obligations to apply for TPV holders who are dependent on government income support payments.

Committee Response

The Committee thanks the Senator for this response. The committee retains concerns about this matter given that there is insufficient detail in the explanation to assess the appropriateness of imposing mutual obligations through regulations. **If the bill proceeds to further stages of debate the committee may request further information to allow it to fully assess this matter.**

Alert Digest No. 3 of 2013 - extract

Rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
Schedule 1, item 4, proposed subsections 76E(2) and 76E(7)

Proposed subsection 76E(2) gives the Minister a power to lift the bar (created by subsection 76E(1)) on the grant of a permanent visa for persons holding temporary protection visas. This power may be exercised on the basis of what the Minister thinks is in the public interest. Subsection 76E(7) provides that the Minister 'does not have a duty to consider whether to exercise the power under subsection (2) in respect of any person who holds a temporary protection (offshore entry) visa, whether the Minister is requested to do so by the visa holder or by any other person, or in any other circumstances'.

The result is that the power is conferred on the basis of broad discretionary considerations and, indeed, the Minister need not even consider whether or not it should be exercised. Although the courts' judicial review jurisdiction is not ousted by these clauses, the practical result of the combination of a broadly framed power and a 'no-consideration clause' (ie subsection 76E(2)) would be that judicial review would not provide any significant control of the exercise of the powers. **As the explanatory memorandum does not specifically address the justification for the proposed approach in these subsections, the committee seeks further advice as to why the power should not be subject to clearer criteria and why the no-consideration clause is considered necessary given that the non-exercise or refusal to exercise this power does not appear to be subject any accountability mechanisms.**

> *Pending the Senator'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.*

Senator's response - extract

TPVs provide protection in Australia for a designated period up to three years, but do not provide people with special additional entitlements over and above the nation's general migration programs. There is nothing preventing a TPV holder from leaving Australia at any time. If they then wish to return to Australia they would seek authority to do so

through Australia's migration or visitor programs like other people visiting or migrating to Australia.

The same principle applies to family reunion. A TPV does not provide special additional entitlements for family reunion over and above those applying to other people in Australia who are neither Australian citizens nor permanent residents.

These Bills provide for the Minister to grant a permanent visa to a TPV holder. Therefore, in limited circumstances where protection will clearly be owed for many years, provision is available under the Bills for a permanent visa to be granted.

In summary, these Bills do not impose any limitations on people's rights. Rather, they provide fair and reasonable protection and support to people granted TPVs with work rights, access to special benefit income support, Medicare and a range of Government services.

However, the Bills do no convey special additional entitlements or rights over and above those available generally to people within the Australian community. Similarly, the Bills apply obligations to TPV holders no more and no less than those generally applied in our community.

Committee Response

The committee thanks the Senator for this response. The committee notes the explanation provided, but retains concerns about the breadth of this discretionary power. **If the bill proceeds to further stages of debate the committee may request further information to allow it to fully assess this matter.**

National Disability Insurance Scheme Bill 2012

Introduced into the House of Representatives on 29 November 2012 *(passed and received Royal Assent on 28 March 2013)*
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2013 which was published in the committee's *Fourth Report of 2013*. The Minister then provided a further response, dated 27 May 2013, to the committee's comments in its report. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Delegation of Legislative Power
Insufficiently defined administrative power
Paragraph 118(2)(a)

The committee had requested that information received from the Minister in relation to this matter be included in the explanatory memorandum. The Minister provided the following further information.

Minister's Further Response - extract

I am glad that my response was helpful in clarifying questions raised by the Committee. There were also two additional matters where the Committee has requested that some key information from my response be included in the Bill. Specifically, the Committee has requested that my response clarifying that intergovernmental agreements are to provide useful contextual information for the Agency in performing its statutory functions and that these agreements are not legally binding on the Agency be included in the Bill's explanatory memorandum.

With regard to including information in the explanatory memorandum to the Bill (to indicate that compliance with intergovernmental agreements is legally binding on the Agency), it is no longer feasible to make the inclusion as the Bill has now been enacted.

Committee's Further Response

The committee thanks the Minister for this further response.

Alert Digest No. 1 of 2013 - extract

Delegation of legislative power – incorporating material by reference
Insufficient parliamentary scrutiny
Clause 209

In addition to the clause 209 concern outlined above, subclause 209(2) provides that the rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in another instrument as in force or existing from time to time.

The committee draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. **As there is no explanation or justification of this subclause the committee seeks the Minister's advice as to:**

- **why it is necessary to rely on material incorporated by reference to other instruments as in force from time-to-time; and**
- **if the approach is considered necessary, has consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how relevant changes will be notified to affected persons.**

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 and to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's First Response - extract

Delegation of legislative power - incorporating material by reference
Clause 209

The Committee seeks advice as to:

- **why it is necessary to rely on material incorporated by reference to the instruments as in force from time-to-time; and**
- **If the approach is considered necessary, has consideration been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **How relevant changes will be notified to affected persons.**

The material incorporated by reference forms part of the rule itself and therefore is subject to all of the same processes that the rule is by way of parliamentary scrutiny. The reference material will be available either direct or via links on the Agency website. If there are changes to the reference material from time-to-time, the changes will be publicised on the Agency's website and in any regular news publication that the Agency may have. Where the changes directly affect individuals, these individuals will be notified by letter or equivalent.

Disallowable instruments have been chosen as the approach for developing the NDIS rules because of the flexibility that they provide to make amendments as experience with the launch and scheme develops. Many areas of social support have been legislated in this way, including the Carer Allowance and the extension of Carer Payment to carers of children, income management for income support recipients, and the impairment tables for the Disability Support Pension.

Experience has shown that the ability to amend these provisions quickly through drafting a new instrument where required has provided a robust way of ensuring flexibility and agility as new evidence becomes available or unintended consequences arise during implementation. Appropriately, the approach of using disallowable instruments would ensure that the instruments are subject to parliamentary oversight.

Committee's First Response

The committee thanks the Minister for this response and notes the information provided, particularly the advice that any changes to reference material will be widely publicised and that any individuals affected will be notified directly by letter.

The committee also notes that while parliamentary oversight of the content of a rule that incorporates material by reference will occur *at the time the rule is made*, the use of this mechanism means that no parliamentary oversight occurs when there are subsequent changes to the material that has been incorporated by reference – that is the nature of the

scrutiny problem that arises with this approach. **The committee notes that the bill has been passed by both Houses of Parliament and makes no further comment.**

Minister's Further Response - extract

With regard to the Committee's suggestion for a legislative requirement regarding materials incorporated into rules by reference, I note that sections 8 and 8A of the *Freedom of Information Act 1982* will require the NDIS Launch Transition Agency to publish any operational information (including rules, guidelines, practices and precedents) that assists it to perform or exercise the functions or powers in making decisions or recommendations affecting members of the public or any particular person or entity or class of persons or entities. While I understand that operational information does not generally include information published by someone other than the Agency, the Agency's operational material will identify and describe changes to materials incorporated in the rules by reference.

As outlined in my response to the Committee, I understand that it will be standard practice for the Agency to make any materials that are incorporated by reference available on the Agency's website (either directly or via links) and that any changes to that material would be publicised on the Agency's website. The Agency will also, as a matter of standard practice, notify individuals who are directly affected by the changes by letter or equivalent. I therefore do not believe it is necessary to include this in the legislation by way of an amendment.

Committee's Further Response

The committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the Senate as whole.**

National Measurement Amendment Bill 2013

Introduced into the House of Representatives on 20 March 2013
Portfolio: Industry and Innovation

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter dated 3 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill amends the *National Measurement Act 1960* to provide for:

- a discretion for trade measurement inspectors to allow the continued use of measuring instruments for trade or the continued sale of packaged goods where there is a minor technical infringement of the Act but no material detriment to any affected person;

- a new monitoring power that allows trade measurement inspectors to enter public areas of business premises when open for business to purchase any article for sale and to collect information about trade measurement activities without having to identify himself or herself as an inspector;

- a new power allowing an inspector to give a reasonable direction to the controller of a business vehicle or a person in the vehicle which may include a direction to move or drive the vehicle, remain in or leave the vehicle or unload or reload the vehicle ensuring that inspections can be practically exercised and in accordance with the intent of the legislation;

- a new offence provision that applies to the controller of a business vehicle or a person in the vehicle who does not comply with a reasonable direction;

- a separation of the existing offence of repairing or adjusting an instrument without obliterating the verification mark from *causing* the repair or an adjustment to an instrument without obliterating the verification mark; and

- a number of minor and technical amendments to facilitate the working of the Act.

Trespass on Personal Rights and liberties—reversal of onus
Schedule 1, items 7 and 8, proposed subsection 18GE(10) and subsection 18GR(6)

The bill will allow a trade measurement inspector to give a person a 'notice to remedy' for minor technical infringements of the Act under the amendments in items 7, 8, 10, 12, 15, 18, 24 and 26 in defined circumstances. As noted in the statement of compatibility, 'the effect of these notices is that if a person complies with such a notice, they can rely on these notices as an exemption to certain offences under the Act' (at 11). Proposed subsection 18GE(10), subsection 18GR(6), subsection 18HB(9), subsection18HC(6), subsection HD(6), subsection HG(6), subsection 18JHA(3), and subsection 18JLA(3) state that compliance with such a notice or direction is an exemption to specified offences. A *Note* to each provision indicates that a defendant bears an evidential burden to establish that they have complied with the requirements set out in the notice or direction.

The statement of compatibility argues that this reversal of the burden of proof is appropriate (and should not be considered to violate the right to the presumption of innocence) for the reasons that:

> The power of a trade measurement inspector to give a person a notice to remedy will ensure that a trade measurement inspector will not automatically find that a person has breached the Act. As this measure will be beneficial to those persons who use measuring instruments for trade, the fact that they will bear an evidential burden of proof to rely on the exemption is appropriate as those persons are best placed to produce the evidence of their compliance with the notice to remedy.

In light of the explanation provide 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

Reversal of onus of proof

As noted in the Committee's review of the Bill, and in light of the explanation provided within the explanatory memorandum, the Committee leaves the question of whether the reversal of onus of proof is appropriate to the consideration of the Senate as a whole.

However for the benefit of the Committee I note that, in addition to the justification for the reversal of the burden of proof contained within the explanatory memorandum, it is important to consider that the note contained within the Bill provides that "a defendant bears an evidential burden" of proof. This merely reflects subsection 13 .3(3) of the Criminal Code Act 1995 (the Criminal Code), which states that "a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter".

In accordance with the Committee's third report of 2010, it is appropriate in this case that the defendant bears the evidential burden of proof to prove that he or she has complied with any condition specified in a notice to remedy or direction (i.e. the evidence that suggests a reasonable possibility of their defence). This is because evidence of compliance is particularly within the knowledge of the defendant and could be readily and cheaply provided by the defendant. In circumstances where the defendant does produce evidence of compliance with a notice to remedy or a direction, the prosecution then has to refute the defence beyond reasonable doubt.

It is for these reasons that the reversal of the onus of proof is appropriate.

Committee Response

The committee thanks the Minister for this additional information.

Alert Digest No. 5 of 2013 - extract

Trespass on Personal Rights and liberties—uncertain application of offence provision
Item 31, proposed subsection 18MIA(3)

This proposed subsection provides that it is an offence to fail to comply with a direction given under proposed section 18MIA. Subsection 18MIA(1) provides that a trade measurement inspector is authorised to give ‘reasonable directions’ to the controller of a vehicle and any person in a vehicle they are otherwise authorised to inspect (under sections 18ME or 18MF). Subsection 18MIA(2) provides that without limiting subsection (1) an inspector may direct a person in control of or in a vehicle to do any or all of the following: drive or move the vehicle to or from a particular area, remain in, leave or return to the vehicle, or to unload or reload anything in or on the vehicle.

The explanatory memorandum does not indicate why it is necessary to define authorised directions for the purposes of this offence by reference to the uncertain language of 'reasonableness'. The committee therefore seeks an explanation of why a power broader than the more specific types of directions specified in subsection 18MIA(2) is necessary. Given that subsection 18MIA(4) provides for a strict liability offence in relation to the same conduct (ie breach of a 'reasonable direction'), it would be possible for this power to be abused if it is not appropriately confined.

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

Use of the phrase "reasonable directions"

Section 18MIA, as inserted by the Bill, is to ensure that a trade measurement inspector may give a reasonable direction to the controller of a vehicle (and any person in the vehicle) for the purposes of exercising their powers under section 18M G of the Act in relation to a vehicle or anything in, or on, a vehicle. This is necessary to ensure that inspectors are able to effectively and safely carry out authorised inspections of a vehicle.

The phrase *"reasonable direction"* is necessary to ensure that a trade measurement inspector may have the requisite discretion to give a direction depending on the specific circumstances in which a direction is required.

The term "reasonable" is used to ensure that the trade measurement inspector is limited in the kinds of directions that he or she could give. For example, it would not be considered reasonable for an inspector to give a direction to a controller of a vehicle to go to a weighbridge other than the closest usable weighbridge. Therefore the term *"reasonable"* is used to ensure the discretion of the trade measurement inspector is fettered.

The purpose of subsection 18MIA(2) is to provide some examples of what is to be considered a reasonable direction. This will provide guidance to both trade measurement inspectors and the controllers of vehicles as to what can be required in the event that a trade measurement inspector considers it necessary to issue a direction.

The list of what will be considered a reasonable direction in subsection 18MIA(2) is based on what trade measurement inspectors *typically* require in order to exercise their powers under section 18MG in an effective and safe way. This list, however, will not effectively capture what will be a reasonable direction in all circumstances. For example, when inspecting vehicles that are transporting certain goods with fast acting agents (such as

concrete), where time will affect the quality of the goods, it is necessary to give a direction to the controller that allows the measurement of the goods to be carried out in a particular (and reasonable) period of time and in a particular way. In such circumstances the list of what will be considered a reasonable direction in subsection 18MIA(2) may not adequately capture such a direction and therefore the requirement to carry out a reasonable direction is necessarily flexible enough to capture such directions.

In addressing the Committee's concern as to whether or not it would be possible for this power to be abused, the National Measurement Institute are currently developing Directions, an administrative guideline, which directs the way in which trade measurement inspectors will be required to exercise their power to issue a reasonable direction. This will be in addition to the ongoing training that trade measurement inspectors will receive in regards to exercising this power and all their other powers under the Act. This will ensure that trade measurement inspectors will exercise their power in an appropriate manner and will ensure that this power is not subject to abuse.

Committee Response

The committee thanks the Minister for this detailed response and notes the useful example and the proposed guidelines. The committee makes no further comment on this matter.

Alert Digest No. 5 of 2013 - extract

Strict liability
Subsection 18MIA(4)

Note in relation to strict liability: The statement of compatibility contains a very detailed explanation as to the appropriateness of the use of strict liability in proposed subsection 18MIA(4). The following reasons are given in justification of the creation of a strict liability offence: 'regulatory' nature of the offence, the necessity of the offence for effective enforcement, the lower penalty for the strict liability offence (40 as opposed to 200 penalty units), and the fact that if a person choses to pay the penalty when issued with an infringement notice for such an offence will pay a penalty as low as 5 penalty units. Subject to the above comment in relation to the uncertainty as to the limits of authorised directions for the purposes of this offence, **in light of the explanation provide 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

Strict liability

As noted in the Committee's review of the Bill, the Committee leaves the question of whether the strict liability offence contained in subsection 1 8MIA(4) is appropriate to the consideration of the Senate as a whole.

I also note that the Committee has considered the explanation of the strict liability offence which is discussed in detail within the explanatory memorandum.

Thank you for raising your concerns with me and I trust the information provided is helpful.

Committee Response

The committee thanks the Minister for this response.

Public Interest Disclosure Bill 2013

Introduced into the House of Representatives on 21 March 2013
Portfolio: Public Service and Integrity

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Attorney-General responded to the committee's comments in a letter dated 12 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill establishes a framework to encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector.

The bill also ensures that Commonwealth agencies properly investigate and respond to public interest disclosures; and provides protections to public officials who make qualifying public interest disclosures.

Trespass on rights and liberties—reversal of onus
Subclause 23(1)

Under paragraph 23(1)(a) a person seeking to claim immunity from prosecution under clause 10 of the bill (which provides that a person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability on that account) bears the onus of pointing to evidence that suggests a reasonable possibility that the protection applies. Subclause 23(1)(b) provides that if the initial onus is discharged, then the party instituting the proceedings bears the onus of proving that the claim is not made out.

In the context of a criminal proceeding, the situation is therefore analogous to placing an evidential burden of proof to establish an exception to an offence based on clause 10 of the bill. **The explanatory memorandum does not give an explanation of why, in this context, it is appropriate for the defendant to bear such an onus and the committee therefore seeks the Minister's further advice as to the appropriateness of paragraph 23(1)(a).**

> *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

Request for clarification as to why it is necessary to reverse the burden of proof in clause 23(1)(a)

Clause 23 establishes a procedure for a person who is a defendant in a civil or criminal proceeding to invoke the immunity given by clause 10. The person would be seeking to invoke that immunity as a defence to the proceedings brought against them. Clause 23 does not affect the existing onus upon the plaintiff to establish liability, or the prosecution to establish guilt, in the primary proceedings. Under clause 23(1)(a), the person would have an onus of pointing to evidence that suggests a reasonable possibility that the claim for clause 10 immunity is made out. This is a lower threshold than on the balance of probabilities. Once the defendant has discharged that lower onus, the party instituting proceedings will then bear the onus of proving that the immunity claim is not made out.

Committee Response

The committee thanks the Attorney-General for this response, which outlines the process for invoking the immunity. In addition to an awareness of the process, the committee is interested in understanding the basis on which the use of the immunity is considered appropriate. The committee expects that the principles in the *Guide to Framing Commonwealth Offences* will be taken into account and the appropriate rationale will be included in the explanatory memorandum. For example, is the offence being structured with an immunity because the relevant information would be peculiarly within the defendant's knowledge? If not, would it be more appropriate for the matter to be included as an element that the prosecution should prove? **The committee therefore seeks the Attorney-General's further advice as to whether the proposed immunity is consistent with the *Guide to Framing Commonwealth Offences*.**

Alert Digest No. 5 of 2013 - extract

Delegation of legislative power
Subclause 29(1)

Item 10 of the table in subclause 29(1) provides that the PID rules may prescribe further types of disclosable conduct. Given the importance of the definition of 'disclosable conduct' for the operation of the bill and the committee's long-standing view that important matters should be included in primary legislation unless a strong justification is provided, the committee seeks the Minister's advice as to the necessity for including further disclosable conduct in delegated legislation.

> *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

Request for advice on why it is necessary for further kinds of 'disclosable conduct' to be specified in the PID rules (table item 10, clause 29(1))

Clause 29(1) gives an expansive definition of the kinds of wrongful conduct that may be reported for the purposes of the scheme, referred to in the Bill as 'disclosable conduct'. The ability for a Minister administering the legislation to prescribe any further type of 'disclosable conduct' under the PID rules would apply only to expand the scope of wrongdoing which could be the subject of a protected disclosure for the purposes of the scheme. Given the breadth of the current definition of 'disclosable conduct', it could be expected that this power would be exercised infrequently. The PID rules are expressed to be a legislative instrument in clause 83 of the Bill and would be disallowable.

Committee Response

The committee thanks the Attorney-General for this response. However, it would have been useful to assist the committee to assess whether the delegation of legislative power was appropriate if the explanatory memorandum included examples of the types of circumstances in which the power might be used. **However, in the circumstances the committee notes that the instruments will be disallowable and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 5 of 2013

Trespass—self-incrimination
Clause 57

It does not appear that this clause evinces a clear intention to abrogate the privilege against self-incrimination. **However, in light of the importance of this matter the committee seeks the Minister's clarification as to whether or not this is indeed the case.**

> *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

Request for clarification on whether clause 57 is intended to abrogate the privilege against self: incrimination

Clause 57 is intended to give protection to an individual who gives information to a person who is conducting an investigation into a public interest disclosure. The protection is limited in so far as clauses 57(2), (3) and (4) would be applicable. Clause 57 is not a power that could be used to compel the provision of information. There is no provision in Part 3 of the Bill that gives an investigator a power to require production of information for the purposes of an investigation under that Part.

Committee Response

The committee thanks the Attorney-General for this response, which confirms that there is no intention to abrogate the privilege against self-incrimination.

Alert Digest No. 5 of 2013 - extract

Delegation of legislative power—exclusion of Legislative Instruments Act
Subclause 59(2) and clauses 65 and 67

The explanatory memorandum does not make it clear whether this subclause is a substantive exclusion from the *Legislative Instruments Act*. The procedures deal with important matters (such as the maintenance of confidentiality) and it is not clear why the provisions of the *LIA* should not apply. A similar situation also arises in relation to the reversal of onus in clauses 65 and 67. **The committee therefore seeks the Minister's advice on this issue. If the provisions are substantive exclusions from the *LIA*, the committee seeks the Minister's justification for the 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

Request/or clarification on the effect of clause 59(2)

Clause 59(2) provides that the procedures, required to be established by principal officers of each agency for dealing with public interest disclosures under clause 59(1), are not legislative instruments. The provision is intended to be declaratory to assist readers and is not an exemption from the Legislative Instruments Act 2003. While intended to operate as internal administrative procedures, the procedures must also comply with standards determined by the Ombudsman which are legislative instruments. Under clause 74(3), the Ombudsman is required to ensure that standards are in force for that purpose, in addition to standards on the conduct of investigations and the preparation of reports, at all times after commencement.

Clauses 65 and 67 (secrecy offences)

The Committee also seeks clarification on clauses 65 and 67, which are secrecy offences. While the comment appears in the section dealing with the Legislative Instruments Act, the text refers to a 'reversal of onus' suggesting that the concern relates to notes in these clauses that a defendant bears an evidential burden in relation to establishing that disclosure or use of protected information is authorised by an exception to the offence established in clauses 65(2) or 67(2). As the notes indicate, this is the position under subsection 13.3(3) of the Criminal Code, which provides that a defendant, who wishes to

rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence, bears an evidential burden in relation to that matter.

I trust this information is of assistance to you.

Committee Response

The committee thanks the Attorney-General for this response, which addresses its concern.

Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012

Introduced into the House of Representatives on 19 September 2012 *(passed and received Royal Assent on 28 November 2012)*
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No.12 of 2012*. The Minister responded to the committee's comments in a letter received 6 March 2013 which was published in the committee's *Third Report of 2013*. The committee sought further advice and the Minister responded in a letter dated 28 May 2013. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2012 - extract

Delegation of legislative power—incorporating material by reference
Schedule 2, item 9, proposed subsection 128Q(4)

Pursuant to proposed subsection 128Q(1) the Regulator may, by legislative instrument, determine 'competency standards to be complied with by all approved self-managed superannuation fund auditors'. Proposed subsection 128Q(4) provides that these standards may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, a matter contained in an instrument as in force or existing from time to time.

It is the committee's practice to seek a justification for such provisions as they diminish the capacity of the Parliament to adequately oversee the making of legislative instruments. As the explanatory memorandum does not explain why it is necessary to incorporate other instruments as they exist from time to time into the competency standards, **the committee seeks the Minister's advice in relation to the justification for this proposed approach**.

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

Minister's First Response - extract

With respect to the delegation of legislative power in Schedule 2, it is appropriate to provide the Regulator with flexibility to adjust the competency standards in response to emerging issues identified by the Regulator. The SMSF sector is subject to ongoing changes in legislative and market conditions that are likely to require modifications to the competency standards on a time-to-time basis. In addition, the Regulator may identify systematic issues in SMSF auditor competency in the course of its regulatory activities. It is appropriate that the Regulator has the power to adjust the competency standards to improve auditor competency in relation to such issues.

The provision of ASIC with the power to set competency standards was a recommendation of the Super System Review (Recommendation 8.8a). The purpose of the recommendation was to make all approved auditors subject to the same minimum competency standards.

Under existing SMSF auditor regulation, one way to be an approved auditor of SMSFs is to be a member of a professional association listed in Schedule 1AAA of the Superannuation Industry (Supervision) Act 1994 Regulations. These professional associations set competency standards for their members and may update these standards on an ongoing basis. It is appropriate for ASIC to have a similar level of flexibility in the proposed regulatory regime.

ASIC is committed to consultation with the industry with respect to the competency standards. ASIC's draft competency standards have undergone public consultation, and there has been direct consultation with the Joint Accounting Bodies and the SMSF Professionals' Association of Australia.

Committee's First Response

The committee thanks the Minister for this response and notes the arguments made in relation to the need for ASIC to have flexibility in setting competency standards and the public consultation that has taken place in relation to the draft standards. **However, the committee specifically sought advice as to why it is necessary to provide the power to incorporate other instruments as they exist from time to time into the competency standards, but unfortunately the response does not address this point. The committee therefore seeks the minister's further advice on this issue, including what information is likely to be incorporated by reference and whether that information will be publicly available.**

Minister's Further Response - extract

In your letter, you indicate that the Committee seeks further advice in relation to its views on the Act, set out in its Third Report of 2013 (13 March 2013). Specifically, the Committee seeks advice as to why it is necessary to provide the Regulator with the power to incorporate other instruments as they exist from time to time into the competency standards for approved self-managed superannuation fund (SMSF) auditors, what requirements are likely to be incorporated by reference and whether those requirements will be publicly available.

Under the superannuation laws prior to the commencement of the Act, one path to status as an approved auditor of SMSFs was to be a member of one of the professional associations listed in Schedule 1AAA of the Superannuation Industry (Supervision) Regulations 1994. These are CPA Australia Limited, The Institute of Chartered Accountants in Australia, Institute of Public Accountants, Association of Taxation and Management Accountants, National Tax and Accountants Association Ltd and SMSF Professionals' Association of Australia Limited. A large proportion of approved SMSF auditors were, and continue to be, members of these professional associations. The professional associations set competency standards for their members and have the flexibility to update these standards on an ongoing basis.

The purpose of allowing the Regulator to incorporate material by reference is to ensure that the Australian Securities and Investments Commission (ASIC), the Regulator in this case, has the ability to incorporate existing standards, such as those already set by professional associations, into the new competency standards. This allows the Regulator, if it considers it appropriate, to bring existing standards within the scope of the law and gives it the ability to enforce the standards in relation to all approved SMSF auditors, including those who are not members of professional associations. This will ensure that there is consistency in the implementation of the requirements and will simplify the maintenance of the standards.

The requirements that are incorporated in the current competency standards are some of the competency requirements set by professional associations for their members. All of these competency requirements arc publicly available.

As I have previously indicated, ASIC, as Regulator, is committed to consultation with industry regarding competency standards for approved SMSF auditors. I note that the current competency standards underwent public consultation prior to being finalised and I would anticipate that this practice will continue for future changes to the competency standards.

In addition, in the current competency standards, ASIC has incorporated by reference standards made by the Auditing and Assurance Standards Board. These are standards that are applicable to the duties of an approved SMSF auditor and all of these standards are publicly available.

Committee's Further Response

The committee thanks the Minister for this very useful additional information. The committee notes that the key information would have been useful in the explanatory memorandum.

Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013

Introduced into the House of Representatives on 20 March 2013
Portfolio: Health and Ageing

Introduction

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Parliamentary Secretary responded to the committee's comments in a letter dated 17 June 2013. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill amends the *Therapeutic Goods Act 1989* (the Act) to:

- amend the definition of 'therapeutic goods' in subsection 3(1) of the Act to enable the Minister, by legislative instrument, to specify products that are taken not to be therapeutic goods for the purposes of the Act;

- enable the Secretary to remove products from the Australian Register of Therapeutic Goods which are not, or are no longer, therapeutic goods within the definition in the Act;

- clarify the source of the power for the Secretary to approve product information under section 25AA of the Act; and

- make minor amendments designed to ensure consistency in the way the different classes of therapeutic goods are treated under the Act.

Delegation of Legislative Power/Broad discretionary power
Schedule 3, items 1 and 2

These items introduce amendments the effect of which is to allow the Minister to exclude from the definition of 'therapeutic goods' those goods which have been determined by the Minister in a legislative instrument not to be therapeutic goods or not to be therapeutic goods when used, advertised or presented for supply in a specified way.

The consequence of excluding a particular good from the definition of 'therapeutic goods' is that it would no longer be regulated in accordance with the requirements of the Act. The

explanatory memorandum notes that the definition of therapeutic goods is very broad and offers a detailed case for the importance of allowing 'the Minister to respond flexibly, on a case by case basis, to ensure that the Therapeutic Goods Administration is not involved in the regulation of products for which there is no public health focus or for which there may be sound public policy reasons for their not being regulated under the therapeutic goods legislation' (at 22). Although the need for flexibility may be accepted, it is not clear what sort of public policy reasons will be considered appropriate for excluding the requirements of the Act. **The committee therefore seeks the Minister's advice as to whether consideration has been given as to specifying the purposes for which this power may be exercised or to other ways to confine this power (which amounts to a broad discretion to exclude the operation of the Act in relation to particular goods).**

> *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 and they may also be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

Parliamentary Secretary's response - extract

Proposed new section 7AA- excluding goods for public policy reasons

Proposed section 7AA would enable the Minister to determine by legislative instrument that specified products are not therapeutic goods for the purposes of the *Therapeutic Good Act 1989* (the Act), or are not therapeutic goods when used, advertised or presented for supply in a specified way. The focus of the new section will be those products for which therapeutic use claims are made (often in the form of advertising) but which do not, and are not likely to, present a risk to public health. Consumer protection laws may offer a more appropriate mechanism for addressing concerns in relation to such products.

As noted in the Second Reading Speech of the then Parliamentary Secretary for Health and Ageing, the Hon Catherine King MP, the kinds of matters the Minister would take into account when considering excluding products from regulation may include:

- whether the product is of a kind that has the potential to harm person's health;
- whether the application of the regulatory requirements under the Act that are designed to test the safety, quality, efficacy and performance of a product for it to be supplied in Australia would be appropriate to a product of that kind; and

- whether the kinds of risks to which the public might be exposed from the supply of the product (for instance, unsupported therapeutic claims) can be more effectively managed under other Commonwealth or state and territory laws.

The Minister would take into account all relevant factors for the product in question in making a determination under the proposed new section 7AA.

In relation to the circumstances in which the review power might be used to exclude products for public policy reasons, it is intended this would only occur where there are very clear and unequivocal reasons for doing so, and where such a measure is necessary to give effect to Australian Government policy. An example is set out in the enclosure, Attachment A, in relation to solid human organs and human reproductive tissues, which the Australian Health Ministers' Conference agreed in 2008, should not be regulated under the therapeutic goods legislation.

It is a requirement of the *Legislative Instruments Act 2003* that consultation be undertaken before any exercise of the proposed new power. This consultation would include sponsors whose products are likely to be affected, as well as consumer representative bodies and health professionals. Further, any determination will be subject to the parliamentary disallowance process.

Proposed new section 7AA - specifying purposes

Consideration was given to specifying the purposes for which the proposed new power may be exercised or to other ways to confine this power, in the development of the 7AA proposal. Criteria of the kind referred to in the Second Reading Speech were not reflected in the Bill because of the difficulty in setting out all-encompassing criteria which could capture all of the likely circumstances and all the possible products for which an exercise of the new power might be considered appropriate in the future.

In particular, it is very difficult to identify purposes that could anticipate all the different kinds of products that might emerge as a concern resulting from the making of claims for therapeutic use, or that might arise for instance from the use of innovative technologies that are not currently contemplated.

This is particularly a concern as health claims appear to be increasingly being made about a wide range of products that were not contemplated as relating to public health when the Act was first drafted, e.g. paint and curtains containing alltibach~rial properties. The absence of purposes or criteria reflects these difficulties and concerns, and retains a level of flexibility for the Minister in being able to respond as new products emerge.

It is important to note that excluding a product from the Act will not curtail its supply or marketing or result in ·the imposition of restrictions. Rather, the product will no longer be subject to the regulatory burden or costs associated with being subject to Act, e.g. complying with applicable standards and post-market conditions of entry on the Register,

and paying fees and annual charges. Nor will it exclude such goods from coverage by other Commonwealth legislation such as the Australian Consumer Law.

Committee Response

The committee thanks the Parliamentary Secretary for his detailed response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**.

Alert Digest No. 5 of 2013 - extract

Trespass on personal rights and liberties—strict liability offence Schedule 11, item 1

This item would, through subsection 9G(2), introduce a new strict liability offence for providing false and misleading information in relation to a request under section 9D of the Act to vary an entry for therapeutic goods on the Register where the information relates to goods that if used would be likely to result in harm or injury to any person. The maximum penalty is 2000 penalty units, which is well above the maximum penalty recommended by the *Guide to Framing Commonwealth Offences* (60 penalty units for an individual and 300 units for a body corporate).

The explanatory memorandum (at 46 and 47) notes this issue but argues that the penalty is appropriate because:

> (1) there is no imprisonment element and the maximum is capped at 2000 penalty units;
> (2) the maximum penalty level 'reflects the seriousness of the conduct addressed by the offence' and is consistent with the penalty levels for existing offences in the Act relating to the provision of false or misleading information; and
> (3) the new strict liability offence forms part 'of the Act's tiered approach to criminal offences' and this approach 'serves an important role in deterring and addressing conduct that endangers public health'. Of these justifications the key argument is relates to the importance of deterring conduct which has potentially serious consequences for public health.

As noted in the statement of compatibility, variations to goods listed on the Register can relate to a variety of matters, including quite serious safety issues, such as adding a warning or a precaution to the product information of a prescription medicine in connection with the use of the medicine' (at 5). What is lacking, however, is an

explanation as to why strict liability will significantly enhance effective regulatory enforcement and why it is legitimate to penalise persons who lack fault. **The committee therefore seeks the Minister's further explanation of 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.*

Parliamentary Secretary's response - extract

Strict liability offence

The Bill includes a new criminal offence (proposed section 90) and an equivalent civil penalty provision (proposed section 9H) for making false or misleading statements in, or in connection with, a request under section 9D of the Act for a variation to an existing entry for therapeutic goods in the Register. These requests usually arise out of a proposal by the sponsor of the goods previously approved for marketing in Australia to make a change to the goods.

The information provided by a sponsor for the purposes of such a request can include complex and extensive scientific data about the goods, e.g., results of clinical trials, or the incidence of adverse reactions to prescription medicines. This information will be exclusively and confidentially within the knowledge of the sponsor. Moreover, it is up to the sponsor to demonstrate that the basis on which the product was approved for marketing in Australia (via inclusion on the Register) - i.e. that its quality, safety and efficacy/performance was acceptable- remains, and that, as such, it should continue to 'be on the Register notwithstanding the proposed change.

Thus there is a particular level of dependence on the accuracy and comprehensiveness of the supporting information provided to support a section 90 request, especially in relation to higher risk goods like prescription medicines. If the Secretary of the Department of Health and Ageing relies on false information to approve a request, there could potentially be serious consequences for public health and safety.

Where non-compliance with the requirement to provide accurate information that is not false or misleading is likely to cause harm or injury (as per proposed subsection 9G(2), it is considered that non-compliance should attract a criminal sanction regardless of any mental element. By setting out a strong deterrence against providing false or misleading information, and by forming an integral part of the suite of sanctions proposed for such conduct, it is expected subsection 9G(2) will significantly enhance regulatory enforcement and help to protect the public from exposure to therapeutic goods that have been approved for continued supply on the basis of false or misleading information.

Proposed section 9G is consistent with the existing tiered criminal offences in the Act that apply in relation to the provision of false or misleading information (e.g. by applicants for the inclusion of products in the Register [2]), and with the current approach of tiered criminal offences in the Act which include in that structure an offence of strict liability along the same lines as proposed subsection 9G(2).

This approach was introduced into the Act in 2006 by the *Therapeutic Goods Amendment Act (No.1) 2006* (the 2006 Amendment Act). The Senate Scrutiny of Bills Committee noted, in its Alert Digest 10/05, in relation to the Therapeutic Goods Amendment Bill 2005 (which became the 2006 Amendment Act), that the Explanatory Memorandum for that Bill set out a clear explanation of the nature of strict criminal liability and a justification for the inclusion in the Bill of its strict liability provisions. The Committee made no further comment on those provisions.

I trust that the above information is of assistance.

Committee Response

The committee thanks the Parliamentary Secretary for this detailed and useful response and makes no further comment.

Senator the Hon Ian Macdonald
Chair

[2] Sections 22A and 22B, 41 FE and 41FEA and 320 0 and 32DP of the Act refer.

THE HON MARK BUTLER MP
MINISTER FOR MENTAL HEALTH AND AGEING
MINISTER FOR HOUSING AND HOMELESSNESS
MINISTER FOR SOCIAL INCLUSION
MINISTER ASSISTING THE PRIME MINISTER ON MENTAL HEALTH REFORM

Senator the Hon Ian Macdonald
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

Re: Senate Standing Committee for the Scrutiny of Bills – Alert Digest No. 5 of 2013 – Aged Care (Living Longer Living Better) Bill 2013 and Australian Aged Care Quality Agency Bill 2013

I write to provide advice to the Senate Standing Committee for the Scrutiny of Bills as sought through Alert Digest No. 5 of 2013 in relation to the Aged Care (Living Longer Living Better) Bill 2013 and the Australian Aged Care Quality Agency Bill 2013.

Aged Care (Living Longer Living Better) Bill 2013

The Aged Care (Living Longer Living Better) Bill 2013 amends the *Aged Care Act 1997* (the Act) to make changes that:

- relate to residential care, such as changes to the way that Government subsidies and resident fees are calculated, and the options available to care recipients to pay for their accommodation;
- relate to home care, such as changes to the types of home care available and the way that Government subsidies and fees are calculated;
- relate to governance and administration, such as the establishment of the new Aged Care Pricing Commissioner; and
- are minor, administrative or consequential. For example, changes that improve the operation of the Act or address anomalies in the legislation.

Delegation of legislative power

The Committee has sought advice as to the rationale for the provisions which provide for the making of determinations (by way of legislative instruments).

Currently the Act describes a range of circumstances in which either the Minister or the Secretary may make determinations:

- Determinations made by the Minister generally relate to the dollar value of, for example, subsidies and supplements. These Determinations are legislative instruments. The reason these matters are not included in the primary legislation is because the dollar values change with indexation and therefore need regular updating;

- Determinations made by the Secretary are legislative instruments if they state a rule that has general application, such as conditions relating to allocations of places generally (see section 14-6 of the Act). The Aged Care (Living Longer Living Better) Bill 2013 does not contain any new provisions of this kind; and

- Determinations made by the Secretary are not legislative instruments if they relate to the individual circumstances of a care recipient or an approved provider and as such include information that may be protected information under the Act. A decision by the Secretary not to make a determination of this kind, or to revoke such a determination, is a reviewable decision which means that it is subject to reconsideration by the Secretary and also subject to review by the Administrative Appeals Tribunal.

Consistent with the approach currently adopted in the Act, the same approach has been adopted in relation to the amendments being made through the Aged Care (Living Longer Living Better) Bill 2013. That is, the Bill describes the circumstances in which determinations may be made by the Minister (the focus of the Committee's query).

For example the Minister may, by legislative instrument, determine:

- the basic subsidy amount;

- the maximum amount of accommodation payment that an approved provider may charge a person;

- the amount of each primary supplement and other supplement;

- the annual and lifetime caps for income tested care fees (home care) and means tested care fees (residential care);

- asset thresholds for the purposes of working out means tested care fees; and

- the maximum home value (which forms part of the calculation of the value of a person assets).

It is essential that these dollar values be reflected in determinations rather than in the primary legislation because they require regular updating. As is currently the case in relation to Ministerial determinations under the Act, different amounts are adjusted at different times.

Some amounts are linked to the CPI pension increases and are therefore changed on 20 March and 20 September each year. Other amounts are linked to wage cost indexation and are changed on 1 July of each year.

Australian Aged Care Quality Agency Bill 2013

Trespass on personal rights and liberties – privacy – Part 7

The Committee has requested additional information about the provisions relating to the use of personal information and the appropriateness of allowing for the creation of further instances of authorised disclosure of personal information through the Quality Agency Principles.

The Australian Aged Care Quality Agency Bill 2013 establishes a new, independent quality agency responsible for, among other things, accreditation of approved providers of residential aged care.

While the Quality Agency is independent of the Secretary, there is and must be a similarity between the way the Secretary and the CEO of the Quality Agency collect, use and disclose protected information. This is the case particularly because it is the Secretary who may take compliance action against an approved provider on the basis of evidence collected by the Quality Agency. Given the complementary roles, the provisions relating to protected information that are included in the Australian Aged Care Quality Agency Bill are based on those contained in the *Aged Care Act 1997* (refer Division 86).

Section 86-3 of the *Aged Care Act 1997* enables the Secretary to disclose protected information to a person of a kind specified in the *Information Principles 1997*. Similarly, the Bill (section 49) also enables the CEO to disclose protected information to a person of a kind specified in the Quality Agency Principles.

It is important that the Australian Aged Care Quality Agency Bill includes a provision of this kind:

- to maintain consistency with the *Aged Care Act 1997;*

- to enable additional purposes (for disclosure) to be specified. For example, in the case of the *Aged Care Act 1997*, the *Information Principles 1997* have been amended over time to include additional circumstances in which disclosure is authorised. This has been necessary as new legislation is introduced which interacts with the *Aged Care Act 1997*. For example the *Information Principles 1997* were amended to enable disclosure of information to the Secretary of the Department of Families, Housing and Community Services and Indigenous Affairs for working out the payment of rent assistance. Disclosure of this type ensures the seamless operation of related legislation enabling the payment of aged care subsidies, pensions and other Government payments.

An important safeguard, however, is the requirement that both the *Information Principles 1997* under the *Aged Care Act 1997* and the Quality Agency Principles under the Australian Aged Care Quality Agency Bill are disallowable instruments. This enables the Senate Standing Committee on Regulations and Ordinances to review any proposed disclosures to ensure that they do not trespass on rights and liberties.

Delegation of legislative power – Clause 53

The Committee has sought advice as to the rationale for the proposed approach to including information in delegated legislation and whether it would be more appropriate to include the matters that it is proposed to cover in the Quality Agency Principles in primary legislation rather than in delegated legislation.

Currently, the detailed matters relating to the accreditation process are described in the *Accreditation Grant Principles 2011* made under the *Aged Care Act 1997.* Similarly, it is proposed that detailed matters relating to the new Quality Agency's process of accreditation be detailed in new Quality Agency Principles.

The rationale for including this detail in delegated legislation is:

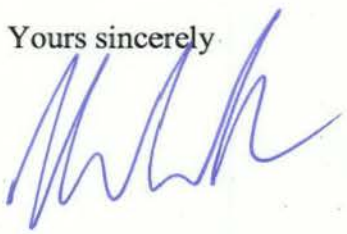
- the administrative processes surrounding accreditation are quite detailed and therefore more appropriately contained in delegated legislation (or administrative guidelines) rather than primary legislation;

- information that is currently included in the *Accreditation Grant Principles 2011* (and will, in future, be included in the Quality Agency Principles) includes application fees, fees charged for the provision of manuals, documents and other items, as well as the maximum fees able to be charged for seminars and conferences. As this information needs regular updating, it is not appropriate for inclusion in primary legislation; and

- as an organisation focused on continuous improvement, the Quality Agency is likely to adjust its internal processes over time, as more efficient and effective ways are identified for administering the accreditation of residential aged care services. By describing the detailed processes in delegated legislation, there is greater capacity to make such adjustments. These types of adjustments have been made over the last few years in relation to the Accreditation Grant Principles. When this has occurred, the proposed changes have been subject to examination by the Office of Best Practice Regulation and public consultation including with approved providers. This practice is proposed to continue in relation to any proposed changes to the Quality Agency Principles. The Quality Agency Principles will also be subject to consideration by the Senate Standing Committee on Regulations and Ordinances Committee.

I trust this clarifies the reasoning underpinning provisions included in the Aged Care (Living Longer Living Better) Bill 2013 and the Australian Aged Care Quality Agency Bill 2013.

Yours sincerely



MARK BUTLER

The Hon Anthony Albanese MP
Minister for Infrastructure and Transport
Minister for Regional Development and Local Government
Leader of the House

Reference: 01824-2013

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

4 JUN 2013

Dear Senator Macdonald Ian

I refer to the issues raised by the Senate Scrutiny of Bills Committee in Alert Digest No.5 of 2013 about the inclusion of a strict liability offence in the Aviation Transport Security Amendment (Inbound Cargo Security Enhancement Bill 2013) (the Bill). I will address each of the issues below.

Undue trespass on personal rights and liberties – strict liability; delegation of legislation

While the Committee noted the reasoning provided for the strict liability offence in the Explanatory Memorandum, a concern was raised about its appropriateness in relation to how prohibited cargo is to be specified in an instrument, and the appropriate delegation of legislative powers.

I acknowledge the Committee's reference to the catastrophic nature of a successful attack using prohibited air cargo cited in the explanatory memorandum, and reiterate the dangers of allowing prohibited cargo into Australia. It is imperative that aviation industry participants remain vigilant and take the appropriate actions to guard against threats to security. The threat of air cargo being used for unlawful interference with aviation is real, and successful attacks could achieve devastating results and significantly damage Australia's economy. The need to protect Australians and Australian interests justifies the application of the strict liability offence to ensure that aviation industry participants do their utmost to prevent prohibited cargo from entry into Australia.

However, I also recognise that any such imposition must be proportionate and subject to appropriate safeguards. In that context, it is important to note that the power the Bill provides the Minister is a power to make a disallowable instrument, meaning that Parliament retains the opportunity to scrutinise each and every exercise of the power created under the Bill, and assess its reasonableness in the context of the strict liability offence.

Therefore, Parliament will be able to take direct action to prevent any inappropriate ambiguities leading to the unreasonable or uncertain burdens being placed on aviation industry participants. This is a significant safeguard which should allay concerns about the Bill potentially causing undue trespass on personal rights and liberties.

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Whilst the broad nature of the prohibitions which may be contained within an instrument created under the Bill is acknowledged, the Bill was specifically drafted to address the difficulty in accurately predicting the precise nature of the risks that must be mitigated. It is intended to provide the Minister with the necessary flexibility to draft an instrument which will have the greatest effect in mitigating risks to national security whilst having the minimum necessary impact on aviation industry participants and international trade.

To place any additional limitations on the way in which any prohibition may be structured could defeat the purpose of introducing such a power, and inadvertently lead to unnecessary impositions on industry. The use of a disallowable instrument is intended as a way of maintaining a democratically scrutinised balance between mitigating an unpredictable risk to Australia's national security, and protecting individuals from the inappropriate imposition of a strict liability offence.

I believe that this Bill is an appropriate and proportionate way to address potential security threats posed by air cargo. The unpredictable nature of the security risk environment means that it would be impractical to specifically prescribe provisions in the Act to address all emerging threats. Attacks may occur at any time, and require a swift response from the government to put in place adequate security measures. Therefore it is appropriate that matters relating to the prohibition of certain kinds of cargo be included in a legislative instrument rather than the Act to allow the government the flexibility to respond in a timely manner with due reference to the rights and liberties of aviation industry participants.

Undue trespass on personal rights and liberties – penalties

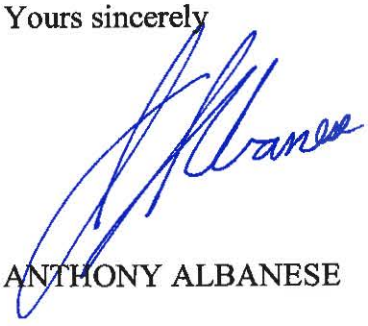
The committee has also indicated a concern about the level of penalty contained within the Bill. Whilst I note that it has deferred its consideration on this matter until it has had the opportunity to consider the response to the previous issues, I do want to make a brief comment about the applicability of the penalty.

The penalties for an offence under the Bill apply to aircraft operators and other aviation participants. 'Aviation industry participants' is a defined term under section 9 of the *Aviation Transport Security Act 2004*.

The *Aviation Transport Security Act 2004* and the Aviation Transport Security Regulations 2005 both contain penalties for offences committed by aviation industry participants. These have been consistently assessed with reference to applicable rates for bodies corporate recommended by the Commonwealth *Guide to drafting Commonwealth offences*.

I trust this response satisfactorily addresses the Committee's concerns.

Yours sincerely



ANTHONY ALBANESE

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

13/5837-01, MHA-SB2013/0981

12 JUN 2013

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

Dear Chair

I refer to your letter of 16 May 2013 regarding the Scrutiny of Bills Committee's *Alert Digest No. 5 of 2013* (15 May 2013) concerning the *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (the Organised Crime Act), which received Royal Assent on 28 May 2013.

Customs Act Amendments

You have sought advice in relation to a number of amendments to the *Customs Act 1901* (the Customs Act). The amendments to the Customs Act seek to strengthen the cargo supply chain against criminal infiltration.

Trespass on personal rights and liberties – capacity to comply with legal obligations Schedule 1, subitem 42(3)

The Committee has requested further information regarding the ability of persons to comply with the obligations imposed by Schedule 1, subitems 42(2) and (3) of the Organised Crime Act. In particular, the Committee sought advice on whether appropriate records will exist to enable the obligation to be fulfilled and what measures will be taken to ensure licence holders are aware of what information should be provided to the Australian Customs and Border Protection Service (ACBPS).

The amendments to the Customs Act provide those subject to the notification obligation with a period of 90 days from the commencement of the obligation to comply. Where the relevant person does not already hold that information, 90 days is considered a reasonable period to make inquiries and to obtain the necessary information. If ACBPS subsequently identifies non-compliance with the obligation, ACBPS decision-makers are required to determine responses to non-compliance based on all the available information. Decision-makers can also exercise some

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discretion in determining an appropriate response. That response could range from education and warnings, administrative action such as the suspension and revocation of licences and the application of infringement notices, through to prosecution. Relevant factors in exercising that discretion include, for example, the significance of the breach, efforts to comply, any relevant remedial or risk mitigation action, compliance history and reasons beyond the person's control.

ACBPS has and will continue to provide information to those subject to the various obligations under the amendments to the Customs Act to promote awareness and compliance.

Broad discretionary power
Schedule 1, item 43, proposed paragraph 102CJ(c)

The Committee notes that new section 102CJ of the Customs Act enables the CEO to impose additional obligations on cargo terminal operators (CTOs) generally where the CEO considers the obligations to be necessary or desirable to protect revenue, to ensure compliance with certain laws, or for any other purpose. The Committee has sought advice as to whether the intended meaning of the expression 'any other purpose' could be expressly incorporated into paragraph 102CJ(c) to better reflect the intended limitations on the exercise of the relevant power.

The limitation 'for any other purpose' is consistent with the licensing schemes under the Customs Act, such as subsection 77Q(1), which enables the CEO to impose additional conditions on the holder of a depot licence. Further, as noted in the explanatory memorandum, the reference to "any other purpose" in section 102CJ is limited to purposes of the Customs Act.

Trespass on personal rights and liberties – search without warrant
Schedule 1, item 43, proposed section 102E

The Committee has requested further advice on the general restrictions on the manner in which the powers in section 102E are exercised.

The powers in new section 102E build on the existing powers that can be exercised by Customs officers at ports, wharfs or airports appointed under section 15 of the Customs Act. Authorised officers execute their powers under the Customs Act in line with the public sector *Privacy Act 1988* (Privacy Act) provisions, which require information containing personal information to be collected for a lawful purpose that relates directly to the function or activity of the collector. Under new subsection 102E(1), an authorised officer has powers to enter a cargo terminal to inspect and extract copies of documents and take equipment and material into a cargo terminal.

Authorised officers may only exercise these powers for the purpose of determining compliance with any Customs-related law. The powers of accessing electronic equipment and storage devices at subsection 102E(2) are also subject to a reasonable suspicion threshold, that the information relates to the matters set out in subsection 102E(3). All ACBPS employees are bound by section 16 of the *Customs Administration Act 1985,* which prohibits the unauthorised recording and disclosure of certain information held by ACBPS. Further, authorised officers executing powers under new section 102E will undertake training regarding their new powers and the new obligations placed on CTOs and cargo handlers.

These powers will give ACBPS greater control over the movement and safekeeping of goods at cargo terminals and greater visibility of persons entering and operating in cargo terminals. Placing a higher level of accountability on CTOs and cargo handlers is reasonable, necessary and

proportionate to the need to eliminate vulnerabilities in the cargo supply chain and maritime and aviation sectors that organised crime may exploit.

Trespass on personal rights and liberties—time to respond
Schedule 1, item 43, proposed section 102EA

The Committee notes that new section 102EA enables authorised officers to request CTOs and cargo handlers to provide documentation and records to support an assessment for a fit and proper person test. The Committee has sought advice as to why section 102EA does not provide a minimum timeframe for compliance with such a request, and why maximum flexibility is necessary in the context of these powers.

Section 102CF provides a maximum of 30 days for compliance with a request for information to support an assessment that a CTO is a fit and proper person. Section 102D provides that section 102CF applies to cargo handlers in the same way that it does to CTOs. Accordingly, subsection 102EA, which provides the power for an authorised officer to make a request for information from a CTO or a cargo handler for information to support an assessment for a fit and proper person test, requires the information to be provided within 30 days of the request. Thirty days is considered a reasonable timeframe for CTOs and cargo handlers to comply with such a request.

Strict liability
Items 59 and 60

The Committee has sought advice as to why strict liability is appropriate for the offences in subsections 60(1), 60(2) and 60(3), and why the weather defence does not apply to the offences relating to ships in subsection 60(1).

The explanatory memorandum notes that it is appropriate to apply strict liability to the offences for a number of reasons, including:

- to enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border
- that the offences are regulatory in nature, and
- to ensure consistency across like offences in section 60 of Customs Act.

The retention of the additional defence, where weather or other reasonable cause prevents compliance, balances the higher than usual penalty of 100 penalty units for the offences in subsections 60(2) and 60(3).

The reasons outlined in the explanatory memorandum and the special defence justify the application of strict liability to the offences in subsections 60(2) and (3).

Prior to these legislative amendments, subsection 60(1) was already an offence of strict liability. The defence regarding stress of weather or other reasonable cause does not currently, and will not, apply to subsection 60(1) following commencement of the relevant measures in the Act. The amendments apply strict liability to subsections 60(2) and 60(3), but retain the weather defence to balance the application of strict liability.

AusCheck Act Amendments

You have also sought advice in relation to amendments to the *AusCheck Act 2007* (the AusCheck Act). The amendments to the AusCheck Act provide the framework to allow suspension of a person's Aviation Security Identification Card (ASIC) or Maritime Security Identification Card (MSIC) or application for an ASIC or MSIC (a card) where the card holder or applicant has been charged with a serious offence.

Delegation of legislative power – important matters in regulations
Part 1, Schedule 2

The committee has requested an explanation as to why important elements of the regulatory framework to facilitate the suspension of a person's card (or application for a card) are to be included in the regulations rather than in the primary legislation.

The ASIC and MSIC schemes are administered by the Transport Secretary and are set out in the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations). AusCheck undertakes background checking for the ASIC and MSIC schemes.

To ensure consistency with those schemes, and to ensure necessary and appropriate amendments can be made in short timeframes, appropriate elements of the suspension on charge scheme that interact with the ASIC and MSIC schemes, will be set out in the *AusCheck Regulations 2007* (AusCheck Regulations).

For example, the lists of aviation-security-relevant offences (ASROs) and maritime-security-relevant offences (MSROs) that are applied when determining whether an individual is eligible to hold a card are set out in the Aviation and Maritime Regulations. The AusCheck Act provides that the serious offences for the purposes of the suspension on charge measure will be a subset of the ASROs and MSROs in the Aviation and Maritime Regulations. Placing the list of serious offences in the AusCheck Regulations will facilitate the timely making of necessary changes to that list to reflect changes to the lists of ASROs and MSROs in the Aviation and Maritime Regulations.

In addition, the existing processes for suspending or cancelling a card in specified circumstances are set out in the Aviation and Maritime Regulations. Consistent with this, the processes for suspending a person's card or application following charge with a serious offence will be set out in the AusCheck Regulations.

The Aviation and Maritime Regulations also contain criminal offences for failing to comply with relevant obligations with respect to the ASIC and MSIC schemes. For example, offences relating to failing to report a new conviction for an ASRO or MSRO are contained in the Aviation and Maritime Regulations. Consistent with this, the offences relevant to the suspension on charge measure will be set out in the AusCheck Regulations. Co-locating offences with the relevant obligations assists readers in understanding the possible implications of non-compliance. Consistent with the offences in the Aviation and Maritime Regulations, the new offences in the AusCheck Regulations will only carry pecuniary penalties.

The committee has also requested a fuller explanation of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information.

The AusCheck Act sets out a range of requirements and protections for the personal information obtained under the AusCheck Act. For example, the AusCheck Act contains offences, punishable

by two years imprisonment, for AusCheck officers and/or other persons who unlawfully disclose personal information. AusCheck personal information is also protected by the Privacy Act.

AusCheck currently collects, uses, stores and shares a range of personal information relating to applicants and card holders, including, where applicable, current name, any other names previously used, date of birth, place of birth, gender, current residential address, all other previous residential addresses for the past 10 years, employment details, a list of all criminal convictions, security assessment information, photo and, if an immigration check is requested, a range of immigration related information.

AusCheck has a range of secure systems in place to protect that information, including obtaining information with consent, secure electronic links with checking partners, and secure filing systems with access limited to those with a legitimate need to access the information.

To implement the suspension on charge measure, AusCheck will collect, use, store and, where necessary, share basic details about a charge for a serious offence in relation to applicants and card holders. Those basic details might include the individual's name, date of birth, residential address, card number, as well as details of the offence(s) with which the person was charged, where the charge was laid, and the date of the charge.

Possible Trespass – fair hearing
Part 1, Schedule 2

The committee notes suspension will be 'automatic', and expressed concern that no hearing will occur prior to suspension.

Suspension will occur immediately where the Secretary of the Attorney-General's Department (the Secretary) considers on reasonable grounds that the individual has been charged with a serious offence. It is necessary and appropriate for suspension to be immediate to remove the high risk individual from security sensitive aviation or maritime areas.

Where the Secretary suspends a card or an application, AusCheck will, in all cases, follow processes consistent with existing practices for advising individuals of decisions affecting them under the AusCheck scheme. This includes writing to the applicant or card holder to inform them of both the suspension and the details of the charges that resulted in the decision to suspend the application or card. The individual will then have the opportunity to make any representations in relation to the suspension. Once AusCheck is advised that an individual whose application or card has been suspended has been acquitted, the charges have been discontinued, or the individual has been found guilty of an offence that is not an ASRO or MSRO, AusCheck will be required to determine whether the person is eligible to hold a card. Where AusCheck determines the applicant or holder of the suspended card is eligible, AusCheck will be required to advise the relevant issuing body it can issue or re-issue the card, as the case may be.

In addition, in line with existing review and appeal mechanisms under the AusCheck Act, a person whose application or card has been suspended will have access to both merits review and judicial review with respect to AusCheck's decision to categorise an offence as a serious offence.

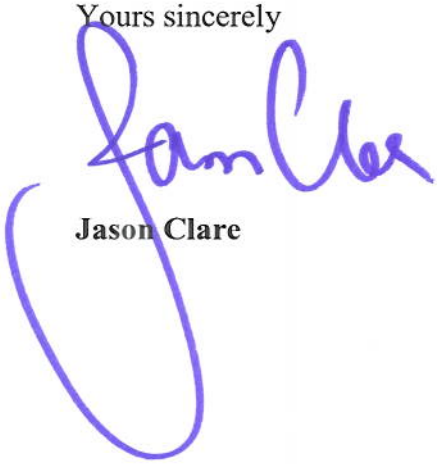
The Committee has also requested advice regarding the intended fault elements for each element of the offences to be included in the regulations.

The new offences contemplated to support the suspension on charge measure will mirror existing offences in the Aviation and Maritime Regulations. The fault elements for those offences will be consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The offence provisions in the AusCheck Regulations relating to the suspension on charge measure and the requirement to self report will be drafted in such a way to ensure adequate protections are provided to individuals where the individual had no knowledge of the charge. This could include, for example, where an arrest warrant has been issued in relation to an applicant or card holder but that person has no knowledge of the issue of the warrant or laying of the charges.

The officer responsible for the Customs Act amendments is Craig Riviere who can be contacted on 02 6275 6804. The officer responsible for the AusCheck Act amendments is Karen Horsfall who can be contacted on 02 6141 3034.

Yours sincerely



Jason Clare

COPY

Senator Michaelia Cash
LIBERAL SENATOR FOR WESTERN AUSTRALIA

2 May 2013

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013

I refer to your letter of 13 March 2013. My response to the issues raised in your letter is set out below.

These Bills will restore two classes of temporary protection visas **(TPV)** to provide safe haven and protection to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the nation's international obligations.

A number of important principles underpin these Bills.

First, circumstances in source countries for asylum seekers are constantly changing and the need for ongoing protection under the Refugee Convention needs therefore to be regularly tested. The Refugee Convention reflects the temporary nature of refugee status in the cessation clauses of article 1C, especially paragraph 5.

For this reason, under the Bills, TPVs will be granted for no more than three years. At the end of the period set out for the visa, continuing claims can be re-tested through a further TPV application.

Mutual obligation is a long established principle underpinning income support arrangements in Australia. It refers to the principle that it is fair and reasonable to expect unemployed people receiving income support to do their best to find work, undertake activities that will improve their skills and increase their employment prospects and, in some circumstances, contribute to their community in return for income support. The Bills provide for similar obligations to apply for TPV holders who are dependent on government income support payments.

TPVs provide protection in Australia for a designated period up to three years, but do not provide people with special additional entitlements over and above the nation's general migration programs. There is nothing preventing a TPV holder from leaving Australia at any

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time. If they then wish to return to Australia they would seek authority to do so through Australia's migration or visitor programs like other people visiting or migrating to Australia.

The same principle applies to family reunion. A TPV does not provide special additional entitlements for family reunion over and above those applying to other people in Australia who are neither Australian citizens nor permanent residents.

These Bills provide for the Minister to grant a permanent visa to a TPV holder. Therefore, in limited circumstances where protection will clearly be owed for many years, provision is available under the Bills for a permanent visa to be granted.

In summary, these Bills do not impose any limitations on people's rights. Rather, they provide fair and reasonable protection and support to people granted TPVs with work rights, access to special benefit income support, Medicare and a range of Government services.

However, the Bills do no convey special additional entitlements or rights over and above those available generally to people within the Australian community. Similarly, the Bills apply obligations to TPV holders no more and no less than those generally applied in our community.

Yours sincerely

SENATOR MICHAELIA CASH
SENATOR FOR WESTERN AUSTRALIA
Deputy Manager of Opposition Business in the Senate
Shadow Parliamentary Secretary for the Status of Women
Shadow Parliamentary Secretary for Immigration

CC: Senator the Hon Ian Macdonald
Chair of the Scrutiny of Bills Committee

Minister for Climate Change, Industry and Innovation

C13/976

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

03 JUN 2013

Dear Senator Macdonald

Thank you for your letter of 16 May 2013 on behalf of the Senate Standing Committee for the Scrutiny of Bills regarding the National Measurement Amendment Bill 2013 (the Bill). I note that the Committee has raised a number of issues which are addressed below.

Reversal of onus of proof

As noted in the Committee's review of the Bill, and in light of the explanation provided within the explanatory memorandum, the Committee leaves the question of whether the reversal of onus of proof is appropriate to the consideration of the Senate as a whole.

However for the benefit of the Committee I note that, in addition to the justification for the reversal of the burden of proof contained within the explanatory memorandum, it is important to consider that the note contained within the Bill provides that "a defendant bears an ***evidential*** burden" of proof. This merely reflects subsection 13.3(3) of the *Criminal Code Act 1995* (the Criminal Code), which states that "a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter".

In accordance with the Committee's third report of 2010, it is appropriate in this case that the defendant bears the evidential burden of proof to prove that he or she has complied with any condition specified in a notice to remedy or direction (i.e. the evidence that suggests a reasonable possibility of their defence). This is because evidence of compliance is particularly within the knowledge of the defendant and could be readily and cheaply provided by the defendant. In circumstances where the defendant does produce evidence of compliance with a notice to remedy or a direction, the prosecution then has to refute the defence beyond reasonable doubt.

It is for these reasons that the reversal of the onus of proof is appropriate.

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Use of the phrase "reasonable directions"

Section 18MIA, as inserted by the Bill, is to ensure that a trade measurement inspector may give a reasonable direction to the controller of a vehicle (and any person in the vehicle) for the purposes of exercising their powers under section 18MG of the Act in relation to a vehicle or anything in, or on, a vehicle. This is necessary to ensure that inspectors are able to effectively and safely carry out authorised inspections of a vehicle.

The phrase *"reasonable direction"* is necessary to ensure that a trade measurement inspector may have the requisite discretion to give a direction depending on the specific circumstances in which a direction is required.

The term "reasonable" is used to ensure that the trade measurement inspector is limited in the kinds of directions that he or she could give. For example, it would not be considered reasonable for an inspector to give a direction to a controller of a vehicle to go to a weighbridge other than the closest usable weighbridge. Therefore the term "*reasonable*" is used to ensure the discretion of the trade measurement inspector is fettered.

The purpose of subsection 18MIA(2) is to provide some examples of what is to be considered a reasonable direction. This will provide guidance to both trade measurement inspectors and the controllers of vehicles as to what can be required in the event that a trade measurement inspector considers it necessary to issue a direction.

The list of what will be considered a reasonable direction in subsection 18MIA(2) is based on what trade measurement inspectors *typically* require in order to exercise their powers under section 18MG in an effective and safe way. This list, however, will not effectively capture what will be a reasonable direction in all circumstances. For example, when inspecting vehicles that are transporting certain goods with fast acting agents (such as concrete), where time will affect the quality of the goods, it is necessary to give a direction to the controller that allows the measurement of the goods to be carried out in a particular (and reasonable) period of time and in a particular way. In such circumstances the list of what will be considered a reasonable direction in subsection 18MIA(2) may not adequately capture such a direction and therefore the requirement to carry out a reasonable direction is necessarily flexible enough to capture such directions.

In addressing the Committee's concern as to whether or not it would be possible for this power to be abused, the National Measurement Institute are currently developing Directions, an administrative guideline, which directs the way in which trade measurement inspectors will be required to exercise their power to issue a reasonable direction. This will be in addition to the ongoing training that trade measurement inspectors will receive in regards to excercising this power and all their other powers under the Act. This will ensure that trade measurement inspectors will exercise their power in an appropriate manner and will ensure that this power is not subject to abuse.

Strict liability

As noted in the Committee's review of the Bill, the Committee leaves the question of whether the strict liability offence contained in subsection 18MIA(4) is appropriate to the consideration of the Senate as a whole.

I also note that the Committee has considered the explanation of the strict liability offence which is discussed in detail within the explanatorary memorandum.

Thank you for raising your concerns with me and I trust the information provided is helpful.

Yours sincerely

GREG COMBET

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

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MC13-003693

27 MAY 2013

Senator the Hon Ian Macdonald
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

Thank you for publishing, in the Committee's report dated 20 March 2013, my response to comments on the National Disability Insurance Scheme Bill 2012 (now the *National Disability Insurance Scheme Act 2013* (the NDIS Act).

I am glad that my response was helpful in clarifying questions raised by the Committee. There were also two additional matters where the Committee has requested that some key information from my response be included in the Bill. Specifically, the Committee has requested that my response clarifying that intergovernmental agreements are to provide useful contextual information for the Agency in performing its statutory functions and that these agreements are not legally binding on the Agency be included in the Bill's explanatory memorandum. The Committee has also requested that there be a legislative requirement on the Agency to widely publicise any changes to material incorporated by reference into rules made under the NDIS Act and notify any individual affected directly by letter.

With regard to including information in the explanatory memorandum to the Bill (to indicate that compliance with intergovernmental agreements is legally binding on the Agency), it is no longer feasible to make the inclusion as the Bill has now been enacted.

With regard to the Committee's suggestion for a legislative requirement regarding materials incorporated into rules by reference, I note that sections 8 and 8A of the *Freedom of Information Act 1982* will require the NDIS Launch Transition Agency to publish any operational information (including rules, guidelines, practices and precedents) that assists it to perform or exercise the functions or powers in making decisions or recommendations affecting members of the public or any particular person or entity or class of persons or entities. While I understand that operational information does not generally include information published by someone other than the Agency, the Agency's operational material will identify and describe changes to materials incorporated in the rules by reference.

As outlined in my response to the Committee, I understand that it will be standard practice for the Agency to make any materials that are incorporated by reference available on the Agency's website (either directly or via links) and that any changes to that material would be publicised on the Agency's website. The Agency will also, as a matter of standard practice, notify individuals who are directly affected by the changes by letter or equivalent. I therefore do not believe it is necessary to include this in the legislation by way of an amendment.

Yours sincerely

JENNY MACKLIN MP

Special Minister of State
Minister for the Public Service and Integrity

Reference: C13/31489

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

Dear Senator

I refer to the Committee Secretary's letter of 16 May 2013 advising that the Committee seeks my response to a number of issues relating the Committee's consideration of the Public Interest Disclosure Bill 2013 set out in *Digest No.5 of 2013* (15 May 2013).

Request for clarification as to why it is necessary to reverse the burden of proof in clause 23(1)(a)
Clause 23 establishes a procedure for a person who is a defendant in a civil or criminal proceeding to invoke the immunity given by clause 10. The person would be seeking to invoke that immunity as a defence to the proceedings brought against them. Clause 23 does not affect the existing onus upon the plaintiff to establish liability, or the prosecution to establish guilt, in the primary proceedings. Under clause 23(1)(a), the person would have an onus of pointing to evidence that suggests a reasonable possibility that the claim for clause 10 immunity is made out. This is a lower threshold than on the balance of probabilities. Once the defendant has discharged that lower onus, the party instituting proceedings will then bear the onus of proving that the immunity claim is not made out.

Request for advice on why it is necessary for further kinds of 'disclosable conduct' to be specified in the PID rules (table item 10, clause 29(1))
Clause 29(1) gives an expansive definition of the kinds of wrongful conduct that may be reported for the purposes of the scheme, referred to in the Bill as 'disclosable conduct'. The ability for a Minister administering the legislation to prescribe any further type of 'disclosable conduct' under the PID rules would apply only to expand the scope of wrongdoing which could be the subject of a protected disclosure for the purposes of the scheme. Given the breadth of the current definition of 'disclosable conduct', it could be expected that this power would be exercised infrequently. The PID rules are expressed to be a legislative instrument in clause 83 of the Bill and would be disallowable.

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Request for clarification on whether clause 57 is intended to abrogate the privilege against self-incrimination

Clause 57 is intended to give protection to an individual who gives information to a person who is conducting an investigation into a public interest disclosure. The protection is limited in so far as clauses 57(2), (3) and (4) would be applicable. Clause 57 is not a power that could be used to compel the provision of information. There is no provision in Part 3 of the Bill that gives an investigator a power to require production of information for the purposes of an investigation under that Part.

Request for clarification on the effect of clause 59(2)

Clause 59(2) provides that the procedures, required to be established by principal officers of each agency for dealing with public interest disclosures under clause 59(1), are not legislative instruments. The provision is intended to be declaratory to assist readers and is not an exemption from the *Legislative Instruments Act 2003*. While intended to operate as internal administrative procedures, the procedures must also comply with standards determined by the Ombudsman which are legislative instruments. Under clause 74(3), the Ombudsman is required to ensure that standards are in force for that purpose, in addition to standards on the conduct of investigations and the preparation of reports, at all times after commencement.

Clauses 65 and 67 (secrecy offences)

The Committee also seeks clarification on clauses 65 and 67, which are secrecy offences. While the comment appears in the section dealing with the Legislative Instruments Act, the text refers to a 'reversal of onus' suggesting that the concern relates to notes in these clauses that a defendant bears an evidential burden in relation to establishing that disclosure or use of protected information is authorised by an exception to the offence established in clauses 65(2) or 67(2). As the notes indicate, this is the position under subsection 13.3(3) of the *Criminal Code*, which provides that a defendant, who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence, bears an evidential burden in relation to that matter.

I trust this information is of assistance to you.

Yours sincerely

MARK DREYFUS QC MP

12/6/13

THE HON BILL SHORTEN MP
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Ms Toni Dawes
Committee Secretary
Senate Scrutiny of Bills Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

28 MAY 2013

Dear Ms Dawes

Thank you for your letter of 14 March 2013 concerning the Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012. As you are aware, this Bill has received Royal Assent and is now the *Superannuation Laws Amendment* (Capital Gains Tax Relief and Other Efficiency Measures) *Act 2012* (the Act).

In your letter, you indicate that the Committee seeks further advice in relation to its views on the Act, set out in its Third Report of 2013 (13 March 2013). Specifically, the Committee seeks advice as to why it is necessary to provide the Regulator with the power to incorporate other instruments as they exist from time to time into the competency standards for approved self-managed superannuation fund (SMSF) auditors, what requirements are likely to be incorporated by reference and whether those requirements will be publicly available.

Under the superannuation laws prior to the commencement of the Act, one path to status as an approved auditor of SMSFs was to be a member of one of the professional associations listed in Schedule 1AAA of the Superannuation Industry (Supervision) Regulations 1994. These are CPA Australia Limited, The Institute of Chartered Accountants in Australia, Institute of Public Accountants, Association of Taxation and Management Accountants, National Tax and Accountants Association Ltd and SMSF Professionals' Association of Australia Limited. A large proportion of approved SMSF auditors were, and continue to be, members of these professional associations. The professional associations set competency standards for their members and have the flexibility to update these standards on an ongoing basis.

The purpose of allowing the Regulator to incorporate material by reference is to ensure that the Australian Securities and Investments Commission (ASIC), the Regulator in this case, has the ability to incorporate existing standards, such as those already set by professional associations, into the new competency standards. This allows the Regulator, if it considers it appropriate, to bring existing standards within the scope of the law and gives it the ability to enforce the standards in relation to all approved SMSF auditors, including those who are not members of professional associations. This will ensure that there is consistency in the implementation of the requirements and will simplify the maintenance of the standards.

The requirements that are incorporated in the current competency standards are some of the competency requirements set by professional associations for their members. All of these competency requirements are publicly available.

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As I have previously indicated, ASIC, as Regulator, is committed to consultation with industry regarding competency standards for approved SMSF auditors. I note that the current competency standards underwent public consultation prior to being finalised and I would anticipate that this practice will continue for future changes to the competency standards.

In addition, in the current competency standards, ASIC has incorporated by reference standards made by the Auditing and Assurance Standards Board. These are standards that are applicable to the duties of an approved SMSF auditor and all of these standards are publicly available.

Yours sincerely

BILL SHORTEN

COPY

The Hon Shayne Neumann MP

Parliamentary Secretary for Health and Ageing

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

17 JUN 2013

Dear Senator Macdonald

THE THERAPEUTIC GOODS AMENDMENT (2013 MEASURES NO.1) BILL 2013

I refer to the request of the Scrutiny of Bills Committee (the Committee) for further information in relation to two particular aspects of the Therapeutic Goods Amendment (2013 Measures No.1) Bill 2013 (the Bill).

The Committee has asked whether consideration has been given to specifying the purposes for which proposed section 7AA may be exercised or to other ways to confine this power, and why the new strict liability offence in subsection 9G(2) will significantly enhance effective regulatory enforcement and why it is considered legitimate to penalise persons who 'lack fault'.

Proposed new section 7AA – excluding goods for public policy reasons

Proposed section 7AA would enable the Minister to determine by legislative instrument that specified products are not therapeutic goods for the purposes of the *Therapeutic Good Act 1989* (the Act), or are not therapeutic goods when used, advertised or presented for supply in a specified way. The focus of the new section will be those products for which therapeutic use claims are made (often in the form of advertising) but which do not, and are not likely to, present a risk to public health. Consumer protection laws may offer a more appropriate mechanism for addressing concerns in relation to such products.

As noted in the Second Reading Speech of the then Parliamentary Secretary for Health and Ageing, the Hon Catherine King MP, the kinds of matters the Minister would take into account when considering excluding products from regulation may include:

- whether the product is of a kind that has the potential to harm a person's health;
- whether the application of the regulatory requirements under the Act that are designed to test the safety, quality, efficacy and performance of a product for it to be supplied in Australia would be appropriate to a product of that kind; and
- whether the kinds of risks to which the public might be exposed from the supply of the product (for instance, unsupported therapeutic claims) can be more effectively managed under other Commonwealth or state and territory laws.

The Minister would take into account all relevant factors for the product in question in making a determination under the proposed new section 7AA.

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In relation to the circumstances in which the new power might be used to exclude products for public policy reasons, it is intended this would only occur where there are very clear and unequivocal reasons for doing so, and where such a measure is necessary to give effect to Australian Government policy. An example is set out in the enclosure, Attachment A, in relation to solid human organs and human reproductive tissues, which the Australian Health Ministers' Conference agreed in 2008, should not be regulated under the therapeutic goods legislation.

It is a requirement of the *Legislative Instruments Act 2003* that consultation be undertaken before any exercise of the proposed new power. This consultation would include sponsors whose products are likely to be affected, as well as consumer representative bodies and health professionals. Further, any determination will be subject to the parliamentary disallowance process.

Proposed new section 7AA – specifying purposes

Consideration was given to specifying the purposes for which the proposed new power may be exercised or to other ways to confine this power, in the development of the 7AA proposal. Criteria of the kind referred to in the Second Reading Speech were not reflected in the Bill because of the difficulty in setting out all-encompassing criteria which could capture all of the likely circumstances and all the possible products for which an exercise of the new power might be considered appropriate in the future.

In particular, it is very difficult to identify purposes that could anticipate all the different kinds of products that might emerge as a concern resulting from the making of claims for therapeutic use, or that might arise for instance from the use of innovative technologies that are not currently contemplated.

This is particularly a concern as health claims appear to be increasingly being made about a wide range of products that were not contemplated as relating to public health when the Act was first drafted, e.g. paint and curtains containing antibacterial properties. The absence of purposes or criteria reflects these difficulties and concerns, and retains a level of flexibility for the Minister in being able to respond as new products emerge.

It is important to note that excluding a product from the Act will not curtail its supply or marketing or result in the imposition of restrictions. Rather, the product will no longer be subject to the regulatory burden or costs associated with being subject to Act, e.g. complying with applicable standards and post-market conditions of entry on the Register, and paying fees and annual charges. Nor will it exclude such goods from coverage by other Commonwealth legislation such as the Australian Consumer Law.

Strict liability offence

The Bill includes a new criminal offence (proposed section 9G) and an equivalent civil penalty provision (proposed section 9H) for making false or misleading statements in, or in connection with, a request under section 9D of the Act for a variation to an existing entry for therapeutic goods in the Register. These requests usually arise out of a proposal by the sponsor of the goods previously approved for marketing in Australia to make a change to the goods.

The information provided by a sponsor for the purposes of such a request can include complex and extensive scientific data about the goods, e.g., results of clinical trials, or the incidence of adverse reactions to prescription medicines. This information will be exclusively and confidentially within the knowledge of the sponsor. Moreover, it is up to the sponsor to demonstrate that the basis on which the product was approved for marketing in Australia (via inclusion on the Register) – i.e. that its quality, safety and efficacy/performance was acceptable - remains, and that, as such, it should continue to be on the Register notwithstanding the proposed change.

Thus there is a particular level of dependence on the accuracy and comprehensiveness of the supporting information provided to support a section 9D request, especially in relation to higher risk goods like prescription medicines. If the Secretary of the Department of Health and Ageing relies on false information to approve a request, there could potentially be serious consequences for public health and safety.

Where non-compliance with the requirement to provide accurate information that is not false or misleading is likely to cause harm or injury (as per proposed subsection 9G(2)), it is considered that non-compliance should attract a criminal sanction regardless of any mental element. By setting out a strong deterrence against providing false or misleading information, and by forming an integral part of the suite of sanctions proposed for such conduct, it is expected subsection 9G(2) will significantly enhance regulatory enforcement and help to protect the public from exposure to therapeutic goods that have been approved for continued supply on the basis of false or misleading information.

Proposed section 9G is consistent with the existing tiered criminal offences in the Act that apply in relation to the provision of false or misleading information (e.g. by applicants for the inclusion of products in the Register[1]), and with the current approach of tiered criminal offences in the Act which include in that structure an offence of strict liability along the same lines as proposed subsection 9G(2).

This approach was introduced into the Act in 2006 by the *Therapeutic Goods Amendment Act (No.1) 2006* (the 2006 Amendment Act). The Senate Scrutiny of Bills Committee noted, in its Alert Digest 10/05, in relation to the Therapeutic Goods Amendment Bill 2005 (which became the 2006 Amendment Act), that the Explanatory Memorandum for that Bill set out a clear explanation of the nature of strict criminal liability and a justification for the inclusion in the Bill of its strict liability provisions. The Committee made no further comment on those provisions.

I trust that the above information is of assistance.

Yours sincerely

Shayne Neumann

Encl

cc: scrutiny.sen@aph.gov.au

1 Sections 22A and 22B, 41FE and 41FEA and 32DO and 32DP of the Act refer.

Example of circumstances in which the proposed new section 7AA power might be used to exclude products for public policy reasons

At its meeting on 22 July 2008, the Australian Health Ministers' Conference (AHMC) agreed that:

- un-manipulated reproductive tissues should not be regulated by the Therapeutic Goods Administration under its proposed Class 1 for human cellular and tissue therapies because the Assisted Reproductive Technology Sector is already coherently and consistently managed; and
- the development of appropriate standards and regulatory arrangements for solid organs be referred to the National Organ Donation and Transplant Authority.

These decisions reflected the findings of the Department of Health and Ageing's '*Report to the Parliament of Australia as Prescribed by Section 47C of the Research Involving Human Embryos Act 2002*' (the Report).

The Report noted there was a need for a national regulatory approach for the effective governance of solid organ therapies, including the provision of a consistent approach for national protocols and standards, but said that this should be led by a national organ donation and transplantation authority (now the Organ and Tissue Authority). It argued that un-manipulated reproductive tissues should not be subject to any further regulatory burden in addition to the existing framework for such products, which is underpinned by the Research Involving Human Embryos Act.

The current Therapeutic Goods (Excluded Goods) Order No.1 of 2011, made by the delegate of the Secretary of the Department of Health and Ageing (the Secretary) under section 7 of the Act, reflects the policy agreed by the AHMC in relation to these products, by declaring that the following are not therapeutic goods for the purposes of the Act:

- fresh viable human organs, or parts of human organs, for direct donor-to-host transplantation and used in accordance with applicable laws and standards (item 4(o) of the Order); and
- reproductive tissue for use in assisted reproductive therapy (item 4(r)) of the Order.[2].

However, section 7 of the Act – under which these excluded goods orders are made – only permits the Secretary to confirm by declaration that (among other things) particular goods or classes of goods are not therapeutic goods *when she is satisfied that those goods are not, in fact, therapeutic goods*. A declaration made by the Minister under proposed section 7AA would allow the Minister to exclude a product from regulation under the Act without having to come to the conclusion that it is not therapeutic goods, thus allowing clarity and legal certainty even in cases where it may not be possible for the Secretary to make a declaration under section 7.

Proposed section 7AA could be used to exclude goods from regulation under the Act in a case where the Parliament has created a different and specific regulatory regime for those goods, thus ensuring legal and regulatory certainty for industry, consumers and health professionals.

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2 The differences in the description of these products in the Therapeutic Goods (Excluded Goods) Order No.1 of 2011 and the AHMC's agreement principally reflects the development of organ transplantation practice in relation to the retrieval and delivery of organs for use in recipients since 2008.