



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

EIGHTH REPORT
OF
2014

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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

EIGHTH REPORT OF 2014

The committee presents its *Eighth Report of 2014* to the Senate.

The committee draws the attention of the Senate to responsiveness to requests for information and 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:

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Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014

Introduced into the House of Representatives on 15 May 2014

Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No.6 of 2014*. The Minister responded to the committee's comments in a letter dated 26 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to amend the *Corporations Act 2001* relating to issuers of corporate bonds and to provide company directors with more certainty of their liability in relation to disclosure material.

Delegation of legislative power

Schedule 1, item 8, proposed subsection 283AA(4)

This item proposes to introduce a regulation making power which would enable a specified offer of debentures, or a specified class of offers of debentures, to be exempted from 'the requirement for a trust deed and trustee' (explanatory memorandum, at p. 10). The explanatory memorandum states that 'this regulation making power has been inserted to ensure that regulations can be made to remove an offer of simple corporate bonds depository interests from Chapter 2L and provided appropriate consumer protections remain in place' (at p. 11).

However, it is not clear how it will be ensured that appropriate consumer protections will remain in place. **The committee therefore seeks the Parliamentary Secretary's advice on how this objective will be achieved in the context of the regulation-making power.**

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

Minister's response - extract

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 proposes in part to create a depository interest mechanism to enable simple corporate bonds issued in the wholesale market to be traded in the retail market. The depository interest mechanism requires an 'interest' in a bond to be created in the wholesale market which is then offered for sale in the retail market. This interest is called a depository interest. Holders of a depository interest in a bond have 'beneficial ownership' of the bond receiving interest payments in the same way as a legal owner of a bond would receive interest payments. In the case of simple corporate bonds, the depository interests are called simple corporate bonds depository interests.

The Committee has requested further information on the consumer protection that will exist following the creation of a regulation making power in the *Corporations Act 2001* that can remove an offer of simple corporate bonds depository interests from the trust deed and trustee requirements of Chapter 2L of the *Corporations Act 2001*.

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 requires that simple corporate bonds have a two-part prospectus comprising an offer-specific prospectus and a base prospectus. Offers of simple corporate bonds depository interests will be required to have the same level of disclosure as offers of simple corporate bonds to the retail market. This requirement will be brought forward in further amendments to the Corporations law that put in place the detail required for the depository interest mechanism to operate.

The prospectus requirement will give investors in simple corporate bonds depository interests a level of consumer protection equivalent to those of simple corporate bonds available to retail investors. Given simple corporate bonds have effectively the same characteristics as a simple corporate bonds depository interest, I consider it is appropriate to provide the same level of consumer protection for investors in simple corporate bonds depository interests as investors in simple corporate bonds.

Committee Response

The committee thanks the Minister for this response. The committee notes that the Minister has indicated that 'offers of simple corporate bonds depository interests will be required to have the same level of disclosure as offers of simple corporate bonds to the retail market', however it appears from the Minister's response that this prospectus requirement will only be instituted after future amendments to the Corporations law 'that put in place the detail required for the depository interest mechanism to operate'. **The committee requests further clarification from the Minister as to whether the availability of simple corporate bonds depository interests will be simultaneous with applicable consumer protection requirements or whether there will be a period of time during which offers of simple corporate bonds depository interests will be available, but will not have the same level of disclosure as offers of simple corporate bonds to the retail market.**

Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014

Introduced into the House of Representatives on 14 May 2014

Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No.6 of 2014*. The Minister responded to the committee's comments in a letter dated 6 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) relating to bilateral agreements including:

- allowing States and Territories to be accredited for approval decisions on large coal mining and coal seam gas developments that are likely to have a significant impact on a water resource;
- ensuring that all States and Territories are able to be declared under the EPBC Act for the purposes of requesting advice from the Independent Expert Scientific Committee;
- clarifying that proponents do not need to make referrals to the Commonwealth for actions that are covered by an approved bilateral agreement;
- ensuring there is an efficient process to enable the Commonwealth to complete the approval process where an approved bilateral agreement is suspended or cancelled, or ceases to apply to a particular action;
- ensuring that State or Territory processes that meet the appropriate EPBC Act standards can be accredited for bilateral agreements, recognising the different technical approaches taken by different States and Territories to give legal effect to those processes;

- providing for an efficient process so that the relevant bilateral agreement continues to apply to an accredited State or Territory management arrangement or authorisation process, where there are minor amendments to that arrangement or process; and
- a number of minor miscellaneous amendments.

Insufficiently defined administrative powers

Schedule 2, item 9, proposed subsections 87(7) and 87(8)

Subsection 87(7) provides that, in circumstances in which a State or Territory has partially completed an assessment of the relevant impacts of an action and the Commonwealth Minister decides to complete one of the assessment approaches provided for in Part 8 of the EPBC Act, the Minister must make a determination on:

- (a) which steps of the State or Territory assessment process are to be used for the purposes of assessing the action, and
- (b) the remaining steps to be carried out under the assessment approach chosen to complete the assessment under Part 8.

The explanatory memorandum (at p. 15) states that such a determination will make it clear what steps are taken to have been completed by the States and Territories for the purposes of Part 8 of the EPBC Act and what steps remain to be completed by the Commonwealth under Part 8 in circumstances where State or Territory processes may not align with the approaches to assessment set out in Part 8. This provision appears to give the Minister considerable discretion as to what assessment steps are required in particular cases. As the power is not confined by reference to guiding principles or relevant considerations **the committee seeks the Minister's advice as to whether consideration was given to ways in which the exercise of this power may be appropriately controlled given that subsection 87(8) provides that a determination made by the Minister is not a legislative instrument and is therefore not disallowable.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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

The committee seeks the Minister's advice as to whether consideration was given to ways in which the exercise of this power may be appropriately controlled given that subsection 87(8) provides that a determination made by the Minister is not a legislative instrument and is therefore not disallowable.

Subsection 87(7), inserted by Item 9 of Schedule 2 to the Bill, provides that, in the circumstances where a state or territory has partially completed an assessment of the relevant impacts of an action and the Minister decides to complete the assessment under an approach under Part 8 of the EPBC Act, the Minister must make a determination on:

- which steps of the State or Territory assessment process are to be used for the purposes of assessing the action; and
- the remaining steps to be carried out under the assessment approach chosen to complete the assessment under Part 8.

I note that the committee has stated that this provision provides the Minister with considerable discretion as to what assessment steps are required in particular cases and suggested that more guidance could be given in the legislation as to the exercise of this power. However, I am of the view that the EPBC Act already includes a number of relevant considerations which the Minister must take into account when making any assessment approach decision under the EPBC Act, and these considerations are relevant to decisions relating to state assessment processes.

In particular, the existing section 87 of Part 8 of the EPBC Act currently sets out a number of mandatory considerations for the Minister when selecting an assessment approach. These considerations would also apply to a decision under section 87(7). Subsection 87(3) specifies that, in making a decision on the approach for assessment, the Minister must consider:

- a) information relating to the action given to the Minister in the referral of the proposal to take the action; and
- b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
- c) any relevant information received in response to an invitation under subparagraph 74(2)(b)(ii);
- d) the matters (if any) prescribed by the regulations; and
- e) the guidelines (if any) published under subsection (6).

New subsection 87(3)(ca), inserted by item 6 of Schedule 2 to the Bill, also requires that where an action ceases to be covered by a bilateral agreement, or where a bilateral agreement has been suspended or cancelled, the Minister must consider the extent to which the partially completed state assessment can be used and the assessment completed under new subsections 87(7) and (8).

Committee Response

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

Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014

Introduced into the House of Representatives on 14 May 2014

This bill received Royal Assent on 30 June 2014

Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No.6 of 2014*. The Minister responded to the committee's comments in a letter dated 6 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to allow for cost recovery for environmental impact assessments, including strategic assessments, under the EPBC Act.

Insufficiently defined administrative power—determining fees by an administrative determination

Parliamentary scrutiny of legislative power

Schedule 1, item 13, proposed section 170CA

Section 170CA provides that the Minister may determine the fees to be charged, including the way in which a fee is to be worked out (see proposed subsection 170CA(3)). Section 170CA(4) explicitly states that such a determination is not a legislative instrument, which means that it is not subject to Parliamentary scrutiny in the form of the disallowance process.

The explanatory memorandum (at p. 5) explains the approach to cost recovery as follows:

It is anticipated that the fees for these types of assessments will be determined on a case-by-case basis, rather than specified in the Regulations. The fees the Minister will determine appropriate for these assessment approaches will be dependent on the specifics of each individual project being assessed and related departmental resources necessary to undertake the assessment. The Minister cannot determine the fees and fix them in Regulations in advance, as for other assessment methods, due the wide variations in the actual resources required to conduct these assessments.

Strategic assessments may also provide a general public benefit, and cost recovery therefore may not be appropriate in some cases.

Before making a determination, subsection 170CA(2) will require the Minister to consult with the person proposing to take the action, the designated proponent, or the person responsible for the policy, plan or program for strategic assessments (as the case requires), about the level of fee to be charged. This will provide the person proposing to take the action with greater certainty of costs prior to commencing the assessment, so that they can make amendments to their proposed action, or policy, plan or program, to avoid or mitigate the significance of the action's impact on matters of national environmental significance and potentially reduce the cost of their assessment. Fees will be based on the level of departmental resourcing required to conduct the assessment of the action or the strategic assessment of the plan, policy or program.

Although this information is useful, and it may be accepted that flexibility in decision-making about fees is required, it is not clear why it is not possible to establish a formula, based on cost recovery principles, which would impose parameters on the level of fees.

Further, it is a matter of concern that the power is not subject to any limits other than an obligation to consult the proponent of the policy, plan or program being assessed. The committee considers that it may be possible to subject this discretionary power to other statutory accountability measures which would improve parliamentary scrutiny and add transparency to the decision-making process.

The committee therefore seeks the Minister's further advice as to:

- a) whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and**
- b) if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.**

Pending the Minister's reply the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Minister's response - extract

The committee seeks the Minister's further advice as to:

- a. whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and*
- b. if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.*

Cost recovery arrangements are subject to rigorous non-statutory accountability mechanisms as set out in the Australian Government Cost Recovery Guidelines. Cost recovery fees reflect the most efficient costs of conducting environmental assessment under the EPBC Act are based on 'best practice' scenarios. The Minister can only consider the actual costs of undertaking environmental assessments when setting cost recovery fees.

The cost recovery arrangements for environmental assessments are included in a Cost Recovery Impact Statement published on the Department of the Environment's website at: www.environment.gov.au/resource/cost-recovery-under-environment-protection-and-biodiversity-conservation-act-1999-epbc-act. The Cost Recovery Impact Statement details the levels of fees applicable for environmental assessments and the method by which the Department determined those fees. This includes fees for various stages of assessment based on the actual costs of conducting those assessments, and a method for determining additional costs based on the complexity of a particular action.

The Department of Finance has agreed the methodology and the quantum of fees included in the Cost Recovery Impact Statement.

The Cost Recovery Impact Statement will be reviewed in one year, following the implementation of the one stop shop for environmental approvals, and will be subject to ongoing review to ensure that the arrangements continue to reflect the cost of carrying out activities under the EPBC Act.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. Despite the accountability mechanisms outlined, it is not clear why the bill itself could not include some limits or other parameters. **The committee is aware that the bill has been passed by both Houses of Parliament, but would welcome any comment from the Minister about this matter.**

Alert Digest No. 6 of 2014 - extract

Merits review

Schedule 1, item 15, proposed part 19A

The provisions proposed by this item operate as an internal merits review mechanism for those whose rights and interests are affected in relation to the aspects of the imposition of fees which involve some exercise of discretion. The internal review mechanism will apply to the calculation of fees by a person to whom a power or function is delegated under section 515 of the EPBC Act. A fee determined by the Minister will not be subject to reconsideration under the provision. The explanatory memorandum (at pp 6-7) indicates that if a standard or set fee is imposed as an automatic consequence of a particular event (e.g. the making of an application), internal merits review will not be available.

The explanatory memorandum also explains that the amendments do not provide for external merits review of the internal merits review provided by the Secretary. The justification for this is that the methods for calculating fees specified in the Regulations will 'include clear criteria for assigning a level of complexity to the project' and these 'criteria will be defined, and will be objective rather than discretionary criteria' (at p. 7).

The committee considers that a decision-maker applying a rule or making determinations about objective criteria (as opposed to exercising discretion) does not necessarily render external merits review inappropriate. Merits review is conceptualised as enabling the tribunal to make the *correct* or *preferable* decision. Even where administrative decision-makers are not exercising discretionary powers there may be reasons why they make errors as to the correct decision when applying objective criteria, a formula or a rule—even if the correct application of such requirements means there is only one legally correct decision that can be made. In such circumstances, merits review can provide a relatively low cost mechanism for such decisions to be corrected.

Noting the considerations outlined above (which are applicable to both external and internal merits review), the committee seeks further advice as to (a) why internal review should not be available in relation to the imposition of a standard or set fee, and (b) why external merits review of the internal review provided by the Secretary is not considered appropriate. In addition, the committee requests further information as to the nature of the criteria that will be used to calculate fees, including whether the criteria will include mandatory considerations that a decision-maker must take into account.

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

Noting the considerations outlined above (which are applicable to both external and internal merits review), the committee seeks further advice as to (a) why internal review should not be available in relation to the imposition of a standard or set fee, and (b) why external merits review of the internal review provided by the Secretary is not considered appropriate. In addition, the committee requests further information as to the nature of the criteria that will be used to calculate fees, including whether the criteria will include mandatory considerations that a decision-maker must take into account.

As detailed in the Cost Recovery Impact Statement, the application fee payable on referral of an action under the EPBC Act will be a set fee for all applicants, unless they are subject to an exemption. Other set fees include fees for seeking further information and a number of other 'contingent' activities under the EPBC Act. These fees will all be set amounts, so there is no capacity for the decision to change on review.

The criteria for determining fees are set out in the Cost Recovery Impact Statement. These criteria will be included in the EPBC Act Regulations and the decision maker will follow the requirements in the Regulations. The arrangements operate such that there is a base fee for a particular assessment approach, and additional fees will be payable if the project involves additional complexity components. The Cost Recovery Impact Statement includes a complexity matrix which sets out the factors which determine the level of complexity. The complexity assessments will be subject to internal merits review.

Committee Response

The Committee thanks the Minister for this response, but notes that its enquiry also sought information as to why the complexity assessments cannot be subject to external merits review. **The committee is aware that the bill has been passed by both Houses of Parliament, but in order to complete its assessment of the bill would appreciate receiving the Minister's advice on this point.**

Alert Digest No. 6 of 2014 - extract

Inappropriate exercise of legislative power—determining fees by regulation Schedule 1, item 16, proposed subsection 520(4A)

The explanatory memorandum explains the approach that will be taken to the setting of fees in the regulations, including that a complexity matrix will be used to enable fees for assessments to be determined on a case-by-case basis. Other matters to be dealt with by regulation include the basis on which fees may be waived.

The committee consistently draws attention to legislation that provides for the rate of a levy or fee to be set in (subordinate) legislative instruments because, in general, it is considered that Parliament should be responsible for setting the rate of any tax. Thus, while the committee accepts that the line between a tax and a fee is sometimes difficult to draw, in instances where it is considered a fee the committee expects that there will be a limit on the exercise of this power, for example, by setting a maximum rate in the legislation or including a formula by which the levy is to be calculated.

As all of the key matters relating to the determination of fees are to be dealt with in delegated legislation and the committee's principles require it to consider whether delegations of legislative power are appropriate, **the committee seeks the Minister's advice as to the justification for dealing with such matters in delegated legislation rather than in the primary legislation.**

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

Minister's response - extract

As all of the key matters relating to the determination of fees are to be dealt with in delegated legislation and the committee's principles require it to consider whether delegations of legislative power are appropriate, the committee seeks the Minister's advice as to the justification for dealing with such matters in delegated legislation rather than in the primary legislation.

Any fees set out in the EPBC Regulations must reflect the costs of conducting environmental assessments (because the arrangements are a fee for service, not a tax). As

discussed above, these arrangements and the justifications for the fees are set out in detail in the Cost Recovery Impact Statement, and must comply with the Australian Cost Recovery Guidelines.

The Department of the Environment is working to improve the efficiency of environmental assessment processes and will review the cost recovery arrangements following the implementation of one stop shop. Including the fees in delegated legislation enables these fees to be revised in line with revisions to the cost recovery model as the assessment process becomes more efficient, meaning that applicants under the EPBC Act benefit from cost savings as soon as possible.

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 this response and notes the additional information provided, however, it is not clear why the bill itself could not include safeguards or other important parameters. **The committee is aware that the bill has been passed by both Houses of Parliament, but would welcome any comment from the Minister about this matter.**

Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014

Introduced into the House of Representatives on 29 May 2014

Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No.6 of 2014*. The Minister responded to the committee's comments in a letter dated 26 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to amend various taxation laws.

Schedule 1 seeks to amend the *Medicare Levy Act 1986* to increase the Medicare levy low-income threshold for families and the dependent child-student component of the threshold for 2013-14 income year and later income years.

Schedule 2 seeks to amend the *Income Tax Assessment Act 1936* to ensure outcomes are preserved in relation to tax assessments where:

- taxpayers have reasonably and in good faith anticipated the impact of identified announcements made by a previous government that the tax law would be amended with retrospective effect; and
- the current Government has now decided that the announced proposal to change the law will not proceed.

Schedule 3 seeks to amend the *Income Tax Assessment Act 1997* to introduce an integrity rule to limit the ability of taxpayers to obtain a tax benefit from 'dividend washing'.

Retrospective commencement

Schedule 3, Part 2, item 9

Part 2 of Schedule 3 makes technical amendments to update a number of cross-references to 'offsets throughout Division 207 of the ITAA 1997' (explanatory memorandum, p. 57). The explanatory memorandum states that the sections being amended are 'clearly intended to convey...that the Subdivision removes the taxpayer's entitlement to an offset' and that

the amendment removes any ambiguity about this intention (at p. 58). According to the explanatory memorandum, the law has been applied by the Commissioner and taxpayers in accordance with the intended policy but the amendments will 'eliminate any doubt and provide certainty' (p. 57).

Item 9 is an application provision which applies these amendments retrospectively from 1 July 2003, the date when the current misdescribed cross-references were introduced. The justification given for this backdating of the amendments is to ensure that 'the ambiguity does not give rise to doubt about the previously settled applications of the law' and, as such, 'is not in substance retrospective as it merely confirms the existing interpretation and operation of the law' (p. 58).

The committee does not accept the position that amendments will not in substance be retrospective merely because they are in line with the approach that government officials have been taking to the application of the law. Although the practice of government officials applying the law, and the expectations of affected persons, is relevant to the justification for retrospective commencement of amendments, the committee continues to expect explanatory memoranda to address the identification and fairness of any adverse impact that any retrospective application of amendments may have. **The committee therefore seeks the Minister's advice as to any potential detrimental impact of the proposed approach on any person who has complied with a reasonable alternative interpretation of the law.**

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

On the Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014, the Committee has asked about the potential detrimental impacts of retrospective technical amendments to references to offsets in Division 207 of the *Income Tax Assessment Act 1997* on any person who has complied with a reasonable alternative interpretation of the law.

The amendments made by the measure replace a number of references to entities being not entitled to tax offsets under 'this Subdivision' with references to entities being not entitled to offsets under 'this Division'. The intention of this amendment is to clarify that the references were to the effect of the Subdivision rather than requiring that the offset was provided by the Subdivision.

I am advised that in practice this clarification is not to the detriment of taxpayers. The effect of most of the relevant provisions is to allow taxpayers a partial entitlement to a tax offset in respect of a franking credit where the full tax offset is not available (because, for example, the related distribution is exempt income in the hands of the entity). Under the alternative interpretation these provisions would have no operation and so taxpayers would receive no tax offset at all. The remaining relevant provisions deal with anti-avoidance rules. Here, were the specific rules not to apply, the Commissioner would likely seek to apply the general anti-avoidance rules under Part IVA of the *Income Tax Assessment Act 1936*, to achieve what would be the same or a less favourable outcome for the taxpayer.

I am also advised that it is unlikely that the alternative interpretation of these provisions could be considered reasonable. While the wording of the provisions was not entirely clear, the interpretation that is confirmed by the clarification is the only one that is consistent with their context. The alternative view, that the wording confined the operation to offsets specifically provided under the relevant Subdivisions of the Act, would mean that the relevant provisions have no operation at all which is inconsistent with the basic rule of interpretation that all provisions are intended to have substantive effect.

Given this, I consider that the technical amendments are unlikely to have adverse impact upon any person. There is no evidence that any entities have adopted the alternative interpretation of the provisions. That said, I understand that if any person did adopt a reasonable alternative interpretation of the law that that is no longer available, to their detriment, as a result of the clarification, under the administrative practice of the Commissioner of Taxation they would not be subject to penalties or interest charges as a result of the change.

I trust this information will be of assistance to you.

Committee Response

The committee thanks the Minister for this detailed response which addresses the committee's concerns. **The committee notes that it would have been helpful for this information to have been included in the explanatory memorandum, but is aware that the bill has already been passed by both Houses of Parliament.**

Senator Helen Polley
Chair



Minister for Finance Acting Assistant Treasurer

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

Dear Senator Polley

Thank you for your letter of 19 June 2014 concerning questions raised by the Senate Scrutiny of Bills Committee (the Committee) in respect of the Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 and the Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014.

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 proposes in part to create a depository interest mechanism to enable simple corporate bonds issued in the wholesale market to be traded in the retail market. The depository interest mechanism requires an 'interest' in a bond to be created in the wholesale market which is then offered for sale in the retail market. This interest is called a depository interest. Holders of a depository interest in a bond have 'beneficial ownership' of the bond receiving interest payments in the same way as a legal owner of a bond would receive interest payments. In the case of simple corporate bonds, the depository interests are called simple corporate bonds depository interests.

The Committee has requested further information on the consumer protection that will exist following the creation of a regulation making power in the *Corporations Act 2001* that can remove an offer of simple corporate bonds depository interests from the trust deed and trustee requirements of Chapter 2L of the *Corporations Act 2001*.

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 requires that simple corporate bonds have a two-part prospectus comprising an offer-specific prospectus and a base prospectus. Offers of simple corporate bonds depository interests will be required to have the same level of disclosure as offers of simple corporate bonds to the retail market. This requirement will be brought forward in further amendments to the Corporations law that put in place the detail required for the depository interest mechanism to operate.

The prospectus requirement will give investors in simple corporate bonds depository interests a level of consumer protection equivalent to those of simple corporate bonds available to retail investors. Given simple corporate bonds have effectively the same characteristics as a simple corporate bonds depository interest, I consider it is appropriate to provide the same level of consumer protection for investors in simple corporate bonds depository interests as investors in simple corporate bonds.

On the Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014, the Committee has asked about the potential detrimental impacts of retrospective technical amendments to references to offsets in Division 207 of the *Income Tax Assessment Act 1997* on any person who has complied with a reasonable alternative interpretation of the law.

The amendments made by the measure replace a number of references to entities being not entitled to tax offsets under 'this Subdivision' with references to entities being not entitled to offsets under 'this Division'. The intention of this amendment is to clarify that the references were to the effect of the Subdivision rather than requiring that the offset was provided by the Subdivision.

I am advised that in practice this clarification is not to the detriment of taxpayers. The effect of most of the relevant provisions is to allow taxpayers a partial entitlement to a tax offset in respect of a franking credit where the full tax offset is not available (because, for example, the related distribution is exempt income in the hands of the entity). Under the alternative interpretation these provisions would have no operation and so taxpayers would receive no tax offset at all. The remaining relevant provisions deal with anti-avoidance rules. Here, were the specific rules not to apply, the Commissioner would likely seek to apply the general anti-avoidance rules under Part IVA of the *Income Tax Assessment Act 1936*, to achieve what would be the same or a less favourable outcome for the taxpayer.

I am also advised that it is unlikely that the alternative interpretation of these provisions could be considered reasonable. While the wording of the provisions was not entirely clear, the interpretation that is confirmed by the clarification is the only one that is consistent with their context. The alternative view, that the wording confined the operation to offsets specifically provided under the relevant Subdivisions of the Act, would mean that the relevant provisions have no operation at all which is inconsistent with the basic rule of interpretation that all provisions are intended to have substantive effect.

Given this, I consider that the technical amendments are unlikely to have adverse impact upon any person. There is no evidence that any entities have adopted the alternative interpretation of the provisions. That said, I understand that if any person did adopt a reasonable alternative interpretation of the law that that is no longer available, to their detriment, as a result of the clarification, under the administrative practice of the Commissioner of Taxation they would not be subject to penalties or interest charges as a result of the change.

I trust this information will be of assistance to you.

Kind regards,

MATHIAS CORMANN

26 June 2014



The Hon Greg Hunt MP

Minister for the Environment

MC14-013149

Senator Helen Polley
Chair
Standing Committee for the Scrutiny of Bills
Suite 1.111
PARLIAMENT ACT 2600

6 JUL 2014

Dear Senator Polley

I refer to correspondence of 19 June 2014 from Ms Toni Dawes, Committee Secretary for the Senate Scrutiny of Bills Committee, seeking my response to the Committee's comments on the Environment Protection and Biodiversity Amendment (Bilateral Agreement Implementation) Bill 2014 and the Environment Protection and Biodiversity Amendment (Cost Recovery) Bill 2014.

I understand that the Committee has requested clarification on a number of matters in its *Alert Digest No. 6 of 2014*. Please see my response against each request below.

Environment Protection and Biodiversity Amendment (Bilateral Agreement Implementation) Bill 2014

1. *The committee seeks the Minister's advice as to whether consideration was given to ways in which the exercise of this power may be appropriately controlled given that subsection 87(8) provides that a determination made by the Minister is not a legislative instrument and is therefore not disallowable.*

Subsection 87(7), inserted by Item 9 of Schedule 2 to the Bill, provides that, in the circumstances where a state or territory has partially completed an assessment of the relevant impacts of an action and the Minister decides to complete the assessment under an approach under Part 8 of the EPBC Act, the Minister must make a determination on:

- which steps of the State or Territory assessment process are to be used for the purposes of assessing the action; and
- the remaining steps to be carried out under the assessment approach chosen to complete the assessment under Part 8.

I note that the committee has stated that this provision provides the Minister with considerable discretion as to what assessment steps are required in particular cases and suggested that more guidance could be given in the legislation as to the exercise of this power. However, I am of the view that the EPBC Act already includes a number of relevant considerations which the Minister must take into account when making any assessment approach decision under the

EPBC Act, and these considerations are relevant to decisions relating to state assessment processes.

In particular, the existing section 87 of Part 8 of the EPBC Act currently sets out a number of mandatory considerations for the Minister when selecting an assessment approach. These considerations would also apply to a decision under section 87(7). Subsection 87(3) specifies that, in making a decision on the approach for assessment, the Minister must consider:

- a) information relating to the action given to the Minister in the referral of the proposal to take the action; and
- b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
- c) any relevant information received in response to an invitation under subparagraph 74(2)(b)(ii);
- d) the matters (if any) prescribed by the regulations; and
- e) the guidelines (if any) published under subsection (6).

New subsection 87(3)(ca), inserted by item 6 of Schedule 2 to the Bill, also requires that where an action ceases to be covered by a bilateral agreement, or where a bilateral agreement has been suspended or cancelled, the Minister must consider the extent to which the partially completed state assessment can be used and the assessment completed under new subsections 87(7) and (8).

Environment Protection and Biodiversity Amendment (Cost Recovery) Bill 2014

2. *The committee seeks the Minister's further advice as to:*

- a. *whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and*
- b. *if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.*

Cost recovery arrangements are subject to rigorous non-statutory accountability mechanisms as set out in the Australian Government Cost Recovery Guidelines. Cost recovery fees reflect the most efficient costs of conducting environmental assessment under the EPBC Act are based on 'best practice' scenarios. The Minister can only consider the actual costs of undertaking environmental assessments when setting cost recovery fees.

The cost recovery arrangements for environmental assessments are included in a Cost Recovery Impact Statement published on the Department of the Environment's website at: www.environment.gov.au/resource/cost-recovery-under-environment-protection-and-biodiversity-conservation-act-1999-epbc-act. The Cost Recovery Impact Statement details the levels of fees applicable for environmental assessments and the method by which the Department determined those fees. This includes fees for various stages of assessment based on the actual costs of conducting those assessments, and a method for determining additional costs based on the complexity of a particular action.

The Department of Finance has agreed the methodology and the quantum of fees included in the Cost Recovery Impact Statement.

The Cost Recovery Impact Statement will be reviewed in one year, following the implementation of the one stop shop for environmental approvals, and will be subject to ongoing review to ensure that the arrangements continue to reflect the cost of carrying out activities under the EPBC Act.

3. *Noting the considerations outlined above (which are applicable to both external and internal merits review), the committee seeks further advice as to (a) why internal review should not be available in relation to the imposition of a standard or set fee, and (b) why external merits review of the internal review provided by the Secretary is not considered appropriate. In addition, the committee requests further information as to the nature of the criteria that will be used to calculate fees, including whether the criteria will include mandatory considerations that a decision-maker must take into account.*

As detailed in the Cost Recovery Impact Statement, the application fee payable on referral of an action under the EPBC Act will be a set fee for all applicants, unless they are subject to an exemption. Other set fees include fees for seeking further information and a number of other 'contingent' activities under the EPBC Act. These fees will all be set amounts, so there is no capacity for the decision to change on review.

The criteria for determining fees are set out in the Cost Recovery Impact Statement. These criteria will be included in the EPBC Act Regulations and the decision maker will follow the requirements in the Regulations. The arrangements operate such that there is a base fee for a particular assessment approach, and additional fees will be payable if the project involves additional complexity components. The Cost Recovery Impact Statement includes a complexity matrix which sets out the factors which determine the level of complexity. The complexity assessments will be subject to internal merits review.

4. *As all of the key matters relating to the determination of fees are to be dealt with in delegated legislation and the committee's principles require it to consider whether delegations of legislative power are appropriate, the committee seeks the Minister's advice as to the justification for dealing with such matters in delegated legislation rather than in the primary legislation.*

Any fees set out in the EPBC Regulations must reflect the costs of conducting environmental assessments (because the arrangements are a fee for service, not a tax). As discussed above, these arrangements and the justifications for the fees are set out in detail in the Cost Recovery Impact Statement, and must comply with the Australian Cost Recovery Guidelines.

The Department of the Environment is working to improve the efficiency of environmental assessment processes and will review the cost recovery arrangements following the implementation of one stop shop. Including the fees in delegated legislation enables these fees to be revised in line with revisions to the cost recovery model as the assessment process becomes more efficient, meaning that applicants under the EPBC Act benefit from cost savings as soon as possible.

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 