SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2008

12 March 2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)
Senator M Bishop (Deputy Chair)
Senator A McEwen
Senator A Murray
Senator R Ray
Senator the Hon J Troeth

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

FIRST REPORT OF 2008

The Committee presents its First Report of 2008 to the Senate.

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

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007

Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007

National Greenhouse and Energy Reporting Act 2007

Northern Territory National Emergency Response Act 2007

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007

Water Act 2007

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The then Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. In its *Ninth Report of 2007*, the Committee sought further advice in relation to the exemption of determinations from provisions of the *Legislative Instruments Act 2003*. The then Minister responded in a letter dated 11 October 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 17 August 2007, the former Minister's response may, nevertheless, be of interest to Senators.

Extract from Ninth Report of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills developed to support the implementation of the Northern Territory Emergency Response, this bill was introduced with the Northern Territory National Emergency Response Bill 2007 and the Social Security and Other Legislation Amendment (Welfare Payment Reform Bill) 2007.

Schedule 1 inserts a new Part 10 into the *Classification (Publications, Films and Computer Games) Act 1995,* containing measures banning the possession and supply of pornographic materials in prescribed areas within the Northern Territory and giving the police powers in prescribed areas to seize and destroy materials that may be prohibited under this new Part 10.

Schedule 2 amends the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979* to:

- allow the Australian Crime Commission (ACC) Board to authorise the ACC to undertake an intelligence operation or investigation into Indigenous violence or child abuse;

- allow an ACC examiner to request or compel information, documents or things, relevant to an operation/investigation, that are held by state and territory agencies, provided an arrangement is in force between the Commonwealth and the state or territory;

- extend the term of appointment of ACC examiners from five to ten years; and

- clarify that Australian Federal Police officers deployed to the Northern Territory Police Service (NTPS) can exercise all of the powers and duties of a member of the NTPS under NT legislation.

Schedule 3 amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to allow the Commonwealth and Northern Territory to retain an interest in buildings and infrastructure constructed or upgraded on Aboriginal land with government funding (construction or renovation to be undertaken with the consent of the relevant Land Council). The schedule also provides a mechanism for the statutory rights to come to an end once the buildings and infrastructure are no longer required.

Schedule 4 amends provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* governing access to Aboriginal land. It removes the requirement for people to obtain permits to enter and remain on certain areas of Aboriginal land, including common areas of townships, road corridors, boat landings and airstrips. It also allows for the placement of temporary restrictions on access to these areas to protect the privacy of cultural events or public health and safety.

Schedule 5 makes several amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* and to what is referred to as the Northern Territory National Emergency Response Act 2007, which is currently still a bill.

The bill also provides that, for the purposes of the *Racial Discrimination Act 1975*, the provisions of this Act are deemed to be special measures and are excluded from the operation of Part II of that Act.

The bill also contains application provisions.

Legislative Instruments Act—exemptions
Schedule 4, item 12

Proposed new subsection 70B(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70B(2), to specify roads in vested Aboriginal land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 42) states that this subsection is included to assist readers, as the determination is not legislative in character.

Similarly, proposed new subsection 70E(4) of the same Act, also to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70E(3), to specify roads within Aboriginal community land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 47) provides the same explanation, that is, that the new subsection is merely declaratory of the law.

Proposed new subsections 70B(16) and 70E(20) also state that determinations made under other subsections of sections 70B and 70E are not legislative instruments. In this case, the determinations would impose temporary restrictions on the rights of any person to enter or remain on roads in vested Aboriginal land or within Aboriginal community land respectively. The Committee notes that, in contrast to the earlier occurrences, in these cases the explanatory memorandum (pages 43 and 48 respectively) states that the reason for these determinations not being legislative instruments is that the 'Attorney-General has granted an exemption from the Legislative Instruments Act on the basis that the restrictions will be temporary in nature and may need to take effect on short notice.'

The Committee notes that these determinations appear to be identical in nature, except that some specify roads on which a person may lawfully enter or remain, while others apply temporary restrictions on the right of any person to enter or remain on specified roads.

Despite this, the bill indicates that one set of determinations (those that specify roads on which a person may lawfully enter or remain and which would appear to be more legislative in character) are *not* legislative instruments, while another set (those that apply temporary restrictions on access and appear to be more administrative in nature) are not legislative instruments because they have been exempted from the provisions of the Legislative Instruments Act by the Attorney-General.

The Committee **seeks the Minister's clarification** as to the nature of these determinations and whether a more considered explanation could be included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Relevant extract from the response from the former Minister dated 15 August 2007

In relation to Schedule 4, item 12 (see pages 13 to 14), the Committee seeks clarification as to the nature of certain determinations in relation to the *Legislative Instruments Act 2003* (Legislative Instruments Act) and, in particular, why some are stated in the explanatory memorandum to have been exempted by the Attorney-General, while others are stated more simply not to be legislative instruments.

Proposed new subsections 70B(3) and 70E(4) provide that determinations related to certain roads under proposed new subsections 70B(2) and 70E(3) are not legislative instruments. The provisions assist the reader, as these determinations are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act. The determinations merely apply the law to a particular case (that is, to particular roads on Aboriginal land).

Proposed new subsections 70B(16) and 70E(20) provide that various determinations which impose temporary restrictions on access are not legislative instruments. The Attorney-General has granted an exemption for these determinations from the Legislative Instruments Act. The basis for these exemptions is that the determinations are only temporary in nature and will often need to take effect on very short notice, particularly where the restrictions are put in place to protect public health and safety. In these circumstances it would not be appropriate for the determinations to be subject to the Legislative Instruments Act.

The Committee thanks the Minister for this response and notes that determinations under subsections 70B(2) and 70E(3) of the bill are **not** considered to be legislative instruments, as defined by the *Legislative Instruments Act 2003*, as they apply the law to a particular case, that is, particular roads on Aboriginal land. The Committee further notes that it would have been useful if this explanation had been included in the explanatory memorandum.

The Committee remains confused regarding why the determinations referred to in subsections 70B(16) and 70E(20), which also appear to apply the law in a particular case, are not treated in the same way. The Minister advises that the 'Attorney-General has granted an exemption for these determinations from the Legislative Instruments Act' (thus implying that the determinations are, in fact, legislative in character) on the basis that they are 'only temporary in nature and will often need to take effect on very short notice.' The Committee notes, however, that the fact that an instrument is temporary in nature and needs to take effect on short notice is irrelevant to whether or not it is considered to be a legislative instrument, as defined in section 5 of the *Legislative Instruments Act 2003*. The Committee further notes that while the *Legislative Instruments Act 2003* provides for the Attorney-General to issue a certificate determining whether an instrument is a legislative instrument or not, it makes no provision for him or her to 'exempt' a determination from that Act.

The Committee **seeks the Minister's further advice** whether the determinations referred to in new subsections 70B(16) and 70E(20) of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* are administrative or legislative in nature.

Relevant extract from the further response from the former Minister dated 11 October 2007

In relation to new subsections 70B(16) and 70E(20) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act), the Committee seeks further advice on whether determinations referred to in those subsections are administrative or legislative in nature.

Those determinations are legislative in nature because they create law (the restrictions) that apply to the roads and common areas. However, they are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* (Legislative Instruments Act) because of the interaction of the following provisions:

- paragraph 7(1)(b) of the Legislative Instruments Act, which provides that an instrument is not a legislative instrument for the purposes of the Legislative Instruments Act if the instrument is made under an Act that authorises the making of the instrument and declares the instrument not to be a legislative instrument for the purposes of the Legislative Instruments Act; and

- new subsections 70B(13) and 70E(14), (15) and (17) of the Land Rights Act, which, together with new subsections 70B(16) and 70E(20), authorise the making of determinations to impose temporary restrictions, and also declare that such determinations are not legislative instruments for the purposes of the Legislative Instruments Act.

As I advised in my letter of 15 August 2007, the restrictions can only be temporary in nature and would often need to be in place on very short notice, particularly where they were imposed to protect public health and safety. The Attorney-General agreed that it was appropriate in these circumstances for the Act to declare that the determinations are not legislative instruments.

The legislative character of the determinations referred to in new subsections 70B(16) and 70E(20) therefore contrasts with the administrative character of the determinations referred to in new subsections 70B(2) and 70E(3), as I previously described to the Committee. For that reason, the same legislative approach could not be applied to the two groups of determinations.

The Committee thanks the former Minister for this further response.

Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2007*. The then Treasurer responded to the Committee's comments in a letter dated 19 September 2007. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 24 September 2007, the former Treasurer's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 8 of 2007

Introduced into the House of Representatives on 21 June 2007
Portfolio: Treasury

Background

Introduced with the Corporations (National Guarantee Fund Levies) Amendment Bill 2007, this bill amends the *Financial Sector (Collection of Data) Act 2001*, the *Corporations Act 2001* and the *Insurance Act 1973* to amend the prudential regulation, consumer protection and data collection requirements for direct offshore foreign insurers carrying on an insurance business in Australia. The bill:

- clarifies the requirement that anyone carrying on general insurance business in Australia is required to become authorised and will be prudentially regulated by the Australian Prudential Regulation Authority (APRA);
- provides a framework that enables the government to develop regulations to make available limited exemptions from the new regime;
- expands APRA's powers to allow it to investigate entities that it reasonably believes are carrying on insurance business in Australia without being authorised;

- requires Australian financial service licence holders and authorised representatives to deal only in authorised general insurance products, with limited exceptions, and to supply data on any dealing in insurance covered by the exemptions;

- requires Discretionary Mutual Funds (DMFs) to disclose to all clients the key characteristics of their product, including that the DMF has a discretion whether or not to pay out on a claim; and

- subjects DMFs to a compulsory data collection regime so as to better understand the nature and scope of their operations.

The bill also contains application, consequential, technical and transitional provisions.

Strict liability
Schedule 2, item 1

Proposed new subsection 985D(4) of the *Corporations Act 2001*, to be inserted by item 1 of Schedule 2, would impose strict liability for the offences created by subsection (1). The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

Unfortunately in this instance the explanatory memorandum does not refer to that fact that the offences created by new subsection 985D(1) are offences of strict liability and, as such, provides no explanation for why an offence of strict liability was considered necessary. The Committee **seeks the Treasurer's advice** whether consideration was given to the matters outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers,* in framing these provisions.

Pending the Treasurer's advice, 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.

Relevant extract from the response from the former Treasurer

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of the strict liability offence in the *Corporations Act 2001* prohibiting an Australian financial services licence holder from dealing in a general insurance product unless it is from an authorised insurer, Lloyd's underwriters or an exemption applies.

The strict liability offence adopted in the Bill complies with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offence is designed to ensure effective prudential regulation of Direct Offshore Foreign Insurers (DOFIs) and the financial intermediaries that deal in general insurance products issued by DOFIs to ensure the integrity of the prudential regulation regime so that there is stability in the financial system, and the interests of policyholders and beneficiaries are protected.

A strict liability offence is considered necessary to maximise the deterrent value of the new offence, thus maximising its role in complementing and reinforcing the regulation of general insurance.

It would be difficult under the circumstances for the prosecution to prove that a person had the intent to breach the prohibition as the prosecution would have to prove that a person knew of the prohibition in the *Corporations Act 2001*. Proof of intent in this case would be peculiarly within the knowledge of the defendant and as such the inability to prosecute these offences would undermine the effectiveness of the prudential regulation framework put in place to address the problem of DOFIs carrying on insurance business in Australia without being authorised.

Consistent with the Government policy and other strict liability offences in Chapter 7 of the Corporations Act, there is a cap on monetary penalties of 50 penalty units and no term of imprisonment attaches to breach of this offence.

The Committee thanks the former Treasurer for this response.

Legislative Instruments Act—declarations
Schedule 2, item 8

Proposed paragraph 3A(3)(a) of the *Insurance Act 1973*, to be inserted by item 8 of Schedule 2, provides that a determination made under new paragraph 3A(1)(b) that specifies a particular contract of insurance, is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance the explanatory memorandum remains silent on this proposed paragraph. The Committee **seeks the Treasurer's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

Pending the Treasurer'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.

Relevant extract from the response from the former Treasurer

> The Committee sought advice as to whether the provision 3A(1)(b) that specified a particular contract of insurance is not a legislative instrument was declaratory in nature or provides a substantive exemption and if it provides a substantive exemption, the policy rationale for that exemption.
>
> As outlined in paragraphs 2.48 and 2.49 of the explanatory memorandum, determinations made under the *Insurance Regulations 2002* that specify a class or kinds of contracts will be legislative instruments for the purposes of the *Legislative Instruments Act 2003* and reviewable by Parliament. Determinations made under the *Insurance Regulations 2002* that specify a particular contract of insurance, while being exempt from Parliamentary review, will be reviewable in accordance with Part VI of the *Insurance Act 1973.* Part VI will be expanded to allow a person who has

applied for a determination under the new proposed provision 3A(1)(b) to have that determination reviewed by a decision-maker.

This approach ensures consistency with the treatment of decisions in other parts of the *Insurance Act 1973* and will enable the efficient review of individual contract of insurance determinations, without the need for these individual contract determinations to be reviewed by Parliament.

The Committee thanks the former Treasurer for this response.

Abrogation of the privilege against self-incrimination
Schedule 2, items 12 and 36

Proposed new subsection 62D(2) of the *Insurance Act 1973*, to be inserted by item 12 of Schedule 2, and proposed new subsection 115AB(2) of the same Act, to be inserted by item 36 of Schedule 2, would abrogate the privilege against self-incrimination for a person required to provide information or produce a document under new section 62C or new section 115AA respectively. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties. The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures.

In this instance, subsections 62D(3) and 115AB(3) respectively would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. However, that limitation applies only to information directly supplied by the person, not to information gained indirectly as a result of the statement or document provided by the person. The immunity is, in other words, only a 'use immunity' and not a 'derivative use immunity'. The Committee notes that the explanatory memorandum, at paragraphs 2.64 and 2.79 respectively, does not remark on this fact and **seeks the Treasurer's advice** as to the reasons why 'use immunity' rather than 'derivative use immunity' applies in these circumstances.

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

Relevant extract from the response from the former Treasurer

The Committee sought advice as to the reasons why 'use immunity' rather than 'derivative use immunity' applies under the provisions relating to protection for a person providing information to the Australian Prudential Regulation Authority (APRA) relating to whether or not there has been a contravention of section 9 or 10 of the *Insurance Act 1973* (that is, an entity is carrying on insurance business without being authorised) or aiding and abetting, counselling or procuring that contravention.

'Use immunity' rather than 'derivative use' immunity applies in relation to the protection for information gathering provisions as 'derivative use immunity' would unacceptably fetter investigation and prosecution of corporate misconduct offences.

Use immunity is accepted as appropriate for legislation governing regulators such as the Australian Prudential Regulation Authority (APRA) and Australian Securities and Investments Commission (ASIC) in the exercise of their corporate regulation responsibilities. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties involved in promoting compliance with corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities in 1992 and the 'Review of the Derivative Use Immunity Reforms', conducted by John Kluver in 1997.

I trust this information will be of assistance to you.

The Committee thanks the former Treasurer for this response.

Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2007*. The then Treasurer responded to the Committee's comments in a letter dated 18 September 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 24 September 2007, the former Treasurer's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 8 of 2007

Introduced into the House of Representatives on 21 June 2007
Portfolio: Treasury

Background

This bill introduces measures to simplify prudential regulation of the financial sector and to reduce compliance costs.

Schedule 1 amends the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, the *Superannuation Industry (Supervision) Act 1993* and other related legislation, including the *Corporations Act 2001*, to implement commitments in response to *Rethinking Regulation: The Report of the Taskforce on Reducing Regulatory Burdens on Business*.

Schedule 2 amends the *Superannuation Industry (Supervision) Act 1993* and the *Financial Institutions Supervisory Levies Collection Act 1998* to make financial assistance available on a more equitable basis to the trustee of a superannuation fund where the fund has suffered a loss as a result of fraudulent conduct or theft. The bill also abolishes the Special Protection Account.

Schedule 3 amends the *Financial Institutions Supervisory Levies Collection Act 1998*, the *Financial Sector (Collection of Data—Consequential and Transitional Provisions) Act 2001*, the *Income Tax Assessment Act 1936*, the *Superannuation Industry (Supervision) Act 1993*, and the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987* to, among other things, consolidate and rationalise prudential reporting requirements and distinguish between reporting requirements relating to registrable superannuation entities and self-managed funds.

Schedule 4 contains a number of technical amendments to various Acts consequential to the *Legislative Instruments Act 2003.*

The bill also contains application and saving provisions.

Abrogation of the privilege against self-incrimination
Schedule 1, items 44, 62, 115 and 154

Various provisions in this bill will abrogate the privilege against self-incrimination. They are:

- proposed new section 52F of the *Banking Act 1959*, to be inserted by item 44 of Schedule 1;
- proposed new section 38F of the *Insurance Act 1973*, to be inserted by item 62 of Schedule 1;
- proposed new section 156F of the *Life Insurance Act 1995*, to be inserted by item 115 of Schedule 1; and
- proposed new section 336F of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 154 of Schedule 1.

At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties. The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures.

In each of these cases the respective provisions go on to limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. However, that limitation applies only to information directly supplied by the person, and not to information gained indirectly from the statement or document provided by the person. The immunity is, in other words, only a 'use immunity' and not a 'derivative use immunity'.

The explanatory memorandum seeks to justify these provisions simply on the basis that the Australian Prudential Regulatory Authority's 'interest in receiving information that would assist to maintain the integrity of the prudential regulatory framework outweighs, in this context, the privilege against self-incrimination' (see paragraphs 1.75, 1.92, 1.107 and 1.124 respectively), but says nothing about the fact that these provisions do not provide a 'derivative-use' immunity. The Committee **seeks the Treasurer's advice** as to the reasons why 'use immunity' rather than 'derivative use immunity' applies in these circumstances.

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

Relevant extract from the response from the former Treasurer

> The Committee sought advice as to the reasons why 'use immunity' rather than 'derivative use immunity' applies under the provisions relating to protection for whistleblowers.
>
> 'Use immunity' rather than 'derivative use' immunity applies in relation to the protection for whistleblower provisions as 'derivative use' immunity' would unacceptably fetter investigation and prosecution of corporate misconduct offences.
>
> Use immunity is accepted as appropriate for legislation governing regulators such as the Australian Prudential Regulation Authority (APRA) and Australian Securities and Investments Commission (ASIC) in the exercise of their corporate regulation responsibilities. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties involved in promoting compliance with corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities in 1992 and the 'Review of the Derivative Use Immunity Reforms', conducted by John Kluver in 1997.

The Committee thanks the former Treasurer for this response.

Strict liability
Schedule 1, items 67 and 143

Proposed new subsection 7B(2) of the *Life Insurance Act 1995,* to be inserted by item 67 of Schedule 1, applies strict liability to an element of the offence created by subsection 7B(1). Similarly, new subsection 29JCA(2) of the *Superannuation Industry (Supervision) Act 1993,* to be inserted by item 143 of Schedule 1, applies strict liability to an element of the offence created by subsection 29JCA(1). The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

In these instances, the explanatory memorandum (paragraphs 1.147 and 1.383 respectively) merely cites section 6.1 of the Criminal Code. The Committee **seeks the Treasurer's advice** whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of these offences.

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

Relevant extract from the response from the former Treasurer

Strict Liability - Schedule 1, items 67, 143, 160, 187, 244, Schedule 3, item 8

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of strict liability offences in the Bill.

The Bill contains a number of strict liability offences relating to:

- APRA's exemption powers under the *Life Insurance Act 1995* (Life Act) (Schedule 1, item 67);
- a person falsely represent themselves as being a Registrable Superannuation Entity (RSE) licensee under the *Superannuation Industry (Supervision) Act 1993 (SIS* Act) (Schedule 1, item 143);
- breach reporting under the *Banking Act 1959* and *Insurance Act 1973* (Schedule 1, items 160 and 187);
- superannuation trustees failing to comply with a direction from APRA to remove an auditor or actuary under the SIS Act (Schedule 1, item 244); and
- accounts, audit and reporting obligations under the SIS Act (Schedule 3, item 8).

Strict liability offences adopted in the Bill comply with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offences are designed to promote a robust regulatory framework by improving the enforceability, and hence the incentives for compliance, with key prudential requirements. In this way, the strict liability offences help to ensure that the financial sector entities are managed prudently and the assets of depositors, policyholders and members are adequately protected.

Strict liability offences have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, in relation to breach reporting the prosecution would be required to prove that a person intentionally refrained from reporting information to APRA.

Strict liability offences have been also used in some circumstances (Schedule 1, items 67 and 143 and Schedule 3, item 8) to overcome the 'knowledge of the law' problem where a physical element of the offence expressly incorporates a reference to a legislative provision. For example, for item 67, the prosecution would have to prove that a person knew which provisions under the Life Act that they have to comply with and which provisions APRA has exempted the person from.

Proof of intent in both cases would be peculiarly within the knowledge of the defendant, as such it would be difficult for the prosecution to prove intent. Inability to prosecute these offences would undermine the effectiveness of the prudential regulation system.

The use two tiered offences involving a fault liability offence and a strict liability offence, in relation to breach reporting (Schedule 1, items 160 and 187) and reporting obligations (Schedule 3, item 8), reflects the existing use of two-tiered penalty provisions in the prudential Acts for offences of a comparable nature. The two tiered offences include a strict liability offence which is subject to a lower penalty than the fault offence consistent with the principles set down in the *Senate Committee for the Scrutiny of Bills Sixth Report 2002.*

The Committee thanks the former Treasurer for this response.

Strict liability
Schedule 1, items 160 and 187

Proposed new subsections 16BA(4) and (9) of the *Banking Act 1959*, to be inserted by item 160 of Schedule 1, and proposed new subsection 49A(9) of the *Insurance Act 1973*, to be inserted by item 187 of Schedule 1, impose strict criminal liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The explanatory memorandum (paragraphs 1.24 and 1.37 respectively) seeks to justify these provisions on the basis that the offences 'are basic, objective requirements of [the Australian Prudential Regulatory Authority's] prudential supervision functions, and should be complied with by all persons'. The Committee is of the view that it could be argued that all laws, by their very nature, 'should be complied with by all persons' and that this is not, therefore, justification for applying strict liability to this particular offence. The Committee **seeks the Treasurer's advice** whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of these offences.

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

Relevant extract from the response from the former Treasurer

See response included under entry dealing with Schedule 1, items 67 and 143.

The Committee thanks the former Treasurer for this response.

Strict liability
Schedule 1, item 244

Proposed new subsection 131AA(10) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 244 of Schedule 1, imposes strict liability for the offence created by new subsection 131AA(9). The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The explanatory memorandum (paragraph 1.242) seeks to justify this provision on the basis that the offence is a 'basic, objective requirement of the prudential framework, and should be complied with by all entities'. The Committee is of the view that it could be argued that all laws, by their very nature, 'should be complied with by all entities' and that this is not, therefore, a justification for applying strict liability to this particular offence. The Committee **seeks the Treasurer's advice** whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of this offence.

Pending the Treasurer's advice, 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.

Relevant extract from the response from the former Treasurer

See response included under entry dealing with Schedule 1, items 67 and 143.

The Committee thanks the former Treasurer for this response.

Strict liability
Schedule 3, item 8

Proposed new subsections 35A(4), 35B(6), 35C(4) and (8), 35D(5) and 36(3) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 8 of Schedule 3, impose strict liability for the offences created in those provisions. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The explanatory memorandum (paragraphs 3.8 to 3.14) gives a brief explanation of the amendments proposed by item 8 of Schedule 3, but does not refer to the fact that the amendments create offences of strict liability. The Committee **seeks the Treasurer's advice** as to whether the imposition of strict liability is justified in these circumstances and whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of these offences.

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

Relevant extract from the response from the former Treasurer

See response included under entry dealing with Schedule 1, items 67 and 143.

The Committee thanks the former Treasurer for this response.

Apparent error
Explanatory memorandum

The Committee notes that paragraphs 3.15 and 3.16 of the explanatory memorandum describe amendments purported to be made to paragraph 113(3)(b) of the *Superannuation Industry (Supervision) Act 1993* but those amendments do not appear in the version of the bill presented to the House of Representatives. The Committee **seeks the Treasurer's advice** whether this is an error in the explanatory memorandum and, if so, whether it could be removed so as not to cause confusion.

Relevant extract from the response from the former Treasurer

> The Committee sought advice as to whether there is an error in paragraphs 3.15 and 3.16 of the Explanatory Memorandum.
>
> Item 9 repeals the current Part 13 of the SIS Act which includes paragraph 113(3)(b) and replaces it with a new Part 4 which consolidates the reporting obligations for superannuation entities. The explanatory memorandum should have referred to sub-paragraph 35C(5)(c)(ii) rather than paragraph 113(3)(b). This error will be corrected in the revised explanatory memorandum.
>
> I trust this information will be of assistance to you.

The Committee thanks the former Treasurer for this response.

National Greenhouse and Energy Reporting Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 of 2007*. The then Minister for the Environment and Water Resources responded to the Committee's comments in a letter dated 22 September 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 28 September 2007, the former Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 11 of 2007

Introduced into the House of Representatives on 15 August 2007
Portfolio: Environment and Water Resources

Background

This bill establishes a single national framework for reporting greenhouse gas emissions, abatement actions, and energy consumption and production by corporations from 1 July 2008. The bill:

- requires mandatory reporting of greenhouse gas emissions and energy production and consumption for corporations whose production, use and/or emissions exceed specified thresholds;

- establishes a National Greenhouse and Energy Register that will contain the name of each corporation registered under the Act and other matters that may be prescribed by regulation;

- requires corporations registered under the Act to keep certain records and provide specified reports to the Greenhouse and Energy Data Officer, and establishes civil penalty provisions for failure to comply;

- provides for data security and confidentiality and specifies circumstances in which information may be released; and

- establishes the position of 'Greenhouse and Energy Data Officer' to administer the scheme.

The bill also contains application provisions.

Determination of important matters by regulation
Subclauses 5(1) and 10(1)

Subclause 5(1) provides that the whole of that clause applies 'on and after a day specified in the regulations.' The purpose of clause 5 is to determine the extent to which this bill is to 'apply to the exclusion of all laws of a State or Territory which provide for reporting or disclosure of information related to: greenhouse gas emissions; or greenhouse gas projects; or energy consumption; or energy production…'.

Subclause 10(1) provides for the regulations to specify the meaning of a number of 'key terms' (as they are referred to in the explanatory memorandum – page 181, paragraph 23) including: *emissions* of greenhouse gas; *reduction* of greenhouse gas emissions; *removal* of greenhouse gas; *offsets* of greenhouse gas emissions; *production* of energy; and *consumption* of energy.

The Committee draws attention to provisions that may be considered to inappropriately delegate legislative powers of a kind that ought to be exercised by Parliament alone. The Committee notes that the definitions to be incorporated into regulations will be fundamental to the operation of the Act, as will the date on which the Act is taken to operate to the exclusion of state or territory law. As such, the Committee considers that these may be matters that would be more appropriately dealt with in the primary legislation.

The Committee notes that the explanatory memorandum indicates that the 'Government's intention is to work cooperatively with the State and Territory governments to transition towards a single reporting system across all jurisdictions' but provides no indication of why the date of effect should be established through regulations rather than provided for in primary legislation. Similarly, the explanatory memorandum provides no explanation as to why these key terms are not defined in the primary legislation.

The Committee **seeks the Minister's advice** as to why it was considered necessary for the Minister to be able to determine these matters by regulation, rather than through primary legislation.

Pending the Minister's advice, 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.

Relevant extract from the response from the former Minister

The Committee has sought my advice as to why it was considered necessary for certain matters to be determined by regulation rather than through primary legislation under the Bill. In particular, the Committee refers to subclauses 5(1) and 10(1) of the Bill as introduced in the House of Representatives on 15 August 2007.

The Australian Government has proposed amending the Bill in the House of Representatives with respect to a number of matters, including clause 5. The Government's proposed amendments were issued on 12 September 2007. If agreed, the amendments will remove subclause 5(1) and allow for the exclusion of certain state or territory laws, or part thereof, by regulation. This amendment provides an additional safeguard against potential unintended consequences.

The Government is committed to streamlining the reporting requirements currently imposed on industry by a number of duplicative greenhouse and energy schemes. The Government intends to achieve this by working closely with state and territory governments. States and territories have agreed through the Council of Australian Governments that streamlining of some industry reporting requirements is required. The detail of which requirements should be eliminated has yet to be determined.

Clause 5 provides one means of ensuring that duplicative reporting requirements can be eliminated. However, until discussion with the states and territories takes place, it is not possible to name which laws, if any, this provision might exclude in the future. Depending on the outcome of discussions with states and territories during the next 12-18 months, it is possible this provision will never be used. For this reason, the function of listing state or territory laws for exclusion has been left to regulation to be made at a future date.

With regard to Subclause 10(1), the definition of key terms has been left to regulation for technical reasons. The science of climate change issues is rapidly developing. As knowledge improves over time, it is possible that definitions of terms, such as those in this subclause, may change. It may also be necessary for

definitions to be changed to keep pace with international scientific developments and climate change negotiations.

Given the dynamic nature of these issues, regulations provide an appropriately flexible and responsive vehicle to ensure, with appropriate consultation, that definitions used under this Bill are as accurate and comprehensive as possible.

A further factor is that the definitions under this subclause, for example with regard to 'offsets', may be highly complicated and technical in nature. This would suggest it is better that such descriptions should be in a legislative instrument rather than in primary legislation.

My Department will shortly be releasing a discussion paper on legislative instruments to be made under this Bill. The information gained through this process will help inform our understanding of the issues and aid the development of technically accurate regulations.

The Committee thanks the former Minister for this response.

Northern Territory National Emergency Response Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The then Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. In its *Ninth Report of 2007*, the Committee sought further advice in relation to merits review of decisions. The then Minister responded in a letter dated 11 October 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 17 August 2007, the former Minister's response may, nevertheless, be of interest to Senators.

Extract from Ninth Report of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

This bill is the principal bill in a package of five bills to support the implementation of the Australian Government's response to the 'national emergency confronting the welfare of Aboriginal children in the Northern Territory.' The bill:

- modifies the Northern Territory *Liquor Act* to restrict the possession, consumption, sale and transportation of liquor in the Northern Territory, particularly in areas of land prescribed by the bill;

- introduces a scheme of accountability to prevent, and detect, the misuse of publicly funded computers located in the prescribed areas;

- provides for the acquisition of five-year leases over certain Aboriginal townships, preserves the underlying ownership by traditional owners, preserves or excludes any existing interests, provides for compensation to be paid for any acquisition of property, and allows for the early termination of a lease, including when a township lease is granted;

- allows the Australian Government to exercise the powers of the Northern Territory Government to forfeit or resume certain leases known as 'town camps' during the five-year period of the emergency response and the option of acquiring a freehold interest over these areas;

- appoints Government Business Managers to assist local people to improve services such as housing construction, maintenance services, community services and various types of municipal services such as waste collection and road maintenance;

- amends Northern Territory law to prohibit any form of customary law or cultural practice excuses when exercising bail or sentencing discretion in relation to offences and strengthens bail provisions with a view to better securing the safety of victims and witnesses in remote communities;

- introduces a new licensing regime for persons operating community stores in Indigenous communities; and

- declares that the provisions of this bill are 'special measures' for the purposes of the *Racial Discrimination Act 1975* and excludes these provisions from the operation of Part II of that Act.

The bill also contains application provisions.

Legislative Instruments Act—Declarations and excluding merits review Subclause 112(6)

Subclause 112(6) states that a declaration made by the Minister under subclause 112(2), as to the assets and liabilities of a community store, is 'not a legislative instrument.' The Committee notes that the explanatory memorandum (pages 67-68) advises that the Minister's powers in this regard are discretionary then goes on to re-state that the declarations made by the Minister are 'not a legislative instrument' but provides no further point of clarification.

The Committee **seeks the Minister's advice** whether a declaration under subclause 112(2), although not legislative in character, is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977*, and, if so, whether the exercise of the Minister's discretion ought not to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the former Minister dated 15 August 2007

In relation to subclause 112(6) (see pages 27 to 28), the Committee seeks advice on whether a declaration under subclause 112(2) is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977* and, if so, whether the discretion should be subject to merits review under the AAT Act.

Subclause 112(6) clarifies that any declaration made by the Minister under subclause 112(2) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is declaratory in nature to assist the reader, as this provision is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Any declarations made under subclause 112(2) will relate to the eligible assets or the liabilities of a particular community store or the eligible assets or liabilities of the owner or operator of a particular community store. The inclusion of subclause 112(6) is consistent with paragraph 5(2)(a) of the definition of 'legislative instrument' in the Legislative Instruments Act, which clarifies that an instrument is taken to be of a legislative character if it determines the law or alters the content of the law, rather than applying the law in a particular case, as would be the case here.

The declarations would also be likely to reflect the outcome of discussions with the operator/owner of the store concerned and may also be associated with a payment of compensation to the owner/operator under clause 134. Given the nature of these discussions, we consider that it would not be appropriate to register the declarations on the Federal Register of Legislative Instruments as part of the usual requirements that applies to legislative instruments.

The Committee thanks the Minister for this response and notes the advice that a determination under subsection 112(2) is not a legislative instrument, as it applies the law to a particular case. However the Committee **seeks the Minister's further advice** in respect of the Committee's original question as to whether a declaration under subclause 112(2) is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977*, and, if so, whether the exercise of the Minister's discretion ought to be subject to merits review under the *Administrative Appeals Tribunal Act 1975***.**

Relevant extract from the further response from the former Minister dated 11 October 2007

In relation to subsections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the *Northern Territory National Emergency Response Act 2007* (NT NER Act), which declare various determinations not to be legislative instruments, the Committee remains concerned at the absence of merits review of decisions under these provisions.

In its report on the inquiry into the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory Emergency Response*, the Senate Standing Committee on Legal and Constitutional Affairs recommended that the operation of the measures implemented by the bills be the subject of a review two years after their commencement. The Australian Government has agreed with this recommendation in full. The review will provide an opportunity to consider the operation of all measures implemented in the emergency response.

In relation to section 78 of the NT NER Act, the Committee remains concerned, notwithstanding my advice that section 78 is consistent with the powers of the Northern Territory Minister under Part 13 of the *Local Government Act* (NT), at the absence of merits review. The Committee has suggested that careful consideration be given to the possibility of providing for merits review when the Act is reviewed in two years' time.

While I am still of the view that section 78 appropriately mirrors the corresponding Northern Territory provision, and that to open such a decision to merits review would, in the context of the Northern Territory national emergency response, lead to uncertainty, I am prepared, in light of the Committee's concerns, to give careful consideration to the possibility of providing for merits review when the Act is reviewed.

In relation to subsection 112(6) of the NT NER Act, the Committee seeks further advice as to whether a declaration made under the related subsection 112(2) is

subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and, if it is subject to judicial review, whether the exercise of the Minister's discretion under subsection 112(2) ought to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

The ADJR Act, which allows a person affected by an administrative decision made under an enactment to challenge the legality, but not the merits, of the decision in the courts, does apply to decisions made under subsection 112(2). The application of the ADJR Act ensures transparency in the making of declarations under subsection 112(2), due to the obligation it imposes on decision-makers to provide reasons for decisions, should reasons be requested by a person affected by the decision.

Despite the application of the ADJR Act to declarations made under subsection 112(2), 1 still believe that extending merits review to the Administrative Appeals Tribunal would not be appropriate, given the key role of community stores in the Northern Territory national emergency response and the potential for merits review of such decisions to delay the granting of a community store licence to another operator. However, the review in two years' time of the measures introduced in this package of bills will give an opportunity to consider the merits review aspect further.

The Committee thanks the former Minister for this further response.

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The then Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. In its *Ninth Report of 2007*, the Committee sought further advice in relation to merits review of decisions. The then Minister responded in a letter dated 11 October 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 17 August 2007, the former Minister's response may, nevertheless, be of interest to Senators.

Extract from Ninth Report of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills to support the implementation of the Government's Northern Territory Emergency Response, this bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Veterans' Entitlements Act 1986*, the *A New Tax System (Family Assistance) Act 1999*, and the *Income Tax Assessment Act 1936*, to provide new national welfare measures aimed at helping address child neglect and encourage school attendance. The bill:

- establishes a national income management regime that requires parents on income support to ensure that their children are enrolled at, and regularly attend, school. This applies whether either or both parents receive income support and family payments. In the case of more complex family circumstances it is intended that all adults who have a recognised level of responsibility (at least 14 per cent) for the care of the child must ensure the child attends school;

- establishes an income management regime that applies in respect of people on certain welfare payments in the Northern Territory and in Cape York;
- provides for the baby bonus to be paid in 13 fortnightly instalments to claimants who are subject to the income management regime;
- progressively replaces the Community Development Employment Program in the Northern Territory with other employment services and amends procedures and guidelines relating to Work for the Dole; and
- provides that new Part 3B of the *Social Security (Administration) Act 1999*, to be inserted by this bill, and all actions or omissions in any way related to it or the income support management regime, are deemed to be 'special measures' and are excluded from the operation of Part II of the *Racial Discrimination Act 1975*

The bill also contains application provisions.

Excluding merits review
Schedule 1, item 17, paragraph 123UC(b)

Proposed new paragraph 123UC(b) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, would allow a Child Protection Officer of a state or territory to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by proposed new Part 3B of that Act. The Committee notes that the *Social Security (Administration) Act 1999* makes provision for review by the Social Security Appeals Tribunal of 'all decisions of an officer under the social security law' (with some specified exceptions). However, it is unclear to the Committee if a 'Child Protection Officer of a state or territory' would be classified as 'an officer under the social security law'.

The Committee further notes that the explanatory memorandum does not give any indication that a person subject to such a notice has any right to seek the review of the exercise of the discretion by the Child Protection Officer. The Committee **seeks the Minister's advice** whether there is any such right of review and, if there is none, whether it should be provided for.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the former Minister dated 15 August 2007

In relation to Schedule 1 item 17 new paragraphs 123UC(b) and 123UF(1)(b) (see pages 34 to 35), the Committee seeks advice on whether there is any right of review by, respectively, a Child Protection Officer or the Queensland Commission. In the case of the child protection income management regime, a person will be able to appeal a decision of an officer under new Part 3B to an authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal. An officer for this purpose does not include a child protection officer, as the latter would not be performing duties, or exercising powers or functions, under or in relation to the social security law. A decision of an officer for appeal purposes would include decisions made by Centrelink employees as a result of the delegation to Centrelink employees of the powers of the Secretary under the social security law.

The Australian Government believes that income management provides a useful tool for State and Territory Governments who already have responsibility for child protection. In principle, the decision to issue a notice requiring income management is no different from any other decision that may be taken by a child protection officer in the interests of protecting a child. The process for review of such a decision by a child protection officer is a matter that appropriately falls within the responsibility of State and Territory Governments.

The Australian Government will work with each of the States and Territories to establish agreements guiding the operation of this tool.

The Australian Government is required to specify a State or Territory in a legislative instrument before child protection officers in that State or Territory are able to issue an effective notice to place a person in income management. This legislative instrument is subject to disallowance by the Parliament.

The Committee thanks the Minister for this response and notes the Minister's confirmation that a decision by a Child Protection Officer will **not** be subject to review under the *Social Security (Administration) Act 1999*, but instead would need to be provided for in state or territory legislation. The Committee **seeks the Minister's assurance** that, in working with each of the states and territories to establish agreements guiding the operation of these provisions, the Australian Government will seek to ensure that each state and territory makes provision for merits review of a decision by a Child Protection Officer to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime under new paragraph 123UC(b) of the *Social Security (Administration) Act 1999*.

Relevant extract from the further response from the former Minister dated 11 October 2007

> In relation to new paragraphs 123UC(b) and 123UF(1)(b) of the *Social Security (Administration) Act 1999* (Social Security Administration Act), the Committee seeks an assurance as to cooperation with the states and territories in relation to the operation of those provisions. I can confirm that the Australian Government is working with the states and territories to establish bilateral agreements to guide the operation of the child protection element of the income management regime. As a part of this process, the Australian Government will be seeking to ensure that each state and territory has appropriate arrangements in place for the merits review of any decision of a Child Protection Officer to give the Secretary of my department a written notice, requiring that a person be subject to the income management regime under new section 123UC of the Social Security Administration Act.

The Committee thanks the former Minister for this further response.

Water Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 2007*. The then Minister for the Environment and Water Resources responded to the Committee's comments in a letter dated 15 October 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 3 September 2007, the former Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 10 of 2007

Introduced into the House of Representatives on 8 August 2007
Portfolio: Environment and Water Resources

Background

This bill gives effect to a number of key elements of the Commonwealth Government's $10.05 billion *National Plan for Water Security*, announced by the Prime Minister on 25 January 2007. The bill:

- establishes an independent Murray-Darling Basin Authority with the functions and powers, including enforcement powers, needed to ensure that Basin water resources are managed in an integrated and sustainable way;

- requires the Authority to prepare a strategic plan for the management of resources in the Murray-Darling Basin and establishes mandatory content for the plan;

- establishes a Commonwealth Environmental Water Holder to manage the Commonwealth's environmental water, both within the Murray-Darling Basin and outside the Basin where the Commonwealth owns water;

- provides the Australian Competition and Consumer Commission (ACCC) with a key role in developing and enforcing water charge and water market rules along the lines agreed in the *National Water Initiative*; and

- provides the Bureau of Meteorology with water information functions that are in addition to its existing functions under the *Meteorology Act 1955*.

The bill also contains application and transitional provisions.

Determination of important matters by regulation
Subclauses 63(9) and 65(9)

Subclauses 63(9) and 65(9) would permit regulations to provide for 'the time within which the steps provided for in [sections 63 and 65 respectively] are to be taken and the process to be followed in taking [these] steps.' The Committee notes that the 'steps provided for' in these sections include the Minister causing 'a copy of a statement that sets out the Minister's reasons for not following the Authority's recommendation [to accredit or not to accredit a water resource plan or amendments to a water resource plan] to be laid before the [Parliament]', along with a copy of the legislative instrument recording the Minister's decision. It therefore appears to the Committee that the effect of subclauses 63(9) and 65(9) would be for the regulations to be able to specify the process and timelines for the registration and tabling of these documents in the Parliament - powers that the Committee considers would be more appropriately included in primary legislation.

The Committee **seeks the Minister's advice** whether the regulations will be able to specify the process and timelines for the registration and tabling of these documents in the Parliament and if so, why it was considered necessary to include this power in delegated legislation. The Committee also **seeks the Minister's advice** whether the explanatory memorandum could be amended to clarify this issue.

Pending the Minister's advice, 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.

Relevant extract from the response from the former Minister

> The regulations will not specify the process and timelines for tabling of these documents. Subclauses 63(8) and 65(8) require the legislative instruments and the Minister's statements to be tabled together, consistent with the *Legislative Instruments Act 2003* which, in section 38, requires legislative instruments to be tabled within six sitting days of registration.

The Committee thanks the former Minister for this response.

Determination of important matters by regulation
Subclauses 92(10) and 97(8)

Subclauses 92(10) and 97(8) would permit water charge rules and water market rules – both of which are, by virtue of subclauses 92(2) and 97(2), legislative instruments – to impose a civil penalty of 200 penalty units (currently $22,000) for a contravention of a provision of either of the rules.

The Committee notes the advice included in the explanatory memorandum (paragraph 184) that the 'level of penalty was set after consultation with the ACCC about an appropriate penalty level for this type of conduct' but, given the size of the penalty involved (currently $22,000), questions whether these offence-making powers might be more appropriately exercised by the Parliament. The Committee **seeks the Minister's advice** as to why it was considered necessary for these offences to be able to be created by legislative instrument rather than by primary legislation.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the former Minister

> Not all of the water charge and water market rules will, by their nature, be provisions for which a breach should be subject to a penalty. Accordingly, the Bill was drafted to ensure that the rules clearly state whether a penalty will apply. This will provide certainty for people who are bound by the rules.

The Committee thanks the former Minister for this response.

Apparent error
Subclause 92(10)

The Committee notes that subclause 92(10) provides that 'the civil penalty for a contravention of a provision specified under subsection (7) is 200 penalty units.' Subclause 92(7) provides that the water charge rules may provide for the ACCC to determine the amount of regulated water charges imposed. Subclause 92(9) allows the water charge rules to provide that a particular provision of the rules is a civil penalty provision. As such, the Committee **seeks the Minister's advice** whether the cross reference in subclause 92(10) should be to subclause 92(9) rather than to subclause 92(7).

Relevant extract from the response from the former Minister

> The cross reference in subclause 92(10) should be to 92(9), not 92(7). This will be corrected as soon as possible.

The Committee thanks the former Minister for this response.

Legislative Instruments Act—determinations
Subclauses 201(6), 202(8) and 203(3)

Subclauses 201(6), 202(8) and 203(3) provide that instruments made under subclauses 201(1), 202(1) and 203(1) respectively, to establish various advisory committees, are not legislative instruments.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation, justifying the need for the provision, in the explanatory memorandum.

The Committee notes that, in this instance, the explanatory memorandum makes no reference to subclauses 201(6), 202(8) and 203(3). The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemptions, in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Relevant extract from the response from the former Minister

> These subclauses are declaratory and have been included to assist readers as the instruments establishing the committees are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003.*

The Committee thanks the former Minister for this response.

Entry to premises
Subclause 220(1)

Clause 220 outlines the obligations of an authorised officer before entering premises under clause 219. Subclause 220(1) provides that:

'An authorised officer is not authorised to enter premises under section 219 unless:

(a) the officer has given reasonable written notice to the occupiers of the officer's intention to enter the premises; and

(b) if the premises is residential premises—an occupier of the premises has voluntarily consented to the entry; and

(c) the officer has shown his or her identity card if required by an occupier; and

(d) the officer has given the occupiers a written statement of the occupiers' rights and obligations in relation to the officer's proposed entry to the premises.'

The Committee notes that paragraph 220(1)(b) requires voluntary consent to the entry if the premises is a residential premises, but the clause remains silent on whether voluntary consent is required if the premises is non-residential. The Committee further notes that the explanatory memorandum is also silent on this point.

The Committee **seeks the Minister's advice** whether there is a requirement that voluntary consent be given before an authorised officer enters non-residential premises under clause 219 and if not, why not. The Committee also **seeks the Minister's advice** whether this issue could be addressed in the explanatory memorandum.

Pending the Minister's advice, 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.

Relevant extract from the response from the former Minister

> Voluntary consent is not required for entry to non-residential premises under clause 219. In the absence of consent the officer may enter non-residential premises to exercise the powers set out in clause 221. These include monitoring water resources and undertaking other functions of the Murray-Darling Basin Authority that are not related to monitoring compliance or searching for evidence. The officer must, prior to entry comply with the constraints set out in subsection 220(1) and, while on the premises respect the property and wishes of the occupants insofar as is practicable.
>
> These powers are necessary to investigate, monitor and manage the water resources of the Murray-Darling Basin.

The Committee thanks the former Minister for this response. The Committee reiterates that it does not support entry without warrant except in exceptional circumstances.

Chris Ellison
Chair

RECEIVED
17 OCT 2007
Senate Standing C'ttee for the Scrutiny of Bills

The Hon Mal Brough MP
Minister for Families, Community Services and Indigenous Affairs
Minister Assisting the Prime Minister for Indigenous Affairs

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

11 OCT 2007

Dear Senator Ray

The Committee's ninth report of 2007 notes my response to the Committee's comments on the package of bills (now enacted) dealing with the government's welfare payment reform and Northern Territory national emergency response. In this report, the Committee seeks my further advice and assurance on some matters and expresses certain remaining concerns.

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

In relation to new subsections 70B(16) and 70E(20) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act), the Committee seeks further advice on whether determinations referred to in those subsections are administrative or legislative in nature.

Those determinations are legislative in nature because they create law (the restrictions) that apply to the roads and common areas. However, they are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* (Legislative Instruments Act) because of the interaction of the following provisions:

- paragraph 7(1)(b) of the Legislative Instruments Act, which provides that an instrument is not a legislative instrument for the purposes of the Legislative Instruments Act if the instrument is made under an Act that authorises the making of the instrument and declares the instrument not to be a legislative instrument for the purposes of the Legislative Instruments Act; and

- new subsections 70B(13) and 70E(14), (15) and (17) of the Land Rights Act, which, together with new subsections 70B(16) and 70E(20), authorise the making of determinations to impose temporary restrictions, and also declare that such determinations are not legislative instruments for the purposes of the Legislative Instruments Act.

As I advised in my letter of 15 August 2007, the restrictions can only be temporary in nature and would often need to be in place on very short notice, particularly where they were imposed to protect public health and safety. The Attorney-General agreed that it was appropriate in these circumstances for the Act to declare that the determinations are not legislative instruments.

The legislative character of the determinations referred to in new subsections 70B(16) and 70E(20) therefore contrasts with the administrative character of the determinations referred to in new subsections 70B(2) and 70E(3), as I previously described to the Committee. For that reason, the same legislative approach could not be applied to the two groups of determinations.

Northern Territory National Emergency Response Act 2007

In relation to subsections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the *Northern Territory National Emergency Response Act 2007* (NT NER Act), which declare various determinations not to be legislative instruments, the Committee remains concerned at the absence of merits review of decisions under these provisions.

In its report on the inquiry into the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory Emergency Response*, the Senate Standing Committee on Legal and Constitutional Affairs recommended that the operation of the measures implemented by the bills be the subject of a review two years after their commencement. The Australian Government has agreed with this recommendation in full. The review will provide an opportunity to consider the operation of all measures implemented in the emergency response.

In relation to section 78 of the NT NER Act, the Committee remains concerned, notwithstanding my advice that section 78 is consistent with the powers of the Northern Territory Minister under Part 13 of the *Local Government Act* (NT), at the absence of merits review. The Committee has suggested that careful consideration be given to the possibility of providing for merits review when the Act is reviewed in two years' time.

While I am still of the view that section 78 appropriately mirrors the corresponding Northern Territory provision, and that to open such a decision to merits review would, in the context of the Northern Territory national emergency response, lead to uncertainty, I am prepared, in light of the Committee's concerns, to give careful consideration to the possibility of providing for merits review when the Act is reviewed.

In relation to subsection 112(6) of the NT NER Act, the Committee seeks further advice as to whether a declaration made under the related subsection 112(2) is subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and, if it is subject to judicial review, whether the exercise of the Minister's discretion under subsection 112(2) ought to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

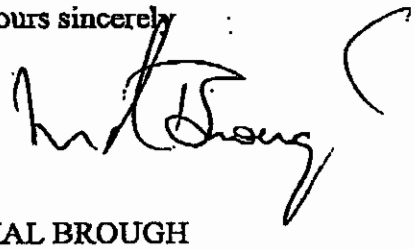
The ADJR Act, which allows a person affected by an administrative decision made under an enactment to challenge the legality, but not the merits, of the decision in the courts, does apply to decisions made under subsection 112(2). The application of the ADJR Act ensures transparency in the making of declarations under subsection 112(2), due to the obligation it imposes on decision-makers to provide reasons for decisions, should reasons be requested by a person affected by the decision.

Despite the application of the ADJR Act to declarations made under subsection 112(2), I still believe that extending merits review to the Administrative Appeals Tribunal would not be appropriate, given the key role of community stores in the Northern Territory national emergency response and the potential for merits review of such decisions to delay the granting of a community store licence to another operator. However, the review in two years' time of the measures introduced in this package of bills will give an opportunity to consider the merits review aspect further.

Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007

In relation to new paragraphs 123UC(b) and 123UF(1)(b) of the *Social Security (Administration) Act 1999* (Social Security Administration Act), the Committee seeks an assurance as to cooperation with the states and territories in relation to the operation of those provisions. I can confirm that the Australian Government is working with the states and territories to establish bilateral agreements to guide the operation of the child protection element of the income management regime. As a part of this process, the Australian Government will be seeking to ensure that each state and territory has appropriate arrangements in place for the merits review of any decision of a Child Protection Officer to give the Secretary of my department a written notice, requiring that a person be subject to the income management regime under new section 123UC of the Social Security Administration Act.

Yours sincerely



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19 SEP 2007

Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the letter of 9 August 2007 from Ms Cheryl Wilson on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) inviting a response to the comments contained in the *Scrutiny of Bills Alert Digest No. 8 of 2007* in relation to the Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 (the Bill).

Strict Liability – Schedule 2, item 1

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of the strict liability offence in the *Corporations Act 2001* prohibiting an Australian financial services licence holder from dealing in a general insurance product unless it is from an authorised insurer, Lloyd's underwriters or an exemption applies.

The strict liability offence adopted in the Bill complies with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offence is designed to ensure effective prudential regulation of Direct Offshore Foreign Insurers (DOFIs) and the financial intermediaries that deal in general insurance products issued by DOFIs to ensure the integrity of the prudential regulation regime so that there is stability in the financial system, and the interests of policyholders and beneficiaries are protected.

A strict liability offence is considered necessary to maximise the deterrent value of the new offence, thus maximising its role in complementing and reinforcing the regulation of general insurance.

It would be difficult under the circumstances for the prosecution to prove that a person had the intent to breach the prohibition as the prosecution would have to prove that a person knew of the prohibition in the *Corporations Act 2001*. Proof of intent in this case would be peculiarly within the knowledge of the defendant and as such the inability to prosecute these offences would undermine the effectiveness of the prudential regulation framework put in place to address the problem of DOFIs carrying on insurance business in Australia without being authorised.

Consistent with the Government policy and other strict liability offences in Chapter 7 of the Corporations Act, there is a cap on monetary penalties of 50 penalty units and no term of imprisonment attaches to breach of this offence.

Legislative Instruments Act – declarations – Schedule 2, item 8

The Committee sought advice as to whether the provision 3A(1)(b) that specified a particular contract of insurance is not a legislative instrument was declaratory in nature or provides a substantive exemption and if it provides a substantive exemption, the policy rationale for that exemption.

As outlined in paragraphs 2.48 and 2.49 of the explanatory memorandum, determinations made under the *Insurance Regulations 2002* that specify a class or kinds of contracts will be legislative instruments for the purposes of the *Legislative Instruments Act 2003* and reviewable by Parliament. Determinations made under the *Insurance Regulations 2002* that specify a particular contract of insurance, while being exempt from Parliamentary review, will be reviewable in accordance with Part VI of the *Insurance Act 1973*. Part VI will be expanded to allow a person who has applied for a determination under the new proposed provision 3A(1)(b) to have that determination reviewed by a decision-maker.

This approach ensures consistency with the treatment of decisions in other parts of the *Insurance Act 1973* and will enable the efficient review of individual contract of insurance determinations, without the need for these individual contract determinations to be reviewed by Parliament.

Abrogation of the privilege against self-incrimination – Schedule 2, items 12 and 36

The Committee sought advice as to the reasons why 'use immunity' rather than 'derivative use immunity' applies under the provisions relating to protection for a person providing information to the Australian Prudential Regulation Authority (APRA) relating to whether or not there has been a contravention of section 9 or 10 of the *Insurance Act 1973* (that is, an entity is carrying on insurance business without being authorised) or aiding and abetting, counselling or procuring that contravention.

'Use immunity' rather than 'derivative use' immunity applies in relation to the protection for information gathering provisions as 'derivative use immunity' would unacceptably fetter investigation and prosecution of corporate misconduct offences.

Use immunity is accepted as appropriate for legislation governing regulators such as the Australian Prudential Regulation Authority (APRA) and Australian Securities and Investments Commission (ASIC) in the exercise of their corporate regulation responsibilities. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties involved in promoting compliance with corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities in 1992 and the 'Review of the Derivative Use Immunity Reforms', conducted by John Kluver in 1997.

I trust this information will be of assistance to you.

Yours sincerely

PETER COSTELLO

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19 SEP 2007
Senate Standing C'ttee for the Scrutiny of Bills

18 SEP 2007

Senator Robert Ray
Chair of the Committee
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the letter of 9 August 2007 from Ms Cheryl Wilson on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) inviting a response to the comments contained in the *Scrutiny of Bills Alert Digest No. 8 of 2007* in relation to the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007 (the Bill).

Abrogation of the privilege against self-incrimination – Schedule 1, items 44 ,62 , 115 and 154

The Committee sought advice as to the reasons why 'use immunity' rather than 'derivative use immunity' applies under the provisions relating to protection for whistleblowers.

'Use immunity' rather than 'derivative use' immunity applies in relation to the protection for whistleblower provisions as 'derivative use' immunity' would unacceptably fetter investigation and prosecution of corporate misconduct offences.

Use immunity is accepted as appropriate for legislation governing regulators such as the Australian Prudential Regulation Authority (APRA) and Australian Securities and Investments Commission (ASIC) in the exercise of their corporate regulation responsibilities. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties involved in promoting compliance with corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities in 1992 and the 'Review of the Derivative Use Immunity Reforms', conducted by John Kluver in 1997.

Strict Liability – Schedule 1, items 67, 143, 160, 187, 244, Schedule 3, item 8

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of strict liability offences in the Bill.

The Bill contains a number of strict liability offences relating to:

- APRA's exemption powers under the *Life Insurance Act 1995* (Life Act) (Schedule 1, item 67);

- a person falsely represent themselves as being a Registrable Superannuation Entity (RSE) licensee under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) (Schedule 1, item 143);
- breach reporting under the *Banking Act 1959* and *Insurance Act 1973* (Schedule 1, items 160 and 187);
- superannuation trustees failing to comply with a direction from APRA to remove an auditor or actuary under the SIS Act (Schedule 1, item 244); and
- accounts, audit and reporting obligations under the SIS Act (Schedule 3, item 8).

Strict liability offences adopted in the Bill comply with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offences are designed to promote a robust regulatory framework by improving the enforceability, and hence the incentives for compliance, with key prudential requirements. In this way, the strict liability offences help to ensure that the financial sector entities are managed prudently and the assets of depositors, policyholders and members are adequately protected.

Strict liability offences have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, in relation to breach reporting the prosecution would be required to prove that a person intentionally refrained from reporting information to APRA.

Strict liability offences have been also used in some circumstances (Schedule 1, items 67 and 143 and Schedule 3, item 8) to overcome the 'knowledge of the law' problem where a physical element of the offence expressly incorporates a reference to a legislative provision. For example, for item 67, the prosecution would have to prove that a person knew which provisions under the Life Act that they have to comply with and which provisions APRA has exempted the person from.

Proof of intent in both cases would be peculiarly within the knowledge of the defendant, as such it would be difficult for the prosecution to prove intent. Inability to prosecute these offences would undermine the effectiveness of the prudential regulation system.

The use two tiered offences involving a fault liability offence and a strict liability offence, in relation to breach reporting (Schedule 1, items 160 and 187) and reporting obligations (Schedule 3, item 8), reflects the existing use of two-tiered penalty provisions in the prudential Acts for offences of a comparable nature. The two tiered offences include a strict liability offence which is subject to a lower penalty than the fault offence consistent with the principles set down in the *Senate Committee for the Scrutiny of Bills Sixth Report 2002.*

Apparent error – Explanatory Memorandum

The Committee sought advice as to whether there is an error in paragraphs 3.15 and 3.16 of the Explanatory Memorandum.

Item 9 repeals the current Part 13 of the SIS Act which includes paragraph 113(3)(b) and replaces it with a new Part 4 which consolidates the reporting obligations for superannuation entities. The explanatory memorandum should have referred to sub-paragraph 35C(5)(c)(ii) rather than paragraph 113(3)(b). This error will be corrected in the revised explanatory memorandum.

I trust this information will be of assistance to you.

Yours sincerely

PETER COSTELLO

Minister for the Environment and Water Resources

22 SEP 2007

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the letter of 13 September 2007 from the Secretary of the Standing Committee for the Scrutiny of Bills to my Office concerning the National Greenhouse and Energy Reporting Bill 2007 (the Bill).

The Committee has sought my advice as to why it was considered necessary for certain matters to be determined by regulation rather than through primary legislation under the Bill. In particular, the Committee refers to subclauses 5(1) and 10(1) of the Bill as introduced in the House of Representatives on 15 August 2007.

The Australian Government has proposed amending the Bill in the House of Representatives with respect to a number of matters, including clause 5. The Government's proposed amendments were issued on 12 September 2007. If agreed, the amendments will remove subclause 5(1) and allow for the exclusion of certain state or territory laws, or part thereof, by regulation. This amendment provides an additional safeguard against potential unintended consequences.

The Government is committed to streamlining the reporting requirements currently imposed on industry by a number of duplicative greenhouse and energy schemes. The Government intends to achieve this by working closely with state and territory governments. States and territories have agreed through the Council of Australian Governments that streamlining of some industry reporting requirements is required. The detail of which requirements should be eliminated has yet to be determined.

Clause 5 provides one means of ensuring that duplicative reporting requirements can be eliminated. However, until discussion with the states and territories takes place, it is not possible to name which laws, if any, this provision might exclude in the future. Depending on the outcome of discussions with states and territories during the next 12-18 months, it is possible this provision will never be used. For this reason, the function of listing state or territory laws for exclusion has been left to regulation to be made at a future date.

With regard to Subclause 10(1), the definition of key terms has been left to regulation for technical reasons. The science of climate change issues is rapidly developing. As knowledge improves over time, it is possible that definitions of terms, such as those in this subclause, may change. It may also be necessary for definitions to be changed to keep pace with international scientific developments and climate change negotiations.

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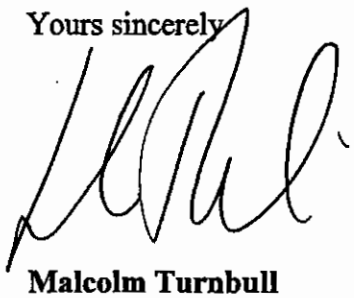
Given the dynamic nature of these issues, regulations provide an appropriately flexible and responsive vehicle to ensure, with appropriate consultation, that definitions used under this Bill are as accurate and comprehensive as possible.

A further factor is that the definitions under this subclause, for example with regard to 'offsets', may be highly complicated and technical in nature. This would suggest it is better that such descriptions should be in a legislative instrument rather than in primary legislation.

My Department will shortly be releasing a discussion paper on legislative instruments to be made under this Bill. The information gained through this process will help inform our understanding of the issues and aid the development of technically accurate regulations.

Yours sincerely



Malcolm Turnbull

Minister for the Environment and Water Resources

15 OCT 2007

Senator the Hon Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the letter from Ms Cheryl Wilson of 16 August 2007 to my Senior Adviser regarding the Scrutiny of Bills *Alert Digest No.10 of 2007 - Water Bill 2007.*

I regret that I was not able to provide a response or make the suggested amendments to the Explanatory Memorandum before the *Water Bill 2007* (the Bill) was dealt with in the Senate. My responses to the Standing Committee's requests for advice are set out below.

Determination of important matters by regulation
Subclauses 63(9) and 65(9)

The regulations will not specify the process and timelines for tabling of these documents. Subclauses 63(8) and 65(8) require the legislative instruments and the Minister's statements to be tabled together, consistent with the *Legislative Instruments Act 2003* which, in section 38, requires legislative instruments to be tabled within six sitting days of registration.

Determination of important matters by regulation
Subclauses 92(10) and 97(8)

Not all of the water charge and water market rules will, by their nature, be provisions for which a breach should be subject to a penalty. Accordingly, the Bill was drafted to ensure that the rules clearly state whether a penalty will apply. This will provide certainty for people who are bound by the rules.

Apparent Error
Subclause 92(10)

The cross reference in subclause 92(10) should be to 92(9), not 92(7). This will be corrected as soon as possible.

Legislative Instruments Act - determinations
Subclauses 201(6), 202(8) and 203(3)

These subclauses are declaratory and have been included to assist readers as the instruments establishing the committees are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003.*

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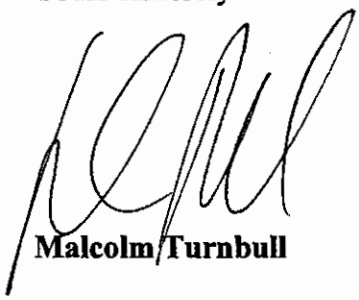
Entry to premises
Subclauses 220(1)

Voluntary consent is not required for entry to non-residential premises under clause 219. In the absence of consent the officer may enter non-residential premises to exercise the powers set out in clause 221. These include monitoring water resources and undertaking other functions of the Murray-Darling Basin Authority that are not related to monitoring compliance or searching for evidence. The officer must, prior to entry comply with the constraints set out in subsection 220(1) and, while on the premises respect the property and wishes of the occupants insofar as is practicable.

These powers are necessary to investigate, monitor and manage the water resources of the Murray-Darling Basin.

Yours sincerely



Malcolm Turnbull