SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2008

18 June 2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)
Senator M Bishop (Deputy Chair)
Senator J Collins
Senator A McEwen
Senator A Murray
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

FIFTH REPORT OF 2008

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

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

Customs Amendment (Strengthening Border Controls) Bill 2008

Customs Legislation Amendment (Modernising) Bill 2008

Excise Legislation Amendment (Condensate) Bill 2008

Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008

First Home Saver Accounts Bill 2008

Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008

Unit Pricing (Easy comparison of grocery prices) Bill 2008

Customs Amendment (Strengthening Border Controls) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Home Affairs responded to the Committee's comments in a letter dated 13 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to:

- allow a person to surrender certain prohibited imports that have not been concealed;
- allow for the granting of post-importation permissions for certain prohibited imports;
- allow infringement notices to be served for certain offences, including importing certain prohibited imports, and border security related offences; and
- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences.

The bill also contains application and consequential provisions.

Search without a warrant
Schedule 2, item 8

Proposed new subsections 185AA(1A) and (2A) of the *Customs Act 1901*, to be inserted by item 8 of Schedule 2, provide that a person found on a ship or aircraft that has been boarded under either section 185 or section 185A may be searched, as may the person's clothing and any property under the person's control, without a warrant. The Committee has regularly commented on provisions that permit searches of a person without a warrant, as it may be regarded as trespassing on personal rights.

The Committee notes that the explanatory memorandum to the bill does not provide any rationale as to why these search without warrant powers are considered necessary. The Committee **seeks the Minister's advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the preparation of this part of the bill and whether the provisions are consistent with that guide.

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

Relevant extract from the response from the Minister

I am writing in response to the comments contained within the Scrutiny of Bills Alert Digest No. 3 of 2008 (14 May 2008) concerning the *Customs Amendment (Strengthening Border Controls) Bill 2008* (the Bill).

As stated in the Alert Digest, the proposed new subsections I85AA(lA) and 185AA(2A) of the *Customs Act 1901* (the Customs Act) will provide that a person found on a ship or aircraft that has been boarded under either section 185 or section 185A may be searched, as may the person's clothing and any property under the person's control, without a warrant.

I can confirm that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) was consulted in preparation of this part of the Bill. In particular, I note that the primary requirement within section 11.3 of the Guide in relation to personal search powers is the need for a strong justification for proposed new search powers. The Australian Customs Service (Customs) considered this requirement in the development of the proposed powers and submits that a

strong justification does indeed exist for the proposed powers. Customs has also discussed this proposal with the Attorney-General's Department.

Personal search powers without warrant are currently available to Customs officers under section 185AA of the Customs Act; however these powers cannot currently be invoked until such time as an officer on board a vessel can form a reasonable suspicion that the vessel has been engaged in the execution of a relevant offence. The focus of the amendments is to change the time when this power is exercisable, rather than create an entirely new power available to Customs officers.

There has been an increased number of occasions where officers have faced resistance when boarding foreign ships suspected of being involved in illegal activities, and where evidence of illegal activities has been disposed of before it can be secured by Customs officers. The proposed search powers will significantly reduce the threat of harm to officers while exercising their powers, help prevent the escape of persons detained on suspicion of committing an offence and help prevent evidentiary material from being disposed of.

Customs advises me that the ability to undertake such searches without warrant, in the context of the proposed amendments, is necessary to enable Customs to maintain its effectiveness and to safeguard officers and others in unforeseen circumstances and/or in remote locations.

Some of the challenges faced in Customs operational environments illustrate the importance of this amendment:

1. Customs patrol vessels operate 24 hours a day/7 days a week and often at great distances from the mainland. This means that communication with the mainland can be difficult and in particular, it would be almost impossible to obtain a response back from the mainland in a timely manner in situations where Customs officers are required to undertake operational activities.

2. Situations often arise where Customs officers are in the process of boarding or are already on board suspect vessels when they determine that it is necessary to search a crew member. This decision is generally based on observations made by Customs officers of the persons and the situation onboard the boarded vessel. For example, in the Southern Ocean, fishers and crew wear multiple layers of clothing that could conceal items (such as weapons) and generally Customs enforcement officers are outnumbered by the crew of the boarded fishing vessel. It is the intention of the proposed amendments to enable precautionary action to be undertaken to reduce possible harm to Customs officers. In situations such as this, it would be too late for Customs officers to request a warrant prior to undertaking the search.

3. It is not necessarily apparent that officers would wish to exercise this proposed power prior to any boarding activity. Consequently, on most occasions, information to support an application for a warrant would not be available.

4. Crew members on vessels often carry knives, hooks, steel poles, hammers and other work implements that could be used to harm officers. However; it would be impractical, if not impossible, to satisfy the requirements for obtaining a warrant in particular circumstances without first placing the Customs officers in an unsafe environment.

5. Quick action needs to be taken to secure an item of evidence and delay while waiting for a warrant in the unique operational environment at sea, would mean that the item could be disposed of in the meantime. It has often been difficult for Customs officers to have a reasonable suspicion that a person is carrying an item of evidence (for example, a handheld GPS receiver) as there are often no signs that one may be onboard the vessel. Many potential items of evidence are small and highly concealable.

I trust that the Committee will find this information of assistance

The Committee thanks the Minister for this comprehensive response, which addresses its concerns. The Committee notes that it would have been helpful if a summary of this information had been included in the explanatory memorandum.

Customs Legislation Amendment (Modernising) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Home Affairs responded to the Committee's comments in a letter dated 13 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to implement recommendations of the first Ministerial Review of the Singapore-Australia Free Trade Agreement (SAFTA), which took place in July 2004. The bill:

- provides for new Certificate of Origin requirements for the SAFTA;
- updates the broker licensing provisions to recognise the changing environment, including the contractual arrangements that exist between some brokerages and nominees;
- modernises provisions relating to duty recovery and payments under protest, and allows refunds to be applied against unpaid duty in some circumstances; and
- makes it an offence to make false or misleading declarations in using the new SmartGate automated passenger processing system.

The bill also contains application and transitional provisions.

Uncertainty of commencement
Schedule 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 1 will commence on the later of the day after the Act receives the Royal Assent or the day on which Articles 11 and 12 of Chapter 3 of the SAFTA come into force for Australia. The item goes on to provide that Schedule 1 does not commence at all if those Articles do not come into force for Australia.

The Committee has for some time been concerned that measures may be passed by the Parliament, and the first few sections commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence. The Committee, therefore, **seeks the Minister's advice** whether item 2 in the table to subclause 2(1) might provide that if Articles 11 and 12 of the SAFTA do not come into force for Australia within some fixed period after assent, the Minister shall announce that fact by *Gazette* notice (just as item 2 already provides that the Minister must announce, by *Gazette* notice, when Articles 11 and 12 come into force for Australia).

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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 Minister

I am writing in response to the Scrutiny of Bills Alert Digest No. 3 of 2008, dated 14 May 2008 containing comments on the *Customs Legislation Amendment (Modernising) Bill 2008* (the Bill). These comments relate to Item 2 of the table in subclause 2(1) of the Bill, which provides for the commencement of Schedule 1 to the Bill. The provisions in Schedule 1 amend the *Customs Act 1901* to incorporate changes to Articles 11 and 12 of the Singapore-Australia Free Trade Agreement (the SAFTA).

The Committee asked me whether Item 2 of the table might be amended to include a requirement for me to announce by *Gazette* notice that the Articles will not come into force, in the event that the SAFTA does not come into force. With respect to the Committee's proposal, I offer the following information for its further consideration.

The SAFTA entered into force on 28 July 2003. Item 2 of the table refers to amended Articles 11 and 12 of the SAFTA '...as retabled in the House of Representatives on 31 May 2005...', which formed part of a package of amendments

agreed to in the first Ministerial review of the SAFTA in 2004. This package of amendments was referred to the Joint Standing Committee on Treaties, which recommended binding treaty action be taken [Report 66 of August 2005].

The procedure for the entry into force of these amendments is an exchange of notes between the Government and the Government of Singapore, confirming the completion of the Parties' respective domestic legal procedures. In the case of the amended Articles 11 and 12 of the SAFTA, the exchange of notes cannot occur until the Bill receives the Royal Assent. By contrast, the other amendments in the review package did not require legislative implementation and have all entered into force through the exchange of notes procedure.

I can assure the Committee, subject to the successful passage of the proposed amendments and after the Royal Assent, it is the Government's intention to proceed without delay on the exchange of notes with the Government of Singapore.

Customs officials are available to provide any further clarification, if required.

The Committee thanks the Minister for this response and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Excise Legislation Amendment (Condensate) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Treasurer responded to the Committee's comments in a letter dated 17 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2008

Introduced into the House of Representatives on 15 May 2008
Portfolio: Treasury

Background

This bill amends the *Excise Act 1901*, the *Petroleum Excise (Prices) Act 1987*, and the *Petroleum Revenue Act 1985* to facilitate a policy change, outlined in the Excise Tariff Amendment (Condensate) Bill 2008, to apply the Crude Oil Excise regime to condensate produced in the North West Shelf project area and onshore Australia.

The bill also contains application and transitional provisions.

Retrospective application
Schedule 1, items 3 and 6

Proposed new subsection 164A(1) of the *Excise Act 1901*, to be inserted by item 3 of Schedule 1, would permit regulations made for the purposes of that Act to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*, which is the date on which such regulations would normally take effect. Similarly, proposed new subsection 4(1C) of the *Petroleum Excise (Prices) Act 1997*, to be inserted by item 6 of Schedule 1, would permit regulations made for the purposes of that Act to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum (paragraph 1.23) describes the effect of these proposed provisions and provides an assurance that the bill will not allow the making of regulations that apply retrospectively to make a person liable to an offence or civil penalty. However, the explanatory memorandum provides no rationale for why it is considered necessary for these regulations to apply from a date prior to their registration under the *Legislative Instruments Act 2003*, nor does it provide an assurance that their retrospective application will not be detrimental to any person.

The Committee **seeks the Treasurer's advice** as to the rationale for requiring these regulations to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*, and whether this retrospective application will be detrimental to any person.

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 Treasurer

This Bill allows regulations made for the purposes of the *Petroleum Excise (Prices) Act 1987* and the *Excise Act 1901* in relation to condensate to take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*.

The regulations relating to the Petroleum Excise (Prices) Act are part of the mechanism to impose the crude oil excise on the production of condensate. In particular, the regulations identify the condensate production area or areas from which condensate is produced. These regulations are required to enable the collection of revenue from midnight (Canberra time) 13 May 2008, as announced by the Government on 13 May 2008 in the context of the 2008-09 Budget. However, the regulations cannot be made until after the Excise Legislation Amendment (Condensate) Bill 2008 receives Royal Assent.

In this respect, I note that as a matter of practice the Committee does not generally comment adversely where the commencement of a measure has been announced by the government and the legislation is introduced into Parliament within 6 months of announcement. This is the case with the measure being implemented by the Excise Legislation Amendment (Condensate) Bill 2008, together with the Excise Tariff Amendment (Condensate) Bill 2008.

The regulations relating to the Excise Act will ensure that remissions, rebates and refunds of excise duty relating to condensate operate the same way as those applying to stabilised crude oil. As a result, these regulations will not have any detrimental impact on taxpayers.

The Committee thanks the Treasurer for this response, and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 17 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2008

Introduced into the House of Representatives on 29 May 2008
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Farm Household Support Act 1992* and the *Social Security Act 1991* to introduce new eligibility criteria for the Exceptional Circumstances Relief Payment (ECRP). The bill:

- increases the income exemption for the ECRP income test from $10,000 to $20,000;
- extends the ECRP in certain circumstances to include the operators of small businesses that are located in towns that are substantially reliant on farm income, have a population of 10,000 or less, and are wholly or partially located in an Exceptional Circumstances declared area; and
- allows recipients of ECRP to travel overseas in certain circumstances, without losing their ECRP.

The bill also contains application and transitional provisions.

Legislative Instruments Act—determination
Schedule 1, item 4 and subitem 23(5)

Proposed new subsection 8A(9) of the *Farm Household Support Act 1992*, to be inserted by item 4 of Schedule 1, states that a determination made by the Minister under paragraph 8A(7)(c) is not a legislative instrument.

Similarly, subitem 23(5) of Schedule 1, which is a transitional provision relating to the circumstances dealt with in proposed new section 8A, states that a Ministerial determination made under that item is not a legislative instrument.

As outlined in Drafting Direction No. 3.8, 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.

The Committee notes that, in respect of both of the above-mentioned provisions, the explanatory memorandum does not acknowledge their existence and, as such, there is no indication of whether they are no more than declaratory of the law or seek to create an exemption from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

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 exemption, 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 Minister

> In response to the committee's comments on proposed new subsection 8A(9), to be inserted by item 4 of Schedule 1, which states that a determination made by the minister under paragraph 8A(7)(d) is not a legislative instrument, this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003.*
>
> In response to the committee's comments on subitem 23(5) of Schedule 1, which is a transitional provision relating to the circumstances dealt with in the proposed new section 8A, which states that a ministerial determination made under that item is not a legislative instrument, this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003.*

The Committee thanks the Minister for this response, and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Retrospective operation
Schedule 1, item 10

Proposed new paragraphs 24A(4)(a) and (b) of the *Farm Household Support Act 1992*, to be inserted by item 10 of Schedule 1, substitute paragraphs referring to the period from 1 July 2005 to 30 June 2006 with paragraphs referring to the period from 1 July 2007 to 30 June 2009. The new paragraphs are, therefore, to some extent retrospective in operation.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that, in this instance, the explanatory memorandum does not acknowledge the existence of item 10 of Schedule 1, and therefore provides no explanation of the change proposed by that item. The Committee **seeks the Minister's advice** whether this retrospectivity will be detrimental to any person and whether this information could be included 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 Minister

In response to the committee's comments on proposed new paragraphs 24A(4)(a) and (b), to be inserted by item 10 of Schedule 1, which substitute paragraphs referring to the period from 1 July 2005 to 30 June 2006 with paragraphs referring to the period from 1 July 2007 to 30 June 2009, these paragraphs instruct Centrelink on how to calculate the rate of payment, taking into account the maximum allowable disregarded income for the purposes of the income test. The ministerial announcement of 25 September 2007, increasing the disregarded income from $10 000 to $20 000, applies to the two full financial years covered by the period from 1 July 2007 to 30 June 2009, regardless of when in the financial year the applicant first received a payment. This retrospectivity will not be detrimental to any person. Rather, it will maximise benefits for those people affected by these provisions.

Thank you for pointing out these oversights and for your feedback in relation to the Explanatory Memorandum. I have passed this information on to the department for future reference.

The Committee thanks the Minister for this response, and notes that it would have been helpful if this information had been included in the explanatory memorandum. The Committee also thanks the Minister for alerting the department to the Committee's concerns.

First Home Saver Accounts Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Treasurer responded to the Committee's comments in a letter received on 16 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2008

Introduced into the House of Representatives on 28 May 2008
Portfolio: Treasury

Background

This bill, along with two supporting bills, the First Home Saver Accounts (Consequential Amendments) Bill 2008 and the Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008, aims to implement the Government's election commitment to introduce First Home Saver Accounts (FHSA). The bill:

- provides for the general operation of the FHSA, outlines the eligibility rules for opening and issuing FHSA, and establishes the rules for making contributions into these accounts;
- provides for a Government contribution of 17 per cent on the first $5,000 of personal contributions made into the account each year;
- outlines the prudential regulatory framework that applies to FHSA providers;
- establishes an enforcement regime, including providing for the appointment of authorised persons and defining the powers of such persons; and
- establishes a range of offences under the Act.

The bill also contains application and transitional provisions.

Strict liability offences
Subclauses 58(5), 60(9), 61(5), 111(4) and 112(3)

Various clauses in this bill impose strict criminal liability. They are subclauses 58(5), 60(9), 61(5), 111(4) and 112(3). 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 reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

The Committee notes that with regard to the first three of these provisions (subclauses 58(5), 60(9) and 61(5)), the only reference to them in the explanatory memorandum is at paragraph 8.94 which states, in full: 'Where an offence of strict liability (requiring no fault element) is proven the FHSA provider is liable for a penalty of up to 50 penalty units.' There is no reference to the reason for the imposition of strict liability, nor to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004.

With regard to the fourth and fifth of the above provisions (111(4) and 112(3) respectively), the explanatory memorandum is slightly more helpful, but only marginally so. Paragraph 4.49, which relates to subclause 111(4), states: 'Consistent with the [*Superannuation Industry (Supervision) Act 1993*], this offence is a strict liability offence punishable by 50 penalty units. These offences are ones of strict liability because they are basic, objective requirements of APRA's prudential supervision functions, and should be complied with by all persons.'

The Committee notes that this commentary is very similar to that provided by the explanatory memorandum to the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007, on which the Committee commented in *Alert Digest No. 8 of 2007*. The Committee reiterates the view that it expressed at that time, that is, that it could be argued that all laws, by their very nature, 'should be complied with by all persons' and that this is not, in and of itself, justification for applying strict liability to these particular offences.

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 and, if so, whether the justifications used to support the imposition of strict liability in the context of the *Guide* could be included in the explanatory memorandum.

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 Treasurer

The Bill contains strict liability offences relating to:

- a first home saver account (FHSA) provider requesting, recording and providing tax file numbers (subsections 58(5), 60(9), 61(5)); and

- an FHSA provider failing to notify a breach of condition of authorisation and failing to comply with a direction from the Australian Prudential Regulation Authority (APRA) (subsections 111(4) and 112(3)).

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 this Bill. I can inform the Committee that the strict liability offences adopted in the Bill were framed against, and comply with, the Guide.

In addition, as an FHSA provider can only be a corporation, the offences in question cannot apply to individuals, and consequently do not affect individuals' rights and liberties.

These offences mirror existing offence provisions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that were recently enacted by the Parliament.

Consistent with the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002, strict liability offences were chosen for these provisions for a number of reasons.

- Strict liability is appropriate in order to ensure the integrity of the tax file number (TFN) arrangements and prudential regulation regime.

- Strict liability is appropriate as otherwise it would be difficult for the prosecution to prove the relevant fault elements. Inability to prosecute these offences would undermine the effectiveness of the TFN and prudential regulation provisions.

- The TFN offences are two tier offences containing alternative fault and strict liability offences. In these offence provisions, the strict liability limb is subject to a lower penalty than the fault limb which is consistent with the principles set down in the Senate Committee for the Scrutiny of Bills Sixth Report 2002.

These reasons are explained in greater detail below.

Tax file number offences

The compliance of FHSA providers with the TFN rules in the Bill is critical to the effective operation of First Home Saver Accounts system. The rules are designed to ensure that only one account is opened per individual and to assist the Commissioner of Taxation in paying the Government contribution.

The strict liability offences are designed to improve the enforceability of the TFN rules, and hence the incentives for compliance with those rules. In this way, the strict liability offences help to ensure that the FHSA providers establish effective systems for obtaining, recording and providing tax file numbers.

Strict liability offences have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, where an FHSA provider must request a FHSA holder to quote a TFN where the holder had not quoted a TFN previously, it would be difficult to prove that the provider intentionally failed to request the holder to quote their TFN.

The TFN provisions have two-tier offence provisions. The maximum penalty for contravening the strict liability offences is 50 penalty units. Where an FHSA provider commits an offence with the necessary fault element, the maximum penalty is 100 penalty units. The strict liability limb is subject to a lower penalty than the fault limb which is consistent with the principles set down in the Senate Committee for the Scrutiny of Bills Sixth Report 2002. This is also consistent with the recently enacted TFN provisions in the SIS Act.

Offences about breaching conditions or failing to comply with an APRA direction

The Bill contains two strict liability offences relating to the prudential regulation of FHSA providers, including:

- breach reporting (section 111); and
- Registrable Superannuation Entity (RSE) licensees failing to comply with a direction from APRA to comply with a condition on authorisation (section 112).

These two offence provisions replicate offences that currently exist under Parts 2A and 2B of the SIS Act. As this Bill creates an authorisation process that generally mirrors the licensing process under the SIS Act, it was necessary to provide similar offence provisions.

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 FHSA holders are adequately protected.

In particular, the trustees are undertaking a new, non-superannuation business in providing FHSAs, and as such are required to satisfy APRA that they have sufficient resources and experience to do so. It is important for APRA to ensure that trustees who provide FHSAs continue to have sufficient resources, including financial, technological and human resources, to undertake this activity. The requirements to report significant breaches to APRA, and to comply with APRA's directions to comply with conditions on authorisation, are fundamental in APRA's ability to prudentially supervise the FHSA activities of trustees.

Strict liability offences have been used in these two circumstances 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; and in relation to complying with APRA's direction, the prosecution would be required to prove that a person intentionally refrained from complying with APRA's direction.

Proof of intent in both cases would be peculiarly within the knowledge of the defendant, and 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 and APRA's ability to protect FHSA holders by ensuring that FHSA providers that are RSE licensees continue to comply with the fundamental prudential regulatory requirements, including conditions on these FHSA providers' authorisation.

The Committee thanks the Treasurer for this comprehensive response, and notes that it would have been helpful if a summary of this information had been included in the explanatory memorandum.

Personal rights and liberties
Subsections 91(4) and 102(4)

Subclause 91(1) requires APRA to decide an application for a body to be authorised as a provider of a first home saver account within 30 days of receiving the application, with an extension of a further 14 days provided for by subclause 91(2). Subclause 91(4) provides that if APRA has not decided the application within the required period, 'APRA is taken to have decided… to refuse the application.' Clause 102 is in very similar terms.

The Committee is concerned that under these clauses a body could be refused authorisation as a provider of a first home account (clause 91), or refused to have a condition applied by APRA to such an authorisation varied or removed (clause 102), not because of any failing on their part, but rather because the APRA had failed to make a decision within the allotted timeframe. The Committee notes that the explanatory memorandum, at paragraphs 4.23 and 4.38 respectively, summarises the effect of these clauses, but gives no explanation for why it is considered appropriate that the consequences of any inaction on APRA's part will be born by the applicant, rather than by APRA.

The Committee **seeks the Treasurer's advice** on this matter, including what safeguards will be put in place to ensure that the APRA makes a decision on these matters within the required timeframe and what recourse will be available to bodies who may have their application deemed to be unsuccessful as a result of inaction by the APRA.

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 Treasurer

The Committee sought advice as to whether sections 91 and 102 of the Bill unduly trespass on personal rights and liberties, including:

- where an application for authorisation as an FHSA provider is not decided within the prescribed period or an extended period, the application is taken to be refused (subsection 91(4)); and

- where an application for a variation or revocation of a condition on authorisation as an FHSA provider is not decided within the prescribed period or an extended period, the application is taken to be refused (subsection 102(4)).

As mentioned, it is fundamental to the prudential regulation framework for FHSAs that only RSE licensees that have the requisite experience and resources, including financial, technological and human resources, be permitted to offer this new, non-superannuation product. Managing entry into this sector allows APRA to fulfil its duties to promote a stable and competitive financial system and protects the interests of consumers that hold FHSAs.

In relation to applications for authorisation, it is necessary that APRA be satisfied an RSE licensee has the required resources and experience to offer FHSAs before granting authorisation. Likewise, a condition on the RSE licensee's authorisation relates to fundamental prudential requirements. Where the entity seeks to vary or revoke a condition on authorisation under section 102, it is necessary that APRA be satisfied that such a variation or revocation is justified and will not have an adverse impact on the prudential soundness of the entity.

Under sections 90 and 101 of the Bill, APRA may request further information from the applicant in relation to its application. APRA would request further information where it is not satisfied, on the available information, that the RSE licensee has the requisite resources and experience to offer FHSAs or the variation or revocation of conditions on authorisation is justified and will not have an adverse effect on the prudential management of the entity.

In both circumstances, it would be inappropriate for the application to be 'deemed' to be granted merely because the RSE licensee has failed to provide the necessary information to APRA within the prescribed period such that APRA could not make a decision based on the available information.

APRA has the flexibility under sections 91 and 102 to extend the period for making a decision by a further 30 days. If the application lapses because of subsection 91(4) or subsection 102(4), the entity may submit a further application under sections 89 or 100 with any additional required information.

It is expected that APRA will make decisions within the initial period for decision or the extended period for decision, to facilitate RSE licensee's entry into this market and maintain competitive neutrality relative to FHSA providers that are authorised deposit-taking institutions or life insurance companies. It is also expected that applicants will provide any required additional information to APRA within the initial period or the extended period for decision.

The Committee thanks the Treasurer for this comprehensive response, and notes that it would have been helpful if a summary of this information had been included in the explanatory memorandum.

Setting the rate of a fee by regulation
Paragraph 131(2)(a)

Paragraph 131(2)(a) of this bill provides that the Governor-General may make regulations that 'prescribe fees in respect of any matter under this Act'. The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. This creates a risk that the fee may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

Where a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. The vice to be avoided is delegating an unfettered power to impose fees. In this instance, the Committee notes that the primary legislation does not provide for any limits on this power to impose fees.

The Committee further notes that the explanatory memorandum, at paragraph 8.108, merely states that 'the main Bill includes a standard power permitting the Governor-General to make regulations', but provides no explanation of why it is necessary to be able to prescribe fees by regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power. The Committee **seeks the Treasurer's advice** in respect of these matters.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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 Treasurer

> Paragraph 131(2)(a) permits the Governor-General to make regulations prescribing fees in respect to any matter under the Bill. Subsection 89(2) is the only provision in the Bill that provides for a fee to be prescribed. It says that an application by an Registrable Superannuation Entity (RSE) licensee for authorisation as an FHSA provider must be accompanied by the application fee (if any) specified in regulations.
>
> It is appropriate for the amount of the application fee (if any) to be set by regulation. It is essentially an administrative charge for which the Government has the expertise

and capacity to work out an appropriate quantum and advise the Governor-General as to the making of a suitable regulation.

The Committee's concern that the fee may become a tax is not warranted. It is not necessary to include in section 131 of the Bill words to the effect that the fee must not constitute a tax. This principle is an existing limitation on legislative drafting which does not need to be stated expressly in each Act that provides for a fee to be prescribed by regulation. In addition, if the fee did become a tax, it would be invalid.

The Government does not consider that there any need to impose limits on the power of the Governor-General to set the amount of the application fee. A regulation setting the fee is subject to the normal processes of Parliamentary scrutiny for legislative instruments under which either House of Parliament can disallow the regulation.

Finally, because the fee provisions in the Bill apply only to RSE licensees, they closely follow the provisions in the SIS Act that govern applying for RSE licences.

I trust this explanation will assist the Committee in its consideration of the Bill.

The Committee thanks the Treasurer for this response, and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. Senator Milne responded to the Committee's comments in two letters dated 16 June 2008. Copies of the letters are attached to this report.

Extract from Alert Digest No. 4 of 2008

Introduced into the Senate on 15 May 2008
By Senator Milne

This bill amends the *Renewable Energy (Electricity) Act 2000* to establish a national feed-in-tariff scheme, with a view to providing greater financial support for the commercialisation of a broad range of prospective renewable energy technologies. The bill:

- provides for owners of qualifying electricity generators to register their generator, feed electricity into the grid, and be paid a tariff, as long as certain conditions are met;
- requires the Minister to set a feed-in-tariff scheme rate for qualifying generators each financial year and sets out the circumstances in which the rate may be varied;
- provides that the feed-in-tariff scheme rate set by the Minister, and payable to the owner of a qualifying generator at the date of registration of that generator, is fixed and guaranteed for a period of 20 years from the date of registration;
- requires the Minister to set a feed-in-tariff scheme levy rate annually. The levy is to be payable by all electricity retailers and direct customers of electric energy from the grid and is to be sufficient to cover the estimated cost of payments under the feed-in-tariff scheme; and
- sets out record keeping and reporting requirements.

Legislative Instruments Act—declarations
Schedule 1, item 2, proposed new subsections 34D(15) and 34E(5)

Proposed new subsection 34D(15) of the *Renewable Energy (Electricity) Act 2000*, to be inserted by item 2 of Schedule 1, would provide that the feed-in-tariff rates (to be set under proposed new subsections 34D(1) and (2)) and the statement made by the Minister under subsection 34D(14), are not legislative instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

Similarly, proposed new subsection 34E(5) of the same Act, also to be inserted by item 2 of Schedule 1, would provide that the feed-in-tariff levy rates (to be set under proposed new subsection 34E(1)) and the statement made by the Minister under subsection 34E(4) are not legislative instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

As outlined in Drafting Direction No. 3.8, 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.

The Committee notes that, in this instance, the explanatory memorandum makes no reference to these provisions. The Committee **seeks the Senator's advice** whether these provisions are declaratory in nature or provide for a substantive exemption from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003* and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

Pending the Senator'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 Senator

> Thankyou for your letter of 5 June in which you raised a number of matters regarding the Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008.
>
> The matters you raised are acknowledged and because of advances in the policy basis of the bill I will now be amending the bill to provide for the application of the Legislative Instruments Act to instruments and statements under sub clauses 34D(15) and 34E(5). When the bill is in the Committee of the whole the Senator will move the attached amendment.
>
> Thank you for bringing this matter to my attention.

The Committee thanks the Senator for this response, and for the commitment to amend the bill to address the Committee's concern.

Setting the rate of a levy by delegated legislation
Schedule 1, item 2, proposed new subsection 34E(1)

Proposed new subsection 34E(1) of the *Renewable Energy (Electricity) Act 2000* requires the Minister to set a feed-in-tariff levy rate per MWh of electricity acquisition from the electricity grid, to fund the feed-in-tariff rate scheme. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by delegated legislation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

The Committee notes that in this case, the levy only needs to be set once per financial year, so it is unclear why the levy cannot be set via an amendment to the primary legislation, thus providing the parliament with an opportunity to consider the proposed levy. The Committee also notes that while the bill specifies that the amount of the levy must be 'sufficient to cover the estimated cost of payments under the feed-in-tariff rate scheme' it does not provide for any maximum amount above which the Minister may not set the levy.

Finally, the Committee notes that the bill provides for no parliamentary scrutiny whatsoever of the Minister's power to set the rate of the levy, because proposed new subsection 34E(5) of the bill declares that the feed-in-tariff levy rate set under subsection (1) and the statement made under subsection (4) by the Minister, explaining how the feed-in-tariff levy rate is calculated, are not legislative instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

The Committee **seeks the Senator's advice** as to the reasons why the feed-in-tariff levy rate is to be determined by the Minister, rather than through an amendment to the primary legislation, and why no provision has been made for parliamentary review of the Minister's determination.

Pending the Senator's advice, the Committee draws Senators' attention to the provision, as it 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 Senator

> Further to previous correspondence (12 June) regarding the Committee's concerns about my Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008.
>
> The Committee subsequently advised that my amendments left one query unaddressed; that is that why the feed-in tariff rate is set by delegated legislation.
>
> The reason for this is that the scheme must be flexible and responsive to changes in the take-up rate of different forms of renewable energy technologies. As you can see from the legislation, at the end of each year the Minister will receive a report on the take-up rates of each type of technology. The Minister may then choose to increase rates for technologies considered to be falling behind their potential, or may decrease the rate for technologies which are being over-subscribed. As you can see from the legislation, there are very tight timeframes of 15 days for reporting and 28 days for

setting the rate and it is not possible for primary legislation to meet those timeframes imposed on the Minister.

Because of the nature of the scheme and the timeframes required for it to be successful, the mechanism of primary legislation is unworkable; it is for this reason that the mechanism of subordinate legislation was selected.

I do note the Committee's recommendation that the subordinate legislation needs to have full parliamentary scrutiny and I think the legislation is now improved by that recommendation of the committee.

Thankyou for bringing this matter to my attention. Please note that I will seek to have the Bill referred to Environment, Communications and the Arts Committee this afternoon.

The Committee thanks the Senator for this response.

Unit Pricing (Easy comparison of grocery prices) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. Senator Fielding responded to the Committee's comments in a letter dated 5 June 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2008

Introduced into the Senate on 15 May 2008
By Senator Fielding

Background

This bill amends the *National Measurement Act 1960* to introduce a compulsory comparative pricing system (also known as unit pricing) for all products sold in retail grocery stores. The bill also:

- requires retailers to prominently display posters and pamphlets containing information about unit pricing and how it can be used by consumers;
- requires retailers to display both the price and unit price for specified grocery items;
- establishes an enforcement regime, including providing for the appointment of unit pricing inspectors and detailing their powers; and
- provides for civil and criminal penalties and infringement notice penalties for breaches of the Act.

Commencement on Proclamation
Schedule 1

Item 2 in the table to subclause 2(1) provides that Schedule 1 shall commence on Proclamation, but that it must commence 12 months after Assent in any event.

The Committee will generally not comment where a bill specifies a period of delayed commencement of six months or less. Where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation. This is consistent with Paragraph 19 of Drafting Direction No. 1.3, which states that 'if the Specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum'.

Unfortunately, in the absence of an explanatory memorandum, there is no explanation for this extended delay in commencement. The Committee therefore **seeks the Senator's advice** regarding the reasons for this commencement provision.

Pending the Senator's advice, the Committee draws Senators' attention to the provision, as it 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 Senator

> The commencement date for the bill is set at 12 months to assist those who must comply with the unit pricing scheme. It would give supermarkets the necessary time to upgrade their systems to implement a complex scheme, in some cases across national networks.
>
> Both Coles and Woolworths in public comments on unit pricing have estimated that implementation of a unit pricing scheme would take about one year.

The Committee thanks the Senator for this response.

Legislative Instruments Act—declarations
Schedule 1, item 2

Proposed new subsection 18ZZU(5) of the *National Measurement Act 1960*, to be inserted by item 2 of Schedule 1, provides that a remedial direction, which may be given by the Secretary of the Department administering this provision, is not a legislative instrument. In the absence of an explanatory memorandum, it is not clear to the Committee whether this provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt the remedial direction from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.*

The Committee **seeks the advice of the Senator** whether this provision is declaratory in nature or provides for a substantive exemption. If it provides for a substantive exemption, the Committee **seeks the Senator's advice** about why an exemption is considered appropriate.

Pending the Senator'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 Senator

> The provision in subsection 18ZZU(5) is purely declaratory as the direction is not legislative in character.
>
> I trust these explanations satisfy the Committee.

The Committee thanks the Senator for this response, which addresses its concern.

Chris Ellison
Chair

THE HON BOB DEBUS
Minister for Home Affairs

Ministerial No: 94875

Senator the Hon. Chris Ellison
Chair of Committee
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I am writing in response to the comments contained within the Scrutiny of Bills Alert Digest No. 3 of 2008 (14 May 2008) concerning the *Customs Amendment (Strengthening Border Controls) Bill 2008* (the Bill).

As stated in the Alert Digest, the proposed new subsections 185AA(1A) and 185AA(2A) of the *Customs Act 1901* (the Customs Act) will provide that a person found on a ship or aircraft that has been boarded under either section 185 or section 185A may be searched, as may the person's clothing and any property under the person's control, without a warrant.

I can confirm that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) was consulted in preparation of this part of the Bill. In particular, I note that the primary requirement within section 11.3 of the Guide in relation to personal search powers is the need for a strong justification for proposed new search powers. The Australian Customs Service (Customs) considered this requirement in the development of the proposed powers and submits that a strong justification does indeed exist for the proposed powers. Customs has also discussed this proposal with the Attorney-General's Department.

Personal search powers without warrant are currently available to Customs officers under section 185AA of the Customs Act; however these powers cannot currently be invoked until such time as an officer on board a vessel can form a reasonable suspicion that the vessel has been engaged in the execution of a relevant offence. The focus of the amendments is to change the time when this power is exercisable, rather than create an entirely new power available to Customs officers.

There has been an increased number of occasions where officers have faced resistance when boarding foreign ships suspected of being involved in illegal activities, and where evidence of illegal activities has been disposed of before it can be secured by Customs officers. The proposed search powers will significantly reduce the threat of harm to officers while exercising their powers, help prevent the escape of persons detained on suspicion of committing an offence and help prevent evidentiary material from being disposed of.

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Customs advises me that the ability to undertake such searches without warrant, in the context of the proposed amendments, is necessary to enable Customs to maintain its effectiveness and to safeguard officers and others in unforeseen circumstances and/or in remote locations.

Some of the challenges faced in Customs operational environments illustrate the importance of this amendment:

1. Customs patrol vessels operate 24 hours a day/7 days a week and often at great distances from the mainland. This means that communication with the mainland can be difficult and in particular, it would be almost impossible to obtain a response back from the mainland in a timely manner in situations where Customs officers are required to undertake operational activities.

2. Situations often arise where Customs officers are in the process of boarding or are already on board suspect vessels when they determine that it is necessary to search a crew member. This decision is generally based on observations made by Customs officers of the persons and the situation onboard the boarded vessel. For example, in the Southern Ocean, fishers and crew wear multiple layers of clothing that could conceal items (such as weapons) and generally Customs enforcement officers are outnumbered by the crew of the boarded fishing vessel. It is the intention of the proposed amendments to enable precautionary action to be undertaken to reduce possible harm to Customs officers. In situations such as this, it would be too late for Customs officers to request a warrant prior to undertaking the search.

3. It is not necessarily apparent that officers would wish to exercise this proposed power prior to any boarding activity. Consequently, on most occasions, information to support an application for a warrant would not be available.

4. Crew members on vessels often carry knives, hooks, steel poles, hammers and other work implements that could be used to harm officers. However; it would be impractical, if not impossible, to satisfy the requirements for obtaining a warrant in particular circumstances without first placing the Customs officers in an unsafe environment.

5. Quick action needs to be taken to secure an item of evidence and delay while waiting for a warrant in the unique operational environment at sea, would mean that the item could be disposed of in the meantime. It has often been difficult for Customs officers to have a reasonable suspicion that a person is carrying an item of evidence (for example, a handheld GPS receiver) as there are often no signs that one may be onboard the vessel. Many potential items of evidence are small and highly concealable.

I trust that the Committee will find this information of assistance.

Yours sincerely

Bob Debus

13.6.08

THE HON BOB DEBUS
Minister for Home Affairs

Ministerial No. 94873

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

Dear Senator Ellison

I am writing in response to the Scrutiny of Bills Alert Digest No. 3 of 2008, dated 14 May 2008 containing comments on the *Customs Legislation Amendment (Modernising) Bill 2008* (the Bill). These comments relate to Item 2 of the table in subclause 2(1) of the Bill, which provides for the commencement of Schedule 1 to the Bill. The provisions in Schedule 1 amend the *Customs Act 1901* to incorporate changes to Articles 11 and 12 of the Singapore-Australia Free Trade Agreement (the SAFTA).

The Committee asked me whether Item 2 of the table might be amended to include a requirement for me to announce by *Gazette* notice that the Articles will not come into force, in the event that the SAFTA does not come into force. With respect to the Committee's proposal, I offer the following information for its further consideration.

The SAFTA entered into force on 28 July 2003. Item 2 of the table refers to amended Articles 11 and 12 of the SAFTA '...as retabled in the House of Representatives on 31 May 2005...', which formed part of a package of amendments agreed to in the first Ministerial review of the SAFTA in 2004. This package of amendments was referred to the Joint Standing Committee on Treaties, which recommended binding treaty action be taken [Report 66 of August 2005].

The procedure for the entry into force of these amendments is an exchange of notes between the Government and the Government of Singapore, confirming the completion of the Parties' respective domestic legal procedures. In the case of the amended Articles 11 and 12 of the SAFTA, the exchange of notes cannot occur until the Bill receives the Royal Assent. By contrast, the other amendments in the review package did not require legislative implementation and have all entered into force through the exchange of notes procedure.

I can assure the Committee, subject to the successful passage of the proposed amendments and after the Royal Assent, it is the Government's intention to proceed without delay on the exchange of notes with the Government of Singapore.

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Customs officials are available to provide any further clarification, if required.

Yours sincerely

Bob Debus

13.6.08

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

17 JUN 2008

Dear ~~Senator~~ Ellison Chris,

I refer to the letter of 5 June 2008 from the Secretary of the Standing Committee for the Scrutiny of Bills concerning the Excise Legislation Amendment (Condensate) Bill 2008. This Bill allows regulations made for the purposes of the *Petroleum Excise (Prices) Act 1987* and the *Excise Act 1901* in relation to condensate to take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*.

The regulations relating to the Petroleum Excise (Prices) Act are part of the mechanism to impose the crude oil excise on the production of condensate. In particular, the regulations identify the condensate production area or areas from which condensate is produced. These regulations are required to enable the collection of revenue from midnight (Canberra time) 13 May 2008, as announced by the Government on 13 May 2008 in the context of the 2008-09 Budget. However, the regulations cannot be made until after the Excise Legislation Amendment (Condensate) Bill 2008 receives Royal Assent.

In this respect, I note that as a matter of practice the Committee does not generally comment adversely where the commencement of a measure has been announced by the Government and the legislation is introduced into Parliament within 6 months of announcement. This is the case with the measure being implemented by the Excise Legislation Amendment (Condensate) Bill 2008, together with the Excise Tariff Amendment (Condensate) Bill 2008.

The regulations relating to the Excise Act will ensure that remissions, rebates and refunds of excise duty relating to condensate operate the same way as those applying to stabilised crude oil. As a result, these regulations will not have any detrimental impact on taxpayers.

Yours sincerely

WAYNE SWAN

The Hon. Tony Burke MP

Minister for Agriculture, Fisheries and Forestry

17 JUN 2008

Senator the Hon. Christopher Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I refer to your comments contained in the Scrutiny of Bills *Alert Digest No. 4 of 2008* (4 June 2008) concerning the Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008.

In response to the committee's comments on proposed new subsection 8A(9), to be inserted by item 4 of Schedule 1, which states that a determination made by the minister under paragraph 8A(7)(d) is not a legislative instrument, this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

In response to the committee's comments on subitem 23(5) of Schedule 1, which is a transitional provision relating to the circumstances dealt with in the proposed new section 8A, which states that a ministerial determination made under that item is not a legislative instrument, this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

In response to the committee's comments on proposed new paragraphs 24A(4)(a) and (b), to be inserted by item 10 of Schedule 1, which substitute paragraphs referring to the period from 1 July 2005 to 30 June 2006 with paragraphs referring to the period from 1 July 2007 to 30 June 2009, these paragraphs instruct Centrelink on how to calculate the rate of payment, taking into account the maximum allowable disregarded income for the purposes of the income test. The ministerial announcement of 25 September 2007, increasing the disregarded income from $10 000 to $20 000, applies to the two full financial years covered by the period from 1 July 2007 to 30 June 2009, regardless of when in the financial year the applicant first received a payment. This retrospectivity will not be detrimental to any person. Rather, it will maximise benefits for those people affected by these provisions.

Thank you for pointing out these oversights and for your feedback in relation to the Explanatory Memorandum. I have passed this information on to the department for future reference.

Yours sincerely

Tony Burke

Tony Burke

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Senator the Hon. Christopher Ellison
Chair of Committee
Senate Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2000

Dear Senator Ellison Chris

I refer to the letter of 5 June 2008 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. 4 of 2008* in relation to the First Home Saver Accounts Bill 2008.

Strict liability – subsections 58(5), 60(9), 61(5), 111(4) and 112(3)

The Bill contains strict liability offences relating to:

- a first home saver account (FHSA) provider requesting, recording and providing tax file numbers (subsections 58(5), 60(9), 61(5)); and
- an FHSA provider failing to notify a breach of condition of authorisation and failing to comply with a direction from the Australian Prudential Regulation Authority (APRA) (subsections 111(4) and 112(3)).

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 this Bill. I can inform the Committee that the strict liability offences adopted in the Bill were framed against, and comply with, the Guide.

In addition, as an FHSA provider can only be a corporation, the offences in question cannot apply to individuals, and consequently do not affect individuals' rights and liberties.

These offences mirror existing offence provisions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that were recently enacted by the Parliament.

Consistent with the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002, strict liability offences were chosen for these provisions for a number of reasons.

- Strict liability is appropriate in order to ensure the integrity of the tax file number (TFN) arrangements and prudential regulation regime.

- Strict liability is appropriate as otherwise it would be difficult for the prosecution to prove the relevant fault elements. Inability to prosecute these offences would undermine the effectiveness of the TFN and prudential regulation provisions.

- The TFN offences are two tier offences containing alternative fault and strict liability offences. In these offence provisions, the strict liability limb is subject to a lower penalty than the fault limb which is consistent with the principles set down in the Senate Committee for the Scrutiny of Bills Sixth Report 2002.

These reasons are explained in greater detail below.

Tax file number offences

The compliance of FHSA providers with the TFN rules in the Bill is critical to the effective operation of First Home Saver Accounts system. The rules are designed to ensure that only one account is opened per individual and to assist the Commissioner of Taxation in paying the Government contribution.

The strict liability offences are designed to improve the enforceability of the TFN rules, and hence the incentives for compliance with those rules. In this way, the strict liability offences help to ensure that the FHSA providers establish effective systems for obtaining, recording and providing tax file numbers.

Strict liability offences have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, where an FHSA provider must request a FHSA holder to quote a TFN where the holder had not quoted a TFN previously, it would be difficult to prove that the provider intentionally failed to request the holder to quote their TFN.

The TFN provisions have two-tier offence provisions. The maximum penalty for contravening the strict liability offences is 50 penalty units. Where an FHSA provider commits an offence with the necessary fault element, the maximum penalty is 100 penalty units. The strict liability limb is subject to a lower penalty than the fault limb which is consistent with the principles set down in the Senate Committee for the Scrutiny of Bills Sixth Report 2002. This is also consistent with the recently enacted TFN provisions in the SIS Act.

Offences about breaching conditions or failing to comply with an APRA direction

The Bill contains two strict liability offences relating to the prudential regulation of FHSA providers, including:

- breach reporting (section 111); and

- Registrable Superannuation Entity (RSE) licensees failing to comply with a direction from APRA to comply with a condition on authorisation (section 112).

These two offence provisions replicate offences that currently exist under Parts 2A and 2B of the SIS Act. As this Bill creates an authorisation process that generally mirrors the licensing process under the SIS Act, it was necessary to provide similar offence provisions.

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 FHSA holders are adequately protected.

In particular, the trustees are undertaking a new, non-superannuation business in providing FHSAs, and as such are required to satisfy APRA that they have sufficient resources and experience to do so. It is important for APRA to ensure that trustees who provide FHSAs continue to have sufficient resources, including financial, technological and human resources, to undertake this activity. The requirements to report significant breaches to APRA, and to comply with APRA's directions to comply with conditions on authorisation, are fundamental in APRA's ability to prudentially supervise the FHSA activities of trustees.

Strict liability offences have been used in these two circumstances 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; and in relation to complying with APRA's direction, the prosecution would be required to prove that a person intentionally refrained from complying with APRA's direction.

Proof of intent in both cases would be peculiarly within the knowledge of the defendant, and 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 and APRA's ability to protect FHSA holders by ensuring that FHSA providers that are RSE licensees continue to comply with the fundamental prudential regulatory requirements, including conditions on these FHSA providers' authorisation.

Personal rights and liberties (subsections 91(4) and 102(4))

The Committee sought advice as to whether sections 91 and 102 of the Bill unduly trespass on personal rights and liberties, including:

- where an application for authorisation as an FHSA provider is not decided within the prescribed period or an extended period, the application is taken to be refused (subsection 91(4)); and

- where an application for a variation or revocation of a condition on authorisation as an FHSA provider is not decided within the prescribed period or an extended period, the application is taken to be refused (subsection 102(4)).

As mentioned, it is fundamental to the prudential regulation framework for FHSAs that only RSE licensees that have the requisite experience and resources, including financial, technological and human resources, be permitted to offer this new, non-superannuation product. Managing entry into this sector allows APRA to fulfil its duties to promote a stable and competitive financial system and protects the interests of consumers that hold FHSAs.

In relation to applications for authorisation, it is necessary that APRA be satisfied an RSE licensee has the required resources and experience to offer FHSAs before granting authorisation. Likewise, a condition on the RSE licensee's authorisation relates to fundamental prudential requirements. Where the entity seeks to vary or revoke a condition on authorisation under section 102, it is necessary that APRA be satisfied that such a variation or revocation is justified and will not have an adverse impact on the prudential soundness of the entity.

Under sections 90 and 101 of the Bill, APRA may request further information from the applicant in relation to its application. APRA would request further information where it is not satisfied, on the available information, that the RSE licensee has the requisite resources and experience to offer FHSAs or the variation or revocation of conditions on authorisation is justified and will not have an adverse effect on the prudential management of the entity.

In both circumstances, it would be inappropriate for the application to be 'deemed' to be granted merely because the RSE licensee has failed to provide the necessary information to APRA within the prescribed period such that APRA could not make a decision based on the available information.

APRA has the flexibility under sections 91 and 102 to extend the period for making a decision by a further 30 days. If the application lapses because of subsection 91(4) or subsection 102(4), the entity may submit a further application under sections 89 or 100 with any additional required information.

It is expected that APRA will make decisions within the initial period for decision or the extended period for decision, to facilitate RSE licensee's entry into this market and maintain competitive neutrality relative to FHSA providers that are authorised deposit-taking institutions or life insurance companies. It is also expected that applicants will provide any required additional information to APRA within the initial period or the extended period for decision.

Setting the rate of a fee by regulation (paragraph 131(2)(a))

Paragraph 131(2)(a) permits the Governor-General to make regulations prescribing fees in respect to any matter under the Bill. Subsection 89(2) is the only provision in the Bill that provides for a fee to be prescribed. It says that an application by an Registrable Superannuation Entity (RSE) licensee for authorisation as an FHSA provider must be accompanied by the application fee (if any) specified in regulations.

It is appropriate for the amount of the application fee (if any) to be set by regulation. It is essentially an administrative charge for which the Government has the expertise and capacity to work out an appropriate quantum and advise the Governor-General as to the making of a suitable regulation.

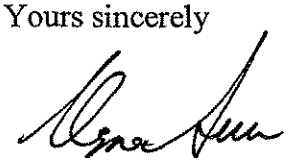
The Committee's concern that the fee may become a tax is not warranted. It is not necessary to include in section 131 of the Bill words to the effect that the fee must not constitute a tax. This principle is an existing limitation on legislative drafting which does not need to be stated expressly in each Act that provides for a fee to be prescribed by regulation. In addition, if the fee did become a tax, it would be invalid.

The Government does not consider that there any need to impose limits on the power of the Governor-General to set the amount of the application fee. A regulation setting the fee is subject to the normal processes of Parliamentary scrutiny for legislative instruments under which either House of Parliament can disallow the regulation.

Finally, because the fee provisions in the Bill apply only to RSE licensees, they closely follow the provisions in the SIS Act that govern applying for RSE licences.

I trust this explanation will assist the Committee in its consideration of the Bill.

Yours sincerely



WAYNE SWAN

CHRISTINE MILNE

Australian Greens Senator for Tasmania

Senator Ellison
Chair, Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

16/06/2008

Dear Senator Ellison

Further to previous correspondence (12 June) regarding the Committee's concerns about my Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008.

The Committee subsequently advised that my amendments left one query unaddressed; that is that why the feed-in tariff rate is set by delegated legislation.

The reason for this is that the scheme must be flexible and responsive to changes in the take-up rate of different forms of renewable energy technologies. As you can see from the legislation, at the end of each year the Minister will receive a report on the take-up rates of each type of technology. The Minister may then choose to increase rates for technologies considered to be falling behind their potential, or may decrease the rate for technologies which are being over-subscribed. As you can see from the legislation, there are very tight timeframes of 15 days for reporting and 28 days for setting the rate and it is not possible for primary legislation to meet those timeframes imposed on the Minister.

Because of the nature of the scheme and the timeframes required for it to be successful, the mechanism of primary legislation is unworkable; it is for this reason that the mechanism of subordinate legislation was selected.

I do note the Committee's recommendation that the subordinate legislation needs to have full parliamentary scrutiny and I think the legislation is now improved by that recommendation of the committee.

Thankyou for bringing this matter to my attention. Please note that I will seek to have the Bill referred to Environment, Communications and the Arts Committee this afternoon.

Yours sincerely

Christine Milne

Parliament House, Canberra ACT 2600 • Phone: 02 6277 3377 • Fax: 02 6277 3000

CHRISTINE MILNE

Australian Greens Senator for Tasmania

12 June 2008

Senator Ellison
Chair, Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Senator Ellison

Thankyou for your letter of 5 June in which you raised a number of matters regarding the Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008.

The matters you raised are acknowledged and because of advances in the policy basis of the bill I will now be amending the bill to provide for the application of the Legislative Instruments Act to instruments and statements under sub clauses 34D (15) and 34E(5). When the bill is in the Committee of the whole the Senator will move the attached amendment.

Thank you for bringing this matter to my attention.

Yours sincerely

Christine Milne
Australian Greens Senator for Tasmania

2008

The Parliament of the
Commonwealth of Australia

THE SENATE

Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008

(Amendment to be moved my Senator Milne on behalf of the Australian Greens in committee of the whole)

(1) Schedule 1, item 2, page 8 (lines 12 to 15), subclause 34D (15), omit the subclause, substitute:

(15) The feed–in–tariff rates set under subsection (1) or (2) are legislative instruments for the purpose of the *Legislative Instruments Act 2003*.

[Feed–in–tariff rate disallowable]

(2) Schedule 1, item 2, page 9 (lines 3 to 6), subclause 34E(5), omit the subclause, substitute:

(5) The feed–in–tariff levy rates set under subsection (1) is a legislative instrument for the purposes of the *Legislative instruments Act 2003*.

[Feed–in–tariff rate disallowable]

Steve Fielding **Family First** Senator for Victoria

5 June 2008

Senator Chris Ellison
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I am writing in response to the Scrutiny of Bills Alert Digest No.4 of 2008 regarding the *Unit Pricing (Easy comparison of grocery prices) Bill 2008*.

The Committee raised two concerns with the Bill.

Commencement on Proclamation – Schedule 1

The commencement date for the bill is set at 12 months to assist those who must comply with the unit pricing scheme. It would give supermarkets the necessary time to upgrade their systems to implement a complex scheme, in some cases across national networks.

Both Coles and Woolworths in public comments on unit pricing have estimated that implementation of a unit pricing scheme would take about one year.

Legislative Instruments Act – declarations – Schedule 1, item 2

The provision in subsection 18ZZU(5) is purely declaratory as the direction is not legislative in character.

I trust these explanations satisfy the Committee.

Yours sincerely

Senator Steve Fielding
Leader of Family First

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