SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

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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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 2016

The committee presents its *Second Report of 2016* 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:

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015

Introduced into the House of Representatives on 2 December 2015
Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2016*. The Minister responded to the committee's comments in a letter dated 16 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends various Acts in relation to communications to:

- amend account keeping and licence fee administration arrangements for commercial broadcasters and datacasting transmitter licensees;
- remove duplicative requirements for licensees, publishers and controllers to notify the Australian Communications and Media Authority (ACMA) of certain changes in control of regulated media assets;
- provide a consistent classification arrangement for all television programs, including films;
- clarify the complaints handling and information gathering functions of the ACMA;
- removes the ability of the Australian Competition and Consumer Commission (ACCC) to issue tariff filing directions to certain carriers and carriage service providers; and
- amends the statutory information collection powers of the ACMA and the ACCC.

The bill also repeals 53 Acts and removes redundant provisions in four Acts.

Inappropriate delegation of legislative power—consultation requirements Schedule 5, item 2

Section 152ELB of the *Competition and Consumer Act 2010* will be repealed by this item. Currently, section 152ELB requires the ACCC to publish a draft of its procedural rules and invite interested persons to make submissions during a period of at least 30 days and to consider submissions received. The explanatory memorandum asserts that this provision is considered unnecessary in light of the standard consultation requirements in section 17 of

the *Legislative Instruments Act 2003* (the LI Act). It should be noted, however, that the consultation requirements under the LI Act are (a) less prescriptive and therefore leave more discretion to the rule-maker about what level of consultation is required, and (b) subject to exceptions specified in section 18. Furthermore, section 19 of the LI Act expressly provides that non-compliance with these requirements does not affect 'the validity or enforceability of a legislative instrument'.

In light of these differences between the section 152ELB of the *Competition and Consumer Act 2010* and the LI Act consultation requirements the committee seeks the Minister's further advice for the conclusion that section 152ELB is unnecessary.

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

Minister's response - extract

Delegation of legislative power – consultation requirements

The proposed removal of the consultation requirements in section 152ELB of the *Competition and Consumer Act 2010* (C&C Act) forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. These reforms have been progressed over several years, including through the Omnibus Repeal Day (Autumn 2014) Act 2014, which made similar amendments to the *Broadcasting Services Act 1992, Interactive Gambling Act 2001, Radiocommunications Act 1992* and the *Telecommunications Act 1997* (Tel Act).

The rationale for the removal of bespoke consultation requirements is that they are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act), which sets the standard consultation requirements for all Commonwealth legislative instruments.

The provisions that have and will be repealed, mandate a variety of inconsistent approaches with respect to the time and method of consultation. There is no policy rationale for this inconsistency, which otherwise continues unnecessary inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements. The proposed repeal of section 152ELB is intended to contribute to the underlying goal of simplifying and harmonising the law.

The Committee has noted that LI Act consultation requirements are less prescriptive and subject to certain exemptions. One of the significant benefits of Part 3 of the LI Act is the fact that it does not purport to prescribe in detail exactly how consultation should occur. It

simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken. This means that targeted consultation can be undertaken, with flexibility to ensure that the consultation meets the needs of stakeholders and also that unnecessary costs to the Government and stakeholders are minimised.

The Committee has also queried why section 152ELB of the C&C Act is seen to be unnecessary in light of the fact that section 19 of the LI Act provides that failure to consult does not affect the validity or enforceability of a legislative instrument. Section 19 is not confined to consultation in accordance with section 17 of the LI Act and it is not certain that any failure by the ACCC to comply with the public consultation requirements in section 152ELB would necessarily affect the validity or enforceability of Procedural Rules made under section 152ELA. In this context, Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the consultation of the Australian Competition and Consumer Commission (ACCC) on Procedural Rules made under section 152ELA, the relevant instrument may be disallowed.

Committee response

The committee thanks the Minister for this detailed response and **requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

While repealing the current bespoke consultation requirements in favour of the general consultation requirements in the *Legislative Instruments Act 2003* (LI Act) may allow for increased flexibility, the committee reiterates its comments above. In particular, the committee emphasises that: (a) the requirements in the LI Act are not identical to the current consultation requirements; and (b) the 'no invalidity' clause in section 19 of the LI Act will now apply to consultation undertaken in relation to these provisions and therefore failure to consult will not affect the validity or enforceability of the legislative instruments.

The committee notes that this bill has already been passed by the Senate and therefore makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Adequacy of review rights
Schedule 6

The purpose of this schedule is to move to an industry-based management structure for the administration of numbering arrangements for carriage services. Central to these arrangements is the appointment of a numbering scheme manager. The scheme involves a number of mechanisms for the Minister, ACMA and ACCC to ensure that public policy objectives are maintained under the new industry based management scheme. **As it is unclear what, if any, review rights are provided for in relation to the administration of the numbering scheme the committee seeks the Minister's advice about this matter.**

> *Pending the Minister's advice, 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

Adequacy of review rights – administration of numbering scheme

The Australian Communications and Media Authority (ACMA) is currently required under the Tel Act to make a 'numbering plan' dealing with the numbering of carriage services and the use of numbers in connection with the supply of such services in Australia. Schedule 6 to the Bill would amend the Tel Act to facilitate the potential appointment of a person specified by the Minister to manage and administer the numbering scheme, in accordance with the numbering scheme principles. This is intended to provide a framework to transition to an industry-managed numbering scheme, if the Minister is satisfied that certain safeguards are met, to achieve a more efficient and effective management of numbering.

The Committee has sought advice as to what, if any, review rights are provided for in relation to the administration of the numbering scheme by an appointed numbering scheme manager.

The Minister cannot appoint a numbering scheme manager unless satisfied that the person will administer the numbering scheme in accordance with the numbering scheme principles.

Proposed section 454C contains the numbering scheme principles, which include making effective complaints processes available to both the telecommunications industry and users of carriage services (proposed new paragraph 454C(2)(n)). This principle will ensure that avenues are in place through which industry and consumers can have their complaints about actions which may affect their rights and obligations heard and addressed. The Minister may also supplement the statutory principles with new requirements by instrument if warranted (proposed new paragraph 454C(2)(q)).

Furthermore, the numbering scheme principles require the numbering scheme manager to adhere to the rules and processes of the numbering scheme (proposed new paragraph 454C(2)(1)). If necessary, the Minister can direct the numbering scheme manager to amend the rules or change the processes of the numbering scheme (proposed section 454E). This could cover, for example, where a complaints process was not satisfactory. In the event the numbering scheme manager did not adhere to the rules and processes of the numbering scheme in administering the scheme (including complaints-handling processes), the ACMA and ACCC could direct the numbering scheme manager to do, or not do, a specified act or thing in relation to the management of the numbering scheme. The numbering scheme manager would be required to comply with such a direction, subject to civil penalties. If necessary, there is scope for the Minister to revoke a person's appointment as a numbering scheme manager (proposed section 454D). This could be used, for example, where the Minister is not satisfied the numbering scheme manager is managing the numbering scheme in accordance with the numbering scheme principles (e.g. by not making effective complaints processes available).

These oversight and direction mechanisms provide strong incentives for the numbering scheme manager to provide an effective complaints process to both the telecommunications industry and users of carriage services in line with proposed new paragraph 454C(2)(n).

Committee response

The committee thanks the Minister for this detailed response and **requests that the key information above in relation to the provision of a complaints process be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

The committee notes the advice that the Minister will have a number of powers and opportunities for oversight which may be directed to ensuring that the numbering scheme manager provides an effective complaints process. Nevertheless the committee also notes that a complaints process is quite different to a system for merits review. The latter typically provides for review by an independent tribunal or decision-maker who is empowered make a substitute decision on the basis of their view of what the correct or preferable decision should be.

The committee emphasises its view that a complaints mechanism is not equivalent to the provision of merits review, however as the bill has already been passed by the Senate the committee makes no further comment in relation to this matter.

Corporations Amendment (Crowd-sourced Funding) Bill 2015

Introduced into the House of Representatives on 3 December 2015
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2016*. The Assistant Treasurer responded to the committee's comments in a letter received on 18 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends the *Corporations Act 2001* to:

- establish a framework to facilitate crowd-sourced funding offers by small unlisted public companies;
- provide new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would usually apply; and
- enable the Minister to provide that certain financial market and clearing and settlement facility operators are exempt from specified parts of the Australian Market Licence and clearing and settlement facility licencing regimes.

The bill also makes consequential amendments to the *Australian Securities and Investments Commission Act 2001*.

Delegation of legislative power—Henry VIII clause
Schedule 1, item 14, proposed subsection 738F(3)

Henry VIII clauses enable delegated legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

This delegation of legislative power appears to enable the regulations to modify the operation of the primary legislation in relation to Chapter 7 (see the explanatory memorandum at p. 41) and therefore operates as a Henry VIII clause.

It is the practice of the committee to comment on so-called Henry VIII clauses when the rationale for their use is not provided or is insufficient. **In this instance, no explanation is**

provided for the necessity of proposed subsection 738F(3) and the committee therefore seeks the Assistant Treasurer's advice as to the rationale for the proposed approach.

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

Minister's response - extract

Delegation of legislative power
Schedule 1, item 14, proposed subsection 738F(3)

Proposed section 738F of the Bill ensures that the rules in chapter 7 of the *Corporations Act 2001* (the Act) that treat partnerships and trusts as legal persons and ensure that a person is generally responsible for the conduct of their directors, employees and agents apply to the crowd-sourced funding (CSF) regime. The existing rules in chapter 7 of the Act are essential to the regime as CSF intermediaries could be established as partnerships and trusts. It is also essential that a relevant person under the CSF regime is responsible for the conduct of their directors, employees and agents.

Proposed subsection 738F(3) enables regulations to modify the application of the above chapter 7 provisions to the CSF regime. The Committee has sought advice on the need to include this modification power as part of the CSF regime.

The modification power in subsection 738F(3) is required to ensure that the application of the relevant chapter 7 provisions to the CSF regime is consistent with the existing provisions in chapter 7 of the Act. The existing provisions in chapter 7 of the Act (sections 761F, 761FA and 769B) all have a regulation making power to exclude or modify their effect in relation to specified provisions.

In applying the existing chapter 7 provisions to the CSF regime, it was necessary to include a similar modification power so that any changes to the application of the existing provisions to chapter 7 could also be reflected in the application of these provisions to the CSF regime. As such, the modification power has been included to eliminate the risk that there could be a mismatch between the way the current provisions operate in relation to chapter 7 and the way the provisions apply in relation to the CSF regime.

Committee response

The committee thanks the Assistant Treasurer for this response and notes the advice in relation to existing similar provisions in chapter 7 of the *Corporations Act 2001*. **The committee requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

The committee takes this opportunity to reiterate its general concern about provisions which allow delegated legislation (made by the Executive) to override or modify the operation of primary legislation (which has been passed by the Parliament).

In relation to this particular matter, in light of the explanation provided the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 1 of 2016 - extract

Delegation of legislative power
Schedule 1, item 14, proposed subsection 738G(1)(c)

The securities that are to be the subject of the crowd-sourced funding (CSF) offer are those prescribed by a class specified in the regulations. The explanatory memorandum (at p. 16) justifies this approach as follows:

> Allowing CSF eligible securities to be specified in the regulations will enable the CSF regime to be restricted to a limited range of securities, which is appropriate given crowd-funding is a relatively new development in Australia, but will provide flexibility to permit the expansion of crowd-funding to a broader range of securities in the future.

As the regulations will be subject to disallowance, and in light of the explanation provided, the committee leaves the question of whether the proposed delegation of legislative power is appropriate to the Senate as a whole.

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

Delegation of legislative power
Schedule 1, item 14, proposed subsection 7380(1)(c)

The committee has identified proposed subsection 738G(1)(c) as a delegation of legislative power as it provides for regulations to prescribe the types of securities eligible for crowd funding. Proposed subsection 738G(1)(c) delegates the power to prescribe eligible securities for the CSF regime to the regulations to enable the Government to quickly change the types of securities available under crowd-funding. Any regulations prescribed would be subject to disallowance and thus subject to parliamentary scrutiny.

As the CSF regime is new and is expected to evolve quickly, there is a need to have the flexibility to quickly adjust the type of securities that are eligible for crowd-funding. The Government is currently proposing that only fully-paid ordinary shares would be subject to crowd-funding when the regime commences. This will ensure that there are appropriate limits on the securities made available under crowd-funding as the regime commences and begins to develop. As the market develops and investors become more familiar with the benefits and risks associated with the sector, it may be desirable to permit other types of securities to ensure that the crowd-funding market can grow and be sustainable, and also provide investors with opportunities to invest in different type of securities. As crowd-funding is a new market in Australia, it is important that any changes can be implemented quickly and in response to the way the market is developing as this would ensure the market is given the best chance for success.

An important aspect of the CSF regime is to ensure investors have appropriate protections when participating in crowd-funding. Prescribing the securities eligible for crowd-funding is an important aspect of the CSF regulatory regime. It ensures the Government can quickly amend the types of securities available on crowd-funding platforms to prevent a systemic issue from arising and maintain investor confidence.

Committee response

The committee thanks the Assistant Treasurer for taking the opportuniy to provide this additional information.

Alert Digest No. 1 of 2016 - extract

Reversal of burden of proof
Schedule 1, item 14, proposed subsection 738Z

This section provides for a number of defences against liability to an offence relating to a defective offer document under section 738Y. In relation to theses defences a defendant bears an evidential burden (see the notes to subsections 738Y(1), (3) and (6)).

The explanatory memorandum notes that the defences are similar to those available in relation to certain existing disclosure documents. In relation to the first defence the explanatory memorandum states that the company is best placed to raise evidence that 'they did not know the offer document was defective'. The reversal of onus is not explicitly addressed in relation to the second two defences.

While some material justifying the approach has been provided, in light of the significance of any reversal of the burden of proof, the committee seeks the Assistant Treasurer's more detailed justification, which addresses each of the items against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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

Minister's response - extract

Reversal of burden of proof
Schedule 1, item 14, proposed subsection 738Z

The committee has sought further information in relation to the reversal of the burden of proof in relation to the defences to defective CSF offer documents in proposed subsections 738Z(1), (3) and (6).

The CSF regime provides for defences to defective disclosure documents that are consistent with the defences available for other types of fundraising in chapter 6D of the Act. For these defences a defendant bears an evidential burden to point to evidence that suggests a reasonable possibility that the matter exists or does not exist. Once the defendant discharges this evidential burden, the prosecution must disprove these matters beyond reasonable doubt.

The evidential burden on the defendant is therefore fully consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which establishes the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence.

Proposed subsection 738Z(1) establishes a defence to a defective offer document if the relevant person did not know that the document was defective. Similarly, a second defence (proposed subsection 738Z(3)) to a defective offer document is available where a person relies on information given to them from another person, other than if the information was provided by an employee or agent or (in the case of a company) a director.

In addition, a person who is named in a CSF offer document as being a proposed director or underwriter, or as making a statement included in the CSF offer document, has a defence from liability for defects in an offer document if the person publically withdrew their consent to being referenced in the document in that way (proposed subsection 738Z(6)).

To make use of any of these defences, the relevant person will have to provide evidence as appropriate that they did not know that the offer document was defective, appropriately relied on information from another person or publically withdrew consent to being referenced in the offer document. In each of these cases, it is appropriate that the person making use of the defence is required to raise the required evidence as they are the ones best placed to do so.

Committee response

The committee thanks the Assistant Treasurer for this response. **The committee requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

The committee takes this opportunity to reiterate the importance of the principle outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 50) which states that:

"Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, a matter should only be [framed as] an offence-specific defence, as opposed to being specified as an element of the offence, where:

(a) it is peculiarly within the knowledge of the defendant, and

(b) it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter."

continued

In relation to this particular matter, the committee leaves the question of whether placing an evidential burden on the defendant is appropriate to the Senate as a whole.

Alert Digest No. 1 of 2016 - extract

Reversal of burden of proof
Schedule 1, item 14, proposed subsection 738ZG(6)–(9)

The bill sets out a number of defences to the restriction on advertising offences (see subsections 738ZG(6)–(9)). The note to proposed subsection 738ZG(4) states that a defendant bears an evidential burden in relation to matters relevant to establishing these defences. Although the explanatory memorandum (at p. 76) justifies the reversal of the burden of proof in relation to the exception stated in subsection 738ZG(8), the other instances are not addressed. **The committee therefore seeks the Assistant Treasurer's more detailed justification, which covers all instances where an evidential burden is placed on a defendant, including addressing each of the items against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

Minister's response - extract

Reversal of burden of proof
Schedule 1, item 14, proposed subsection 738ZG(6)–(9)

The committee has sought further information on the reversal of burden of proof in relation to the defences to restrictions on advertising CSF offers in proposed subsections 738ZG(6)-(9).

The CSF regime provides for exemptions to the restrictions on the publication of CSF offers that are consistent with the exemptions available in relation to advertising other types of offer documents under chapter 6D of the Act. A person relying on one of these

exemptions bas an evidential burden of pointing to the relevant evidence that suggests a reasonable possibility that the matters required under an exemption exists. Once the defendant discharges this evidential burden, the onus is still on the prosecution to disprove the matters beyond reasonable doubt.

This approach is consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which establishes the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence. In this case, the person seeking to use one of the exemptions to the restrictions on the publication of CSF offers is required to bear an evidential burden in showing that the specific exemption applies.

Proposed subsection 738ZG(6) provides an exemption to the restrictions on advertising CSF offers if the advertisement also states that a person should consider the CSF offer document and general CSF risk warning when considering whether to make an application pursuant to the offer. Placing the evidential burden on the person publishing the advertisement is appropriate as they are best placed to provide the evidence that the statement complied with the requirements to fall within the exemption.

A second exemption to the prohibition on advertising CSF offers provided for under proposed subsection 738ZG(7) applies to publishers who advertise a CSF offer in the ordinary course of a media business and do not know that publication is prohibited. It is appropriate for the publisher to bear the evidentiary burden in this case as the exemption relies on their state of mind.

There is a general exemption to the prohibition on advertising CSF offers under proposed subsection 738ZG(8) for statements made on the communication facility of a CSF offer as long as the statement is made in 'good faith'. The evidential burden of demonstrating that the statement was made in 'good faith' falls on the person making the statement. This is appropriate as the person making the statement is best placed to raise evidence as to why the statement was made in good faith, given it could at least in part involve some inquiry as to the person's state of mind and knowledge.

Finally, there is a broad exemption from the restrictions on advertising CSF offers under proposed subsection 738ZG(9) to permit disclosure in certain circumstances. These exemptions apply as follows:

- A publication that consists solely of a notice or report of a general meeting of the company making or intending to make the offer is permitted. In this case, it is appropriate that the person making the publication bears the evidentiary burden of showing that it consists solely of a notice or report of the company's general meeting as that person is best placed to have records of the meeting and know the circumstances surrounding the meeting.
- Publication of a report about a company making or intending to make the CSP offer and does not contain information that materially affects the affairs of the company,

other than information previously made available in a CSP offer document that is appropriately published, or in any other permitted report, and does not refer to the CSP offer. The person making the publication is best placed to bear the evidential burden in these circumstances as they are best placed to point to the source of information previously made public by the company.

- News reports or genuine comment in the media relating to a published CSP offer is permitted if it is based on information covered in the published offer document or another permitted report and no consideration is paid to the person making the publication. The person claiming the defence is best placed to bear the evidential burden as they are best placed to point to the source of the information used.
- Reports on securities of a company making or intending to make a CSP offer published by a person not related to or acting at the instigation of the company making the offer is permitted as long as no consideration is paid to the person making the publication. In this case, it is appropriate that the person making the publication bear the evidential burden as they are best placed to demonstrate their independence from the company making the CSP offer.

Committee response

The committee thanks the Assistant Treasurer for this detailed response. **The committee requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

The committee takes this opportunity to reiterate the importance of the principle outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 50) which states that:

"Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, a matter should only be [framed as] an offence-specific defence, as opposed to being specified as an element of the offence, where:

(a) it is peculiarly within the knowledge of the defendant, and

(b) it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter."

In relation to this particular matter, the committee leaves the question of whether placing an evidential burden on the defendant is appropriate to the Senate as a whole.

Courts Administration Legislation Amendment Bill 2015

Introduced into the Senate on 2 December 2015
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2016*. The Attorney-General responded to the committee's comments in a letter received on 22 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends the *Federal Court of Australia Act 1976*, *Family Law Act 1975* and *Federal Circuit Court of Australia Act 1999* to:

- designate the Federal Court of Australia (including the National Native Title Tribunal), the Family Court of Australia and the Federal Circuit Court of Australia as a single administrative entity under the *Public Governance, Performance and Accountability Act 2013* and a single statutory agency under the *Public Service Act 1999*;
- establish shared corporate services functions for the courts;
- maintain heads of jurisdiction's responsibility in relation to the business and administrative affairs of their respective courts;
- provide for a chief executive officer (CEO) for each head of jurisdiction to assist with the management of administrative affairs and provide that the CEOs also hold the position of Principal Registrar;
- provide for the Federal Court CEO to have responsibility for managing the shared corporate services, with a requirement for consultation; and
- provide that the Federal Court CEO is the accountable authority for the administrative entity and the agency head for the statutory agency.

The bill also makes consequential amendments to 16 Acts.

Delegation of legislative power
Schedule 1, items 5 and 8, proposed paragraph 18A(1B)(j) and subsection 18A(5) of the *Federal Court of Australia Act 1976*
Schedule 2, items 53 and 57, proposed paragraph 38A(1B)(j) and subsection 38A(5) of the *Family Law Act 1975*
Schedule 3, items 5 and 7, proposed paragraph 89(2A)(j) and subsection 89(5) of the *Federal Circuit Court of Australia Act 1999*

Item 5 would insert a new definition of 'corporate services' into the *Federal Court of Australia Act 1976* and provide that they are excluded from the administrative affairs of the courts. A major purpose of the bill is to enable the corporate services for the Federal Court, Family Court and Federal Circuit Court to be provided under an amalgamated corporate structure. New paragraph 18A(1B)(j) provides that in addition to the matters listed in subsection 18A(1B), further matters may be prescribed so as to come within the definition of corporate services (see also proposed subsection 18A(5)).

This approach to the definition of corporate services is replicated in the amendments relating to the Family Court and the Federal Circuit Court (see Schedule 2, items 53 and 57 and Schedule 3, items 5 and 7).

The explanatory memorandum justifies this delegation of legislative power to the Attorney-General by pointing to the flexibility that it would provide 'to determine the inclusion of further matters in the definition of corporate services in the future, should further matters be identified' (at p. 15).

Given the importance of federal courts maintaining an appropriate level of control over their own administrative affairs and the central role the definition of corporate services plays in the overall objectives of the legislation, **the committee seeks the Attorney-General's more detailed justification for enabling the Attorney-General to modify the definition by legislative instrument rather than requiring such modifications to be achieved through amendment to the primary legislation.**

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

Attorney-General's response - extract

The Committee has highlighted that the Bill would insert a new definition of 'corporate services' and exclude these matters from the definition of 'administrative affairs' in each of the *Federal Court of Australia Act 1976*, *Family Law Act 1975* and *Federal Circuit Court Act 1999*. The Committee has commented on the element of the definition that

allows the Attorney-General determine by legislative instrument other matters that will form part of the definition of corporate services and requested further information to justify the provision.

The key purpose of the Bill is to generate efficiencies in corporate services functions that can be reinvested in the core business of the courts. The provision highlighted by the Committee is intended to allow the maximum possible scope for this objective to be achieved into the future.

I note an exclusive list of matters is used for the definition of corporate services as this is necessary to provide clear lines of management and accountability.

It is expected that the other matters provided for in the provision would be used at the request of the courts in cases where they identify additional corporate services that would be beneficially managed jointly by the Federal Court CEO on behalf of the three courts. This is consistent with the approach taken in developing the Bill, which was done with the agreement of all of the heads of jurisdiction; for example, an earlier draft did not include 'libraries', but this was added at the request of the courts. A determination power of the Attorney-General provides an efficient means of adapting the definition to suit the courts' requirements.

The requirement that any determination be a legislative instrument will provide transparency and safeguards. The possibility of disallowance provides a visible mechanism to ensure the independence of the courts, in the highly unlikely event there is concern within the courts about the manner in which the Attorney-General has exercised the power. I am pleased to advise that close consultation with the courts has characterised the development of the Bill.

Committee response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

The committee notes that any instrument which expands the definition of 'corporate services' will be subject to disallowance by either House of the Parliament. Noting this, and the fact that the bill has already been passed by the Senate, the committee makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Introduced into the House of Representatives on 26 November 2015
Portfolio: Justice
This bill passed both Houses on 23 February 2016

Introduction

The committee dealt with this bill in *Alert Digest No. 14 of 2015*. The Minister responded to the committee's comments in a letter dated 2 February 2016. The committee sought further information and the Minister responded in a letter dated 12 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2015 - extract

Background

This bill amends the *Proceeds of Crime Act 2002* (POC Act), *Criminal Code Act 1995* (*Criminal Code*), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), and the *AusCheck Act 2007* (AusCheck Act).

Schedule 1 amends the POC Act to clarify the operation of the non-conviction based confiscation regime provided under that Act.

Schedule 2 amends the *Criminal Code* to create two new offences of false dealing with accounting documents.

Schedule 3 amends the *Criminal Code* to clarify the definitions of the terms 'drug analogue' and 'manufacture' and ensure that they capture all relevant substances and processes.

Schedule 4 amends the AML/CTF Act to clarify and address operational constraints identified by law enforcement agencies including:

- listing the Independent Commissioner Against Corruption of South Australia as a 'designated agency' under the Act;
- amending the definition of 'foreign law enforcement agency' in the Act to specifically include Interpol and Europol, and provide a new regulation-making power to enable additional international bodies to be prescribed in future; and
- clarifying the circumstances in which entrusted investigating officials may disclose information obtained under section 49 of the Act.

Schedule 5 amends the AusCheck Act to enable AusCheck to directly share AusCheck scheme personal information with State and Territory authorities and with a broader range of Commonwealth authorities.

Trespass on personal rights and liberties—privacy
Schedule 5, item 3

This amendment will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. In each case the disclosure must be for the performance of functions relating to law enforcement or national security.

The statement of compatibility and explanatory memorandum justify this measure in part on the basis that appropriate safeguards will remain in place to protect disclosure of AusCheck personal information under the AusCheck legislation (see pp 6–7 and 15–16).

One of the safeguards discussed relates to AusCheck's 'robust administrative procedures and practices' for ensuring that its information is managed in an open and transparent way. Further, it is emphasised AusCheck has developed *Guidelines for Accessing Information on the AusCheck Database* under regulation 15 of the AusCheck regulations which 'establish a compulsory framework for providing access to AusCheck information'. Although these practices and the Guidelines do constitute practical safeguards, it is a matter of concern that the existence of safeguards such as these is not required by law. **As such, the committee seeks the Minister's advice as to whether consideration has been given to enshrining practices and policy in law to provide assurance that the safeguards are robust and permanent. Alternatively, the committee seeks the Minister's advice as to whether consideration has been given to establishing at least a general legislative requirement that safeguards, such as those currently used, are required to be in place.**

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

Minister's initial response - extract

The amendments in Schedule 5, Item 3 will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. The broadening of disclosure is however limited to that which is necessary for the purpose of the performance of functions relating to law enforcement or national security.

The use and disclosure of AusCheck scheme personal information is protected by law. AusCheck scheme personal information is subject to the privacy protections in the *Privacy Act 1988*, including the Australian Privacy Principles (APPs). Section 15 of the *AusCheck Act 2007* also prescribes criminal penalties for the unlawful disclosure of AusCheck scheme personal information by any person, which carries a maximum penalty of two years imprisonment.

Pursuant to regulation 15(2) of the *AusCheck Regulations 2007*, all AusCheck staff members are required to comply with the *Guidelines for Accessing Information on the AusCheck Database*. The Guidelines provide a compulsory decision-making framework for AusCheck staff members to determine whether disclosure of AusCheck scheme personal information is appropriate and for prescribed purposes only. This framework has been established in the form of guidelines, as these are administrative procedures that require updating on a frequent basis due to, for example, changes in ICT systems.

Failure of an AusCheck staff member to comply with the Guidelines may constitute a criminal offence under section 15 of the *AusCheck Act 2007*. The Attorney-General's Department considers that this is a significant legislative incentive to comply with the Guidelines, and ensures that the safeguards on information held by AusCheck are robust and permanent. Information provided by AusCheck to other agencies will also be protected by these agencies' own privacy or secrecy obligations.

AusCheck is required under the Guidelines to publicly report disclosures of personal information from the AusCheck database to recognised Commonwealth authorities and accredited agencies, in the Attorney-General's Department Annual Report. This includes the names of the authorities or agencies to which information was provided and the purposes, frequency and method of provision of access to personal information.

AusCheck's privacy notice and Guidelines will be updated to clarify the agencies and purposes for which an individual's personal information may be provided. The privacy notice is provided to all individuals who are background checked through AusCheck and is published on the AusCheck website.

Committee's initial response

The committee thanks the Minister for this detailed response and **requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

continued

The committee notes the Minister's advice, including:

- in relation to the legal protections connected with the use and disclosure of AusCheck scheme personal information, including that such information is subject to the privacy protections in the *Privacy Act 1988* and that there are criminal penalties for the unlawful disclosure of information;
- that all AusCheck staff members are required to comply with the *Guidelines for Accessing Information on the AusCheck Database* (made under regulation 15 of the AusCheck Regulations 2007). The Minister states that the 'Guidelines provide a compulsory decision-making framework for AusCheck staff members to determine whether disclosure of AusCheck scheme personal information is appropriate and for prescribed purposes only.' Furthermore, the Guidelines require the public reporting of disclosures of personal information from the AusCheck database; and
- that this 'framework has been established in the form of guidelines, as these are administrative procedures that require updating on a frequent basis due to, for example, changes in ICT systems'.

The committee notes this rationale for the use of guidelines rather than primary or delegated legislation in this instance; however the committee is also aware that there is no *requirement* for these guidelines to be in place. Regulation 15(1) of the AusCheck Regulations 2007 provides that 'The Secretary *may* issue guidelines about the use and disclosure of information included in the AusCheck database.'

While acknowledging the Minister's advice, given that these proposed amendments will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies, the committee recommends that consideration be given to amending regulation 15(1) to at least specify that the Secretary '*must* issue guidelines about the use and disclosure of information included in the AusCheck database.' This would at least ensure that there is a general legislative requirement that safeguards, such as those currently in the Guidelines, are *required* to be in place. The committee seeks the Minister's advice in this regard.

In addition, the committee remains of the view that it would be useful to include at least some minimum safeguards relating to the use and disclosure of personal information in the primary legislation or regulations.

Pending the Minister's further reply, the committee draws this matter, and the comments above, to the attention of Senators.

Minister's further response - extract

I note your recommendation that consideration be given to amending regulation 15(1) of the AusCheck Regulations 2007 to specify that the Secretary of the Attorney-General's Department *must* issue Guidelines for Accessing Information on the AusCheck Database (Guidelines), to ensure that there is a general legislative requirement that safeguards, such as those currently in the Guidelines, are required to be in place. I note your further recommendation that it would be useful to include some minimum safeguards relating to the use and disclosure of personal information in the primary legislation or regulations.

I consider that the current safeguards relating to the use and disclosure of personal information, as set out in existing legislation and regulations, to be sufficient. AusCheck is subject to the requirements of the *Privacy Act 1988,* including the Australian Privacy Principles. Information held by AusCheck is further protected by the strict procedures relating to the disclosure of personal information to specified parties in both the *AusCheck Act 2007* and the AusCheck Regulations. Disclosure outside of these procedures – by any person who obtains AusCheck scheme personal information – is an offence under the AusCheck Act, with a maximum penalty of 2 years imprisonment.

AusCheck's information sharing arrangements are further strengthened by obligations on accredited agencies (law enforcement and national security agencies) to use and share AusCheck information in accordance with their own privacy or secrecy obligations. Agencies also have legislated obligations to share information appropriately.

The Guidelines have formed a part of the AusCheck administrative framework since its inception and are assessed regularly to ensure they are fit for purpose.

AusCheck will continue to assess the adequacy of the information sharing provisions under its legislative framework and its associated policies and procedures, to ensure these remain robust and fit for purpose. This will include an ongoing assessment of the Guidelines, and how provisions imposing obligations relating to the Guidelines (including regulation 15) could be strengthened in light of the current arrangements.

Committee response

The committee thanks the Minister for this response.

continued

The committee notes the Minister's advice that 'AusCheck will continue to assess the adequacy of the information sharing provisions under its legislative framework…to ensure these remain robust and fit for purpose' and that this 'will include an ongoing assessment of the Guidelines, and how provisions imposing obligations relating to the Guidelines (including regulation 15) could be strengthened in light of the current arrangements'.

Noting this, the committee reiterates its view that as part of this ongoing assessment consideration be given to amending regulation 15(1) to at least specify that the Secretary '*must* issue guidelines about the use and disclosure of information included in the AusCheck database.' While the Guidelines have formed part of the AusCheck administrative framework since its inception there is currently no general legislative requirement that safeguards, such as those currently in the Guidelines, are required to be in place.

However, as the bill has already passed both Houses of the Parliament, the committee makes no further comment in relation to this matter.

The committee also takes this opportunity to thank the Minister for providing an addendum to the explanatory memorandum (tabled in the Senate on 22 February 2016) which inserted the key information from the Minister's previous response to committee (published in the committee's *First Report of 2016* – see pages 10–15). The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

Criminal Code Amendment (Firearms Trafficking) Bill 2015

Introduced into the House of Representatives on 2 December 2015
Portfolio: Justice

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No. 1 of 2016*. The Minister responded to the committee's comments in a letter dated 10 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends the *Criminal Code Act 1995* to provide for a mandatory minimum sentence and increased maximum penalties for the offences of trafficking firearms or firearms parts within Australia, and into and out of Australia.

Offences—penalties

This bill raises the maximum penalties and sets new mandatory minimum penalties for the offences of:

- trafficking firearms and firearm parts within Australia (in Division 360 of the *Criminal Code*); and
- trafficking firearms and firearm parts into and out of Australia (in Division 361 of the *Criminal Code*),

The **maximum penalties** for these offences will be raised from 10 years imprisonment or a fine of 2500 penalty units or both to 20 years imprisonment or a fine of 5000 penalty units or both. The doubling of the applicable maximum penalty is justified in the explanatory memorandum (at p. 6):

> The increased maximum penalty is necessary to ensure that the serious offences of trafficking firearms within Australia, and into and out of Australia, are matched by commensurate punishments.
>
> Consistent with the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, the increased maximum penalty will be adequate to deter and punish the worst case offence. This ensures that

sentences imposed by courts can continue to take into account the particular circumstances of the offence and the offender.

The new maximum penalty reflects the seriousness of the conduct covered by the offences, to address the clear and serious social and systemic harms associated with this trade.

The statement of compatibility elaborates the seriousness of the offences by reference the 'serious social and systemic harms associated with firearms trafficking' and 'the gravity of supplying firearms and firearm parts to the illicit market'. The gravity of the offences is illustrated by noting that the 'entry of even a small number of illegal firearms into Australia can have a significant impact on the community' on account of the fact that 'firearms can remain within that market for many years and be accessed by individuals and groups who would use them to commit serious and violent crimes, such as murder'. For example, in 2012 firearms were identified as being the type of weapon used in 25% of homicides in Australia (at p. 4).

Although the explanatory materials make a case for increasing the maximum penalty, doubling the penalties represents a very significant increase. **The committee therefore seeks the Minister's advice as to examples of other offences that carry this level of penalty and a more detailed justification demonstrating that these trafficking offences are of a similar level of seriousness.**

Minister's response - extract

Currently, the maximum penalties for firearms trafficking offences under the Code are imprisonment for 10 years, or a fine of 2,500 penalty units (equal to $450,000), or both. The Bill would double those maximum penalties to imprisonment for 20 years, or a fine of 5,000 penalty units (equal to $900,000), or both.

Offences under the Code which carry similar maximum penalties include a number of drug offences, such as trafficking marketable quantities of controlled drugs (section 302.3), cultivating or selling marketable quantities of controlled plants (section 303 .5 and section 304.2 respectively), manufacturing marketable quantities of controlled drugs (section 305.4), and importing and exporting marketable quantities of border controlled drugs or border controlled plants (section 307.2). Each of these offences carry a penalty of imprisonment for 25 years (five more than those proposed for firearms trafficking), or 5,000 penalty units, or both.

Increasing the maximum penalty for firearms trafficking offences in the Code from 10 to 20 years' imprisonment and 2,500 to 5,000 penalty units is analogous with the maximum penalties applied to serious drug offences. This indicates the serious social and systemic harms posed by both forms of trafficking and supply. In each case, the offender's behaviour gives rise to harmful and potentially deadly outcomes. Further, the risk posed to

community health and safety by firearms endures over time, as—due to their imperishable nature—firearms can remain in the illicit market for decades and be used in the commission of countless crimes over their lifespan.

As noted by the Law Council of Australia in its submission to the Senate Legal and Constitutional Affairs References Committee, the increased penalties proposed by the Bill would also more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. For example, in NSW firearms trafficking offences can attract a maximum sentence of 20 years' imprisonment (section 51 *Firearms Act 1996* (NSW)), while in the ACT repeated firearms trafficking offences within a 12-month period can also attract a maximum penalty of 20 years' imprisonment (section 220 *Firearms Act 1996* (ACT)).

Committee response

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*)**.

The committee draws this matter to the attention of Senators and leaves the question of whether doubling the maximum penalties for firearms trafficking offences is appropriate to the Senate as a whole.

Alert Digest No. 1 of 2016 - extract

The justification provided for the imposition of a **new mandatory minimum sentence** of five years imprisonment is also addressed in the explanatory materials. The explanatory memorandum (at p. 7) states:

> The Commonwealth has adopted a range of measures in response to the threat posed by illicit firearms, one of which is sentencing people convicted of firearms trafficking offences to mandatory minimum prison terms. Mandatory minimum sentences, when applied to individuals convicted of serious offences, are an effective way to deter potential offenders from firearms trafficking. The severe mandatory penalties associated with the firearms trafficking sentencing regime accord with the criminality of firearms smuggling, but must be carefully directed towards those whose individual culpability also justifies mandatory terms of imprisonment.

> The mandatory minimum penalty will not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed (subsection 360.3A(2)). This preserves judicial discretion when sentencing to take into account the particular circumstances of minors.
>
> The amendment does not prescribe a minimum non-parole period. This will preserve a court's discretion in sentencing, and will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender. The mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence.

The statement of compatibility suggests that the mandatory minimum penalty is proportionate given the seriousness of the offences, the fact it does not apply to children and because there is no minimum non-parole period.

Nevertheless, mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. Such discretions are exercised judicially and in light of sentencing principles and it remains unclear why the discretion should be removed in this particular instance. **For this reason the committee seeks the Minister's more detailed justification for the proposed approach, including whether there are examples of analogous offences that carry a mandatory minimum penalty.**

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

Minister's response - extract

Currently, there is no mandatory minimum term of imprisonment for firearms trafficking offences under the Code. The Bill introduces a five year mandatory minimum sentence for those offences.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers does not prohibit the use of mandatory minimum sentences. The Government's decision to introduce mandatory minimums for firearms trafficking offences demonstrates the seriousness with which it takes this type of offending, which can lead to the supply of firearms to those who would use them in the commission of serious crimes.

The outcomes of the Martin Place Siege Joint Commonwealth – NSW Review (the Review) support the view that firearms trafficking requires a strong response from Government. In drafting the Review, the Commonwealth and New South Wales Governments considered gunman Man Haran Manis' access to firearms. The Review noted

that the measures included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, which included mandatory minimum sentences, would strengthen the Commonwealth's ability to tackle the illegal trafficking of firearms and firearms parts into and out of Australia.

I note that the Committee has stated that mandatory penalties undermine the discretion of judges to ensure that penalties are proportionate in light of the individual circumstances of particular cases. Mandatory minimum sentences for firearms trafficking offences are reasonable and necessary both to deter would-be firearms traffickers, and to appropriately penalise those who commit these offences. There are appropriate limitations and safeguards in place to ensure that detention is proportionate in each individual case.

As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will remain at the discretion of the sentencing judge. In response to concerns raised by the Parliamentary Joint Committee on Human Rights when the mandatory minimums were first introduced in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, the Explanatory Memorandum for this Bill notes that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. The provisions similarly do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. Importantly, the mandatory minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law.

In response to concerns raised by the Senate Legal and Constitutional Affairs Committee in its report regarding the Bill, the Explanatory Memorandum (EM) has been amended to address the treatment of offenders with significant cognitive impairment. The EM now explicitly states that the lack of a non-parole period for offenders will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offender, including any mitigating factors such as cognitive impairment.

The EM also points to section 7.3 of the Code, which sets out that a person is not criminally responsible for an offence if at the time of carrying out the conduct the person was suffering from a mental impairment that affected their ability to know the nature and quality of the conduct, know that the conduct was wrong, or was unable to control the conduct. This insertion reinforces the discretion of the sentencing judge in applying non-parole periods which are proportionate in individual cases.

Further, under section 16A of the *Crimes Act 1914* courts are required to take into account the character, antecedents, age, means and physical or mental condition of the person. A sentencing judge will therefore be obliged to consider these matters in determining the amount of time an offender spends in custody if they are convicted of a firearms trafficking offence and receive the mandatory minimum head sentence of five years' imprisonment.

The United Kingdom has introduced similar mandatory minimum sentences for firearms-related offences. Under section 51A of the *Firearms Act 1968,* an individual in the United Kingdom may be subject to a five year mandatory minimum for offences such as possession of firearm with intent to injure, carrying a firearm with criminal intent, or carrying a firearm in a public place. The penalties in the United Kingdom are more stringent than those proposed in the Bill, as offenders under the age of 18 (in England and Wales) are still subject to a three year mandatory minimum term.

Australia's people smuggling offences set out in the *Migration Act 1958* (Migration Act) and the Code contain mandatory minimum sentences for certain aggravated offences. The offences contained in the Migration Act and Code carry a mandatory minimum sentence of five years for the offence of organising or facilitating the entry or proposed entry of five or more persons, and a mandatory minimum sentence of eight years for the offence of people smuggling where there is a danger of death or serious harm.

The Code and Migration Act penalties are analogous to the offences in this Bill for which mandatory minimum offences have been proposed. For example, the aggravated offence of people smuggling (danger of death or serious harm etc.) carries a maximum penalty of imprisonment for 20 years, or 2,000 penalty units, or both and carries a mandatory minimum sentence of eight years. In committing this offence, the person's conduct must have been reckless as to the danger of death or serious harm to the victim that arose from the conduct.

Those engaged in firearms trafficking are similarly reckless as to the risk of death or serious harm to any number of potential victims. Due to their imperishable nature, once firearms have been trafficked into the illicit market they can remain within that market for many years, and be accessed by individuals and groups who would use them to commit serious and violent crimes such as murder. As demonstrated by the penalties for people smuggling offences, criminal conduct which is reckless as to potentially deadly consequences should carry significant penalties.

From a national perspective, in 2014 the New South Wales Government passed the *Crimes Amendment (Intoxication) Bill 2014.* As a result, a court is required to impose a sentence of imprisonment of not less than eight years on a person guilty of an offence under subsection 25A(2) of the *Crimes Act 1900* (NSW). Subsection 25A(2) addresses assault causing death when intoxicated (colloquially referred to as 'one punch' laws). Any non-parole period for the sentence is also required to be not less than eight years. The Queensland Government introduced an offence of unlawful striking causing death in the *Safe Night Out Legislation Amendment Act 2014* (Qld). Generally, if a court sentences a person to a term of imprisonment for such an offence, the court must make an order that the person must not be released from imprisonment until the person has served the lesser of 80% of the person's term of imprisonment for the offence or 15 years.

The introduction of mandatory minimum sentences of five years' imprisonment for firearms trafficking offences is an important aspect of the Government's strategy to stop

illegal guns and drugs at the border. The simultaneous introduction of increased maximum penalties ensures that the full range of penalties associated with these offences is commensurate with their seriousness, and with the grave nature of the associated crimes they can affect.

Committee response

The committee thanks the Minister for this detailed response and **requests that the key information above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*)**.

The committee notes the Minister's advice that the provisions do not impose a mandatory non-parole period and therefore the actual time a person will be incarcerated will remain at the discretion of the sentencing judge, who will be able to take into account the particular circumstances of the offence and the offender, including any mitigating factors.

The committee also notes the Minister's advice that the mandatory minimum sentences will not apply to children. In this context, the committee notes that in order for this exception to apply, the defendant will bear an evidential burden regarding their age. This means that the defendant will need to adduce or point to evidence that suggests a reasonable possibility that they are under 18.

The committee draws this matter to the attention of Senators and leaves the question of whether the imposition of a five year mandatory minimum term of imprisonment for firearms trafficking offences is appropriate to the Senate as a whole.

Insolvency Law Reform Bill 2015

Introduced into the House of Representatives on 3 December 2015
Portfolio: Treasury
This bill passed both Houses on 22 February 2016

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No. 1 of 2016*. The Assistant Treasurer responded to the committee's comments in a letter received on 22 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends *Bankruptcy Act 1966*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to:

- make changes in relation to in insolvency administrations;
- align the registration and disciplinary frameworks that apply to registered liquidators and registered trustees;
- align a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations; and
- provide the Australian Securities and Investments Commission with increased powers to assist in the oversight of the regulation of registered liquidators.

The bill also makes consequential amendment to 25 Acts.

Delegation of legislative power
Schedule 1, Insolvency Practice Schedule (Bankruptcy), section 5-30
Schedule 2, Insolvency Practice Schedule (Corporations), section 5-30

The Insolvency Practice Schedule (Bankruptcy) refers to people with a financial interest in the administration of a regulated debtor's estate and provides for a power of such persons to apply to the Court in relation to that administration. Section 5-30 states a person has a 'financial interest' if the person is the regulated debtor, a creditor, the trustee or 'in any other circumstances prescribed'.

The explanatory memorandum states it may be necessary to expand the category of persons who have a financial interest in the future, but does not explain why that may be so

or why it is appropriate to do so through the rules rather than the primary legislation. The same issue arises in the Insolvency Practice Schedule (Corporations), section 5-30.

The committee's view is that important matters, such as the scope of those affected by a particular law, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **In the absence of information outlining the rationale for the approach proposed in these provisions, the committee seeks the Assistant Treasurer's advice as to the justification for the use of delegated legislation rather than addressing these significant matters in primary legislation as the need arises.**

> *Pending the Assistant Treasurer'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.*

Assistant Treasurer's response - extract

Delegation of legislative power
Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), section 5-30

Subsection 5-30(a) sets out the categories of persons that are considered to have a financial interest in the external administration of a company. A person who has a financial interest in the external administration of a company is given a right to apply to the Court in relation to the administration.

Insolvency practice is a dynamic area and circumstances may arise in the future where it is considered appropriate to expand the category of persons that have a financial interest in a company. This would be able to be achieved more expeditiously by the making of an insolvency practice rule rather that attempting to amend the primary legislation.

Inclusion in the list of persons with a financial interest in the external administration of a company confers a benefit or right on those persons. It does not impose a burden or obligation on them. Furthermore, the Parliament will retain oversight on any expansion of the category of persons because the Insolvency Practice Rules are legislative instruments which are disallowable by the Parliament.

Committee response

The committee thanks the Assistant Treasurer for this response.

continued

The committee takes this opportunity to restate its general view that important matters, such as the scope of those affected by a particular law, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

The committee notes that the Insolvency Practice Rules will be subject to disallowance by either House of the Parliament. Noting this, and the fact that the bill has already passed, the committee makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 1 of 2016 - extract

Privacy
Delegation of legislative power
Schedule 1, Insolvency Practice Schedule (Bankruptcy), section 15-1
Schedule 2, Insolvency Practice Schedule (Corporations), section 15-1

Under the proposed subsection 15-1(1) of Insolvency Practice Schedule (Bankruptcy), the Inspector-General must establish and maintain a Register of Trustees. The Insolvency Practice Rules may provide for and in relation to the Register (subsection 15-1(3)) and in particular may provide for and in relation to the details to be entered on the Register and the parts of the Register that are to be made available to the public. Proposed subsection 15-1(5) makes it clear that the details that may be included on the Register may include details of disciplinary action decided by a committee under section 40-55 and details of persons who have had their registration as a trustee under this Act suspended or cancelled.

This means that the Insolvency Practice Rules may include provisions which affect individual privacy interests. The same issue also arises in the Insolvency Practice Schedule (Corporations), section 15-1. The statement of compatibility notes that privacy is affected by the provision of such information to the public, but does not attempt to justify the approach (see p. 233).

As outlined above, the committee's view is that important matters, such as the matters which may affect a person's privacy interests, be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **The committee**

therefore seeks the Assistant Treasurer's justification for the potential impact on privacy interests and an explanation for providing for these important matters in a legislative instrument, including for authorising such an instrument to allow for the publication of disciplinary action taken against individuals.

Pending the Assistant Treasurer'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.

Assistant Treasurer's response - extract

Privacy; Delegation of legislative power
Schedule I, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), section 15-1

The privacy issues raised by section 15-1 should be considered in the context of the overall purpose of the reforms to strengthen the insolvency regulatory framework and the important function that the registration and disciplinary requirements play in achieving that policy objective.

The registration requirements relating to insolvency practitioners perform an essential gateway function which ensures that only persons with the requisite skills and qualifications are able to practise as professional insolvency practitioners. The registration system serves the public interest because it attempts to ensure that external administrations are only undertaken efficiently by skilled practitioners and that the interests of key stakeholders, such as creditors and members of a company, are adequately protected.

The reporting requirements imposed on insolvency practitioners together with the disciplinary system complement the initial registration requirements by ensuring that insolvency practitioners maintain their professional skills and comply with their ethical duties. Where a insolvency practitioner is disciplined for failing to carry out their professional duties, it is in the public interest that this information be included on the Register of Liquidators and the Register of Trustees and is available for public inspection. The need for transparency in relation to information on the Registers concerning details of disciplinary action, and the suspension or cancellation of registration should override any concerns that this affects an individual's privacy interests.

The principle that this information should be included in the Registers is established in the primary legislation. It is appropriate from a best practice administrative perspective that the details relating to the operation of the Register of Liquidators and Register of Trustees should be prescribed in the Insolvency Practice Rules. Furthermore, the Parliament will

retain oversight of these rules because the Insolvency Practice Rules are legislative instruments which are disallowable by Parliament.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee takes this opportunity to restate its general view that important matters, such as those which may affect a person's privacy interests, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

The committee notes that the Insolvency Practice Rules will be subject to disallowance by either House of the Parliament. Noting this, and the fact that the bill has already passed, the committee makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 1 of 2016 - extract

Reversal of onus of proof
Schedule 1, Part 1, Division 2, subsection 50-35(2), 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and others

A defendant bears an evidential burden in relation to the matter in subsection 50-35(2), but no explanation is provided in the accompanying material. The same issue also arises for subsection 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and others. **In light of the importance of any reversal of the burden of proof, the committee seeks the Assistant Treasurer's detailed justification for the proposed approach that addresses each of the instances in the bill against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

> *Pending the Assistant Treasurer'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.*

Assistant Treasurer's response - extract

Reversal of onus of proof
Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), Part 1, Division 2, subsections 50-35(2), 60-20(6), 60-26(3), 65-5(3). 65-15(3), 65-40(3) and others

Subsection 50-35(1) establishes an offence if a member of a committee uses a document or discloses information that was given to the member for purposes of exercising powers or performing functions as a member of the committee.

To prove the offence, the prosecution must prove all elements of the offence in paragraphs 50-35(1)(a),(b) and (c) beyond a reasonable doubt. This does not constitute a reversal of the onus of proof.

Subsection 50-35(2) sets out a list of exceptions where the offence provided for in subsection 50-35(1) does not apply. The defendant bears only an evidential burden when the defendant wishes to rely on one or more of the exceptions. The defendant discharges the evidential burden by adducing or pointing to evidence that suggests a reasonable possibility that one or more of the exceptions in subsection 50-35(2) applies. In this context, it is noted that subsection 13.3(3) of the *Criminal Code* provides, inter alia, that 'a defendant who wishes to rely on any exception, exemption, exception, excuse, qualification or justification provided by the law creating the offence bears an evidential burden in relation to that matter'.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that 'an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden)'. This comment reflects subsection 13.1(2) of the *Criminal Code* which provides that 'the prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant'.

Section 50-35 has been drafted in accordance with the relevant principles codified in the Criminal Code in relation to proof of criminal responsibility and is also consistent with the guidance in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* in relation to the evidential burden of proof.

Similar comments apply to subsections 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and other sections where a defendant bears an evidential burden.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee takes this opportunity to reiterate the importance of the principle outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 50) which states that:

"Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, a matter should only be [framed as] an offence-specific defence, as opposed to being specified as an element of the offence, where:

(a) it is peculiarly within the knowledge of the defendant, and

(b) it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter."

However, as this bill has already passed both Houses of the Parliament the committee makes no further comment in relation to this matter.

Alert Digest No. 1 of 2016 - extract

Delegation of legislative power
Schedule 1, Part 1, Division 2, section 105-1

This section provides for the making of the Insolvency Practice Rules.

The explanatory memorandum provides a general justification for a broad power to make Insolvency Practice Rules (at p. 105).

> 3.204 The Minister may, by legislative instrument, make rules providing for matters:
>
> - required or permitted by the Bankruptcy Act to be provided; or
> - necessary or convenient to be provided in order to carry out or give effect to the Bankruptcy Act.
>
> 3.205 The Minister requires this rule-making power to ensure the detail under and operational aspects of the Bankruptcy Act can be clearly outlined and, where necessary and appropriate, can be modified. Given the limitations on this rule-making power, as discussed below, it is appropriate to empower

> the Minister to make such rules. ***[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(1)]***
>
> 3.206 Rules made under subsection 105-1(1) may include offences but the penalties for such offences must not be more than 50 penalty units for an individual or 250 penalty units for a body corporate. It is appropriate for offences that incur lesser penalties to be created by the Minister under the Insolvency Practice Rules. This will allow greater flexibility where creating offences of a more minor and technical nature while ensuring that more serious offences undergo scrutiny by Parliament. ***[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsections 105-1(2) and (3)]***
>
> 3.207 For further clarification, subsections 105-1(4) and (5) outline limitations to the scope of the Insolvency Practice Rules. The rationale for these limitations is to ensure that rules cannot be created in relation to subject matter that should be limited to laws made by Parliament. ***[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsections 105-1(4) and (5)]***
>
> 3.208 The Minister's power to make rules under this section cannot be delegated to any other person to ensure that this rule-making power is exercised personally by the Minister, as is appropriate. ***[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(6)]***
>
> 3.209 References in section 105-1 to 'this Act' do not include the regulations or rules made under section 105-1. ***[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(7)]***

However, in light of the committee's view that important matters should be included in primary legislation unless a compelling justification is provided it is regrettable that the explanatory materials do not include a more detailed justification for why particular aspects of the new regulatory framework and the content of the rules are to be provided for in the Rules rather than the primary legislation.

For example, subsection 40-40(4) allows for the Rules to prescribe standards applicable to the exercise of power or the carrying out of duties of registered trustees. The explanatory memorandum does not explain why these rules cannot be included in the primary legislation (see p. 44).

Another example is found in subsection 65-50, which provides that significant rules in relation to the consequences for failure to comply with Division 65 of the Schedule may be provided for by the Insolvency Practice Rules. Other examples may also be given, such as section 70-50 (reporting to creditors).

The same issue also arises in the Insolvency Practice Schedule (Corporations).

Although flexibility is a relevant consideration in making such determinations, its relevance is not explained in particular instances. **The committee therefore seeks the**

Assistant Treasurer's detailed explanation of the general division between the Rules and primary legislation, which addresses the justification for including matters in the Rules (delegated legislation) in each instance.

> *Pending the Assistant Treasurer'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.*

Assistant Treasurer's response - extract

Delegation of legislative power
Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), Part 1, Division 2, section 105-1

The Explanatory Memorandum explains that the Minister requires this rule-making power to ensure the detail under and operational aspects of the corporate insolvency regime can be clearly outlined and, where necessary and appropriate, can be modified. The Scrutiny of Bills Committee acknowledges that flexibility is a relevant consideration in making such determinations. In this context, it should be noted that at the operational level, both personal bankruptcy and corporate insolvency are dynamic areas where modifications to the detailed rules may be required periodically, particularly during the initial period of the operation of these substantial reforms while the rules are being 'bedded down'.

There is another important justification for the general division between the Insolvency Practice Rules and the primary legislation. This relates to one of the primary objectives of these insolvency reforms which is to harmonise, as far as practicable, the laws relating to personal bankruptcy and corporate insolvency. The primary legislation has been designed to contain the 'common rules' applying to personal bankruptcy and corporate insolvency. The harmonisation objective has substantially been achieved in the primary legislation. However, at the detailed, operational level, there will be some areas where the corresponding rules relating to personal bankruptcy and corporate insolvency will differ. Accordingly, the general division between the primary legislation and Insolvency Practice Rules ensures that the harmonised requirements in the primary legislation between personal bankruptcy and corporate insolvency remain in place.

Furthermore, it should be noted that the Parliament will retain oversight of the Insolvency Practice Rules because they are legislative instruments which are disallowable by Parliament.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee takes this opportunity to restate its general view that important matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

The committee notes that the Insolvency Practice Rules will be subject to disallowance by either House of the Parliament. Noting this, and the fact that the bill has already passed, the committee makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 1 of 2016 - extract

Delegation of legislative power—Henry VIII clause
Schedule 1, Part 3, section 178
Schedule 2, Part 3, proposed section 1634

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. In this regard, the concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

This delegation of legislative power appears to enable the rules to modify the operation of the primary legislation and therefore operates as a Henry VIII clause. The explanatory memorandum explains section 178 as follows:

> The Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments and repeals made by the Schedule. This will allow for the creation of any transitional provisions that may have been overlooked by Part 3 of the Schedule. The regulations may provide that certain provisions of the Schedule are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified. The provisions of the Schedule that provide for regulations to deal with matters do not limit each other ***[Schedule 1, Part 3, Division 6, section 178]***

It is the practice of the committee to comment on so-called Henry VIII clauses when the rationale for their use is not provided or is insufficient.

The same issue arises in relation to the Insolvency Practice Schedule (Corporations), Schedule 2, Part 3, proposed section 1634.

In this instance, no explanation is given and the committee therefore seeks the Assistant Treasurer's advice as to the rationale for the proposed approach.

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

Assistant Treasurer's response - extract

Delegation of legislative power—Henry VIII clause
Schedule 2, Insolvency Practice Schedule (Corporations), Part 3, proposed section 1634

The power to make regulations modifying the primary legislation in section 1634 is expressly restricted to matters of a transitional nature. This will allow a transitional issue which arises after the enactment of the primary legislation to be resolved by the making of an appropriate regulation rather than having to address the issue by a Bill which would need to be introduced and passed by the Parliament. The adoption of section 1634 provides flexibility and also enables the Government to act expeditiously to resolve transitional issues that arise after the primary legislation comes into operation.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee takes this opportunity to reiterate its scrutiny concerns in relation to Henry VIII clauses which allow delegated legislation made by the Executive to override the operation of legislation which has been passed by the Parliament. In this regard, the committee's concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. The committee is also of the view that any Henry VIII clauses which authorise delegated legislation to modify the operation of primary legislation for transitional purposes should provide that the power to modify the primary legislation is limited to an appropriate transitional period.

continued

However, the committee notes that the Insolvency Practice Rules will be subject to disallowance by either House of the Parliament. Noting this, and the fact that the bill has already passed, the committee makes no further comment in relation to this matter.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Senator Helen Polley
Chair

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MINISTER ASSISTING THE PRIME MINISTER FOR DIGITAL GOVERNMENT
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

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Reply to Correspondence from Senate Scrutiny of Bills Committee - Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015

Helen

Dear Senator Polley

Thank you for the Committee Secretary's letter of 4 February 2016, on behalf of the Senate Scrutiny of Bills Committee (Committee), in relation to the *Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015* (Bill). I welcome the opportunity to address the Committee's questions on the Bill as presented in the Alert Digest No. 1 of 2016.

The committee has sought further advice regarding:

1. the rationale for the proposed repeal of section 152ELB of the *Competition and Consumer Act 2010* (C&C Act); and
2. the adequacy of review rights in relation to the administration of the numbering scheme by a numbering scheme manager, if one is appointed under proposed new section 454A of the *Telecommunications Act 1997* (Tel Act).

Delegation of legislative power – consultation requirements

The proposed removal of the consultation requirements in section 152ELB of the C&C Act forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. These reforms have been progressed over several years, including through the Omnibus Repeal Day (Autumn 2014) Act 2014, which made similar amendments to the *Broadcasting Services Act 1992, Interactive Gambling Act 2001, Radiocommunications Act 1992* and the Tel Act.

The rationale for the removal of bespoke consultation requirements is that they are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act), which sets the standard consultation requirements for all Commonwealth legislative instruments.

The provisions that have and will be repealed, mandate a variety of inconsistent approaches with respect to the time and method of consultation. There is no policy rationale for this inconsistency, which otherwise continues unnecessary inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements. The proposed repeal of section 152ELB is intended to contribute to the underlying goal of simplifying and harmonising the law.

The Committee has noted that LI Act consultation requirements are less prescriptive and subject to certain exemptions. One of the significant benefits of Part 3 of the LI Act is the fact that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken. This means that targeted consultation can be undertaken, with flexibility to ensure that the consultation meets the needs of stakeholders and also that unnecessary costs to the Government and stakeholders are minimised.

The Committee has also queried why section 152ELB of the C&C Act is seen to be unnecessary in light of the fact that section 19 of the LI Act provides that failure to consult does not affect the validity or enforceability of a legislative instrument. Section 19 is not confined to consultation in accordance with section 17 of the LI Act and it is not certain that any failure by the ACCC to comply with the public consultation requirements in section 152ELB would necessarily affect the validity or enforceability of Procedural Rules made under section 152ELA. In this context, Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the consultation of the Australian Competition and Consumer Commission (ACCC) on Procedural Rules made under section 152ELA, the relevant instrument may be disallowed.

Adequacy of review rights – administration of numbering scheme

The Australian Communications and Media Authority (ACMA) is currently required under the Tel Act to make a 'numbering plan' dealing with the numbering of carriage services and the use of numbers in connection with the supply of such services in Australia. Schedule 6 to the Bill would amend the Tel Act to facilitate the potential appointment of a person specified by the Minister to manage and administer the numbering scheme, in accordance with the numbering scheme principles. This is intended to provide a framework to transition to an industry-managed numbering scheme, if the Minister is satisfied that certain safeguards are met, to achieve a more efficient and effective management of numbering.

The Committee has sought advice as to what, if any, review rights are provided for in relation to the administration of the numbering scheme by an appointed numbering scheme manager.

The Minister cannot appoint a numbering scheme manager unless satisfied that the person will administer the numbering scheme in accordance with the numbering scheme principles.

Proposed section 454C contains the numbering scheme principles, which include making effective complaints processes available to both the telecommunications industry and users of carriage services (proposed new paragraph 454C(2)(n)). This principle will ensure that avenues are in place through which industry and consumers can have their complaints about actions which may affect their rights and obligations heard and addressed. The Minister may also supplement the statutory principles with new requirements by instrument if warranted (proposed new paragraph 454C(2)(q)).

Furthermore, the numbering scheme principles require the numbering scheme manager to adhere to the rules and processes of the numbering scheme (proposed new paragraph 454C(2)(l)). If necessary, the Minister can direct the numbering scheme manager to amend the rules or change the processes of the numbering scheme (proposed section 454E). This could cover, for example, where a complaints process was not satisfactory. In the event the numbering scheme manager did not adhere to the rules and processes of the numbering scheme in administering the scheme (including complaints-handling processes), the ACMA and ACCC could direct the numbering scheme manager to do, or not do, a specified act or thing in relation to the management of the numbering scheme. The numbering scheme manager would be required to comply with such a direction, subject to civil penalties. If necessary, there is scope for the Minister to revoke a person's appointment as a numbering scheme manager (proposed section 454D). This could be used, for example, where the Minister is not satisfied the numbering scheme manager is managing the numbering scheme in accordance with the numbering scheme principles (e.g. by not making effective complaints processes available).

These oversight and direction mechanisms provide strong incentives for the numbering scheme manager to provide an effective complaints process to both the telecommunications industry and users of carriage services in line with proposed new paragraph 454C(2)(n).

Thank you again for your questions. I trust that this response addresses the Committee's concerns.

16/2/16

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley Helen

Thank you for the letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 4 February 2016 concerning the Corporations Amendment (Crowd-Sourced Funding) Bill 2015 (the Bill). The Committee commented on four provisions in the Bill relating to the delegation of legislative power and reversal of the burden of proof.

I appreciate the Committee's consideration of the Bill and have attached a detailed response in relation to each of the issues raised.

I trust this information will be of assistance to you.

Yours sincerely

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ATTACHMENT

The Committee has enquired about two provisions of the Bill which provide for the delegation of legislative power and two provisions that reverse the burden of proof.

Delegation of legislative power

Schedule 1, item 14, proposed subsection 738F(3)

Proposed section 738F of the Bill ensures that the rules in chapter 7 of the *Corporations Act 2001* (the Act) that treat partnerships and trusts as legal persons and ensure that a person is generally responsible for the conduct of their directors, employees and agents apply to the crowd-sourced funding (CSF) regime. The existing rules in chapter 7 of the Act are essential to the regime as CSF intermediaries could be established as partnerships and trusts. It is also essential that a relevant person under the CSF regime is responsible for the conduct of their directors, employees and agents.

Proposed subsection 738F(3) enables regulations to modify the application of the above chapter 7 provisions to the CSF regime. The Committee has sought advice on the need to include this modification power as part of the CSF regime.

The modification power in subsection 738F(3) is required to ensure that the application of the relevant chapter 7 provisions to the CSF regime is consistent with the existing provisions in chapter 7 of the Act. The existing provisions in chapter 7 of the Act (sections 761F, 761FA and 769B) all have a regulation making power to exclude or modify their effect in relation to specified provisions.

In applying the existing chapter 7 provisions to the CSF regime, it was necessary to include a similar modification power so that any changes to the application of the existing provisions to chapter 7 could also be reflected in the application of these provisions to the CSF regime. As such, the modification power has been included to eliminate the risk that there could be a mismatch between the way the current provisions operate in relation to chapter 7 and the way the provisions apply in relation to the CSF regime.

Delegation of legislative power

Schedule 1, item 14, proposed subsection 738G(1)(c)

The committee has identified proposed subsection 738G(1)(c) as a delegation of legislative power as it provides for regulations to prescribe the types of securities eligible for crowd funding. Proposed subsection 738G(1)(c) delegates the power to prescribe eligible securities for the CSF regime to the regulations to enable the Government to quickly change the types of securities available under crowd-funding. Any regulations prescribed would be subject to disallowance and thus subject to parliamentary scrutiny.

As the CSF regime is new and is expected to evolve quickly, there is a need to have the flexibility to quickly adjust the type of securities that are eligible for crowd-funding. The Government is currently proposing that only fully-paid ordinary shares would be subject to crowd-funding when the regime commences. This will ensure that there are appropriate limits on the securities made available under crowd-funding as the regime

commences and begins to develop. As the market develops and investors become more familiar with the benefits and risks associated with the sector, it may be desirable to permit other types of securities to ensure that the crowd-funding market can grow and be sustainable, and also provide investors with opportunities to invest in different type of securities. As crowd-funding is a new market in Australia, it is important that any changes can be implemented quickly and in response to the way the market is developing as this would ensure the market is given the best chance for success.

An important aspect of the CSF regime is to ensure investors have appropriate protections when participating in crowd-funding. Prescribing the securities eligible for crowd-funding is an important aspect of the CSF regulatory regime. It ensures the Government can quickly amend the types of securities available on crowd-funding platforms to prevent a systemic issue from arising and maintain investor confidence.

Reversal of burden of proof

Schedule 1, item 14, proposed subsection 738Z

The committee has sought further information in relation to the reversal of the burden of proof in relation to the defences to defective CSF offer documents in proposed subsections 738Z(1), (3) and (6).

The CSF regime provides for defences to defective disclosure documents that are consistent with the defences available for other types of fundraising in chapter 6D of the Act. For these defences a defendant bears an evidential burden to point to evidence that suggests a reasonable possibility that the matter exists or does not exist. Once the defendant discharges this evidential burden, the prosecution must disprove these matters beyond reasonable doubt.

The evidential burden on the defendant is therefore fully consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which establishes the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence.

Proposed subsection 738Z(1) establishes a defence to a defective offer document if the relevant person did not know that the document was defective. Similarly, a second defence (proposed subsection 738Z(3)) to a defective offer document is available where a person relies on information given to them from another person, other than if the information was provided by an employee or agent or (in the case of a company) a director.

In addition, a person who is named in a CSF offer document as being a proposed director or underwriter, or as making a statement included in the CSF offer document, has a defence from liability for defects in an offer document if the person publically withdrew their consent to being referenced in the document in that way (proposed subsection 738Z(6)).

To make use of any of these defences, the relevant person will have to provide evidence as appropriate that they did not know that the offer document was defective, appropriately relied on information from another person or publically withdrew consent to being referenced in the offer document. In each of these cases, it is appropriate that

the person making use of the defence is required to raise the required evidence as they are the ones best placed to do so.

Reversal of burden of proof

Schedule 1, item 14, proposed subsection 738ZG(6)-(9)

The committee has sought further information on the reversal of burden of proof in relation to the defences to restrictions on advertising CSF offers in proposed subsections 738ZG(6)-(9).

The CSF regime provides for exemptions to the restrictions on the publication of CSF offers that are consistent with the exemptions available in relation to advertising other types of offer documents under chapter 6D of the Act. A person relying on one of these exemptions has an evidential burden of pointing to the relevant evidence that suggests a reasonable possibility that the matters required under an exemption exists. Once the defendant discharges this evidential burden, the onus is still on the prosecution to disprove the matters beyond reasonable doubt.

This approach is consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which establishes the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence. In this case, the person seeking to use one of the exemptions to the restrictions on the publication of CSF offers is required to bear an evidential burden in showing that the specific exemption applies.

Proposed subsection 738ZG(6) provides an exemption to the restrictions on advertising CSF offers if the advertisement also states that a person should consider the CSF offer document and general CSF risk warning when considering whether to make an application pursuant to the offer. Placing the evidential burden on the person publishing the advertisement is appropriate as they are best placed to provide the evidence that the statement complied with the requirements to fall within the exemption.

A second exemption to the prohibition on advertising CSF offers provided for under proposed subsection 738ZG(7) applies to publishers who advertise a CSF offer in the ordinary course of a media business and do not know that publication is prohibited. It is appropriate for the publisher to bear the evidentiary burden in this case as the exemption relies on their state of mind.

There is a general exemption to the prohibition on advertising CSF offers under proposed subsection 738ZG(8) for statements made on the communication facility of a CSF offer as long as the statement is made in 'good faith'. The evidential burden of demonstrating that the statement was made in 'good faith' falls on the person making the statement. This is appropriate as the person making the statement is best placed to raise evidence as to why the statement was made in good faith, given it could at least in part involve some inquiry as to the person's state of mind and knowledge.

Finally, there is a broad exemption from the restrictions on advertising CSF offers under proposed subsection 738ZG(9) to permit disclosure in certain circumstances. These exemptions apply as follows:

- A publication that consists solely of a notice or report of a general meeting of the company making or intending to make the offer is permitted. In this case, it is appropriate that the person making the publication bears the evidentiary burden of showing that it consists solely of a notice or report of the company's general meeting as that person is best placed to have records of the meeting and know the circumstances surrounding the meeting.

- Publication of a report about a company making or intending to make the CSF offer and does not contain information that materially affects the affairs of the company, other than information previously made available in a CSF offer document that is appropriately published, or in any other permitted report, and does not refer to the CSF offer. The person making the publication is best placed to bear the evidential burden in these circumstances as they are best placed to point to the source of information previously made public by the company.

- News reports or genuine comment in the media relating to a published CSF offer is permitted if it is based on information covered in the published offer document or another permitted report and no consideration is paid to the person making the publication. The person claiming the defence is best placed to bear the evidential burden as they are best placed to point to the source of the information used.

- Reports on securities of a company making or intending to make a CSF offer published by a person not related to or acting at the instigation of the company making the offer is permitted as long as no consideration is paid to the person making the publication. In this case, it is appropriate that the person making the publication bear the evidential burden as they are best placed to demonstrate their independence from the company making the CSF offer.

ATTORNEY-GENERAL

CANBERRA

MC16-003171

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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22 FEB 2016

Dear Senator Polley

Thank you for your correspondence regarding the Senate Scrutiny of Bills Committee's assessment of the Courts Administration Legislation Amendment Bill 2015. I provide this letter by way of response to the Committee's request.

The Committee has highlighted that the Bill would insert a new definition of 'corporate services' and exclude these matters from the definition of 'administrative affairs' in each of the *Federal Court of Australia Act 1976*, *Family Law Act 1975* and *Federal Circuit Court Act 1999*. The Committee has commented on the element of the definition that allows the Attorney-General determine by legislative instrument other matters that will form part of the definition of corporate services and requested further information to justify the provision.

The key purpose of the Bill is to generate efficiencies in corporate services functions that can be reinvested in the core business of the courts. The provision highlighted by the Committee is intended to allow the maximum possible scope for this objective to be achieved into the future.

I note an exclusive list of matters is used for the definition of corporate services as this is necessary to provide clear lines of management and accountability.

It is expected that the other matters provided for in the provision would be used at the request of the courts in cases where they identify additional corporate services that would be beneficially managed jointly by the Federal Court CEO on behalf of the three courts. This is consistent with the approach taken in developing the Bill, which was done with the agreement of all of the heads of jurisdiction; for example, an earlier draft did not include 'libraries', but this was added at the request of the courts. A determination power of the Attorney-General provides an efficient means of adapting the definition to suit the courts' requirements.

The requirement that any determination be a legislative instrument will provide transparency and safeguards. The possibility of disallowance provides a visible mechanism to ensure the independence of the courts, in the highly unlikely event there is concern within the courts about the manner in which the Attorney-General has exercised the power. I am pleased to advise that close consultation with the courts has characterised the development of the Bill.

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Thank you again for writing on this matter.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister on Counter-Terrorism

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

12 FEB 2016

Dear Chair Helen

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills (the Committee) in the *First Report of 2016* concerning the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015.

I note your recommendation that consideration be given to amending regulation 15(1) of the AusCheck Regulations 2007 to specify that the Secretary of the Attorney-General's Department *must* issue Guidelines for Accessing Information on the AusCheck Database (Guidelines), to ensure that there is a general legislative requirement that safeguards, such as those currently in the Guidelines, are required to be in place. I note your further recommendation that it would be useful to include some minimum safeguards relating to the use and disclosure of personal information in the primary legislation or regulations.

I consider that the current safeguards relating to the use and disclosure of personal information, as set out in existing legislation and regulations, to be sufficient. AusCheck is subject to the requirements of the *Privacy Act 1988*, including the Australian Privacy Principles. Information held by AusCheck is further protected by the strict procedures relating to the disclosure of personal information to specified parties in both the *AusCheck Act 2007* and the AusCheck Regulations. Disclosure outside of these procedures – by any person who obtains AusCheck scheme personal information – is an offence under the AusCheck Act, with a maximum penalty of 2 years imprisonment.

AusCheck's information sharing arrangements are further strengthened by obligations on accredited agencies (law enforcement and national security agencies) to use and share AusCheck information in accordance with their own privacy or secrecy obligations. Agencies also have legislated obligations to share information appropriately.

The Guidelines have formed a part of the AusCheck administrative framework since its inception and are assessed regularly to ensure they are fit for purpose.

AusCheck will continue to assess the adequacy of the information sharing provisions under its legislative framework and its associated policies and procedures, to ensure these remain robust and fit for purpose. This will include an ongoing assessment of the Guidelines, and how provisions imposing obligations relating to the Guidelines (including regulation 15)

could be strengthened in light of the current arrangements.

Thank you for considering this matter.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister on Counter-Terrorism

MS16-000202

Senator Helen Polley
Chair
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10 FEB 2016

Dear Senator Polley

I refer to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 1 of 2016, in which the Committee sought further information relating to the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* (the Bill). In response to issues raised by the Committee, I have provided additional advice below relating to proposed increased maximum penalties and mandatory minimum sentences for firearms trafficking offences under the *Criminal Code Act 1995* (the Code).

1. **Increased maximum penalties: the Committee seeks the Minister's advice as to examples of other offences that carry this level of penalty and a more detailed justification demonstrating that these trafficking offences are of a similar level of seriousness.**

Currently, the maximum penalties for firearms trafficking offences under the Code are imprisonment for 10 years, or a fine of 2,500 penalty units (equal to $450,000), or both. The Bill would double those maximum penalties to imprisonment for 20 years, or a fine of 5,000 penalty units (equal to $900,000), or both.

Offences under the Code which carry similar maximum penalties include a number of drug offences, such as trafficking marketable quantities of controlled drugs (section 302.3), cultivating or selling marketable quantities of controlled plants (section 303.5 and section 304.2 respectively), manufacturing marketable quantities of controlled drugs (section 305.4), and importing and exporting marketable quantities of border controlled drugs or border controlled plants (section 307.2). Each of these offences carry a penalty of imprisonment for 25 years (five more than those proposed for firearms trafficking), or 5,000 penalty units, or both.

Increasing the maximum penalty for firearms trafficking offences in the Code from 10 to 20 years' imprisonment and 2,500 to 5,000 penalty units is analogous with the maximum penalties applied to serious drug offences. This indicates the serious social and systemic harms posed by both forms of trafficking and supply. In each case, the offender's behavior gives rise to harmful and potentially deadly outcomes. Further, the risk posed to community health and safety by firearms endures over time, as—due to their imperishable nature—firearms can remain in the illicit market for decades and be used in the commission of countless crimes over their lifespan.

As noted by the Law Council of Australia in its submission to the Senate Legal and Constitutional Affairs References Committee, the increased penalties proposed by the Bill would also more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. For example, in NSW firearms trafficking offences can attract a maximum sentence of 20 years' imprisonment (section 51 *Firearms Act 1996* (NSW)), while in the ACT repeated firearms trafficking offences within a 12-month period can also attract a maximum penalty of 20 years' imprisonment (section 220 *Firearms Act 1996* (ACT)).

2. **Mandatory minimum sentences: the Committee seeks the Minister's more detailed justification for the proposed approach, including whether there are examples of analogous offences that carry a mandatory minimum penalty**

Currently, there is no mandatory minimum term of imprisonment for firearms trafficking offences under the Code. The Bill introduces a five year mandatory minimum sentence for those offences.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers does not prohibit the use of mandatory minimum sentences. The Government's decision to introduce mandatory minimums for firearms trafficking offences demonstrates the seriousness with which it takes this type of offending, which can lead to the supply of firearms to those who would use them in the commission of serious crimes.

The outcomes of the Martin Place Siege Joint Commonwealth – NSW Review (the Review) support the view that firearms trafficking requires a strong response from Government. In drafting the Review, the Commonwealth and New South Wales Governments considered gunman Man Haron Monis' access to firearms. The Review noted that the measures included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, which included mandatory minimum sentences, would strengthen the Commonwealth's ability to tackle the illegal trafficking of firearms and firearms parts into and out of Australia.

I note that the Committee has stated that mandatory penalties undermine the discretion of judges to ensure that penalties are proportionate in light of the individual circumstances of particular cases. Mandatory minimum sentences for firearms trafficking offences are reasonable and necessary both to deter would-be firearms traffickers, and to appropriately penalise those who commit these offences. There are appropriate limitations and safeguards in place to ensure that detention is proportionate in each individual case.

As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will remain at the discretion of the sentencing judge. In response to concerns raised by the Parliamentary Joint Committee on Human Rights when the mandatory minimums were first introduced in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, the Explanatory Memorandum for this Bill notes that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. The provisions similarly do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. Importantly, the mandatory minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law.

In response to concerns raised by the Senate Legal and Constitutional Affairs Committee in its report regarding the Bill, the Explanatory Memorandum (EM) has been amended to address the treatment of offenders with significant cognitive impairment. The EM now explicitly states that the lack of a non-parole period for offenders will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offender, including any mitigating factors such as cognitive impairment.

The EM also points to section 7.3 of the Code, which sets out that a person is not criminally responsible for an offence if at the time of carrying out the conduct the person was suffering from a mental impairment that affected their ability to know the nature and quality of the conduct, know that the conduct was wrong, or was unable to control the conduct. This insertion reinforces the discretion of the sentencing judge in applying non-parole periods which are proportionate in individual cases.

Further, under section 16A of the *Crimes Act 1914* courts are required to take into account the character, antecedents, age, means and physical or mental condition of the person. A sentencing judge will therefore be obliged to consider these matters in determining the amount of time an offender spends in custody if they are convicted of a firearms trafficking offence and receive the mandatory minimum head sentence of five years' imprisonment.

The United Kingdom has introduced similar mandatory minimum sentences for firearms-related offences. Under section 51A of the *Firearms Act 1968*, an individual in the United Kingdom may be subject to a five year mandatory minimum for offences such as possession of firearm with intent to injure, carrying a firearm with criminal intent, or carrying a firearm in a public place. The penalties in the United Kingdom are more stringent than those proposed in the Bill, as offenders under the age of 18 (in England and Wales) are still subject to a three year mandatory minimum term.

Australia's people smuggling offences set out in the *Migration Act 1958* (Migration Act) and the Code contain mandatory minimum sentences for certain aggravated offences. The offences contained in the Migration Act and Code carry a mandatory minimum sentence of five years for the offence of organising or facilitating the entry or proposed entry of five or more persons, and a mandatory minimum sentence of eight years for the offence of people smuggling where there is a danger of death or serious harm.

The Code and Migration Act penalties are analogous to the offences in this Bill for which mandatory minimum offences have been proposed. For example, the aggravated offence of people smuggling (danger of death or serious harm etc.) carries a maximum penalty of imprisonment for 20 years, or 2,000 penalty units, or both and carries a mandatory minimum sentence of eight years. In committing this offence, the person's conduct must have been reckless as to the danger of death or serious harm to the victim that arose from the conduct.

Those engaged in firearms trafficking are similarly reckless as to the risk of death or serious harm to any number of potential victims. Due to their imperishable nature, once firearms have been trafficked into the illicit market they can remain within that market for many years, and be accessed by individuals and groups who would use them to commit serious and violent crimes such as murder. As demonstrated by the penalties for people smuggling offences, criminal conduct which is reckless as to potentially deadly consequences should carry significant penalties.

From a national perspective, in 2014 the New South Wales Government passed the *Crimes Amendment (Intoxication) Bill 2014*. As a result, a court is required to impose a

sentence of imprisonment of not less than eight years on a person guilty of an offence under subsection 25A(2) of the *Crimes Act 1900* (NSW). Subsection 25A(2) addresses assault causing death when intoxicated (colloquially referred to as 'one punch' laws). Any non-parole period for the sentence is also required to be not less than eight years. The Queensland Government introduced an offence of unlawful striking causing death in the *Safe Night Out Legislation Amendment Act 2014* (Qld). Generally, if a court sentences a person to a term of imprisonment for such an offence, the court must make an order that the person must not be released from imprisonment until the person has served the lesser of 80% of the person's term of imprisonment for the offence or 15 years.

The introduction of mandatory minimum sentences of five years' imprisonment for firearms trafficking offences is an important aspect of the Government's strategy to stop illegal guns and drugs at the border. The simultaneous introduction of increased maximum penalties ensures that the full range of penalties associated with these offences is commensurate with their seriousness, and with the grave nature of the associated crimes they can affect.

The relevant officer for this matter in the Attorney-General's Department is Tara Inverarity, who can be contacted on 02 6141 2800.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Senator Helen Polley
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Dear Senator Polley

Thank you for the letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 4 February 2016 concerning the Insolvency Law Reform Bill 2016 (the Bill). The Committee commented on four provisions in the Bill relating to the delegation of legislative power and reversal of the burden of proof.

I appreciate the Committee's consideration of the Bill and have attached a detailed response in relation to each of the issues raised.

I trust this information will be of assistance to you.

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ATTACHMENT

The Committee has enquired about a range of provisions in the Bill which provide for the delegation of legislative power, privacy and the reversal of the onus of proof.

Delegation of legislative power

Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), section 5-30

Subsection 5-30(a) sets out the categories of persons that are considered to have a financial interest in the external administration of a company. A person who has a financial interest in the external administration of a company is given a right to apply to the Court in relation to the administration.

Insolvency practice is a dynamic area and circumstances may arise in the future where it is considered appropriate to expand the category of persons that have a financial interest in a company. This would be able to be achieved more expeditiously by the making of an insolvency practice rule rather that attempting to amend the primary legislation.

Inclusion in the list of persons with a financial interest in the external administration of a company confers a benefit or right on those persons. It does not impose a burden or obligation on them. Furthermore, the Parliament will retain oversight on any expansion of the category of persons because the Insolvency Practice Rules are legislative instruments which are disallowable by the Parliament.

Privacy; Delegation of legislative power

Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), section 15-1

The privacy issues raised by section 15-1 should be considered in the context of the overall purpose of the reforms to strengthen the insolvency regulatory framework and the important function that the registration and disciplinary requirements play in achieving that policy objective.

The registration requirements relating to insolvency practitioners perform an essential gateway function which ensures that only persons with the requisite skills and qualifications are able to practise as professional insolvency practitioners. The registration system serves the public interest because it attempts to ensure that external administrations are only undertaken efficiently by skilled practitioners and that the interests of key stakeholders, such as creditors and members of a company, are adequately protected.

The reporting requirements imposed on insolvency practitioners together with the disciplinary system complement the initial registration requirements by ensuring that insolvency practitioners maintain their professional skills and comply with their ethical duties. Where a insolvency practitioner is disciplined for failing to carry out their professional duties, it is in the public interest that this information be included on the Register of Liquidators and the Register of Trustees and is available for public inspection. The need for transparency in relation to information on the Registers concerning details of disciplinary action, and the suspension or cancellation of

registration should override any concerns that this affects an individual's privacy interests.

The principle that this information should be included in the Registers is established in the primary legislation. It is appropriate from a best practice administrative perspective that the details relating to the operation of the Register of Liquidators and Register of Trustees should be prescribed in the Insolvency Practice Rules. Furthermore, the Parliament will retain oversight of these rules because the Insolvency Practice Rules are legislative instruments which are disallowable by Parliament.

Reversal of onus of proof

Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), Part 1, Division 2, subsections 50-35(2), 60-20(6), 60-26(3), 65-5(3). 65-15(3), 65-40(3) and others

Subsection 50-35(1) establishes an offence if a member of a committee uses a document or discloses information that was given to the member for purposes of exercising powers or performing functions as a member of the committee.

To prove the offence, the prosecution must prove all elements of the offence in paragraphs 50-35(1)(a),(b) and (c) beyond a reasonable doubt. This does not constitute a reversal of the onus of proof.

Subsection 50-35(2) sets out a list of exceptions where the offence provided for in subsection 50-35(1) does not apply. The defendant bears only an evidential burden when the defendant wishes to rely on one or more of the exceptions. The defendant discharges the evidential burden by adducing or pointing to evidence that suggests a reasonable possibility that one or more of the exceptions in subsection 50-35(2) applies. In this context, it is noted that subsection 13.3(3) of the *Criminal Code* provides, inter alia, that 'a defendant who wishes to rely on any exception, exemption, exception, excuse, qualification or justification provided by the law creating the offence bears an evidential burden in relation to that matter'.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that 'an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden)'. This comment reflects subsection 13.1(2) of the *Criminal Code* which provides that 'the prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant'.

Section 50-35 has been drafted in accordance with the relevant principles codified in the Criminal Code in relation to proof of criminal responsibility and is also consistent with the guidance in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* in relation to the evidential burden of proof.

Similar comments apply to subsections 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and other sections where a defendant bears an evidential burden.

Delegation of legislative power

Schedule 1, Insolvency Practice Schedule (Bankruptcy) and Schedule 2, Insolvency Practice Schedule (Corporations), Part 1, Division 2, section 105-1

The Explanatory Memorandum explains that the Minister requires this rule-making power to ensure the detail under and operational aspects of the corporate insolvency regime can be clearly outlined and, where necessary and appropriate, can be modified. The Scrutiny of Bills Committee acknowledges that flexibility is a relevant consideration in making such determinations. In this context, it should be noted that at the operational level, both personal bankruptcy and corporate insolvency are dynamic areas where modifications to the detailed rules may be required periodically, particularly during the initial period of the operation of these substantial reforms while the rules are being 'bedded down'.

There is another important justification for the general division between the Insolvency Practice Rules and the primary legislation. This relates to one of the primary objectives of these insolvency reforms which is to harmonise, as far as practicable, the laws relating to personal bankruptcy and corporate insolvency. The primary legislation has been designed to contain the 'common rules' applying to personal bankruptcy and corporate insolvency. The harmonisation objective has substantially been achieved in the primary legislation. However, at the detailed, operational level, there will be some areas where the corresponding rules relating to personal bankruptcy and corporate insolvency will differ. Accordingly, the general division between the primary legislation and Insolvency Practice Rules ensures that the harmonised requirements in the primary legislation between personal bankruptcy and corporate insolvency remain in place.

Furthermore, it should be noted that the Parliament will retain oversight of the Insolvency Practice Rules because they are legislative instruments which are disallowable by Parliament.

Delegation of legislative power – Henry VIII clause

Schedule 2, Insolvency Practice Schedule (Corporations), Part 3, proposed section 1634

The power to make regulations modifying the primary legislation in section 1634 is expressly restricted to matters of a transitional nature. This will allow a transitional issue which arises after the enactment of the primary legislation to be resolved by the making of an appropriate regulation rather than having to address the issue by a Bill which would need to be introduced and passed by the Parliament. The adoption of section 1634 provides flexibility and also enables the Government to act expeditiously to resolve transitional issues that arise after the primary legislation comes into operation.