SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2014

12 February 2014

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator Helen Polley (Chair)
Senator Anne Ruston (Deputy Chair)
Senator Cory Bernardi
Senator the Hon Kate Lundy
Senator the Hon Ian Macdonald
Senator Rachel Siewert

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 2014

The committee presents its *First Report of 2014* 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:

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 29 January 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill is part of a package of bills to repeal the legislation that establishes the carbon pricing by the end of the 2013-14 financial year. The bill repeals the following Acts:

- Clean Energy Act 2011 (CE Act);
- Clean Energy (Charges—Customs) Act 2011;
- Clean Energy (Charges—Excise) Act 2011;
- Clean Energy (Unit Issue Charge—Auctions) Act 2011;
- Clean Energy (Unit Issue Charge—Fixed Charge) Act 2011; and
- Clean Energy (Unit Shortfall Charge—General) Act 2011.

The bill also:

- makes consequential amendments to other legislation referring to the CE Act and the carbon pricing mechanism;
- provides for the collection of all carbon tax liabilities for 2012-13 and 2013-14 financial years;
- introduces new powers for the ACCC to take action to ensure price reductions relating to the carbon tax repeal are passed on to consumers; and

- makes arrangements for the finalisation and cessation of industry assistance through the Jobs & Competitiveness Program, the Energy Security Fund and the Steel Transformation Plan.

Trespass on personal rights and liberties—onus of proof
Schedule 2, item 3, proposed subsection 60D(3) of the *Competition and Consumer Act 2010*

Proposed section 60D of the *Competition and Consumer Act* empowers the ACCC to issue a written notice to a corporation if it is considered that the corporation has engaged in price exploitation, the definition of which relates to unreasonably high prices being charged (see proposed section 60C). Proposed subsection 60D(3) provides that such a notice will be prima facie evidence in any proceedings that the price charged for the supply was unreasonably high, and that the unreasonably high price was not attributable to matters to be taken into account under proposed section 60C which are relevant to a conclusion of price exploitation.

The effect of this provision appears to place an onus on the supplier to prove that prices were not unreasonably high in any relevant court proceedings (see explanatory memorandum at page 55). The *Guide to Framing Commonwealth Offences, Infringement notices and Enforcement Powers* (at page 53) cautions against the use of presumptions of fact that are taken to exist unless proven otherwise, and the practice of the committee is that such presumptions be kept to a minimum and that a justification be provided in the explanatory memorandum. Although the effect of proposed subsection 60D(3) is noted in the explanatory memorandum, the reasons why the approach is considered necessary and reasonable are not elaborated. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's general comment

In consultation with the Treasurer, the Hon Joe Hockey MP, I have considered the Committee's comments and respond to each of these issues raised.

The duration of the price exploitation provision

The price exploitation provisions will only have effect during the carbon tax repeal transition starting from 1 July 2014 and ending on 30 June 2015.

Minister's response - extract

Trespass on personal rights and liberties--onus of proof
Schedule 2, item 3, proposed subsection 60D(3) of the *Competition and Consumer Act 2010*

Proposed new subsection 60D(3) only has the effect of reversing the onus of proof in the event proceedings are brought against the supplier. In the first instance, the notice is simply intended to give the supplier adequate and clear notice of the Australian Competition and Consumer Commission's concern so that it has the opportunity to provide information which shows that there has not been a contravention of proposed section 60C or to correct its behaviour. Indeed, no further action may need to be taken against the supplier or, if action need[s] to be taken, the notice would be likely to have the effect of confining the issues in subsequent proceedings. In circumstances where proceedings are actually brought against a supplier to which a notice has been given, it is appropriate that the notice be *prima facie* evidence of its contents. This is because the information available to rebut the presumption will be in the possession of the supplier (for example, the supplier's costs) and the supplier is therefore best placed to provide it. This is an instance where the relevant evidence is peculiarly within the knowledge of the defendant, it would be significantly more difficult and costly for the Commission to prove than for the defendant and it is appropriate to reverse the onus of proof.

I note that such a provision is not unprecedented. Section 151AN of the *Competition and Consumer Act 2010* makes similar provision in relation to the issuing of competition notices given under section 151 AL (located within Part XJB).

Committee Response

The committee thanks the Minister for his timely reply and notes the arguments made supporting the proposed approach, which are consistent with the Commonwealth *Guide to Framing Commonwealth Offences*. **The committee requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 8 of 2013 - extract

Possible retrospective commencement

The explanatory memorandum notes, at page 6, that '2013-14 will be the last financial year that the carbon tax will apply, even if the Parliament does not pass the Carbon Tax Repeal Bills until after 1 July 2014'.

If the bill is passed after 1 July 2014 without amendment to its commencement then some provisions will have a retrospective effect. The committee notes that it has a long-standing objection to retrospective provisions if they will, or might, have an adverse effect on any person.

The committee expects that if the bill is likely to, or will, have a retrospective effect that this will be fully justified in material accompanying the bill, including in a supplementary explanatory memorandum if one is required. The committee draws its view to the attention of the Minister and the Senate.

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

Minister's response - extract

Possible retrospective commencement

The Bill provides for the repeal of the carbon tax. Direct liability for the carbon tax accrues on a financial year basis with liability payment, emissions reporting and verification being undertaken on a financial year basis.

Therefore, for reasons of administrative convenience and clarity, it is important that the end of the carbon tax aligns with the end of a financial year. Doing so provides certainty and stability and ensures that entities that directly pay the carbon tax (called ' liable entities') are not required to invest in costly reporting and compliance arrangements to determine a part-year carbon tax liability. To avoid this, the Government has committed to ending the carbon tax on 1 July 2014.

I note the Committee's concern about retrospective legislation, in particular in relation to provisions that may trespass unduly on personal rights and liberties. The overwhelming

majority of the provisions of the Bill relieve liable entities of obligations and do not trespass on personal rights and liberties.

To the limited extent that the Bill would affect personal rights and liberties retrospectively if enacted after 1 July 2014, it would not unduly trespass on rights and liberties.

Consistent with the Government's election commitments to repeal the carbon tax and to provide certainty to Australian businesses and those entities that are liable to pay the carbon tax, the Bill has been prepared and introduced to the Parliament as a matter of priority and ends the carbon tax at the first possible date (1 July 2014).

Given the importance of ending the carbon tax at the end of a financial year and despite the fact that the Government does not intend the bill to commence retrospectively, the explanatory memorandum included a statement of the Government's position on 2014-15 carbon tax liabilities to provide clarity to stakeholders, in the event of any delay in the passage of the Bill.

Thank you for bringing these issues to my attention and I trust that the Committee's concerns have been fully addressed. As the Committee's concerns include amendments to the *Competition and Consumer Act 2010*, a copy of this correspondence has also been sent to the Treasurer.

Committee Response

The committee thanks the Minister for this response and notes the information provided. While the committee appreciates that it is relevant to link the amendments to a financial year, If there is a delay in passage of the bill beyond the date intended by the Government, stakeholders and executive decision-makers may be faced with a practical dilemma of whether to fulfil their obligations under the existing law or disregard these obligations in light of the government's announcement that it is committed to repeal them. Therefore, foreshadowing a retrospective application does not promote legal certainty about rights and obligations. **However, in the circumstances the committee draws its concerns to the attention of Senators and leaves the matter to the consideration of the Senate as a whole.**

Environment Legislation Amendment Bill 2013

Introduced into the House of Representatives on 14 November 2013
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 10 February 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* and the *Great Barrier Reef Marine Park Act 1975* to:

- provide legal certainty for decisions that require the Minister to have regard to approved conservation advice for relevant threatened species or ecological communities; and

- provide additional protection for turtles and dugong.

Retrospective validation
Schedule 1, item 2

This item provides that decisions and other instruments that (prior to the commencement of the proposed amendments) would have been invalid due to a failure to consider a matter required by the legislation to be considered (namely, approved conservation advice) are to be taken as valid and effective, as if the legal requirement had been complied with.

Item 1 of Schedule 2 makes an amendment that has the same effect with prospective operation, that is, it provides that failure to have regard to approved conservation advice does not render a decision invalid (even though the Minister has a statutory obligation to consider the matter). Items 1 and 2 are said to address the implications arising from the Tarkine case, in which the Federal Court invalidated a decision to approve a development plan to operate a mine in Tasmania on the basis that the Minister failed to comply with a statutory obligation to consider approved conservation advice in relation to the Tasmanian Devil.

Although the High Court has accepted that in at least some circumstances Parliament can specify the remedial consequences of breach of a statutory provision, the committee has raised concerns about this being done with retrospective effect. The retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this case, the detrimental effect may be on the right of an 'aggrieved person' to bring proceedings under the *ADJR Act* to enforce the requirements of the *EPBC Act*. The practical effect of item 2 of Schedule 1 is that a decision which was invalid when made cannot be challenged by such an aggrieved person under the ADJR Act.

The explanatory memorandum justifies the approach on the basis that it will 'provide certainty for past and future decisions and instruments made or entered into by the Minister' (at page 2) and 'will benefit proponents by providing certainty for existing decisions and the projects that rely on those decisions' (at page 7).

Although certainty for proponents is of relevance, the committee considers that a fuller justification for the approach should be sought in light of the retrospective operation. It is not clear that the impact of the Federal Court decision in the *Tarkine* case is that many other decisions under the EPBC Act are also invalid. Other decisions under that Act would only be invalid if it could be established on the facts of each case that the Minister had failed to comply with his or her statutory obligation to consider any approved conservation advice. Here it is noted that challenges under the ADJR Act (like the *Tarkine* case) must, in general, be brought within 28 days of the provision of a statement of reasons for the decision**. The committee therefore seeks the Minister's further advice as to the extent of uncertainty for proponents and why this is thought sufficient to justify retrospectively validating decisions that are contrary to statutory obligations imposed by the Parliament. The committee also seeks the Minister's advice as to whether the amendment may affect any proceedings which have yet to be determined.**

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

Minister's response - extract

1. In relation to Schedule 1 of the Bill (Amendments relating to approved conservation advice), the Committee seeks further advice as to the extent of uncertainty for proponents and why this is thought sufficient to justify retrospectively validating decisions that are contrary to statutory obligations imposed by the Parliament.

I note the Committee's concern that the retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this instance, the Bill is designed to ensure the validity of decisions made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) prior to 31 December 2013 to provide certainty to industry and the community. I consider it essential to ensure that all projects with existing approvals under the EPBC Act, including major projects with long-term investment benefits for the Australian economy, have legal certainty.

As the Committee is aware, the need for the amendment relating to the consideration of approved conservation advice has arisen as a result of the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (the *Tarkine* case).

In this case, the decision brief relied on by the former Minister for the approval given to Shree Minerals Limited stated that approved conservation advices had been considered in the preparation of the advice from the Department of the Environment (the Department) and had informed the Department's recommendations. However, the relevant approved conservation advice document itself was not attached or specifically referred to in the briefing for the approval.

The judgement in the *Tarkine* case has potential implications for approval decisions which have been made under the EPBC Act since January 2007, when amendments to the EPBC Act made it mandatory to consider relevant approved conservation advice in certain circumstances.

I note that the Committee's response states that challenges under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (like that of the *Tarkine* case) must, in general, be brought within 28 days of the provision of a statement of reasons for the decision. However, I also note that there's no limitation period provided for the making of an application under section 39B of the *Judiciary Act 1903* (Cth). Additionally, the existence of time limits, where applicable, may not constitute an absolute bar to proceedings as a court could still grant leave to commence proceedings of this type.

Noting that the degree of legal risk to each EPBC Act approval since 2007 as a result of the *Tarkine* case would turn on the facts of each individual case, the Federal Court's decision raises genuine uncertainty as to the legal validity of those decisions. The Bill is therefore reasonable and necessary in order to provide the assurance to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality, that is, the Department did not attach approved conservation advices to a decision brief.

I also note that, since the Committee's report in *Alert Digest No. 8 of 2013,* the Bill was amended in the House of Representatives to remove the prospective application of the amendment and provide that a failure to have regard to an approved conservation advice will not invalidate a relevant decision under the EPBC Act prior to 31 December 2013.

Since the Federal Court declared the environmental approval given to Shree Minerals Limited invalid on 17 July 2013, the Department has ensured that relevant approved conservation advices are included in the package of information provided to me when making relevant decisions.

2. The Committee also seeks advice as to whether the amendment may affect any proceedings which have yet to be determined

I am advised that there are no related proceedings currently before the courts which would be affected by the retrospective application of Schedule 1 of the Bill (Amendment relating to approved conservation advice). Specifically, there are no related proceedings to the *Tarkine* case nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.

Committee Response

The committee thanks the Minister for this timely and detailed response and notes the information provided. However, the committee notes that the failure to consider the approved conservation advice in the Tarkine case was not characterised as a 'technicality' by the Federal Court. Rather, the Court considered that the approved conservation advice contained important information that was not included in the other material placed before the Minister and that this material raised issues of significance for the Minister's consideration of the likely impact of the proposed mine on the threatened species (ie the Tasmanian Devil).

The committee accepts that the Tarkine decision may create a level of uncertainty as to the legal validity of other decisions made under the EPBC Act, though it remains unclear how many cases would be affected. Nevertheless, the committee further notes that decisions made in the absence of significant conservation information (contained in approved conservation advices) the substance of which is not otherwise before the Minister may result in decisions that are inconsistent with the objectives of the EPBC Act.

However, having noted these matters - and in view of the detailed response received from the Minister - the committee leaves the question of whether the retrospective validation of decisions which fail to consider approved conservation advice is appropriate to the consideration of the Senate as a whole. The committee also requests that the key information provided in the Minister's response be included in the explanatory memorandum.

Alert Digest No. 8 of 2013 - extract

Trespass on personal rights and liberties—penalties and strict liability
Schedule 2

This schedule makes a number of amendments to the EPBC Act and the GBRMP Act, the effect of which is to triple criminal financial penalties and civil penalties for a range of offences relating to the killing, illegal trade and transportation of dugong and turtle populations. The amendments also apply strict liability to the physical elements of the offences, 'for example, in respect of the EPBC Act, that the animal to which the offence relates is a member of a listed threatened species' (statement of compatibility, page 4). As is noted in the statement of compatibility, however, strict liability still allows a defence of honest and reasonable mistake to be raised. The statement of compatibility further argues that the application of strict liability is a proportionate limitation to the right to the presumption of innocence because of the high public interest in protecting and conserving marine turtle and dugong populations'. The increase in penalties is thought necessary to ensure strong deterrence. These general arguments are elaborated in relation to the particular amendments in the explanatory memorandum, where it is also noted that the committee's views on strict liability and the *Guide* have been considered.

In light of the justification provided in the statement of compatibility and explanatory memorandum the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Minister's response - extract

3. In relation to Schedule 2 of the Bill.(Amendments relating to turtles and dugong), the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties. However, in light of the justification provided in the statement of compatibility and explanatory memorandum the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

I note the Committee's comments in relation to Schedule 2 of the Bill (Amendments relating to turtles and dugong), including that the detail provided in the statement of compatibility and the explanatory memorandum explains the application of strict liability as a proportionate limitation to the right to the presumption of innocence because of the high community concern in protecting and conserving marine turtle and dugong populations.

Further, as stated in the explanatory memorandum, the increase in penalties proposed by the amendments is considered necessary to ensure strong deterrence. I am of the view that the justification provided in the statement of compatibility and the explanatory memorandum is sufficient.

I trust that the above information meets the Committee's requirements and that my response will be considered by the Committee in its next report.

Committee Response

The committee thanks the Minister for taking the opportunity to provide this additional information.

Grape and Wine Legislation Amendment (Australian Grape and Wine Authority) Bill 2013

Introduced into the House of Representatives on 14 November 2013
Portfolio: Agriculture

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 11 December 2013. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill is part of a package of three bills. The bill amends the *Wine Australia Corporation Act 1980* to implement the merger of the Grape and Wine Research and Development Corporation (GWRDC) and the Wine Australia Corporation (Wine Australia) to create a new wine statutory authority: the Australian Grape and Wine Authority (the Authority).

The bill also provides for the transfer of assets and liabilities from the GWRDC and Wine Australia to the Authority.

Trespass on personal rights and liberties—reversal of onus
Schedule 2, subitem 26(3)

This subitem provides a defence to a civil penalty provision for contravention of a final reporting requirement by a director of the Australian Grape and Wine Authority. The defence is available if the contravention consists of an 'omission from the financial statements' that 'was immaterial and did not affect the giving of a true and fair view of the matters required by the Finance Minister's Orders to be included in the statements'. The defendant must prove the relevant particulars to rely on the defence.

The explanatory memorandum does not indicate why it is appropriate to reverse the onus of proof in relation to these matters, nor why a legal rather than an evidential burden of proof is appropriate. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

Sub item 26(3) was included in the Bill based on sub item 11(2) of the *Commonwealth Authorities and Companies Act 1997* (CAC Act). The provision is intended to ensure that annual reporting rules for the new authority are consistent with those set out in the CAC Act, so that directors of the proposed Australian Grape and Wine Authority would be at no advantage or disadvantage under the proposed arrangements by the Bill.

At least two other items of legislation exist that have included a similar provision; the *Screen Australia and the National Film and Sound Archive of Australia (Consequential and Transitional Provisions) Act 2008* and the *Australia Council (Consequential and Transitional Provisions) Act 2013.*

As noted by the Committee, sub item 26(3) reverses the onus of proof; however, this is not considered undue as the intent is to ensure consistency with the CAC Act and the provision only applies to directors of the proposed authority without creating any wider imposition.

I trust the Committee will be satisfied with this justification.

Committee Response

The committee thanks the Minister for this timely response. The committee notes that the reply does not substantively address whether the increased burden of proof is appropriate in the specific circumstances beyond the argument that it is appropriate for the approach to be consistent with that in the CAC Act. **However, in the circumstances the committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Introduced into the House of Representatives on 4 December 2013
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No.9 of 2013*. The Minister responded to the committee's comments in a letter dated 24 January 2014. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2013 - extract

Background

This bill amends the *Migration Act 1958* to remove the criterion for grant of a protection visa on 'complementary protection' grounds, and other related provisions.

The purpose of this bill is to change the process for determining whether Australia's *non-refoulement* obligations under the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) are engaged in particular cases.

The current system is based on the provisions of the *Migration Act 1958* (Cth). Under that Act a protection visa may be granted on the basis the applicant is a refugee as defined in the Refugee Convention or on the basis that *non-refoulement* obligations under CAT and the ICCPR are owed.

The proposed amendments would remove the criterion for grant of a protection visa on the basis of 'complementary protections' (i.e. on the grounds that obligations are owed to the applicant under the CAT or ICCPR). The grounds that engage Australia's obligations under these treaties are, in summary, that there is a real risk the person would suffer significant types of harm (including torture). The explanatory memorandum states that by removing this criterion for grant of a protection visa it is not the government's intention to resile from Australia's obligations under CAT and the ICCPR. Rather 'Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012'.

The explanatory material indicates that the process envisaged is not going to be directly regulated by statute, though it may lead to the exercise of statutory powers under the *Migration Act*. More particularly, '[w]here the Minister is satisfied that the person engages Australia's *non-refoulement* obligations under the CAT and the ICCPR, it is then available to the minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa' (at page 1). (The relevant provisions are sections 195A, 351, 391, 417, 454 and 501J of the *Migration Act*.) In the statement of compatibility it is stated that 'the form of the administrative arrangements [to be] put in place to support Australia in meeting its obligations is a matter for the Government' (at page 2). Further, the statement of compatibility indicates that although Australia's international obligations may be fulfilled through processes that ultimately result in the exercise of the Minister's personal, non-compellable powers under the *Migration Act*, it notes that they may, in the alternative, be fulfilled through 'pre-removal assessment procedures' (also at page 2).

Insufficiently defined administrative powers

General

As noted above, the explanatory memorandum states, at page 1, that the bill seeks to implement a process in which:

> Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012.

The envisaged 'administrative process' is not regulated by statutory powers and, therefore, is not constrained by the limits statutory powers would necessarily impose.

The committee understands that administrative powers are proposed in bills from time-to-time and in these instances considers whether the relevant provisions could 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers' (standing order 24(1)(a)(ii)).

On this occasion the explanatory memorandum contains few details about the envisaged non-statutory administrative process. Although the explanatory materials (at page 1) state that the 'purpose of the amendments in this Bill is to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways', there is no statutory guidance in relation to the administrative process and no detail provided as to how the administrative powers will operate.

It therefore appears that the purely administrative process by which the applicability of Australia's *non-refoulement* obligations will be determined is likely to render rights, liberties or obligations unduly dependent upon insufficiently defined

administrative powers. The committee therefore seeks the Minister's advice as to the justification for this approach.

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

Minister's response - extract

This Bill seeks to remove the complementary protection criterion from the *Migration Act 1958* (the Act) and instead re-establish an administrative process similar to the Ministerial intervention and pre-removal assessment processes in place prior to the complementary protection legislation being enacted in March 2012.

Before 24 March 2012, Australia complied with its *non-refoulement* obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* and the International Covenant on Civil and Political Rights (ICCPR) either through a pre-removal clearance process or a Ministerial intervention process in which the Minister considered whether to exercise his or her personal public interest powers under the Act to grant a person in respect of whom Australia had no11-r~foulement obligations a particular type of visa to remain in Australia.

It is the Government's intention to establish a new administrative process that is more transparent and efficient in its consideration of complementary protection claims and includes the development of a more effective decision making model. The new process will again support the Minister in the exercise of his or her public interest powers and will do so, in part, on the basis of publicly available guidelines.

This Bill does not propose to resile from or limit Australia's *non-refoulement* obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's *non-refoulement* obligations under these treaties will not be removed from Australia in breach of these obligations.

Under the new administrative process, where a person believes they may be subjected to significant harm upon return to their home country for a non-Refugees Convention reason, the person will be able to make a request to have their protection claims considered under the CAT and the ICCPR. An assessment of these claims will be undertaken for the purpose of the Minister considering whether to exercise his or her personal and non-compellable public interest powers.

Where a person's specific circumstances are found to engage Australia's *non-refoulement* obligations as interpreted by the Government in accordance with international law, their case will be referred to the Minister for Immigration and Border Protection for consideration of whether it is in the public interest for the Minister to use his or her statutory powers to intervene and grant an appropriate visa for the person's individual circumstances. As per the administrative process in place prior to March 2012, engaging *non-refoulement* obligations under the CAT or the ICCPR will be re-established as a unique or exceptional circumstance within the Minister's Guidelines for referral of cases.

Given this framework, the administrative powers will be clearly defined and rely on legislatively based powers. It is therefore incorrect to characterise the process as purely administrative or insufficiently defined.

Committee Response

The Committee thanks the Minister for this timely response. The committee appreciates the Minister's further information about the administrative process (see also *Alert Digest No. 1 of 2014* for the committee's views on a related issue in another migration bill). However, despite the additional information it appears that there are areas in which further information would be useful in order to understand the detail of the process. For example, while the committee notes that Ministerial guidelines will be made publicly available, it is not aware that the content is publicly available yet. It is also not clear who the relevant decision-makers for the administrative assessment process will be and whether the Minister is necessarily going to consider every case referred by these decision-makers. **However, in light of the information provided by the Minister, the committee draws these matters to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

Rights liberties or obligations unduly dependent upon non-reviewable powers—availability of merits review
Items 17 and 18

An effect of removing 'complementary protection' as an available criterion for the grant of a protection visa is that merits review of protection visa decisions made on the basis of this

criterion will, consequently, no longer be available. This is recognised by the consequential amendments relating to merits review in items 17 and 18.

The scrutiny principles against which the committee assesses bills are articulated in standing order 24 and include an assessment of whether provisions 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions' (standing order 24(1)(a)(iii)).

Although the explanatory memorandum notes, at page 1, that the 'purpose of the amendments in this Bill is to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways', it does not address the justification for the absence of a statutory requirement for merits review for determinations about *non-refoulement* obligations as they will be applied to particular individuals, which will be a practical consequence of these amendments. In addition, it is unclear generally how a purely administrative process can satisfactorily ensure that a person affected by an assessment in relation to complementary protection will have adequate merits review available to them and, in particular, there are no details about how it is proposed that the availability of merits review will be addressed in the administrative scheme envisaged in the context of this bill (such as during the 'pre-removal assessment procedures'). **The committee therefore seeks the Minister's advice as to the justification for the proposed approach and advice as to whether the bill will 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

This Bill seeks to re-establish the consideration of complementary protection issues within an administrative process. Consideration of complementary protection is neither a right nor a liberty. The administrative process will consider whether any of Australia's *non-refoulement* obligations under the CAT or the ICCPR are engaged.

This amendment will apply to a small number of individuals who do not meet the criteria for a protection visa on Refugee Convention grounds, but who the Government considers cannot be removed to a receiving country because that person faces significant harm in that country. Where the Minister for Immigration and Border Protection is satisfied that the

person engages Australia's *non-refoulement* obligations under the CAT or the ICCPR, it will then be open to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

Generally, access to the exercise of these powers is available only to persons who have sought or could have sought, but have not established their right to a visa. In most cases, a person requesting access to the Minister's personal powers has already applied for a Protection visa, sought merits review, sought judicial review and in some instances, appeal, at all of which stages Australian legislation and case law applied.

An applicant for a visa whose application is rejected under section 65 of the Act has, as a general rule, a right to seek merits review from the relevant review tribunal, however, the Act confers no right to merits review of the Minister's decisions under his public interest powers. There is also no obligation imposed upon Australia to provide access to merits review under the CAT or the ICCPR.

These amendments do not limit the ability of applicants to seek merits review in relation to a protection visa application based on Refugees Convention grounds. Any findings of fact regarding a person's protection claims identified during the merits review of their protection visa application will remain relevant to any consideration of Australia's non-refugee *non-refoulement* obligations under the Minister's public interest powers. As was the case prior to the enactment of the complementary protection legislation, it is proposed that the review tribunal will, upon identifying complementary protection issues during the course of its review of the case, refer cases for consideration of the exercise of the Minister's intervention powers.

The Government does not consider that the Bill raises issues of undue dependence on non-reviewable decisions.

Committee Response

The committee thanks the Minister for this timely response, but draws Senators' attention to a number of comments in relation to it:

- the committee notes the Minister's statement that 'in most cases' a person invoking Australia's *non-refoulement* obligations under CAT or the ICCPR and who ultimately asks for the Minister's personal powers under the *Migration Act* to be invoked will also have applied for a protection visa, which provides access to all of the appeal options relevant to that process. However, this is not a prerequisite and it is not clear how many cases may fall outside this category. While there is merits review for protection visa applicants, it is possible that not every person invoking *non-refoulement* obligations will have applied for a protection visa; and

- regardless of whether or not the CAT and the ICCPR do not require merits review, decisions with respect to complementary obligations have a direct and significant impact on the affected individuals analogous to the impact of protection visa provisions. Therefore the committee is not persuaded that the bill does not raise the question of whether merits review should be available or whether compliance with Australia's *non-refoulement* obligations under CAT or ICCPR can appropriately be left to the exercise of the Minister's personal non-compellable powers.

The committee therefore remains concerned about this matter, especially given the fact that the details of the administrative scheme remain uncertain (notwithstanding the additional information Minister provided about this matter, outlined in a preceding comment above). **However, in the circumstances the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

Rights liberties or obligations unduly dependent upon non-reviewable powers—availability of judicial review

Transferring the determination of 'complementary protection' obligations from a statutory basis to a non-statutory administrative process may also have important consequences for the availability of judicial review. Although the High Court's jurisdiction under section 75(v) of the *Constitution*[1] would continue to be available in principle (assuming that the relevant decision-maker was an 'officer of the Commonwealth'), in practice the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability.

If the new administrative process for decision-making foreshadowed in the explanatory memorandum is linked to the exercise of the Minister's personal and non-compellable intervention powers to grant a person a visa under the *Migration Act* (see sections 195A, 351, 391, 417, 454 and 501J), the scope for judicial review will depend on whether the Minister has made a decision to consider the exercise of these powers in a particular case. If the Minister refuses to even consider the exercise of these powers, the result is likely to be that judicial review would in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may

[1] The *Judiciary Act 1903* (Cth) confers upon the Federal Court and Federal Circuit Court a similar jurisdiction to that granted to the High Court under s 75(v) of the Constitution.

arise as to the utility of declaratory relief. (For example, by a *writ of mandamus*: the High Court considered these powers under the Migration Act in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.)

As noted above, the explanatory memorandum suggests that the Australia's obligations under the CAT and the ICCPR may be fulfilled through 'pre-removal assessment procedures' as an alternative to the exercise of the Minister's personal and non-compellable intervention powers under the *Migration Act* (see page 2 of the explanatory memorandum). However, the explanatory materials do not contain details about what this process would involve. Assuming the ultimate source of power exercised is non-statutory Executive power, then questions may arise as to how effective judicial review of its exercise would be. The 'constitutional writs' (such as *mandamus*) are available only on the basis of jurisdictional errors and, typically, such errors are identified by reference to the statute under which a decision is made.

The committee therefore seeks the Minister's advice as to the extent to which judicial review may, in practical effect, be limited under the new arrangements. In addition, if the amendments would diminish the practical effectiveness of judicial review in securing legal accountability, the committee seeks the Minister's justification for this result.

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

This Bill seeks to re-establish an administrative process similar to that which was in place prior to the commencement of the complementary protection framework in March 2012.

As the Committee has identified in its comments, a decision by the Minister not to exercise his or her non-compellable intervention powers to grant a visa to a person is not judicially reviewable. The Minister can also not be compelled to exercise these powers.

The committee in their comments also made reference to *Plaintiff M61/201 OE v Commonwealth of Australia [2010] HCA 41* (M61/2010E). The decision in M61/2010E effectively rendered the processes leading up to the exercise of the Minister's non-compellable powers under sections 46A and 195A of the *Migration Act* 1958, judicially reviewable.

The Committee indicated in its comments that "Australia's non-refoulement obligations under the CAT and the ICCPR may be fulfilled through 'pre-removal assessment procedures' as an alternative to the exercise of the Minister's personal and non-compellable intervention powers". The pre-removal assessment process is not an alternative process to the exercise of the Minister's intervention powers. The pre-removal assessment process is undertaken as a final check to ensure that Australia's *non-refoulement* obligations under the Refugees Convention, the CAT and the ICPPR have been satisfied prior to progressing a person's removal from Australia (ie. using the removal powers under section 198 of the Act). Prior to the enactment of the complementary protection legislation, in some cases this was the first consideration of claims made against Australia's *non-refoulement* obligations under the CAT and the ICCPR (ie. for cases where protection claims had not previously been made and dealt with). Where the department identified complementary protection issues, the case was referred for assessment against the Minister's Guidelines as to whether the case should be referred to the Minister for consideration as to whether to exercise his or her intervention powers under either section 417 or 195A of the Act to grant a visa.

In *Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33* (SZQRB) the court found that the removal power under section 198 of the Act is not available in the case of a person who seeks to engage Australia's *non-refoulement* obligations under the CAT and the ICCPR unless and until those claims are assessed in accordance with relevant law and in a procedurally fair manner. Under the new administrative process, it is proposed that a pre-removal assessment be undertaken and where that assessment determines a person engages Australia's *non-refoulement* obligations under the CAT or the ICCPR this will result in the referral of the case for consideration against the Minister's Guidelines.

These amendments do not limit the ability of applicants to seek judicial review in relation to a protection visa application based on Refugees Convention Grounds.

In light of the above, the Government does not consider that the practical effectiveness of judicial review will be limited under the new administrative process.

Committee Response

The committee thanks the Minister for his response above, and also the additional information provided in relation to the administrative process applying to *non-refoulement* claims (discussed in a preceding comment above). While the committee has outlined areas in which it would be of assistance for further detail to be provided about the administrative process (such as the nature of the Minister's guidelines, who the relevant decision-makers in the administrative process will be and whether the Minister's personal non-compellable powers will necessarily be exercised in all matters referred to him for consideration) the committee also notes the Minister's assurance that the practical effect of the arrangements is that it is not intended that judicial review be limited in any way. **The committee requests that the key information above in relation to judicial review be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

Undue trespass on rights or obligations—new law applicable to the determination of existing applications and appeals
Items 20 and 21

Item 20 provides that the amendments will apply to applications for a protection visa that were made *before* the commencement date. The explanatory memorandum explains the effect of this item in relation to decisions on such applications made before the commencement date as follows:

> Where there has been a primary decision and the matter is under review or has been the subject of review or judicial review (and has been remitted), the application will not be reviewed against the complementary protection criteria in paragraphs 36(2)(aa) or 36(2)(c).

Item 21 is a transitional provision that has the effect that an application for review to the Refugee Review Tribunal or the Administrative Appeals Tribunal, which is made prior to commencement on the basis that a decision to refuse a protection visa was wrong in relation to the applicability of the complementary protection criteria, cannot be reviewed. As explained in the explanatory memorandum, 'the RRT will be required to apply the amendments made by this Schedule, and not the law that applied at the time of the primary decision'.

The effect of these items is that applications made and decisions appealed, in reliance on the law as it existed at the time of those applications or appeals were lodged, will be determined on the basis of the proposed amendments. Indeed, an applicant for a protection visa may have succeeded in judicial review of such a decision (based on the old law), only to find that their claim will be defeated when remitted to the original decision-maker on the basis of the removal of visa criterion on which their original application relied.

Although the explanatory memorandum explains the legal effect of these provisions it does not explain why it is considered appropriate for these amendments to apply to applications made prior to the commencement of the amendments or to RRT and AAT reviews of decisions made prior to the commencement of the proposed amendments. Further, it is not clear why persons who apply before the commencement of the proposed amendments should not be considered to have an 'accrued right' to have their applications determined according to the law and legal processes that applied at the time their application was lodged (see *Esber v Commonwealth* (1992) 174 CLR 430).

The committee therefore seeks the Minister's further advice in relation to these issues so it may better consider the proposed approach against its scrutiny principles.

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

Minister's response - extract

These amendments apply to all "on hand applications", as well as new applications, because the Government considers that it is appropriate and fair for all applications to be considered through the same process and under the same law. This is consistent with the Government's position that it is not appropriate for *non-refoulement* obligations under the CAT and the lCCPR (that is, complementary protection) to be considered as part of a protection visa application.

Applicants that have had a primary decision to refuse their visa application, prior to the commencement of the Act, will still be able to seek review of that decision in the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT). However, the AAT or RRT will not be able to review those aspects of the primary decision that relied on the complementary protection criteria. This means that the RRT and the AAT will apply the new law when reviewing these decisions, and not the law that existed at the time of the primary decision.

There may be some applicants who have sought judicial review of a decision to refuse an application for a protection visa based on complementary protection grounds. If the court determines that there has been a jurisdictional error and the matter is remitted to the RRT so that it can be considered according to law, the legal position is that there has never been a valid decision to refuse the visa application, which means that the application has never been finally determined. Where a case is remitted after the commencement of the proposed amendments, the new law would apply and any fresh assessment of the application would be made without consideration of the complementary protection criteria. Where this occurs, such cases will be referred for consideration under the new administrative process where complementary protection issues will be assessed.

In relation to the Committee's comments regarding 'accrued rights', whether or not a person is considered to have an 'accrued right' to have their protection visa application determined by reference to the law at the time of application, the Parliament may, by clear legislative intent, take away or modify an accrued right.

These amendments do not take effect prior to their commencement date, but operate prospectively, albeit in respect of already existing protection visa applications. To the extent that any accrued rights are adversely affected, the amendments intend this to occur by virtue of their express application to protection visa applications already made but not finally determined prior to this Act commencing. This overrides any rights that may have been accrued by an applicant to have their application considered in accordance with the law that existed at the time they applied.

Thank you for considering this advice.

Committee Response

The committee thanks the Minister for this timely response. While the committee accepts that accrued rights may be overcome by a clear legislative intention, it remains concerned about the fairness of the proposed approach in terms of whether it might trespass unduly on personal rights and liberties. The approach, in effect, changes the applicable rules in relation to decisions already made which may have been invalidly made or which may on appeal be determined not to be "correct or preferable" by a merits review tribunal. However, in light of the detail provided the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Social Services and Other Legislation Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter received on 11 February 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill amends various Acts to implement a number of measures including:

Encouraging responsible gambling

- repealing the position and functions of the National Gambling Regulator, along with those provisions relating to the supervisory and gaming machine regulation levies, the automatic teller machine withdrawal limit, dynamic warning provisions, the trial on mandatory pre-commitment, and matters for Productivity Commission review;

- amending the pre-commitment and gaming machine capability;

Continuing income management as part of Cape York Welfare

- enabling a two-year continuation of income management as part of the continuation of Cape York Welfare Reform;

Family Tax Benefit and eligibility rules

- from 1 January 2014, the family tax benefit Part A will be paid to families only up to the end of the calendar year in which a teenager is completing school;

Period of Australian working life residence

- requiring age pensioners, and other pensioners with unlimited portability, to have been Australian residents for 35 years during their working life to receive their full

means-tested pension if they choose to retire overseas or travel overseas for longer than 26 weeks from 1 January 2014.

Interest charge

- allowing interest charges to be applied to certain debts incurred by recipients of austudy payment, fares allowance, youth allowance for full-time students and apprentices, and ABSTUDY living allowance;

Student start-loans

- replacing the current student start-up scholarship with an income-contingent loan (the student start-up loan) from 1 January 2014;

Paid parental leave

- removing the requirement for employers to provide Government-funded parental leave pay to their eligible long-term employees;

Pension bonus scheme

- ending late registrations for the closed pension bonus scheme from 1 March 2014;

Indexation

- extending the indexation pauses on certain higher income limits for a further three years until 30 June 2017;

- setting the annual child care rebate limit at $7,500 for three income years starting from 1 July 2014;

Changes to the rules for receiving payments overseas

- reducing the length of time that families can be temporarily overseas and continue to receive family and parental payments from three years to 56 weeks from 1 July 2014;

Extending the deeming rules to account-based income streams

- aligning the income test treatment of account-based superannuation income streams for products assessed from 1 January 2015 with the deemed income rules applying to other financial assets; and

Other amendments

- amending administration of debt recovery under the Student Financial Supplement Scheme, clarifying provisions relating to the time period for lodging tax returns for family assistance purposes, and ensuring that funding under the National Disability Insurance Scheme paid into a person's account cannot be garnisheed for debt recovery purposes.

Delegation of legislative powers—important matters dealt with by regulation
Schedule 5, item 6, proposed section 1229D

This item provides for an interest charge to apply to a person and a debt if the debt has not been wholly paid. It relates to youth allowance, Austudy payment, fares allowance or any other social security payment that is prescribed by the Minister in a legislative instrument.

Allowing for interest to be charged on social security debts will have significant implications for some persons and the appropriateness of doing so may well be thought dependent upon the payment to which the debt relates.

The explanatory memorandum notes that the power to prescribe other social security payments in a legislative instrument will provide flexibility to extend the interest charge and that any such extension of the rules must be through a legislative instrument, and as such, subject to Parliamentary scrutiny and disallowance.

The committee expects that important matters will usually be provided for in primary legislation. Therefore, although the power does give flexibility to the Minister to extend the requirement to pay interest, it is not clear why this flexibility is needed and appropriate given that the sort of matters to which it should apply appears to involve a significant question of policy. **The committee therefore seeks the Minister's further advice as to why such flexibility is required and why the proposed approach is considered appropriate.**

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

Minister's response - extract

The Committee asked why Schedule 5, Item 6 of the Social Services and Other Legislation Amendment Bill 2013 (the Bill) provides flexibility for the Minister to extend, by legislative instrument, the application of the proposed interest charge to social security payments other than student payments.

The interest charge provisions within the Bill seek to reinforce the proposition that persons who received payments from the Commonwealth to which they were not entitled should repay the money in a timely manner where they have the financial capacity to do so. This

proposition cannot be regarded as controversial and I note that any instrument issued by the Minister to extend application of the interest charge would be subject to Parliamentary scrutiny and disallowance.

It is also relevant, in the context of the Committee's concerns, that provisions within the social security law (see sections 1229A and 12298 of the *Social Security Act 1991)* already provide the Minister with the power to apply, via a legislative instrument, a penalty interest charge on any income support payment debt. This power is greater than that set out in the Bill because the Bill carefully prescribes a formula for the rate of the new interest charge whereas the existing provisions give the Minister unfettered discretion in setting the rate of the interest charge.

Taking into account that any instrument seeking to extend application of the interest charge will be subject to the scrutiny of Parliament, and that the power given to the Minister under the new interest charge scheme is more restrained than that available under the existing scheme, I do not consider the provision in Schedule 5, Item 6 of the Bill to be an inappropriate delegation of power.

I trust this information is of assistance.

Committee Response

The Committee thanks the Minister for this response, notes the role of the formula included in the bill, and requests that the key information be included in the explanatory memorandum.

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Introduced into the House of Representatives on 14 November 2013
Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 18 December 2013. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill provides for the following amendments to:

- clarify consistency between the regime and the United Nations Convention on the Law of the Sea (UNCLOS);
- enable domestic submarine cables to be brought within the scope of the regime by regulation;
- provide a structured consultation process between the Australian Communications and Media Authority (ACMA) and the Attorney-General's Department on submarine cable installation permit applications;
- streamline the submarine cable installation permit process by removing the requirement to obtain multiple permits, tightening permit application processing timeframes and reducing unnecessary duplication with the *Environment Protection and Biodiversity Act 1999*; and
- enhance the operation of Schedule 3A by ensuring the protection zone declaration, revocation and variation processes are administratively more efficient.

Exclusion of merits review rights
Items 85 to 88

These items have the effect of excluding the availability of reconsideration by the ACMA (internal review) and merits review by the AAT, where one of the grounds for the ACMA decision refusing a permit includes security or where it concerns a security related permit condition. The justification for the approach points to 'the inherent importance and sensitivity of security' concerns in the context of the legislation and the fact that a person would continue to have a right to seek judicial review (see the explanatory memorandum at page 57). The statement of compatibility states that the exclusion of administrative review of these decisions is 'considered necessary for protecting Australia's national security interests'.

However, it is not clear why *internal* review would compromise national security interests and neither the statement of compatibility nor explanatory memorandum explain in any detail how precisely *merits review* procedures will in all (or some cases) compromise such interests or consider whether the exclusion of review rights is justified in all cases.

The committee therefore seeks the Minister's advice as the justification for the proposed approach.

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to 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.*

Minister's response - extract

Specifically, the Committee has sought advice as to the justification for the proposal under the Bill to exclude: the availability of reconsideration by the Australian Communications and Media Authority (ACMA) and merits review where one of the grounds for the ACMA's decision to refuse a permit includes security or where the ACMA specifies or varies a permit condition relating to security.

The ACMA regulates telecommunications, broadcasting, radiocommunications and the internet. It is responsible for regulating and enforcing the submarine cable protection regime set out in Schedule 3A to the *Telecommunications Act 1997*.

Matters of national security fall within the portfolio of the Attorney-General. The ACMA's powers and functions do not generally extend to dealing with or considering national

security matters and it does not have legislative authority or any particular expertise in this area.

In recognition of the significance of submarine cables as critical infrastructure for Australia, the Bill would require the ACMA to consult the Secretary of the Attorney-General's Department on submarine cable installation permit applications. This already takes place on an informal basis and the Bill seeks to improve certainty and transparency for all stakeholders by formalising these arrangements. During the consultation period on a submarine cable permit application, the Secretary of the Attorney-General's Department may make submission(s) on an application which the ACMA must consider when granting a permit. The submission could include a recommendation that security-related permit condition(s) be imposed.

Where during the consultation process, the Attorney-General's portfolio identifies significant security risks or significant concerns which cannot be mitigated through the imposition by the ACMA of security-related conditions on a proposed permit, the Attorney-General would need to form a view as to whether issuing the proposed permit would be prejudicial to one or more of the grounds of 'security' described in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). If so, the Attorney-General could, in consultation with the Prime Minister and the Minister for Communications, direct the ACMA not to issue a permit. The basis on which the Attorney-General may direct the ACMA to not issue a permit would be drawn from the definition of 'security' in the Bill, which is the same as the definition in the ASIO Act.

Ordinarily, a decision to grant a submarine cable installation permit and/or impose any conditions on a permit is a matter for the ACMA. In these circumstances, where an application is refused by the ACMA on non-security related grounds, it remains appropriate for the ACMA to review the merits of its own decisions, and for the decision to be subject to merit reviews by the Administrative Appeals Tribunal (AAT). The Bill makes provision for this under the *Telecommunications Act 1997.*

However, where a permit application raises security issues, the ACMA would be relying on the advice of the Attorney-General and the Attorney-General's Department. Given the ACMA's decisions in these circumstances would be made in reliance on this expert advice, it would not be practical for the ACMA to review the merits of the advice it is given. As such, a decision by the ACMA to refuse a permit on a security ground or to specify or vary a permit condition relating to security should not be open to reconsideration by the ACMA or merits review under the *Telecommunications Act 1997.*

As the Committee would appreciate, security (in particular national security) forms a well-accepted category of exclusions of merits review under Commonwealth law, such as the *Telecommunications (Interception and Access) Act 1979* and the ASIO Act.

Merits review is not entirely excluded where the ACMA refuses to issue a permit on a security ground following direction by the Attorney-General. A security assessment by the Australian Security Intelligence Organisation (ASIO) would form the basis of consideration by the Attorney-General whether to exercise his or her power to direct the ACMA to not grant a permit. That is, the Attorney-General would only exercise the power where an adverse or qualified security assessment is issued by ASIO in respect of the Attorney-General's power. An applicant who is the subject of an adverse or qualified security assessment would have a right to apply for merits review of that assessment from the AA T under Division 4 of Part IV of the ASIO Act.

The proposed provisions are based on the existing carrier licence application process under the *Telecommunications Act 1997,* particularly sections 56A and 58A. If the Bill is enacted, the proposed provisions will have the same administrative review rights as apply in respect of those existing and analogous sections 56A and 58A.

Committee Response

The committee thanks the Minister for this timely and detailed response. The committee notes that an ASIO assessment would form the basis of the Attorney-General's consideration about whether or not to exercise the relevant power and that an applicant would have some right to apply for merits review. **The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator Helen Polley
Chair

The Hon Greg Hunt MP

Minister for the Environment

MC13-005690

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

29 JAN 2014

Dear Senator Polley Helen

I refer to the Senate Standing Committee's comments of 5 December 2013 concerning two measures in the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013.

In consultation with the Treasurer, the Hon Joe Hockey MP, I have considered the Committee's comments and respond to each of these issues raised.

The duration of the price exploitation provision

The price exploitation provisions will only have effect during the carbon tax repeal transition starting from 1 July 2014 and ending on 30 June 2015.

Trespass on personal rights and liberties—onus of proof
Schedule 2, item 3, proposed subsection 60D(3) of the *Competition and Consumer Act 2010*

Proposed new subsection 60D(3) only has the effect of reversing the onus of proof in the event proceedings are brought against the supplier. In the first instance, the notice is simply intended to give the supplier adequate and clear notice of the Australian Competition and Consumer Commission's concern so that it has the opportunity to provide information which shows that there has not been a contravention of proposed section 60C or to correct its behaviour. Indeed, no further action may need to be taken against the supplier or, if action needed to be taken, the notice would be likely to have the effect of confining the issues in subsequent proceedings. In circumstances where proceedings are actually brought against a supplier to which a notice has been given, it is appropriate that the notice be *prima facie* evidence of its contents. This is because the information available to rebut the presumption will be in the possession of the supplier (for example, the supplier's costs) and the supplier is therefore best placed to provide it. This is an instance where the relevant evidence is peculiarly within the knowledge of the defendant, it would be significantly more difficult and costly for the Commission to prove than for the defendant and it is appropriate to reverse the onus of proof.

I note that such a provision is not unprecedented. Section 151AN of the *Competition and Consumer Act 2010* makes similar provision in relation to the issuing of competition notices given under section 151AL (located within Part XIB).

Possible retrospective commencement

The Bill provides for the repeal of the carbon tax. Direct liability for the carbon tax accrues on a financial year basis with liability payment, emissions reporting and verification being undertaken on a financial year basis.

Therefore, for reasons of administrative convenience and clarity, it is important that the end of the carbon tax aligns with the end of a financial year. Doing so provides certainty and stability and ensures that entities that directly pay the carbon tax (called 'liable entities') are not required to invest in costly reporting and compliance arrangements to determine a part-year carbon tax liability. To avoid this, the Government has committed to ending the carbon tax on 1 July 2014.

I note the Committee's concern about retrospective legislation, in particular in relation to provisions that may trespass unduly on personal rights and liberties. The overwhelming majority of the provisions of the Bill relieve liable entities of obligations and do not trespass on personal rights and liberties.

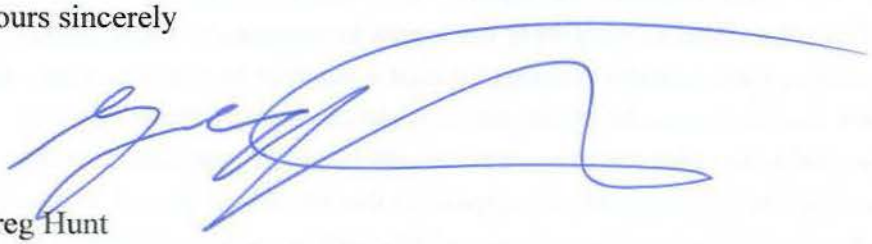
To the limited extent that the Bill would affect personal rights and liberties retrospectively if enacted after 1 July 2014, it would not unduly trespass on rights and liberties.

Consistent with the Government's election commitments to repeal the carbon tax and to provide certainty to Australian businesses and those entities that are liable to pay the carbon tax, the Bill has been prepared and introduced to the Parliament as a matter of priority and ends the carbon tax at the first possible date (1 July 2014).

Given the importance of ending the carbon tax at the end of a financial year and despite the fact that the Government does not intend the bill to commence retrospectively, the explanatory memorandum included a statement of the Government's position on 2014-15 carbon tax liabilities to provide clarity to stakeholders, in the event of any delay in the passage of the Bill.

Thank you for bringing these issues to my attention and I trust that the Committee's concerns have been fully addressed. As the Committee's concerns include amendments to the *Competition and Consumer Act 2010*, a copy of this correspondence has also been sent to the Treasurer.

Yours sincerely



Greg Hunt

The Hon Greg Hunt MP

Minister for the Environment

MC14-003403

10 FEB 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

I refer to your letter of 5 December 2013, concerning the report by the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Environment Legislation Amendment Bill 2013 (the Bill). I apologise for the delay in responding.

I understand that the Committee has requested clarification on a number of matters set out in its *Alert Digest No. 8 of 2013*. Please see my response against each request below.

1. *In relation to Schedule 1 of the Bill (Amendments relating to approved conservation advice), the Committee seeks further advice as to the extent of uncertainty for proponents and why this is thought sufficient to justify retrospectively validating decisions that are contrary to statutory obligations imposed by the Parliament.*

I note the Committee's concern that the retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this instance, the Bill is designed to ensure the validity of decisions made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) prior to 31 December 2013 to provide certainty to industry and the community. I consider it essential to ensure that all projects with existing approvals under the EPBC Act, including major projects with long-term investment benefits for the Australian economy, have legal certainty.

As the Committee is aware, the need for the amendment relating to the consideration of approved conservation advice has arisen as a result of the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (the *Tarkine* case).

In this case, the decision brief relied on by the former Minister for the approval given to Shree Minerals Limited stated that approved conservation advices had been considered in the preparation of the advice from the Department of the Environment (the Department) and had informed the Department's recommendations. However, the relevant approved conservation advice document itself was not attached or specifically referred to in the briefing for the approval.

The judgement in the *Tarkine* case has potential implications for approval decisions which have been made under the EPBC Act since January 2007, when amendments to the EPBC Act made it mandatory to consider relevant approved conservation advice in certain circumstances.

I note that the Committee's response states that challenges under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (like that of the *Tarkine* case) must, in general, be brought within 28 days of the provision of a statement of reasons for the decision. However, I also note that there is no limitation period provided for the making of an application under section 39B of the *Judiciary Act 1903* (Cth). Additionally, the existence of time limits, where applicable, may not constitute an absolute bar to proceedings as a court could still grant leave to commence proceedings of this type.

Noting that the degree of legal risk to each EPBC Act approval since 2007 as a result of the *Tarkine* case would turn on the facts of each individual case, the Federal Court's decision raises genuine uncertainty as to the legal validity of those decisions. The Bill is therefore reasonable and necessary in order to provide the assurance to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality, that is, the Department did not attach approved conservation advices to a decision brief.

I also note that, since the Committee's report in *Alert Digest No. 8 of 2013*, the Bill was amended in the House of Representatives to remove the prospective application of the amendment and provide that a failure to have regard to an approved conservation advice will not invalidate a relevant decision under the EPBC Act prior to 31 December 2013. Since the Federal Court declared the environmental approval given to Shree Minerals Limited invalid on 17 July 2013, the Department has ensured that relevant approved conservation advices are included in the package of information provided to me when making relevant decisions.

2. *The Committee also seeks advice as to whether the amendment may affect any proceedings which have yet to be determined.*

I am advised that there are no related proceedings currently before the courts which would be affected by the retrospective application of Schedule 1 of the Bill (Amendment relating to approved conservation advice). Specifically, there are no related proceedings to the *Tarkine* case nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.

3. *In relation to Schedule 2 of the Bill (Amendments relating to turtles and dugong), the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties. However, in light of the justification provided in the statement of compatibility and explanatory memorandum the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.*

I note the Committee's comments in relation to Schedule 2 of the Bill (Amendments relating to turtles and dugong), including that the detail provided in the statement of compatibility and the explanatory memorandum explains the application of strict liability as a proportionate limitation to the right to the presumption of innocence because of the high community concern in protecting and conserving marine turtle and dugong populations.

Further, as stated in the explanatory memorandum, the increase in penalties proposed by the amendments is considered necessary to ensure strong deterrence. I am of the view that the justification provided in the statement of compatibility and the explanatory memorandum is sufficient.

I trust that the above information meets the Committee's requirements and that my response will be considered by the Committee in its next report.

Yours sincerely

Greg Hunt

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMC2013-08436

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen,

Thank you for the letter of 5 December 2013 from the Senate Standing Committee for the Scrutiny of Bills enquiring into the justification behind Schedule 2, sub item 26(3) of the Grape and Wine Amendment (Australian Grape and Wine Authority) Bill 2013 (the Bill).

Sub item 26(3) was included in the Bill based on sub item 11(2) of the *Commonwealth Authorities and Companies Act 1997* (CAC Act). The provision is intended to ensure that annual reporting rules for the new authority are consistent with those set out in the CAC Act, so that directors of the proposed Australian Grape and Wine Authority would be at no advantage or disadvantage under the proposed arrangements by the Bill.

At least two other items of legislation exist that have included a similar provision; the *Screen Australia and the National Film and Sound Archive of Australia (Consequential and Transitional Provisions) Act 2008* and the *Australia Council (Consequential and Transitional Provisions) Act 2013*.

As noted by the Committee, sub item 26(3) reverses the onus of proof; however, this is not considered undue as the intent is to ensure consistency with the CAC Act and the provision only applies to directors of the proposed authority without creating any wider imposition.

I trust the Committee will be satisfied with this justification. I note that the letter also referred to the Rural Research and Development Legislation Amendment Bill 2013; however, it is my understanding that you are not seeking further advice regarding this Bill.

Yours sincerely

Barnaby Joyce MP

11 DEC 2013

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@maff.gov.au

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Thank you for your letter dated 12 December 2013 in relation to comments made in the Committee's Alert Digest No. 9 of 2013 concerning the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. I would like to provide the following advice to the Committee as a result of the comments in the Alert Digest.

Insufficiently Defined Administrative Powers
It therefore appears that the purely administrative process by which the applicability of Australia's non-refoulement obligations will be determined is likely to render rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The committee therefore seeks the Minister's advice as to the justification for this approach.

This Bill seeks to remove the complementary protection criterion from the *Migration Act 1958* (the Act) and instead re-establish an administrative process similar to the Ministerial intervention and pre-removal assessment processes in place prior to the complementary protection legislation being enacted in March 2012.

Before 24 March 2012, Australia complied with its *non-refoulement* obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR) either through a pre-removal clearance process or a Ministerial intervention process in which the Minister considered whether to exercise his or her personal public interest powers under the Act to grant a person in respect of whom Australia had *non-refoulement* obligations a particular type of visa to remain in Australia.

It is the Government's intention to establish a new administrative process that is more transparent and efficient in its consideration of complementary protection claims and includes the development of a more effective decision making model. The new process will again support the Minister in the exercise of his or her public interest powers and will do so, in part, on the basis of publicly available guidelines.

This Bill does not propose to resile from or limit Australia's *non-refoulement* obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's *non-refoulement* obligations under these treaties will not be removed from Australia in breach of these obligations.

Under the new administrative process, where a person believes they may be subjected to significant harm upon return to their home country for a non-Refugees Convention reason, the person will be able to make a request to have their protection claims considered under the CAT and the ICCPR. An assessment of these claims will be undertaken for the purpose of the Minister considering whether to exercise his or her personal and non-compellable public interest powers.

Where a person's specific circumstances are found to engage Australia's *non-refoulement* obligations as interpreted by the Government in accordance with international law, their case will be referred to the Minister for Immigration and Border Protection for consideration of whether it is in the public interest for the Minister to use his or her statutory powers to intervene and grant an appropriate visa for the person's individual circumstances. As per the administrative process in place prior to March 2012, engaging *non-refoulement* obligations under the CAT or the ICCPR will be re-established as a unique or exceptional circumstance within the Minister's Guidelines for referral of cases.

Given this framework, the administrative powers will be clearly defined and rely on legislatively based powers. It is therefore incorrect to characterise the process as purely administrative or insufficiently defined.

Rights liberties or obligations unduly dependent upon non-reviewable powers – availability of merits review. Items 17 and 18.
The committee therefore seeks the Ministers advice as to the justification for the proposed approach and advice as to whether the Bill will make "rights, liberties or obligations unduly dependent upon non-reviewable decisions.

This Bill seeks to re-establish the consideration of complementary protection issues within an administrative process. Consideration of complementary protection is neither a right nor a liberty. The administrative process will consider whether any of Australia's *non-refoulement* obligations under the CAT or the ICCPR are engaged.

This amendment will apply to a small number of individuals who do not meet the criteria for a protection visa on Refugee Convention grounds, but who the Government considers cannot be removed to a receiving country because that person faces significant harm in that country. Where the Minister for Immigration and Border Protection is satisfied that the person engages Australia's *non-refoulement* obligations under the CAT or the ICCPR, it will then be open to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

Generally, access to the exercise of these powers is available only to persons who have sought or could have sought, but have not established their right to a visa. In most cases, a person requesting access to the Minister's personal powers has already applied for a Protection visa, sought merits review, sought judicial review and in some instances, appeal, at all of which stages Australian legislation and case law applied.

An applicant for a visa whose application is rejected under section 65 of the Act has, as a general rule, a right to seek merits review from the relevant review tribunal, however, the Act confers no right to merits review of the Minister's decisions under his public interest powers. There is also no obligation imposed upon Australia to provide access to merits review under the CAT or the ICCPR.

These amendments do not limit the ability of applicants to seek merits review in relation to a protection visa application based on Refugees Convention grounds. Any findings of fact regarding a person's protection claims identified during the merits review of their protection visa application will remain relevant to any consideration of Australia's non-refugee *non-refoulement* obligations under the Minister's public interest powers. As was the case prior to the enactment of the complementary protection legislation, it is proposed that the review tribunal will, upon identifying complementary

protection issues during the course of its review of the case, refer cases for consideration of the exercise of the Minister's intervention powers.

The Government does not consider that the Bill raises issues of undue dependence on non-reviewable decisions.

Rights liberties or obligations unduly dependent upon non-reviewable powers – availability of judicial review.
The committee therefore seeks the Minister's advice as to the extent to which judicial review may, in practical effect, be limited under the new arrangements. In addition, if the amendments would diminish the practical effectiveness of judicial review in securing legal accountability, the committee seeks the Minister's justification for this result.

This Bill seeks to re-establish an administrative process similar to that which was in place prior to the commencement of the complementary protection framework in March 2012.

As the Committee has identified in its comments, a decision by the Minister not to exercise his or her non-compellable intervention powers to grant a visa to a person is not judicially reviewable. The Minister can also not be compelled to exercise these powers.

The committee in their comments also made reference to *Plaintiff M61/2010E v Commonwealth of Australia [2010] HCA 41* (M61/2010E). The decision in M61/2010E effectively rendered the processes leading up to the exercise of the Minister's non-compellable powers under sections 46A and 195A of the *Migration Act 1958*, judicially reviewable.

The Committee indicated in its comments that *"Australia's non-refoulement obligations under the CAT and the ICCPR may be fulfilled through 'pre-removal assessment procedures' as an alternative to the exercise of the Minister's personal and non-compellable intervention powers"*. The pre-removal assessment process is not an alternative process to the exercise of the Minister's intervention powers. The pre-removal assessment process is undertaken as a final check to ensure that Australia's *non-refoulement* obligations under the Refugees Convention, the CAT and the ICPPR have been satisfied prior to progressing a person's removal from Australia (ie. using the removal powers under section 198 of the Act). Prior to the enactment of the complementary protection legislation, in some cases this was the first consideration of claims made against Australia's *non-refoulement* obligations under the CAT and the ICCPR (ie. for cases where protection claims had not previously been made and dealt with). Where the department identified complementary protection issues, the case was referred for assessment against the Minister's Guidelines as to whether the case should be referred to the Minister for consideration as to whether to exercise his or her intervention powers under either section 417 or 195A of the Act to grant a visa.

In *Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33* (SZQRB) the court found that the removal power under section 198 of the Act is not available in the case of a person who seeks to engage Australia's *non-refoulement* obligations under the CAT and the ICCPR unless and until those claims are assessed in accordance with relevant law and in a procedurally fair manner. Under the new administrative process, it is proposed that a pre-removal assessment be undertaken and where that assessment determines a person engages Australia's *non-refoulement* obligations under the CAT or the ICCPR this will result in the referral of the case for consideration against the Minister's Guidelines.

These amendments do not limit the ability of applicants to seek judicial review in relation to a protection visa application based on Refugees Convention Grounds.

In light of the above, the Government does not consider that the practical effectiveness of judicial

review will be limited under the new administrative process.

Undue trespass on rights or obligations – new law applicable to the determination of existing applications and appeals. Items 20 and 21
The committee therefore seeks the Minister's further advice in relation to these issues so it may better consider the proposed approach against its scrutiny principles.

These amendments apply to all "on hand applications", as well as new applications, because the Government considers that it is appropriate and fair for all applications to be considered through the same process and under the same law. This is consistent with the Government's position that it is not appropriate for *non-refoulement* obligations under the CAT and the ICCPR (that is, complementary protection) to be considered as part of a protection visa application.

Applicants that have had a primary decision to refuse their visa application, prior to the commencement of the Act, will still be able to seek review of that decision in the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT). However, the AAT or RRT will not be able to review those aspects of the primary decision that relied on the complementary protection criteria. This means that the RRT and the AAT will apply the new law when reviewing these decisions, and not the law that existed at the time of the primary decision.

There may be some applicants who have sought judicial review of a decision to refuse an application for a protection visa based on complementary protection grounds. If the court determines that there has been a jurisdictional error and the matter is remitted to the RRT so that it can be considered according to law, the legal position is that there has never been a valid decision to refuse the visa application, which means that the application has never been finally determined. Where a case is remitted after the commencement of the proposed amendments, the new law would apply and any fresh assessment of the application would be made without consideration of the complementary protection criteria. Where this occurs, such cases will be referred for consideration under the new administrative process where complementary protection issues will be assessed.

In relation to the Committee's comments regarding 'accrued rights', whether or not a person is considered to have an 'accrued right' to have their protection visa application determined by reference to the law at the time of application, the Parliament may, by clear legislative intent, take away or modify an accrued right.

These amendments do not take effect prior to their commencement date, but operate prospectively, albeit in respect of already existing protection visa applications. To the extent that any accrued rights are adversely affected, the amendments intend this to occur by virtue of their express application to protection visa applications already made but not finally determined prior to this Act commencing. This overrides any rights that may have been accrued by an applicant to have their application considered in accordance with the law that existed at the time they applied.

Thank you for considering this advice. The contact officer in my Department is Greg Phillipson, Assistant Secretary, Legal Framework Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
29/ 1 /2013

The Hon Kevin Andrews MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

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

MC13-011684

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I write in response to a request for information from the Senate Scrutiny of Bills Committee (the Committee), as outlined in *Alert Digest No. 8* on 4 December 2013. The Committee asked why Schedule 5, Item 6 of the Social Services and Other Legislation Amendment Bill 2013 (the Bill) provides flexibility for the Minister to extend, by legislative instrument, the application of the proposed interest charge to social security payments other than student payments.

The interest charge provisions within the Bill seek to reinforce the proposition that persons who received payments from the Commonwealth to which they were not entitled should repay the money in a timely manner where they have the financial capacity to do so. This proposition cannot be regarded as controversial and I note that any instrument issued by the Minister to extend application of the interest charge would be subject to Parliamentary scrutiny and disallowance.

It is also relevant, in the context of the Committee's concerns, that provisions within the social security law (see sections 1229A and 1229B of the *Social Security Act 1991*) already provide the Minister with the power to apply, via a legislative instrument, a penalty interest charge on any income support payment debt. This power is greater than that set out in the Bill because the Bill carefully proscribes a formula for the rate of the new interest charge whereas the existing provisions give the Minister unfettered discretion in setting the rate of the interest charge.

Taking into account that any instrument seeking to extend application of the interest charge will be subject to the scrutiny of Parliament, and that the power given to the Minister under the new interest charge scheme is more restrained than that available under the existing scheme, I do not consider the provision in Schedule 5, Item 6 of the Bill to be an inappropriate delegation of power.

Should you or the Committee require further information, the policy contact within my Department is Mr Murray Kimber, Branch Manager, Payment Integrity and Performance Information Branch. He can be contacted on 02 6240 2667 or 0412 917 141, or via email at murray.kimber@deewr.gov.au.

I trust this information is of assistance.

Yours sincerely

KEVIN ANDREWS MP

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

RECEIVED
20 DEC 2013
Senate Standing C'ttee
for the Scrutiny
of Bills

13 DEC 2013

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Dear Senator Polley

Thank you for the Standing Committee for the Scrutiny of Bills' letter dated 5 December 2013 concerning review processes in relation to certain decisions in the Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013 (the Bill). Specifically, the Committee has sought advice as to the justification for the proposal under the Bill to exclude: the availability of reconsideration by the Australian Communications and Media Authority (ACMA) and merits review where one of the grounds for the ACMA's decision to refuse a permit includes security or where the ACMA specifies or varies a permit condition relating to security.

The ACMA regulates telecommunications, broadcasting, radiocommunications and the internet. It is responsible for regulating and enforcing the submarine cable protection regime set out in Schedule 3A to the *Telecommunications Act 1997*.

Matters of national security fall within the portfolio of the Attorney-General. The ACMA's powers and functions do not generally extend to dealing with or considering national security matters and it does not have legislative authority or any particular expertise in this area.

In recognition of the significance of submarine cables as critical infrastructure for Australia, the Bill would require the ACMA to consult the Secretary of the Attorney-General's Department on submarine cable installation permit applications. This already takes place on an informal basis and the Bill seeks to improve certainty and transparency for all stakeholders by formalising these arrangements. During the consultation period on a submarine cable permit application, the Secretary of the Attorney-General's Department may make submission(s) on an application which the ACMA must consider when granting a permit. The submission could include a recommendation that security-related permit condition(s) be imposed.

Where during the consultation process, the Attorney-General's portfolio identifies significant security risks or significant concerns which cannot be mitigated through the imposition by the ACMA of security-related conditions on a proposed permit, the Attorney-General would need to form a view as to whether issuing the proposed permit would be prejudicial to one or more

Parliament House, Canberra ACT 2600 | Telephone 02 6277 7480
287-289 New South Head Road, Edgecliff NSW 2027 | Telephone 02 9327 3988

of the grounds of 'security' described in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). If so, the Attorney-General could, in consultation with the Prime Minister and the Minister for Communications, direct the ACMA not to issue a permit. The basis on which the Attorney-General may direct the ACMA to not issue a permit would be drawn from the definition of 'security' in the Bill, which is the same as the definition in the ASIO Act.

Ordinarily, a decision to grant a submarine cable installation permit and/or impose any conditions on a permit is a matter for the ACMA. In these circumstances, where an application is refused by the ACMA on non-security related grounds, it remains appropriate for the ACMA to review the merits of its own decisions, and for the decision to be subject to merit reviews by the Administrative Appeals Tribunal (AAT). The Bill makes provision for this under the *Telecommunications Act 1997*.

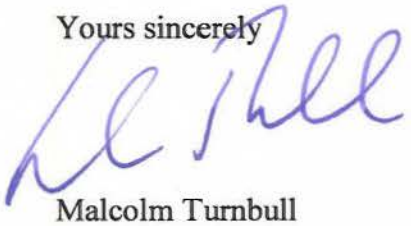
However, where a permit application raises security issues, the ACMA would be relying on the advice of the Attorney-General and the Attorney-General's Department. Given the ACMA's decisions in these circumstances would be made in reliance on this expert advice, it would not be practical for the ACMA to review the merits of the advice it is given. As such, a decision by the ACMA to refuse a permit on a security ground or to specify or vary a permit condition relating to security should not be open to reconsideration by the ACMA or merits review under the *Telecommunications Act 1997*.

As the Committee would appreciate, security (in particular national security) forms a well-accepted category of exclusions of merits review under Commonwealth law, such as the *Telecommunications (Interception and Access) Act 1979* and the ASIO Act.

Merits review is not entirely excluded where the ACMA refuses to issue a permit on a security ground following direction by the Attorney-General. A security assessment by the Australian Security Intelligence Organisation (ASIO) would form the basis of consideration by the Attorney-General whether to exercise his or her power to direct the ACMA to not grant a permit. That is, the Attorney-General would only exercise the power where an adverse or qualified security assessment is issued by ASIO in respect of the Attorney-General's power. An applicant who is the subject of an adverse or qualified security assessment would have a right to apply for merits review of that assessment from the AAT under Division 4 of Part IV of the ASIO Act.

The proposed provisions are based on the existing carrier licence application process under the *Telecommunications Act 1997*, particularly sections 56A and 58A. If the Bill is enacted, the proposed provisions will have the same administrative review rights as apply in respect of those existing and analogous sections 56A and 58A.

Yours sincerely



Malcolm Turnbull