



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**FIFTH REPORT**  
**OF**  
**2014**

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## **Terms of Reference**

### **Extract from Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## FIFTH REPORT OF 2014

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

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

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# **Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014**

Introduced into the House of Representatives 19 March 2014

Portfolio: Attorney-General

## ***Introduction***

The committee dealt with this bill in *Alert Digest No. 4 of 2014*. The Minister responded on behalf of the Attorney-General to the committee's comments in a letter dated 29 April 2014. A copy of the letter is attached to this report.

### ***Alert Digest No. 4 of 2014 - extract***

## **Background**

This bill amends the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) to:

- broaden the scope of existing exempt film categories and amend exemption arrangements for festivals and cultural institutions;
- enable certain content to be classified using classification tools;
- create an explicit requirement in the Classification Act to display classification markings on all classified content;
- expand the exceptions to the modifications rule so that films and computer games which are subject to certain types of modifications do not require classification again; and
- enable the Attorney-General's Department to notify law enforcement authorities of potential Refused Classification content without having the content classified first, to help expedite the removal of extremely offensive or illegal content from distribution.

The bill also makes consequential amendments to the *Broadcasting Services Act 1992*.

## **Delegation of legislative power**

### **Schedule 1, item 4, proposed subsection 22CA(4)**

This item provides that in deciding whether to approve a classification tool under subsection 22CA(1), the Minister must consider any matters specified in written guidelines made by the Minister for this purpose. The committee prefers that important content is included in primary legislation unless a compelling justification for the use of delegated legislation is provided. In this instance, the reasons why the considerations relevant to this question cannot be included in the legislation are not addressed in the explanatory memorandum. **The committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.**

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

### ***Minister's response - extract***

### **Schedule 1, item 4, proposed subsection 22CA(4)**

The Senate Scrutiny of Bills Committee (the Committee) has sought advice as to the justification for why the matters to which the Minister must have regard in deciding whether to approve a classification tool under proposed subsection 22CA(1) will be contained in guidelines and not in the primary legislation.

The fundamental requirements for a classification tool are set out in proposed subsection 22CA(5). These are that the Minister must not approve a classification tool unless the classification tool will: (i) produce a classification decision for the Australian Capital Territory; (ii) determine consumer advice; and (iii) notify the classification decision and consumer advice to the Director of the Classification Board. The purpose of the guidelines will be to specify any other matters to which the Minister must have regard when approving a classification tool. Any guidelines will be required to support the outcomes provided for in section 22CA(5), and could not be inconsistent with it. The use of guidelines will:

- provide flexibility and ensure that the Act remains relevant into the future;
- account for matters that may become relevant with regard to classification tools (which have not been used before and may change significantly with advances in technology);
- respond to changing community standards and expectations regarding the classification information that consumers of content should receive;

- reflect regulatory changes to the National Classification Scheme itself;
- meet the changing demands of industry; and
- keep pace with evolving forms of media content and mechanisms for the delivery of that content.

The Government considers that it is not practicable to list in the Act matters that are not fixed and will likely change due to rapid technological advances and unknown changes in the content environment. Such an approach may result in the primary legislation quickly becoming obsolete.

This is important as classification tools are a new way of providing classification information to consumers. They represent an innovative use of technology and a forward-looking policy approach that will facilitate the classification of large volumes of unclassified content that is available in the market.

As classification tools are developed and become more sophisticated, the matters that I or any future Minister should consider in deciding to approve a tool may need to be expanded or amended to reflect the evolution and range of the technology at the time. The Government must also be able to respond efficiently to the needs of industry and consumers given the rapid rate of change in the content environment. Consequently, the additional matters to be taken into account in approving classification tools should be capable of being amended easily.

For the reasons outlined above, the Government considers that it is appropriate for additional matters to be specified in guidelines. The flexibility provided by administrative guidelines will allow the Minister to efficiently, and appropriately, amend the matters to which he or she must have regard to when considering whether to approve a classification tool.

### *Committee Response*

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

## ***Alert Digest No. 4 of 2014 - extract***

### **Delegation of legislative power**

#### **Schedule 1, item 4, proposed subsection 22CA(7)**

This proposed provision states that the Guidelines made under subsection 22CA(4) (also discussed above) are not a legislative instrument. The explanatory memorandum indicates that this provision clarifies that guidelines do not fall within the definition of 'legislative instrument' for the *Legislative Instruments Act*.

The subsection 5(2) of the *LIA* provides that an instrument is taken to be of a legislative character if '(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right'. The Guidelines made under subsection 22CA(4) arguably fall within this definition as they provide for matters which must be considered by the Minister when making approval decisions. The relevant matters that must be considered affect the making of decisions and, thus, indirectly affect the interests of persons whom rely upon, or wish to rely upon, the operation of particular classification tools. The Guidelines also directly impose an obligation on the Minister in making approval decisions. The basis on which it is concluded, in the explanatory memorandum, that the Guidelines are not within the definition of legislative instruments is not explained.

The *Legislative Instruments Act* includes disallowance and sunseting processes, which will not apply to the Guidelines if that document is not, or is not deemed to be, a legislative instrument.

**The committee therefore seeks the Attorney-General's advice as to the justification for the conclusion that subsection 22CA(4) Guidelines are not legislative instruments, including why such Guidelines should not be subject to the requirements of the LIA, given that they may be characterised as legislative instruments in the sense explained above.**

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

## *Minister's response - extract*

### **Schedule 1, item 4, proposed subsection 22CA(7)**

The Committee has sought advice as to the justification for the conclusion that the guidelines made under subsection 22CA(4) are not a legislative instrument and should not be subject to the requirements of the *Legislative Instruments Act 2003* (LIA).

The Committee notes that it is arguable that such guidelines fall within the meaning of section 5 of the LIA because they provide for matters that must be considered by the Minister when approving a classification tool, and these matters affect the making of a decision. Thus, the Committee states, the guidelines indirectly affect the interests of persons who rely upon, or wish to rely upon, the operation of particular classification tools. The Committee further argues that the guidelines directly impose an obligation on the Minister in making approval decisions.

The Government considers that the guidelines made under proposed subsection 22CA(4) do not fall within the meaning of section 5 of the LIA because:

- the Minister will only be required to have regard to them (that is, they will not determine the law or constrain the Minister's decision-making);
- the guidelines will not specify additional requirements that must be satisfied by a classification tool before it is approved;
- the guidelines will be applied appropriately and flexibly;
- the Minister will determine whether to approve a classification tool on a case-by-case basis;
- the guidelines will not affect the classification decision in relation to a particular item of content, rather whether a particular tool is appropriate to classify content for the Australian market and consumers; and
- the guidelines will not indirectly affect the interests of a person, given the matters listed above.

The guidelines are intended to assist myself or a future Minister in deciding whether a classification tool is suitable to classify material in accordance with the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

The guidelines will illuminate or expand the types of factors that the Minister considers should be taken into account; however they will not determine whether the Minister should approve a classification tool. That is, in contrast to proposed subsection 22CA(5), the

guidelines will not enumerate requirements that a classification tool must meet in order to be approved for use. I also note that it is not mandatory that guidelines be made – rather, if it is useful to publish guidelines, the proposed amendments seek to recognise that utility.

While the Minister must have regard to the matters specified in the guidelines, they do not determine the law but instead assist the Minister in applying the law. The guidelines will not restrict the Minister’s power to approve a classification tool that meets the requirements of subsection 22CA(5) or prevent the Minister imposing conditions in relation to the approval of a decision making tool.

The approach to the guidelines is similar to a provision that currently exists in the Classification Act. Existing subsection 13(4) of the Classification Act provides the Director of the Classification Board with the power to determine written principles to which the Classification Board must have regard when deciding whether to make a declaration under subsection 13(3) of the Act. These principles are not a legislative instrument.

While the Government considers that guidelines made under subsection 22CA(4) are not ‘legislative in character’ for the purposes of section 5 of the LIA, in the interests of accountability and transparency, proposed subsection 22CA(8) will require that the guidelines be published on the Department’s website.

### ***Committee Response***

The committee thanks the Minister for this response and notes that the information provided in justifying the government’s view that the guidelines made under proposed subsection 22CA(4) do not fall within the meaning of section 5 of the *Legislative Instruments Act 2003*. The committee further notes that the guidelines will be published on the Department’s website in the interests of accountability and transparency. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

## ***Alert Digest No. 4 of 2014 - extract***

### **Delegation of legislative power Schedule 3, item 18, proposed section 6G**

This section empowers the Minister to make rules, by legislative instrument, prescribing matters required or permitted by this Division to be prescribed by the conditional cultural exemption rules, or necessary or convenient to be prescribed for carrying out or giving effect to this Division. The explanatory memorandum does not give details or examples of the sort of matters that it is envisaged will be covered in in these rules. **The committee therefore seeks the Attorney-General's further explanation of the nature and scope of matters to be dealt with in the rules so as to better assess whether this is an appropriate delegation of legislative power.**

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

## ***Minister's response - extract***

### **Schedule 3, item 18, proposed section 6G**

The Committee has sought further explanation of the nature and scope of the matters to be dealt with in the conditional cultural exemption rules made under proposed section 6G.

Proposed section 60 will empower the Minister to make rules, by legislative instrument, to prescribe additional conditions (if any) that approved cultural institutions and registered events must satisfy in order to use conditional cultural exemptions for the demonstration, exhibition or screening of publications, film or computer games. These rules are known as the conditional cultural exemption rules.

Proposed sections 6C – 6F will specify the requirements that approved cultural institutions and registered events must satisfy in order to use a condition cultural exemption.

The nature and scope of the matters that will be dealt with in the conditional cultural exemption rules will predominantly be administrative, and the Government considers that it is appropriate that these matters are contained in a legislative instrument as opposed to the primary legislation. Whilst the rules will determine the law, they will contain

prescriptive detail that, if included in the primary legislation, would introduce unnecessary complexity. For example, the rules must deal with: the manner and form in which information about relevant material must be given pursuant to proposed paragraphs 6C(f) and 6E(e); the mechanisms for the registration process pursuant to paragraph 6D(c)); and the training that must be completed in relation to approved cultural institutions pursuant to paragraph 6F(f). The rules will also deal with other matters that may be or may become relevant to the administration of the conditional cultural exemptions scheme. For example, it may be necessary to impose different conditions on travelling festivals or introduce particular conditions for certain unique events.

The purpose of the new exemption arrangements is to reduce the administrative and regulatory burden on industry and the arts and cultural sector. The amendments contained in Part 3 of Schedule 3 of the Bill will simplify exemption arrangements for festivals, events and cultural institutions by replacing provisions that are currently set out in each State and Territory's classification legislation with a consolidated set of rules under the Classification Act. Given that the new arrangements represent a move to a deregulated scheme administered by the Commonwealth, it is appropriate that a legislative instrument deal with administrative matters relating to registration processes, training and any other matters that may arise in relation to festivals and cultural institutions.

The Government must also be in a position to respond quickly and efficiently to the constantly evolving content environment. Moreover, as it is not possible to foresee how and to what extent content and the way it is delivered may change in future, it is necessary that the conditional cultural rules have the flexibility to be amended and cater for the unknown. For example, conditional cultural exemption rules may need to adapt to deal with interactive events or mixed media events that take place simultaneously in multiple locations.

The Government has attempted to ensure that the Bill has not been complicated by the inclusion of prescriptive administrative detail and that there is adequate flexibility through the use of a legislative instrument to ensure a smooth transition of the regulation of festivals and cultural institutions to the Commonwealth.

In summary, the Government considers that this Bill achieves an appropriate level of regulation that better equips the National Classification Scheme to respond efficiently and effectively to the changing needs of industry and consumers.

### ***Committee Response***

The committee thanks the Minister for this response, and notes the information provided in relation to the nature and scope of the matters that will be dealt with in the conditional cultural exemption rules. The committee further notes that as the rules are to be made by legislative instrument there will be some level of parliamentary scrutiny of the rules. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

**The committee draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of legislative power and whether any instruments made under the power would be more suitable for parliamentary enactment.**

# Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014

Introduced into the House of Representatives 5 March 2014

Portfolio: Justice

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 3 of 2014*. The Minister responded to the committee's comments in a letter dated 22 April 2014. A copy of the letter is attached to this report.

### *Alert Digest No. 3 of 2014 - extract*

## **Background**

This bill amends the *Proceeds of Crime Act 2002* (the POC Act) to implement recommendations made by the Parliamentary Joint Committee on Law Enforcement (the PJC-LE) in its final report on its inquiry into Commonwealth unexplained wealth legislation and arrangements.

Schedule 1 of the Bill amends the POC Act to implement the PJC-LE's recommendations to:

- include a statement in the objects clause about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in appropriate circumstances;
- amend legal expense and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings so as to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crime order;

- remove a court’s discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the PJC-LE to seek further information from federal agencies in relation to such a report.

Schedule 1 also amends the POC Act in ways that do not relate to specific recommendations of the PJC-LE, which include:

- clarifying that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensuring that provisions in the POC Act that determine when restraining orders cease to have effect take account of the following matters: the new provisions allowing charges to be created and registered over restrained property to secure the payment of unexplained wealth amounts; and the fact that unexplained wealth restraining orders may sometimes be made *after* an unexplained wealth order (not only *before*);
- further streamlining the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked under section 44 of the POC Act);
- removing redundant affidavit requirements in support of applications for preliminary unexplained wealth orders;
- ensuring that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made must be provided to the person who is subject to the order in light of changes to the affidavit requirements for preliminary unexplained wealth orders outlined above; and
- amending the POC Act to extend the purposes under section 266A for which information obtained under the coercive powers of the POC Act can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose.

### **Undue trespass on personal rights and liberties—fair hearing Schedule 1, item 3**

This item would repeal subsections 20A(3A) to (3C) of the *Proceeds of Crime Act 2002*. These provisions allow a court to order that restrained property be disposed of for the purposes of paying a person’s reasonable legal expenses.

The explanatory memorandum includes a detailed explanation of the approach (at p. 20):

People who are subject to proceeds of crime proceedings (other than unexplained wealth proceedings) are not entitled to meet their legal costs from restrained property.

The ability of a person to dispose of restrained property to meet their legal costs weakens the effectiveness of the unexplained wealth provisions by allowing the wealth suspected to have been unlawfully acquired to be used to contest proceedings. This may lead to fewer assets being available for confiscation if an unexplained wealth order is successful and is likely to cause more protracted litigation.

This amendment will harmonise provisions relating to the payment of legal expenses for unexplained wealth cases with those for other proceedings under the POC Act.

Legal aid commissions will continue to be entitled to be reimbursed for legal costs incurred in representing people whose property is covered by a restraining order under the POC Act. Matters under the POC Act have also been established as a priority civil law area for the allocation of Commonwealth funded legal services by State and Territory legal aid commissions under the National Partnership Agreement on Legal Assistance Services. As a matter of practice, many jurisdictions' legal assistance guidelines provide that, when determining whether legal assistance should be provided in relation to Commonwealth POC Act matters, any of a person's property that is covered by a restraining order, or is likely to be covered by a restraining order, should be disregarded for the purposes of means tests.

This amendment implements Recommendation 10 of the PJC-LE's final report.

The statement of compatibility considers whether the repeal of these provisions engages the right to legal representation under Article 14(3) of the ICCPR which provides that everyone shall be entitled to communicate with counsel of his or her own choosing in the preparation of his or her defence, and to have legal assistance assigned in any case where the interests of justice require, if he or she is unable to pay for it. The argument is that '[to] the extent that the Bill may limit a person's right to legal representation, such limitations are necessary and reasonable in ensuring that wealth is not dissipated on legal expenses to frustrate potential unexplained wealth orders that the Commonwealth's unexplained wealth laws operate effectively' (at 10). The SOC also emphasises the matters raised in the explanatory memorandum set out above.

The committee also notes that existing subsections 20A(3A) to (3C) of the POC Act currently only allow restrained property to be disbursed on legal expenses if a court makes an order that this be allowed on the basis that the expenses are 'reasonable'.

**In the circumstances, and in light of the detailed explanation provided in the explanatory memorandum, the committee draws the provisions to the attention of the Senate and leaves the question of whether there is any undue trespass on the right to a fair hearing to the Senate as a whole.**

*The committee draws Senators' attention to the item 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 response - extract***

**Undue trespass on personal rights and liberties—right to a fair hearing (Item 3)**

The Committee noted that provisions in the Bill that prevent a person from meeting their legal costs from restrained property may unduly trespass on the right to a fair trial.

As noted by the Committee, these provisions are intended to guard against the risk, identified by the Parliamentary Joint Committee on Law Enforcement in the 2012 report of its inquiry into Commonwealth unexplained wealth legislation and arrangements, of a person actively frustrating unexplained wealth proceedings through spending on frivolous or unreasonable legal expenses.

The amendments made by the Bill ensure that a person who is subject to unexplained wealth proceedings has access to legal aid, where that person is unable to meet their legal expenses using their other ( unrestrained) assets. Legal aid commissions will continue to be entitled to be reimbursed for legal costs incurred in representing people whose property is covered by a restraining order (including unexplained wealth restraining orders).

The Committee has accepted the explanation for the provisions as outlined in the supporting materials for the Bill and has indicated that it does not seek to make further comment on this issue, but leaves the question as to whether there is any undue trespass on the right to a fair hearing to the Senate as a whole.

***Committee Response***

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

## *Alert Digest No. 3 of 2014 - extract*

### **Undue trespass on personal rights and liberties—privacy Item 31, proposed subsection 266A(2) (after table item 2A)**

This item inserts new table item 2C, which will expand the circumstances in which authorities are able to share ‘information with foreign authorities for the purpose of identifying, locating, tracing, investigation or confiscating proceeds or instruments of crime under a law of the country’ (at p. 37 of the explanatory memorandum). The material that is able to be shared is that obtained from a person compelled to provide a sworn statement or to produce certain information under relevant provisions of the *Proceeds of Crime Act*.

The justification for the proposed increased sharing of information is that investigations into, and litigation over, proceeds of crime increasingly involve transnational elements ‘due to the international nature of serious and organised crime’ (also at p. 37). For this reason, the explanatory memorandum argues that it ‘is essential that a proceeds of crime authority has the ability to share information for such purposes’.

The explanatory memorandum explains that disclosure is only authorised for the purpose of identifying, locating, tracing, investigation or confiscating proceeds or instruments of crime under a law of the country if the proceeds of crime concerned ‘would be capable of being confiscated under Australian laws’ (at p. 38) (a dual criminality requirement).

However, from a scrutiny point of view it is of concern that there do not appear to be limits on the ability for foreign authorities to further disclose information because there is no control over whether the circumstances in which material is released are appropriate, and additional recipients may not be subject to appropriate legal limits.

The committee also notes that the existing provisions for sharing information in table items 2 and 2A include a requirement that the relevant offence ‘is punishable on conviction by imprisonment for at least 3 years or for life’, but there is no similar requirement for the new provisions.

**The committee is therefore concerned about the apparent absence of adequate safeguards for the process and seeks the Minister’s advice as to whether consideration has been given to including a requirement similar to the minimum three year imprisonment punishment threshold and to limiting any disclosure to foreign agencies based on whether they are subject to legal obligations not to make further disclosure of the material or that such further disclosures are contingent on the existence of appropriate accountability arrangements.**

*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 response - extract***

#### **Undue trespass on personal rights and liberties—privacy (Item 31)**

Item 2A of the table at current section 266A of the *Proceeds of Crime Act 2002* (POC Act) deals with the disclosure of information to an authority of a foreign country that has a function of investigating or prosecuting offences against a law of the country. Under these existing provisions, information must only be shared for the purpose of assisting in the prevention, investigation or prosecution of an offence against that law, and only where the offence is constituted by conduct that would constitute an offence against Australian law had the conduct occurred in Australia. The existing provisions also provide that the corresponding Australian offence must be punishable by imprisonment for at least three years.

#### *Threshold requirements*

The Committee has indicated its concern about the apparent lack of safeguards to protect individuals' privacy associated with provisions in the Bill that expand the circumstances in which authorities are able to share information with foreign authorities. The Committee asked whether consideration has been given to making these provisions subject to a threshold requirement, such as the minimum three year imprisonment penalty that applies to the existing provisions.

The amendments in the Bill provide that information can be shared with appropriate foreign authorities *for the purposes of identifying, locating, tracing, investigating or confiscating proceeds or instruments of crime under a law of the foreign country*. These provisions set clear parameters around the circumstances in which information can be shared. Expressly providing that information can be shared for these purposes overcomes limitations that previously prevented disclosures that related to proceeds of crime investigations and litigation in the absence of the investigation or prosecution of a criminal offence.

New table item 2C expressly provides that information can only be disclosed to foreign authorities for the purposes of assisting in the identification, location, tracing, investigation or confiscation of proceeds of crime *if* the identification, location, tracing, investigation or confiscation could take place under the POC Act, or under a corresponding law of a State or a self-governing Territory, if the proceeds related to an offence against a law of the Commonwealth, State or Territory. This limits the sharing of information to those countries where the proceeds or instruments of crime concerned would be capable of being

confiscated under Australian laws, if the proceeds or instruments had related to an offence against the law of the Commonwealth, State or Territory.

The offences capable of leading to action under the POC Act are Commonwealth indictable and serious offences, foreign indictable offences or indictable offences of Commonwealth concern. As such, the amendments in the Bill are subject to a minimum threshold in the form of a ‘dual criminality’ requirement.

The Bill’s explanatory memorandum provides a specific example of how these provisions would improve current arrangements, using a scenario where the Australian Federal Police (AFP) and a foreign proceeds of crime authority are cooperating on an investigation into an international crime syndicate involved in drug trafficking and money laundering. If the AFP had reasonable grounds to suspect that specific real estate assets in Australia were the proceeds of drug trafficking by this syndicate and was aware that the foreign country intended to commence proceeds of crime action against the registered owner of this real estate, the AFP would be able to share the information about this additional property with the relevant foreign authority. This is because the activity under investigation (drug trafficking) would also constitute an offence against a law of the Commonwealth which is capable of leading to action under the POC Act.

The amendments also make it clear that Australia can share information with foreign authorities that have been set up to undertake proceeds of crime work, but which do not investigate or prosecute criminal offences. This ensures that Australia is not prohibited from dealing with specialist proceeds of crime bodies that have been established in many countries, which deal with proceeds of crime matters but do not investigate offences.

#### *Limitations on further disclosures*

The Committee has also queried whether the Government has considered limiting disclosure to foreign agencies based on whether they are subject to legal obligations or appropriate accountability measures to prevent further disclosure of the material.

Provisions in the POC Act that allow Australian agencies to provide assistance in proceeds of crime matters assist to ensure that criminals cannot evade confiscation proceedings simply because evidence or proceeds of their crimes are in different countries. As noted above, the provisions in the POC Act, as amended by the Bill, only allow a person to disclose information to appropriate foreign authorities for the limited purposes of assisting in the identification, location, tracing, investigation or confiscation of proceeds of crime, and only if the Australian authorities believe on reasonable grounds the disclosure will serve this purpose.

All disclosures of information between foreign law enforcement authorities and Australian law enforcement authorities involve undertaking a broad assessment of whether the requesting country will treat information for the limited purposes for which it is shared and how the requesting country has previously dealt with information that has been disclosed

for similar purposes. It is open to Australia to reject the request to provide specific assistance to the requesting foreign authority.

Given the increasingly international nature of many crimes, including money laundering, drug trafficking and fraud, increased cooperation between Australia and foreign counterparts to target the criminal economy is required. To impose a requirement to undertake a detailed and specific assessment in all circumstances about whether the requesting country's laws prevent further disclosure of shared information and to put in place processes to audit such an arrangement with respect to all requesting authorities is not feasible.

### ***Committee Response***

The committee thanks the Minister for this detailed response and notes the additional information provided. In particular, the committee notes that the Minister has indicated that it would not be feasible to 'impose a requirement to undertake a detailed and specific assessment in all circumstances about whether the requesting country's laws prevent further disclosure of shared information and to put in place processes to audit such an arrangement with respect to all requesting authorities'. **The committee draws this issue to the attention of Senators, requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

### ***Alert Digest No. 3 of 2014 - extract***

#### **Undue trespass on personal rights and liberties—retrospective application Item 34**

This item relates to the application of amendments in part 1 of schedule 1 of the bill.

The explanatory memorandum states that although amendments to the relevant sections of the POC Act will only apply to restraining orders, unexplained wealth orders and preliminary unexplained wealth orders on or after commencement, they may be applied in relation to offences committed before commencement and to wealth that was acquired before commencement. The explanatory memorandum concedes that the operation of these amendments is thus 'partially retrospective'.

The reason for this is that the provisions relate to unexplained wealth and property that may have been accumulated prior to the commencement of the amendments. It is argued

that this approach is justified on the basis that unexplained wealth orders are civil asset confiscation orders and do not result in any finding of criminal guilt or expose people to criminal sanctions (see the explanatory memorandum at page 40-41). For this reason it is concluded that:

...while the amendments may apply retrospectively with respect to a person's wealth, they do not create retrospective criminal liability.

Further, it is argued that it may be difficult, if not impossible, to ascertain specifically when property or wealth was acquired. In this context unexplained wealth orders could, it is argued, be frustrated as property may have been accumulated over decades and it will often be difficult, if not impossible, to ascertain specifically when property or wealth was acquired.

In relation to the application of the amendments to offences regardless of when they are suspected to have been committed, the explanatory memorandum argues that:

...the criminal conduct from which a person may have profited or gained property may continue over several years (including over the time of commencement), may not be discovered immediately, or may not be able to be attributed to a specific date. This is especially relevant for unexplained wealth proceedings which aim to target the heads of organised crime organisations who may have committed and/or profited from multiple offences over many years.

**While provisions that have retrospective application are of concern to the committee when they involve detriment to any person, in light of the detailed explanation provided, the committee draws the provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to the item 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 response - extract***

#### **Undue trespass on personal rights and liberties—retrospective application (Item 34)**

Finally, the Committee noted that provisions in the Bill have a partially retrospective effect. Provisions that have retrospective application are of concern to the Committee when they involve detriment to any person.

The Committee's comments refer to provisions in the Bill that provide that, although amendments to the relevant sections of the POC Act will only apply to restraining orders, unexplained wealth orders and preliminary unexplained wealth orders made *on or after* commencement, the orders (as amended) may be applied in relation to offences committed *before* commencement of the Bill, as well as to wealth that was acquired *before* commencement.

It is necessary for the amendments to apply in this partially retrospective manner to ensure the effective operation of the Bill. As noted in the Bill's explanatory material, the suspected criminal conduct from which a person may have profited or gained property may have continued over several years (including prior to the commencement of the Bill) and may not be discovered immediately. If the Bill did not apply in a partially retrospective manner, it would be necessary for authorities to attribute wealth to a specific date, which would undermine the intent and practical effect of the Bill. The amendments do not make a person retrospectively liable for criminal offences to which a proceeds of crime proceeding may relate.

I note that the Committee has accepted the explanation for the provisions as outlined in the supporting materials for the Bill and has indicated that it does not seek to make further comment on this issue, but leaves the question as to whether the proposed approach as a whole is appropriate to the Senate.

***Committee Response***

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

# Farm Household Support Bill 2014

Introduced into the House of Representatives 6 March 2014 (*the bill has passed both Houses and received Assent on 28 March 2014*)

Portfolio: Agriculture

## ***Introduction***

The committee dealt with this bill in *Alert Digest No. 3 of 2014*. The Minister responded to the committee's comments in a letter dated 12 April 2014. A copy of the letter is attached to this report.

### ***Alert Digest No. 3 of 2014 - extract***

## **Background**

The bill will replace the *Farm Household Support Act 1992* and provides for:

- up to three cumulative years of income support for farmers and their partners in hardship without the need for a climatic trigger;
- a requirement for a person to meet a means test, composed of an asset and income test, to qualify for payment;
- an assets test that is higher than mainstream asset limits in recognition that farm assets are relatively illiquid;
- a requirement for a person to enter into, and comply with, a financial improvement agreement to qualify for payment;
- a requirement for a person to have a farm financial assessment conducted;
- a farm financial assessment supplement and an activity supplement for the purpose of partially or wholly funding the farm financial assessment and compulsory activities, respectively;
- ancillary benefits such as a health care card, telephone allowance, remote area allowance, clean energy supplement, pharmaceutical allowance and rent assistance, subject to a recipient meeting certain requirements; and
- an income support payment for farmers and their partners that aligns with social security law where possible.

## **Delegation of Legislative power—Henry VIII clause Subclauses 5(2) and (3)**

Subclause 5(2) of the bill provides that an ‘expression that is used in the Social Security Act or a part of that Act has the same meaning, when used in this Act, as in that Act or part (subject to subsection 5(1) and Part 5 of this Act)’. The effect of this provision is that expressions used in the Social Security Act have the same meaning as in this Bill, except where they are in conflict.

Subclause 5(3) of the bill provides that the Minister’s rules ‘may prescribe expressions to which subsection (2) does not apply’. Provisions which enable delegated legislation to override or modify primary legislation may constitute an inappropriate delegation of legislative power and the committee’s practice is to seek a justification for such provisions. **As this subclause, in effect, enables the rules to modify the operation of the primary legislation the committee seeks the Minister’s advice as to the justification for the necessity of this delegation of power.**

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

### ***Minister’s response - extract***

## **Delegation of legislative power—Henry VIII clause**

The Digest seeks information as to the justification for the delegation of powers under subclauses 5(2) and 5(3) of the Farm Household Support Bill 2014 (the Bill).

Subclause 5(2) provides that definitions under the *Social Security Act 1991* (the Social Security Act) have the same meaning under the Bill, subject to subsection 5(1) and Part 5 of the Bill. Subclause 5(3) allows for expressions to be prescribed where there is a need to do so. This provision is necessary due to the complex interaction between the Social Security Act and the Bill. The Bill is deliberately structured in a way that allows for provisions in the Social Security Act and the *Social Security Administration Act 1999* to apply unless their operation is turned off or modified. Due to the close relationship between this legislation, it is important that they work consistently with each other and, as a result, amendments to social security law may automatically apply to the Bill. Despite our best efforts however, I acknowledge that the potential exists for unintended consequences to result from the close interaction between this legislation. Subclause 5(3) allows for modifications to be made to expressions used in the Social Security Act for the efficient and effective operation of the Bill without the need for further legislative change.

No expressions requiring a rule to be made under subclause 5(3) have been identified at this time because the payment provided for under the Bill – the Farm Household Allowance – has not yet commenced. However, issues may arise following the implementation of the Farm Household Allowance that may require expressions in the Social Security Act to be modified.

### ***Committee Response***

The committee thanks the Minister for this response. The committee notes that generally it will still retain scrutiny concerns about Henry VIII clauses where the primary rationale for such a clause is ‘the efficient and effective operation of the Bill without the need for further legislative change’. **The committee further notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

### ***Alert Digest No. 3 of 2014 - extract***

#### **Delegations of legislative power**

**Various: subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3)**

There are a number of instances where the bill provides for the making of rules to guide or determine significant aspects of decision-making for the administration of this scheme. The committee expects that important matters will be included in primary legislation unless a persuasive justification is provided in the explanatory memorandum. Regrettably, the explanatory memorandum does not indicate why the various matters are appropriately dealt with in the rules, rather than the primary legislation. **To assist the committee to better assess whether the approach in these provisions is appropriate, the committee seeks the Minister’s justification for these delegations of power.**

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

## *Minister's response - extract*

### **Delegations of legislative power**

The Digest seeks clarification as to the justification for the delegations of power under subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3) of the Bill.

The Bill provides the Secretary of the Department of Agriculture with powers to make rules in circumstances where prescribing something in the legislation could be unintentionally and unnecessarily prescriptive, effectively limiting access to the payment. These rules are disallowable instruments. The operation of the delegations of legislative power under subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3) of the Bill will provide the flexibility required to accommodate the diverse and changing range of circumstances faced by farmers in hardship while ensuring the payment is delivered in accordance with the objects of the Act.

### *Committee Response*

The committee thanks the Minister for this response, and reiterates its expectation that important matters will be included in primary legislation unless a persuasive justification is provided in the explanatory memorandum. **The committee notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

## *Alert Digest No. 3 of 2014 - extract*

### **Merits Review**

#### **Subclause 20(2)**

This subclause has the effect that a decision made by the Secretary not to approve a registered training organisation for the purpose of providing training to participants in the scheme will not be a reviewable decision under the social security law. The explanatory memorandum contains a justification for this approach at page 33:

This is because the Secretary's decision takes account of the relevance of the training in relation to improving an individual's capacity for self-reliance, rather than a

training organisation's compliance against an accepted standards framework. A third party could not test the appropriateness of the Secretary's determination against this objective.

Although it may be accepted that the appropriateness of training for the improvement of capacity for self-reliance requires an exercise of judgment rather than the application of clear or accepted standards, it not clear why, as a general matter, the making of discretionary decisions or decisions which require judgement to be exercised are matters in relation to which merits review should not be available. It is not clear why the objectives being pursued by this scheme could not be properly understood by tribunal members. It is also the case that if the Secretary were to adopt policy to guide the making of these decisions that policy would be likely to be applied by the merit review tribunal unless there were cogent reasons to the contrary. **The committee therefore seeks the Minister's further explanation for the exclusion of merits review in relation to these decisions.**

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

### ***Minister's response - extract***

#### **Merits Review**

The Digest seeks further explanation for the exclusion of merits review in subclause 20(2) in relation to decisions made under subclause 20(1)(b).

Section 20 of the Bill sets out who an appropriately qualified person is for the purpose of providing training. Subsection 20(2) provides that the Secretary's decision to approve a person or body to provide training is not reviewable by a tribunal. A decision by the Secretary under paragraph 20(1)(b) is not taken to be a decision under social security law. This is because the decision relates to the approval of a person or body, which is not a registered training organisation, as a provider of training for the purpose of this Bill. A decision made under this subclause is not a decision relating to a person's entitlement to a payment under the Bill, which will be reviewable as is currently the case under social security law. If a person or body is not satisfied with the Secretary's decision under paragraph 20(1)(b), there is no impediment to them applying to be a registered training organisation and satisfy the requirement in paragraph 20(1)(a).

### *Committee Response*

The committee thanks the Minister for this response. The committee notes that it would have been helpful for this information to have been included in the explanatory memorandum. The committee further notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.

### *Alert Digest No. 3 of 2014 - extract*

#### **Delegation of legislative power—standing appropriation Clause 105**

Clause 105 provides for the payment to qualifying farmers of farm household allowances, activity supplements and farm financial assessment supplements to be made out of the Consolidated Revenue Fund. In its *Fourteenth Report of 2005*, the committee stated, at page 272, that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The committee is not generally questioning the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not address the matters outlined above. **The committee therefore seeks the Minister’s advice as to the justification for including a standing appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations processes.**

*Pending the Minister’s reply, the committee draws Senators’ attention to the provision as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee’s terms of reference.*

### ***Minister's response - extract***

#### **Delegation of legislative power—standing appropriation**

The Digest seeks justification for including a standing appropriation and the exclusion of the appropriation from parliamentary scrutiny under clause 105 of the Bill.

Clause 105 of the Bill provides for all amounts payable to a person because of their qualification for Farm Household Allowance (FHA) are payable out of the Consolidated Revenue Fund. The Financial Impact Statement on page 6 of the Explanatory Memorandum to the Bill states ‘FHA is uncapped and demand-driven, which means funding will increase in times of higher demand’. This provision reflects the policy authority for the allowance and associated benefits and supplements. There is no funding limit or sunset clause in the bill.

Expenditure estimates will be adjusted as part of the normal Budget process and validated by the Department of Finance.

#### ***Committee Response***

The committee thanks the Minister for this response, but notes that scrutiny concerns remain as there is no funding limit or sunset clause in relation to this standing appropriation. **The committee further notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

## *Alert Digest No. 3 of 2014 - extract*

### **Delegation of legislative power Clause 106**

This clause provides that both the Minister and the Secretary may prescribe rules by legislative instrument. The committee notes that the provision of a power to prescribe rules rather than regulations is consistent with the Office of Parliamentary Counsel's recently revised *Drafting Direction 3.8*. For example, paragraph 2 states:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so.

The committee understands that the making of *regulations* is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and also to the Federal Executive Council approval process (currently detailed in the *Federal Executive Council Handbook*, September 2009). To the extent that these requirements appear to provide an additional layer of scrutiny when matters are proposed to be prescribed by regulation, it is not clear whether they will also apply to legislative *rules* (such as those provided for in clause 106) and, if not, whether there are any implications for both the quality, and level, of executive scrutiny applied to such instruments.

Given that delegations of Parliamentary power to the executive already result in a modified level of parliamentary scrutiny and reverse the commencement process (through the disallowance procedure), the committee is concerned to ensure that delegations of power are appropriate, including that adequate levels of scrutiny will continue to apply to the making of legislative instruments other than regulations.

**The committee therefore requests the Minister's advice about the above matters, and particularly as to the scrutiny implications, if any, in relation to these powers to prescribe rules rather than regulations.**

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

## ***Minister's response - extract***

### **Delegation of legislative power**

The Digest seeks clarification regarding the delegation of legislative power under clause 106 of the Bill. Please see the enclosed advice from Mr Peter Quiggin, PSM, First Parliamentary Counsel of the Office of Parliamentary Counsel to myself in relation to this matter.

### ***Advice from Mr Peter Quiggin, First Parliamentary Counsel of the Office of Parliamentary Counsel - extract***

#### ***Farm Household Support Bill 2014—Request for information from Senate Standing Committee for the Scrutiny of Bills***

- 1 The Senate Standing Committee for the Scrutiny of Bills has asked you for further information in relation to the Farm Household Support Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.
- 2 The issue raised by the Committee was as follows:

#### **Delegation of Legislative Power Clause 106**

This clause provides that both the Minister and the Secretary may prescribe rules by legislative instrument. The committee notes that the provision of a power to prescribe rules rather than regulations is consistent with the Office of Parliamentary Counsel's recently revised *Drafting Direction 3.8*. For example, paragraph 2 states:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so.

The committee understands that the making of *regulations* is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and also to the Federal Executive Council approval process (currently detailed in the *Federal Executive Council Handbook*, September 2009). To the extent that these requirements appear to provide an additional layer of scrutiny when matters are proposed to be prescribed by regulation, it is not clear whether they will also apply to legislative *rules* (such as those provided for in clause 106) and, if not, whether there are any implications for both the quality, and level, of executive scrutiny applied to such instruments.

Given that delegations of Parliamentary power to the executive already result in a modified level of parliamentary scrutiny and reverse the commencement process (through the disallowance procedure), the committee is concerned to ensure that delegations of power are

appropriate, including that adequate levels of scrutiny will continue to apply to the making of legislative instruments other than regulation.

**The committee therefore requests the Minister's advice about the above matters, and particularly as to the scrutiny implications, if any, in relation to these powers to prescribe rules rather than regulations.**

### *Existing uses of legislative instruments*

3 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. These have included rules (sometimes more recently tagged as “legislative rules”). For example, the following Acts provide for the prescribing of matters by rules:

- *Financial Sector (Business Transfer and Group Restructure) Act 1999*, section 46 (rules made by APRA)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 229 (rules made by the AUSTRAC CEO)
- *Dental Benefits Act 2008 Part7* (rules made by Minister)
- *Personally Controlled Electronic Health Records Act 2012* , section 109 (rules made by the Minister)
- *Stronger Futures in the Northern Territory Act 2012*, section 119 (rules made by the Minister).

4 Similarly, the following Acts provide for matters to be prescribed by orders and by-laws:

- *Customs Act 1901*, section 271 (by-laws made by the Customs CEO)
- *Excise Act 1901*, section 165 (by-laws made by CEO (the Commissioner of Taxation))
- *Superannuation Act 1922*, section 93DE (orders made by the Minister)
- *Defence Forces Retirement Benefits Act 1948*, section 80E (orders made by the Minister)
- *Parliamentary Contributory Superannuation Act 1948*, section 22CK (orders made by the Minister)
- *Defence Force Retirement and Death Benefits Act 1973*, section 49F (orders made by the Minister)
- *Superannuation Act 1976*, section 146MH (orders made by the Minister).

5 Commonly, instrument-making powers are in the form of (or include) a power to “prescribe” particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976) provides as follows:

- (1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the

practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

*(underlining added)*

- 6 Thus, the approach taken in clause 106 of the Farm Household Support Bill 2014 is not novel. (See also the examples in paragraph 12.)

***What are the ramifications for quality and scrutiny of legislative rules?***

- 7 Since the transfer of a subordinate legislation drafting function from the Attorney-General's Department to OPC in 2012, OPC has reviewed the cases in which it is appropriate to use legislative instruments (as distinct from regulations). OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.
- 8 OPC's view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing those provisions in another type of legislative instrument. These include the following types of provisions:
- (a) offence provisions;
  - (b) powers of arrest or detention;
  - (c) entry provisions;
  - (d) search provisions;
  - (e) seizure provisions.
- 9 OPC's view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise. Further details about OPC's approach are set out in Drafting Direction 3.8, which is available on OPC's website at [http://www.opc.gov.au/about/draft\\_directions.htm](http://www.opc.gov.au/about/draft_directions.htm).
- 10 Since the transfer of the subordinate legislation drafting function to OPC in 2012, the power to prescribe legislative rules has been included in the following Acts:
- *Income Tax Assessment Act 1997*, section 415-100 (rules made by the Minister)
  - *Asbestos Safety and Eradication Agency Act 2013*, section 48 (rules made by the Minister)
  - *Australia Council Act 2013*, section 52 (rules made by the Minister)
  - *Australian Jobs Act 2013*, section 128 (rules made by the Minister)
  - *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*, section 10 (rules made by the Minister)
  - *National Disability Insurance Scheme Act 2013*, section 209 (rules made by the Minister)

- *Public Governance, Performance and Accountability Act 2013*, section 101 (rules made by the Finance Minister)
  - *Public Interest Disclosure Act 2013*, section 83 (rules made by the Minister)
  - *Sugar Research and Development Services Act 2013*, section 14 (rules made by the Minister).
- 11 OPC's approach is consistent with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel's functions and responsibilities under the LIA. Under the LIA all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny. Also, under the LIA the First Parliamentary Counsel's responsibility to encourage high standards in drafting of legislative instruments applies to all legislative instruments and not just regulations.
- 12 Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to the other legislative instruments that are not required to be drafted by OPC.

### ***Committee Response***

The committee thanks the Minister and the First Parliamentary Counsel for this response. The committee welcomes OPC's view that some types of provisions (such as offence provisions, powers of arrest or detention, entry provisions, search provisions and seizure provisions) should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing those provisions in another type of legislative instrument.

The committee notes that all disallowable legislative instruments are subject to the same level of *parliamentary* scrutiny; however the committee remains concerned about the level of *executive* scrutiny that subordinate instruments are subject to, particularly as they usually come into effect before the parliamentary scrutiny process is undertaken.

The committee further notes the information provided by the First Parliamentary Counsel in relation to his responsibility to encourage high standards in the drafting of all legislative instruments, although it is not clear how this responsibility is fulfilled in practice (particularly in relation to legislative instruments which are not drafted by OPC).

From the information available to the committee it appears that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process. It may also negatively impact on the standard to which important legislative instruments are drafted with flow-through impact on the ability of Parliament (and the public in general) to effectively scrutinise such instruments.

**The committee therefore intends to draw such provisions to the attention of Senators under principle 1(a)(iv) of the committee's terms of reference where appropriate in the future. The committee will also draw this information to the attention of the Senate Regulations and Ordinances Committee in light of its further consideration of this issue.**

**The committee notes that this particular bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this bill.**

# Farm Household Support (Consequential and Transitional Provisions) Bill 2014

Introduced into the House of Representatives 6 March 2014 (*the bill has passed both Houses and received Assent on 28 March 2014*)

Portfolio: Agriculture

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 3 of 2014*. The Minister responded to the committee's comments in a letter dated 12 April 2014. A copy of the letter is attached to this report.

### *Alert Digest No. 3 of 2014 - extract*

## **Background**

This bill is a companion bill to the Farm Household Support Bill 2014.

The bill repeals the *Farm Household Support Act 1992* and amends other Acts. The bill also includes transitional provisions to ensure recipients of non-legislated income support payment, including the new Interim Farm Household Allowance, can transition to the Farm Household Allowance.

## **Delegation of legislative power—Henry VIII clause Schedule 3, subitem 2(2)**

This subitem provides that transitional rules may provide that the Farm Household Support Act, the SSA, and the SSA Act have effect with any modifications prescribed by the rules. Although the committee may appreciate the reasons for enacting such a rule in this context, it expects that an explanation be given for the use of Henry VIII clauses. Given that the result of this provision is that primary legislation may be amended by the rules, **the committee requests the Minister's advice as to the justification for the proposed approach.**

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

## ***Minister's response - extract***

### **Delegation of legislative power—Henry VIII clause Schedule 3, subitem 2(2)**

The Digest seeks a justification for the proposed approach. The inclusion of a Henry VIII clause in the Farm Household Support (Consequential and Transitional Provisions) Bill 2014 enables the Minister for Agriculture to make rules to address unintended consequences related to matters of a transitional nature that may arise because of amendment or repeals made by the *Farm Household Support Act 2014*. This provision will also allow modifications for the efficient and effective operation of the Act without the need for further legislative change.

Due to the complex interaction between the Farm Household Support Act, which may be altered by a rule under subclause 2(2), the rule may also apply to the *Social Security Act 1991* and the *Social Security Administration Act 1999*. The explanatory memorandum to the Farm Household (Consequential and Transitional Provisions) Bill 2014 explains that the transitional rules may be necessary to provide for saving or application provisions in relation the *Farm Household Support Act 2014* or the social security acts, as well as to facilitate a smooth transition for recipients of the Interim Farm Household Support to the Farm Household Allowance.

### ***Committee Response***

**The committee thanks the Minister for this response. The committee notes that it would have been helpful for this information to have been included in the explanatory memorandum. The committee further notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

# Migration Amendment Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Immigration and Border Protection

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 1 of 2014*. The Minister responded to the committee's comments in a letter dated 6 March 2014. The committee requested further advice and the Minister responded in a letter dated 15 April 2014. A copy of the letter is attached to this report.

### *Alert Digest No. 1 of 2014 - extract*

## **Background**

This bill amends the *Migration Act 1958* (the Migration Act) to:

- put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder;
- clarify the operation of the statutory bar on making a further protection visa application; and
- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) and associated measures.

### **Trespass on personal rights and freedoms—personal liberty**

#### **Rights and liberties unduly dependent on non-reviewable decisions—adequacy of merits review rights**

#### **Schedule 3, item 1, proposed new subsection 36(1A) and (1B)**

This item amends section 36 of the *Migration Act* by introducing a specific criterion for the grant of a protection visa: namely, the absence of an adverse security assessment issued by ASIO that the applicant is a direct or indirect risk to national security. The amendment is in response to the High Court's decision in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, which invalidated delegated legislation provisions that provided for an identical criterion for the grant of a protection visa.

In addition, items 2 to 6 seek to amend paragraphs 411(1)(c) and (d) and section 500 of the *Migration Act* to remove the ability for the Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT) and the AAT to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

The statement of compatibility accepts (at p. 9) that the result of these provisions, in the context of the mandatory detention regime established by the Act, may be that an applicant for a protection visa in relation to whom Australia has non-refoulement obligations and who has received an adverse security assessment will remain in detention indefinitely.

The statement of compatibility argues that these provisions are consistent with article 9(1) of the ICCPR which provides for a right to liberty and security of the person. The key points of justification for the approach are that:

- (1) the policy of detention of persons who unlawfully enter Australia on the basis of an adverse security assessment is a reasonable measure taken to control immigration and to protect national security. In particular, the statement of compatibility concludes that ‘taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) are considered reasonable, necessary and proportionate to the security risk that they are found to pose’ (at pp 9 and 10); and
- (2) the existence of arrangements for ‘independent review of the initial issue of and continuing need for an adverse security assessment’ (at p. 10). Here the statement of compatibility is referring to the administrative arrangements for review by the Independent Reviewer of Adverse Security Assessments. (See Attorney-General, *Independent Review Function—Terms of Reference*, October 2012.)

The proposed approach gives rise to the question of whether the liberty interests of an asylum seeker who has received an adverse security assessment has been appropriately balanced against the broader interests of the public in maintaining national security. The committee's view is that the result of these amendments, which is that affected persons may be indefinitely detained, is a significant issue which might be seen to trespass unduly on personal rights and liberties. **Nevertheless, in light of the information available in the material accompanying the bill, which will assist individuals to assess the proposed approach, the committee draws its concerns to Senators and leaves to the Senate as a whole the question of the acceptability of detaining persons indefinitely on the basis of an adverse security assessment, in circumstances where, in practice, they cannot be removed from Australia.**

However, the committee is interested to seek further information from the Minister about the arrangements for independent review of adverse security assessments (instead of

review by the RRT, MRT and AAT, discussed above). These arrangements are not explained in any detail in the material accompanying the bill, though the statement of compatibility does note that the work of the Independent Reviewer commenced on 3 December 2012 and that the:

Reviewer's role is to review ASIO adverse security assessments given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the Department to 'engage Australia's protection obligations under international law, and not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled' (at p. 12).

After noting these matters, the statement of compatibility concludes that 'existing avenues for merits review' are not affected.

A number of scrutiny issues of concern arise in relation to the existence of independent review as a justification for the proposed amendments. First, the role of the Independent Reviewer of Adverse Security Assessments is not established by statute. As such there are no statutory guarantees of independence. Indeed, the scheme is subject to administrative alteration or abolition at any time.

Second, the adequacy of the review process is not clear. Although the Terms of Reference (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012) state that 'ASIO will provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the Reviewer on the basis that it will be provided to the eligible person', it is also stated that the 'reasons will include information that can be provided to the eligible person to the extent able without prejudicing the interests of security'. This process appears to allow ASIO to determine how much of a person's case to disclose, without either the affected person or the independent reviewer being in a position to challenge the decision. Clearly, an affected person's ability to make submissions to the independent reviewer will be compromised if insufficient details of the case against them are disclosed.

Third, it should be emphasised that the Independent Reviewer's powers are limited to issuing a non-binding 'opinion' and to providing 'such opinion to the Director-General, including recommendations as appropriate' (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012, p. 1). These arrangements for review thus clearly fall short of what is normally involved with independent merits review by tribunals such as the RRT, MRT and AAT, which all typically exercise determinative powers.

**In light of the above issues, and given the possible consequences of these amendments for the liberty of affected persons, the committee seeks further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis.** In seeking such advice the committee is aware that judicial review remains open to affected persons (this is emphasised in the statement

of compatibility (at p. 12)). However, the committee is aware that it is unlikely that judicial review will in practice provide meaningful review. First, in the absence of more robust disclosure of reasons requirements, it may be difficult to argue grounds of review other than a breach of procedural fairness. Second, the normal requirements of procedural fairness may be overridden by national security interests.

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

### ***Minister's response - extract***

**Under the heading "Trespass on personal rights and freedoms - personal liberty; Rights and liberties unduly dependent on non-reviewable decisions - adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 16 seeks "further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis".**

The amendments in Schedule 3, item 1 of the bill will amend the *Migration Act 1958* (the Migration Act) to provide that a criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act)). The proposed amendment to insert new subsection 36(1B) provides a criterion that is either met or is not met and that is based on an adverse security assessment provided by ASIO.

The amendments in Schedule 3, item 1 of the bill do not affect existing avenues for merits review or judicial review of the adverse security assessment from ASIO. Additionally, the amendments do not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Furthermore, the amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

The adequacy of review mechanisms for adverse security assessments and whether it would be more appropriate for an independent review process to be placed on a statutory basis are issues that are not appropriate to address within the Migration Act.

These matters fall within the portfolio responsibilities of the Attorney-General. However, the Attorney-General has provided me with the following information in response to the Committee's concerns.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security.

There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of her findings are provided to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report.

### ***Committee's First Response***

The committee thanks the Minister for his response, however, the scrutiny problems identified in *Alert Digest No. 1 of 2014* about the review process for adverse security assessments remain. The key scrutiny points made by the committee are:

- the consequence of the amendments is that persons with an adverse security assessment, but who are refugees, may be subjected to indefinite detention;
- part of the government's justification for this result is the existence of 'independent review of the initial issue of and continuing need for an adverse security assessment'; and
- although the overall balance to be struck between liberty and national security is a matter for the Senate as a whole, there are scrutiny issues about the adequacy of the independent review of adverse security assessments.

Although it is true to say that the review process is not addressed by the Migration Act, amendments to the Migration Act are being justified in part by reference to the existence of the review process, about which the committee has asked some questions from a scrutiny perspective. The committee notes the advice the Minister obtained from the Attorney-General in relation to the review mechanisms for adverse security assessments. **However, the committee remains concerned about persons being subjected to indefinite detention on the basis of an adverse security assessment given the concerns raised about the review mechanism for these assessments. The committee remains interested in whether it would be appropriate, in the context of the amendments proposed in this bill, to ensure that the independent review process is placed on a statutory basis. The committee therefore seeks the Minister's further advice about this matter.**

*Further response from the Minister - extract*

I note that the Committee has acknowledged receipt of the information I provided in my letter to the Committee dated 6 March 2014 in regards to the adequacy of review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis.

I further note that the committee remains interested in this matter and has requested that I provide further advice. I would like to provide the following information to the Committee in response to the further request.

**Under the heading "Trespass on personal rights and freedoms - personal liberty; Rights and liberties unduly dependent on non-reviewable decisions - adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 77 states "However, the committee remains concerned about persons being subject to indefinite detention on the basis of an adverse security assessment given the concerns raised about the review mechanism for these assessments. The committee remains interested in whether it would be appropriate, in the context of the amendments proposed in this bill, to ensure that the independent review process is placed on a statutory basis. The committee therefore seeks the Minister's further advice about this matter".**

As noted in my response to the Committee of 6 March 2014, the adequacy of review mechanisms for adverse security assessments from the Australian Security Intelligence Organisation (ASIO) and whether it would be more appropriate for an independent review

process to be placed on a statutory basis are issues that are not appropriate to address within the *Migration Act 1958*.

Placing the independent review process on a statutory basis is beyond the policy intent of the Bill, which is to address the number of recent court and tribunal decisions that significantly affect the operations of the Department of Immigration and Border Protection, including the processing of visa applications made by asylum seekers and other non-citizens.

The Australian Government respects the professional judgment of ASIO. At the same time, the government supports appropriate oversight arrangement of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security.

As the Committee is aware there is also the Independent Reviewer of Adverse Security Assessments, who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. The government does not consider it appropriate or necessary that the Independent Reviewer of Adverse Security Assessments be established on a statutory basis.

#### ***Committee's Further Response***

The committee thanks the Minister for this further response. The committee notes the Minister's advice that issues connected with the adequacy of review mechanisms for adverse security assessments are not appropriately dealt with in the context of the proposed amendments to the Migration Act. The committee further notes that the government does not consider it appropriate or necessary that the Independent Reviewer of Adverse Security Assessments be established on a statutory basis. The committee, however, retains its scrutiny concerns about the adequacy of review mechanisms for adverse security assessments given the role that such assessments may play in a person being subjected to indefinite detention. The committee notes that the existence of the Independent Reviewer of Adverse Security Assessments provides an extra level of scrutiny and that this scrutiny is an important justification for the current approach.

**The committee draws this provision to the attention of Senators, requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Quarantine Charges (Collection) Bill 2014

Introduced into the House of Representatives 6 March 2014 (*the bill has passed both Houses and received Assent on 31 March 2014*)

Portfolio: Agriculture

## ***Introduction***

The committee dealt with this bill in *Alert Digest No. 3 of 2014*. The Minister responded to the committee's comments in a letter dated 12 April 2014. A copy of the letter is attached to this report.

### ***Alert Digest No. 3 of 2014 - extract***

## **Background**

This bill forms part of a package of four bills. The bill provides:

- for the authority to collect charges imposed under the Quarantine Charges (Imposition–General) Bill 2014, the Quarantine Charges (Imposition–Excise) Bill 2014 and the Quarantine Charges (Imposition–Customs) Bill 2014 (the Imposition Bills);
- that regulations will determine the time the charge is due and payable;
- the Commonwealth with powers to refuse service in relation to a person who is liable to pay a charge or late payment fee. Such services include the suspension and revocation of import permits; and
- the Commonwealth with enforcement powers to deal with goods and vessels to recover unpaid charges and late payment fees. In doing so the Commonwealth may create a charge on a good or vessel and withhold goods that are subject to a charge.

## **Undue trespass on personal rights and liberties—fair notice Clause 14**

This clause empowers the Director of Quarantine to suspend or revoke a number of approvals or authorisations made under the Quarantine Act when a person has not paid a quarantine charge or late payment fee which is due and payable. Although the explanatory memorandum indicates that subclause 14(3) requires the Director to 'provide written notice that a charge or late payment fee is outstanding before invoking these powers' (at p. 12), this does not appear to correctly state the proposed legal position: subclause 14(3)

provides for a revocation power, but it does not require that prior written notice be given before invoking the power. **The committee therefore seeks clarification about this from the Minister. In particular, if the position in the bill is correct and a ‘fair notice’ provision is not to be included in the bill the committee seeks the Minister's justification for this omission.**

*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 response - extract***

#### **Undue trespass on person rights and liberties—fair notice**

The Digest seeks clarification regarding the provision of written notice where a permit or other right is suspended or revoked by a Director of Quarantine due to non-payment of a charge or fee under clause 14.

Subclauses 14(2) and 14(3) provides that written notice is required to notify a person of any suspension or revocation of a permit or other right by a Director of Quarantine. Subclauses 14(2) and 14(3) state, "A Director of Quarantine may, *by written notice to the person ...*". I believe that this clause provides for fair notice before any right or liberty is affected by a decision under the Bill.

#### ***Committee Response***

The committee thanks the Minister for this response. The committee notes that while the Director of Quarantine is required to revoke a permit, etc. by written notice, there is no requirement in subclause 14(3) that *prior* written notice be given before invoking the power.

**The committee notes that the bill has already been passed by both Houses of Parliament. The committee therefore makes no further comment on this matter.**

***Alert Digest No. 3 of 2014 - extract***

**Undue trespass on personal rights and liberties—reversal of burden of proof  
Clauses 19 and 25**

Subclause 19(2) provides an exception to the offence of moving or interfering with withheld goods. The exception applies: if the person is authorised to move or interfere with the goods under section 46A of the Quarantine Act or a compliance agreement, has been given a direction by a quarantine officer or permission under this Act or the Quarantine Act. The explanatory memorandum contains a justification of this approach in which it is stated that it is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The justification, at page 15, is that the shift:

...in evidential burden is considered reasonable because it would be significantly more difficult for the prosecution to prove this element, since the relevant information is known particularly to the defendant.

On the other hand, the committee notes that the penalty for the offence is significant (2 years imprisonment or 120 penalty units), which does not appear to be consistent with the *Guide* to the extent that it states that creating a defence is more readily justified if the offence carries a relatively low penalty (see page 50). In addition, it is not clear why business practices could not be adopted which would enable the prosecution to establish whether a person has been authorised to move or interfere with goods so that the exception would not need to apply.

The same issues also arise in relation to subclause 25(2).

**The committee therefore seeks the Minister's further advice in relation to the justification for reversing the burden of proof in these provisions.**

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

## *Minister's response - extract*

### **Undue trespass on personal rights and liberties—reversal of the onus of proof**

The Digest seeks clarification regarding whether the reversing of the onus of proof under clauses 19(2) and 25(2) appropriately reflects Commonwealth best practice.

Subclauses 19(2) and 25(2) provide a defence to the offences outlined in subclauses 19(1) and 25(1). Subclauses 19(2) and 25(2) state that in the event that a person is authorised to move, deal with or interfere with the goods or vessel under this Act, the *Quarantine Act 1908* (Quarantine Act), or under another Australian law, the defendant is responsible for adducing evidence to rely on these defences in the identified subsections.

Whether or not the defendant is authorised to engage in the conduct is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the Commonwealth to establish that the defendant was not authorised under any Australian law than for the defendant to establish that he or she was authorised under such a law. Under such circumstances, I believe that this reflects Commonwealth best practice.

### **Level of penalties**

The Digest seeks clarification about the level of penalty associated with clauses 19 and 25.

An offence under subclauses 19(1) and 25(1) could incur a maximum penalty of 2 years imprisonment or 120 penalty units, or both. The level of penalty is consistent with offences of a similar kind under the Bill and also complements the penalty and offence levels in the Quarantine Act. The ratio of penalty units to months imprisonment is consistent with the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Processes*.

### ***Committee Response***

**The committee thanks the Minister for this response, and notes that the bill has already been passed by both Houses of Parliament. The committee therefore makes no further comment on this matter other than to affirm that where penalties are significant in relation to an offence where there is a reversal of the burden of proof a detailed justification for the approach should be provided in the explanatory memorandum.**

## ***Alert Digest No. 3 of 2014 - extract***

### **Broad discretionary power**

#### **Merits review**

#### **Clause 38**

This clause empowers the Minister to remit or refund the whole or part of a quarantine charge or a late payment fee that is payable, or already paid, if he or she is satisfied that there are ‘exceptional circumstances that justify doing so’. As noted in the explanatory memorandum (at p. 23) this is a discretionary power. The terms of the clause are quite broad and the explanatory memorandum does not provide examples of ways in which it is intended that the power will be used, nor does it further elaborate the justification of the power.

In addition, while it is apparent that the positive exercise of the power will be of benefit to the persons afforded relief from a fee or charge, a decision not to exercise the power will have a significant impact on the rights of applicants and there is no provision for merits review. The explanatory memorandum also does not address this aspect of the proposed approach.

**The committee therefore seeks the Minister’s advice as to justification for the breadth of the discretion and to ask whether consideration has been given to the inclusion of relevant matters that must be considered by the Minister when exercising the power and/or to whether the exercise of the power should be subject to merits review.**

*The committee draws Senators’ attention to the provision as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) and 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***

### **Broad discretionary power**

The Digest seeks clarification about the discretionary power under clause 38.

This clause provides that the Minister may remit or refund a quarantine charge or a late payment fee, if the Minister is satisfied that there are exceptional circumstances that justify doing so. This may be done on the Minister's initiative or on written application.

Rigorous administrative processes are in place to ensure that the exercise of this power is transparent and consistent. The provision mirrors the current arrangements under section 86E of Quarantine Act for the remit or refund of fees. This ensures that the remit and refund of quarantine fees, and the remit and refund of quarantine charges are managed in a consistent manner.

### ***Committee Response***

The committee thanks the Minister for this response, and notes that rigorous administrative processes will be in place to ensure that the exercise of the power is transparent and consistent. **Although the committee does not consider that the existence of such processes renders merits review inappropriate, the committee notes the bill has already been passed by both Houses of Parliament. The committee therefore makes no further comment on this matter.**

### ***Alert Digest No. 3 of 2014 - extract***

#### **Delegation of legislative power**

##### **Subclause 45(2)**

This subclause provides that the regulations may prescribe matters relating to the giving of a notice or direction, or the making of any other requirement, under this Act and the manner in which any notice, direction, requirement or other instrument granted, given or made under this Act may be produced to a person or body. Given that an element of some of the serious offences created by this bill include failure to comply with directions and that the availability of exceptions to some offences depend on whether actions have been authorised by a direction (or perhaps another instrument), these matters appear to be of significance.

In general, the committee expects, in line with the principles set out in the *Guide to Framing Commonwealth Offences*, that the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so and that the explanatory memorandum will include a detailed justification for the proposed approach. **As there is no explanation as to why these matters are more appropriate for delegated legislation**

**rather than being included in the primary legislation the committee seeks the Minister's advice as to this matter.**

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

### ***Minister's response - extract***

#### **Delegation of legislative power**

The Digest seeks clarification about the delegation of legislative power with regard to the matters relating to giving notices and directions.

Subclause 45(2) of the Bill is a general regulation making provision that facilitates the procedural operation of the legislation. This subclause ensures that there is sufficient flexibility relating to the giving of a notice or direction or other requirement under the legislation.

This subclause operates alongside clause 43 of the Bill which prescribes the permissible ways in which a direction under the legislation may be given (orally or in writing). The operation of clause 43 provides certainty as to how directions under the legislation may be given.

The Department of Agriculture does not anticipate having to utilise this subclause on a regular basis, however it is vital to ensuring that the legislation is able to adapt to changes in procedure as they arise in the future.

#### ***Committee Response***

The committee thanks the Minister for this response and notes the Minister's advice that the Department does not anticipate having to utilise this subclause on a regular basis. The committee affirms its view that the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so and that the explanatory memorandum should include a detailed justification for the proposed approach in such circumstances. **The committee notes that the bill has already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

**The committee draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of legislative power and whether any instruments made under the power would be more suitable for parliamentary enactment.**

# **Quarantine Charges (Imposition—General) Bill 2014**

## **Quarantine Charges (Imposition—Customs) Bill 2014**

### **Quarantine Charges (Imposition—Excise) Bill 2014**

Introduced into the House of Representatives 6 March 2014 (*the bills have passed both Houses and received Assent on 31 March 2014*)

Portfolio: Agriculture

#### ***Introduction***

The committee dealt with these bills in *Alert Digest No. 3 of 2014*. The committee commented on the Quarantine Charges (Imposition—General) Bill 2014, but also noted that the other two bills raise identical issues. The Minister responded to the committee's comments in a letter dated 12 April 2014. A copy of the letter is attached to this report.

#### ***Alert Digest No. 3 of 2014 - extract***

#### **Background**

These bills enable cost-recovery of activities that provide benefits to users of the biosecurity system – particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance.

#### **Delegation of legislative power—setting a levy or charge in regulation**

##### **Clause 8**

Subclause 8(1) provides that a regulation may prescribe a charge in relation to a prescribed matter connected with the administration of the *Quarantine Act 1908* (subclause 7(1)). Clause 9 also allows the regulations to prescribe who is liable to pay a charge and that one or more persons may be liable to pay a specified charge prescribed under subsection 7(1). The charges are imposed as taxes for the purposes of cost recovery.

The scheme thus involves the following matters being prescribed by regulation: the matters on which charges will be imposed, the amount or the method for calculating the amount of the charge, and the persons liable to pay the charge. The explanatory memorandum (at p. 3) indicates that the bill enables cost-recovery of activities that provide benefits to users of the biosecurity system—particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance. The justification for setting the charges through delegated legislation is that this ‘will allow the Minister for Agriculture to make appropriate and timely adjustments to the charges, avoiding future over or under recoveries’ (at 3).

The committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation as this creates a risk that the levy may, in practical effect, become a tax. It is considered that it is for the Parliament to set a rate of tax. Thus, although it is accepted that the rate of a levy may appropriately be dealt with by regulation where it may need to be changed frequently and expeditiously, the committee expects that there will be a limit on the exercise of this power, for example, the setting of a maximum rate in the legislation or a formula by which the levy is to be calculated.

In this instance, subclause 8(2) of the bill provides that before a regulation is made under subsection 7(1) prescribing a charge in relation to a matter, the Minister:

...must be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with the matter.

According to the explanatory memorandum:

...this ministerial oversight provides assurance to those liable to pay a charge or charges under the Act, that the amount charged reflects the likely costs to the Commonwealth in connection with the matter.

The explanatory memorandum adds that 'any charges set out in the regulations will be consistent with the *Australian Government Cost Recovery Guidelines*'. Although not detailed in the explanatory memorandum, these guidelines require Ministers administering significant cost recovery arrangements to undertake appropriate stakeholder consultation and for agencies to prepare a Cost Recovery Impact Statement (CRIS). It should be noted, however, that this particular safeguard is non-statutory.

Despite subclause 8(2) and the safeguards identified in the explanatory memorandum, the committee has some concerns about the adequacy of Parliamentary scrutiny given that all of the key elements of the administration charges under this bill are dealt with by regulations. **The committee therefore seeks the Minister's advice as to whether the administration of the scheme is subject to annual or other reporting requirements that would facilitate an appropriate level of parliamentary scrutiny. This request also applies to the related quarantine bills.**

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

## *Minister's response - extract*

### **Delegation of legislative power**

The Digest seeks clarification about the delegation of legislative power regarding the rate of charge and reporting requirements that would facilitate an appropriate level of parliamentary scrutiny.

The amount of a charge prescribed under clause 8 must be consistent with the *Australian Government Cost Recovery Guidelines* and will be subject to a Cost Recovery Impact Statement every 3-5 years. In addition, the Minister must also be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with an indirect biosecurity service that has been provided.

The nature and value of charges imposed under this bill will be identical to the value of Items 2, 3 and 5 currently imposed under the *Quarantine Service Fees Determination 2005*. The regulations will be a disallowable instrument and will be available for parliamentary scrutiny during the disallowance period.

### ***Committee Response***

The committee thanks the Minister for this response and notes that the regulations will be disallowable and will therefore be subject to some level of parliamentary scrutiny. The committee reiterates that it is for the Parliament to proactively set the rate of any tax, and affirms its view that where the key elements of the administration of charges under a bill are dealt with by regulations there must be appropriate safeguards in place and an adequate level of parliamentary scrutiny. **The committee notes that the bills have already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

## ***Alert Digest No. 3 of 2014 - extract***

### **Undue trespass on personal rights and liberties—retrospective validation of charges levied**

#### **Clause 11**

The explanatory memorandum, at page 10, explains that this clause:

...provides that where a charge has been imposed under the Quarantine Act and it was done so in a manner that may be found to be invalid, the charge is validly imposed under this Act.

The purpose of the clause is to ensure that the government's intention to recover the costs of providing services is done so validly under law.

Although the explanatory memorandum explains the legal effect of this clause, it does not provide any material which explains the necessity of retrospectively validating fees that may have been invalid at the time they were levied. It is a fundamental principle that no pecuniary burden can be imposed upon individuals without clear and distinct legal authority. Retrospective validation of the imposition of fees and charges undermines this principle. In this regard it may be noted that the operation of the proposed validation clause is not confined to a specific problem with a particular fee, but will apply generally. **The committee therefore seeks the Minister's advice as to a detailed and compelling justification for this provision.**

*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 response - extract***

### **Undue trespass on personal rights and liberties**

The Digest seeks clarification about whether clause 11 unduly trespasses on rights and liberties by retrospectively validating charges under the Quarantine Act. This clause resolves legal ambiguity around the validity of fees already imposed under the Quarantine Act by ensuring that the charges are validly imposed.

Clause 11 further ensures that those liable to pay fees imposed under the Quarantine Act remain liable to pay those fees despite the operation of the Bill. This ensures that persons liable to pay for indirect biosecurity and quarantine services are required to pay for the provision of those services but will not be charged under both the Quarantine Act and this Bill.

***Committee Response***

The committee thanks the Minister for this response, although notes that it does not directly address the committee's concerns. The committee reiterates that it is a fundamental principle that no pecuniary burden can be imposed upon individuals without clear and distinct legal authority and that retrospective validation of the imposition of fees and charges undermines this principle. In cases where this approach is proposed in a bill the explanatory memorandum should provide a detailed explanation as to why it is considered necessary to retrospectively validate fees that may have been invalid at the time they were levied. **The committee notes that the bills have already been passed by both Houses of Parliament and therefore makes no further comment on this matter.**

# Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013

Introduced into the House of Representatives on 12 December 2013

Received Assent on 28 February 2014

Portfolio: Veterans' Affairs

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 8 of 2013*. The Minister responded to the committee's comments in a letter dated 10 February 2014 which was published in the committee's *Second Report of 2014*. The Minister provided a further response dated 7 April 2014 in relation to the committee's recommendation to amend the *Military Rehabilitation and Compensation Act 2004* (MRCA). A copy of the letter is attached to this report.

## *Alert Digest No. 1 of 2014 - extract*

## **Background**

This bill amends Veterans' Affairs and other portfolio legislation to:

- clarify arrangements for the payment of travel expenses for treatment under the Veterans' Entitlements Act and the Australian Participants in British Nuclear Tests (Treatment) Act;
- provide for the more timely provision of special assistance by way of a legislative instrument in place of the current arrangement requiring a regulation;
- ensure that the debt recovery provisions will be applicable to all relevant provisions of the Veterans' Entitlements Act, the regulations and any legislative instrument made under the Veterans' Entitlements Act;
- make technical amendments to provisions in the Military Rehabilitation and Compensation Act that refer to legislative instruments;
- amend the Military Rehabilitation and Compensation Act to replace obsolete references to pharmaceutical allowance and telephone allowance with references to the MRCA supplement;

- rationalise the maintenance income provisions of the Veterans' Entitlements Act by repealing the redundant definitions and operative provisions and aligning the remaining definitions with those used in the social security law; and
- make minor technical amendments.

### **Legislative Instrument Schedule 1, item 20**

The bill makes a number of amendments, which are consequential to the enactment of the *Legislative Instruments Act 2003*. Item 20 relates to the power for the Military Rehabilitation and Compensation Commission to require a person to undergo a medical examination.

Subsection 328(6) provides that the Minister may, by notice in writing, set a limit on the frequency of examinations. Current subsection 328(7), which is being repealed as it is obsolete, provides that a subsection (6) notice is a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

It appears to the committee that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a subsection (6) notice is disallowable and this is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's clarification as to whether a subsection (6) notice will remain disallowable. If so, the committee requests that the bill be amended to clarify this.**

*Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

### ***Minister's response - extract***

The Bill has now passed both Houses and is expected to shortly receive the Royal Assent. However, it is appropriate that I address the concerns that have been raised by the Committee's letter.

The Committee sought advice concerning the amendment made by Item 20 of Schedule 1 of the Bill repealing subsection 328(7) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

Section 328 of the MRCA is applicable to all current and former Defence Force members who make a claim or on whose behalf a claim is made under the MRCA. Section 328 gives the Military Rehabilitation and Compensation Commission the power to require the

claimant to undergo a medical examination with a medical practitioner of its own choosing.

Subsection 328(6) provides that the Minister for Veterans' Affairs may, by legislative instrument, set a limit on the frequency of examinations.

The repeal of subsection 328(7) removes the obsolete reference to that notice being a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

The concern of the Committee was that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a notice issued under subsection 328(6) was disallowable as the issue was not addressed in the explanatory memorandum.

The committee has sought clarification as to whether a legislative instrument made under subsection 328(6) is disallowable and, if so, requested that the Bill be amended to clarify this.

The explanatory memorandum makes it clear that the amendments to the MRCA that were included in Schedule 1 of the Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013 were consequential amendments resulting from the enactment of the *Legislative Instruments Act 2003* (the LIA).

The explanatory memorandum made no specific reference as to whether or not the legislative instrument would continue to be disallowable as the new scheme for legislative instruments put in place by the LIA and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provided that all legislative instruments would be disallowable unless they were specifically exempted. Section 44 of the LIA and Schedule 2 of the *Legislative Instruments Regulations 2004* list certain legislative instruments that are not disallowable.

All of the legislative instruments made under the MRCA are disallowable instruments under the LIA with the exception of determinations of warlike or non-warlike service made by the Defence Minister under subsection 6(1).

The amendment was essentially a housekeeping amendment to make a consequential amendment to the MRCA that should have been made when the LIA was enacted.

As there was no change in the disallowable status of legislative instruments issued under subsection 328(6) and other similarly amended provisions of the MRCA, no specific reference to the disallowable status of the instruments was included in the explanatory memorandum for the Bill.

### ***Committee Response***

The committee thanks the Minister for his response and notes his advice that the amendment ‘...made no change in the disallowable status of legislative instruments issued under subsection 328(6) and other similarly amended provisions of the [Military Rehabilitation and Compensation Act 2004].’ The committee welcomes the Minister’s confirmation that any ‘notice in writing’ made under subsection 328(6) will be a disallowable legislative instrument (and would not be considered, for example, to be a notice that is administrative in character).

**The committee is aware of, and supports, the practice that has developed since the commencement of the *Legislative Instrument Act 2003* of explicitly declaring in the enabling legislation whether or not an instrument (including a ‘notice in writing’) is a legislative instrument. The committee also encourages the practice of including advice in the explanatory memorandum as to whether this is as a result of deeming or a consequence of the character of the instrument. The committee therefore recommends that the Minister considers amending the MCRA to this effect at the next opportunity.**

### ***Minister's further response - extract***

I refer to the Committee Secretary’s letter of 6 March 2014 recommending that I consider amending the *Military Rehabilitation and Compensation Act 2004* (MRCA) to explicitly declare that a particular ‘notice in writing’ is a legislative instrument.

I enclose for your information a copy of the relevant provision (subsection 328(6)) of the MRCA as amended by the *Veterans Affairs Legislation Amendment (Miscellaneous Measures) Act 2013*, which provides that the interval between required medical examinations may be specified by the Minister by legislative instrument.

As advised in my letter of 26 February 2014, the *Legislative Instruments Act 2003* (LIA) and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provide that all legislative instruments are disallowable unless they are specifically exempted. Section 44 of the LIA and Schedule 2 of the *Legislative Instruments Regulations 2004* list certain legislative instruments that are not disallowable.

All legislative instruments made under the MRCA are disallowable instruments under the LIA with the exception of determinations of warlike or non-warlike service made by the Defence Minister under subsection 6(1).

***Committee Response***

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

Senator Helen Polley  
Chair



**THE HON MICHAEL KEENAN MP**  
**Minister for Justice**

MC14/06446

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Chair  
Senate Scrutiny of Bills Committee  
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Dear Senator Polley

I refer to your letter dated 27 March 2014. I am writing on behalf of the Attorney-General in relation to the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014 (the Bill), as I have responsibility for this Bill.

**Schedule 1, item 4, proposed subsection 22CA(4)**

The Senate Scrutiny of Bills Committee (the Committee) has sought advice as to the justification for why the matters to which the Minister must have regard in deciding whether to approve a classification tool under proposed subsection 22CA(1) will be contained in guidelines and not in the primary legislation.

The fundamental requirements for a classification tool are set out in proposed subsection 22CA(5). These are that the Minister must not approve a classification tool unless the classification tool will: (i) produce a classification decision for the Australian Capital Territory; (ii) determine consumer advice; and (iii) notify the classification decision and consumer advice to the Director of the Classification Board. The purpose of the guidelines will be to specify any other matters to which the Minister must have regard when approving a classification tool. Any guidelines will be required to support the outcomes provided for in section 22CA(5), and could not be inconsistent with it. The use of guidelines will:

- provide flexibility and ensure that the Act remains relevant into the future;
- account for matters that may become relevant with regard to classification tools (which have not been used before and may change significantly with advances in technology);
- respond to changing community standards and expectations regarding the classification information that consumers of content should receive;
- reflect regulatory changes to the National Classification Scheme itself
- meet the changing demands of industry; and

- keep pace with evolving forms of media content and mechanisms for the delivery of that content.

The Government considers that it is not practicable to list in the Act matters that are not fixed and will likely change due to rapid technological advances and unknown changes in the content environment. Such an approach may result in the primary legislation quickly becoming obsolete.

This is important as classification tools are a new way of providing classification information to consumers. They represent an innovative use of technology and a forward-looking policy approach that will facilitate the classification of large volumes of unclassified content that is available in the market.

As classification tools are developed and become more sophisticated, the matters that I or any future Minister should consider in deciding to approve a tool may need to be expanded or amended to reflect the evolution and range of the technology at the time. The Government must also be able to respond efficiently to the needs of industry and consumers given the rapid rate of change in the content environment. Consequently, the additional matters to be taken into account in approving classification tools should be capable of being amended easily.

For the reasons outlined above, the Government considers that it is appropriate for additional matters to be specified in guidelines. The flexibility provided by administrative guidelines will allow the Minister to efficiently, and appropriately, amend the matters to which he or she must have regard to when considering whether to approve a classification tool.

#### **Schedule 1, item 4, proposed subsection 22CA(7)**

The Committee has sought advice as to the justification for the conclusion that the guidelines made under subsection 22CA(4) are not a legislative instrument and should not be subject to the requirements of the *Legislative Instruments Act 2003* (LIA).

The Committee notes that it is arguable that such guidelines fall within the meaning of section 5 of the LIA because they provide for matters that must be considered by the Minister when approving a classification tool, and these matters affect the making of a decision. Thus, the Committee states, the guidelines indirectly affect the interests of persons who rely upon, or wish to rely upon, the operation of particular classification tools. The Committee further argues that the guidelines directly impose an obligation on the Minister in making approval decisions.

The Government considers that the guidelines made under proposed subsection 22CA(4) do not fall within the meaning of section 5 of the LIA because:

- the Minister will only be required to have regard to them (that is, they will not determine the law or constrain the Minister's decision-making);
- the guidelines will not specify additional requirements that must be satisfied by a classification tool before it is approved;
- the guidelines will be applied appropriately and flexibly;
- the Minister will determine whether to approve a classification tool on a case-by-case basis;
- the guidelines will not affect the classification decision in relation to a particular item of content, rather whether a particular tool is appropriate to classify content for the Australian market and consumers; and

- the guidelines will not indirectly affect the interests of a person, given the matters listed above.

The guidelines are intended to assist myself or a future Minister in deciding whether a classification tool is suitable to classify material in accordance with the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

The guidelines will illuminate or expand the types of factors that the Minister considers should be taken into account; however they will not determine whether the Minister should approve a classification tool. That is, in contrast to proposed subsection 22CA(5), the guidelines will not enumerate requirements that a classification tool must meet in order to be approved for use. I also note that it is not mandatory that guidelines be made – rather, if it is useful to publish guidelines, the proposed amendments seek to recognise that utility.

While the Minister must have regard to the matters specified in the guidelines, they do not determine the law but instead assist the Minister in applying the law. The guidelines will not restrict the Minister’s power to approve a classification tool that meets the requirements of subsection 22CA(5) or prevent the Minister imposing conditions in relation to the approval of a decision making tool.

The approach to the guidelines is similar to a provision that currently exists in the Classification Act. Existing subsection 13(4) of the Classification Act provides the Director of the Classification Board with the power to determine written principles to which the Classification Board must have regard when deciding whether to make a declaration under subsection 13(3) of the Act. These principles are not a legislative instrument.

While the Government considers that guidelines made under subsection 22CA(4) are not ‘legislative in character’ for the purposes of section 5 of the LIA, in the interests of accountability and transparency, proposed subsection 22CA(8) will require that the guidelines be published on the Department’s website.

### **Schedule 3, item 18, proposed section 6G**

The Committee has sought further explanation of the nature and scope of the matters to be dealt with in the conditional cultural exemption rules made under proposed section 6G.

Proposed section 6G will empower the Minister to make rules, by legislative instrument, to prescribe additional conditions (if any) that approved cultural institutions and registered events must satisfy in order to use conditional cultural exemptions for the demonstration, exhibition or screening of publications, film or computer games. These rules are known as the conditional cultural exemption rules.

Proposed sections 6C – 6F will specify the requirements that approved cultural institutions and registered events must satisfy in order to use a condition cultural exemption.

The nature and scope of the matters that will be dealt with in the conditional cultural exemption rules will predominantly be administrative, and the Government considers that it is appropriate that these matters are contained in a legislative instrument as opposed to the primary legislation. Whilst the rules will determine the law, they will contain prescriptive detail that, if included in the primary legislation, would introduce unnecessary complexity. For example, the rules must deal with: the manner and form in which information about relevant material must be given pursuant to proposed paragraphs 6C(f) and 6E(e); the mechanisms for the registration process pursuant to paragraph 6D(c)); and the training that must be completed in relation to approved cultural institutions pursuant to paragraph 6F(f). The rules will also deal with other matters that may be or may become relevant to the administration of the conditional cultural exemptions scheme. For example, it may be

necessary to impose different conditions on travelling festivals or introduce particular conditions for certain unique events.

The purpose of the new exemption arrangements is to reduce the administrative and regulatory burden on industry and the arts and cultural sector. The amendments contained in Part 3 of Schedule 3 of the Bill will simplify exemption arrangements for festivals, events and cultural institutions by replacing provisions that are currently set out in each State and Territory's classification legislation with a consolidated set of rules under the Classification Act. Given that the new arrangements represent a move to a deregulated scheme administered by the Commonwealth, it is appropriate that a legislative instrument deal with administrative matters relating to registration processes, training and any other matters that may arise in relation to festivals and cultural institutions.

The Government must also be in a position to respond quickly and efficiently to the constantly evolving content environment. Moreover, as it is not possible to foresee how and to what extent content and the way it is delivered may change in future, it is necessary that the conditional cultural rules have the flexibility to be amended and cater for the unknown. For example, conditional cultural exemption rules may need to adapt to deal with interactive events or mixed media events that take place simultaneously in multiple locations.

The Government has attempted to ensure that the Bill has not been complicated by the inclusion of prescriptive administrative detail and that there is adequate flexibility through the use of a legislative instrument to ensure a smooth transition of the regulation of festivals and cultural institutions to the Commonwealth.

In summary, the Government considers that this Bill achieves an appropriate level of regulation that better equips the National Classification Scheme to respond efficiently and effectively to the changing needs of industry and consumers.

Thank you for allowing me the opportunity to address the Committee's concerns.

Yours sincerely

**Michael Keenan**

29 APR 2014



**THE HON MICHAEL KEENAN MP**  
**Minister for Justice**

**RECEIVED**

22 APR 2014

Senate Standing C'ttee  
for the Scrutiny  
of Bills

MC14/06090

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Dear Senator Polley

I refer to the letter dated 20 March 2014 sent on behalf of the Senate Standing Committee for the Scrutiny of Bills regarding the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014. I welcome the opportunity to provide the following comments in response to the issues identified by the Committee.

**Undue trespass on personal rights and liberties—privacy (Item 31)**

Item 2A of the table at current section 266A of the *Proceeds of Crime Act 2002* (POC Act) deals with the disclosure of information to an authority of a foreign country that has a function of investigating or prosecuting offences against a law of the country. Under these existing provisions, information must only be shared for the purpose of assisting in the prevention, investigation or prosecution of an offence against that law, and only where the offence is constituted by conduct that would constitute an offence against Australian law had the conduct occurred in Australia. The existing provisions also provide that the corresponding Australian offence must be punishable by imprisonment for at least three years.

*Threshold requirements*

The Committee has indicated its concern about the apparent lack of safeguards to protect individuals' privacy associated with provisions in the Bill that expand the circumstances in which authorities are able to share information with foreign authorities. The Committee asked whether consideration has been given to making these provisions subject to a threshold requirement, such as the minimum three year imprisonment penalty that applies to the existing provisions.

The amendments in the Bill provide that information can be shared with appropriate foreign authorities *for the purposes of identifying, locating, tracing, investigating or confiscating proceeds or instruments of crime under a law of the foreign country*. These provisions set clear parameters around the circumstances in which information can be shared. Expressly providing that information can be shared for these purposes overcomes limitations that previously prevented disclosures that related to proceeds of crime investigations and litigation in the absence of the investigation or prosecution of a criminal offence.

New table item 2C expressly provides that information can only be disclosed to foreign authorities for the purposes of assisting in the identification, location, tracing, investigation or confiscation of proceeds of crime *if the identification, location, tracing, investigation or confiscation could take place under the POC Act, or under a corresponding law of a State or a self-governing Territory, if the proceeds related to an offence against a law of the Commonwealth, State or Territory*. This limits the sharing of information to those countries where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian laws, if the proceeds or instruments had related to an offence against the law of the Commonwealth, State or Territory.

The offences capable of leading to action under the POC Act are Commonwealth indictable and serious offences, foreign indictable offences or indictable offences of Commonwealth concern. As such, the amendments in the Bill are subject to a minimum threshold in the form of a ‘dual criminality’ requirement.

The Bill’s explanatory memorandum provides a specific example of how these provisions would improve current arrangements, using a scenario where the Australian Federal Police (AFP) and a foreign proceeds of crime authority are cooperating on an investigation into an international crime syndicate involved in drug trafficking and money laundering. If the AFP had reasonable grounds to suspect that specific real estate assets in Australia were the proceeds of drug trafficking by this syndicate and was aware that the foreign country intended to commence proceeds of crime action against the registered owner of this real estate, the AFP would be able to share the information about this additional property with the relevant foreign authority. This is because the activity under investigation (drug trafficking) would also constitute an offence against a law of the Commonwealth which is capable of leading to action under the POC Act.

The amendments also make it clear that Australia can share information with foreign authorities that have been set up to undertake proceeds of crime work, but which do not investigate or prosecute criminal offences. This ensures that Australia is not prohibited from dealing with specialist proceeds of crime bodies that have been established in many countries, which deal with proceeds of crime matters but do not investigate offences.

#### *Limitations on further disclosures*

The Committee has also queried whether the Government has considered limiting disclosure to foreign agencies based on whether they are subject to legal obligations or appropriate accountability measures to prevent further disclosure of the material.

Provisions in the POC Act that allow Australian agencies to provide assistance in proceeds of crime matters assist to ensure that criminals cannot evade confiscation proceedings simply because evidence or proceeds of their crimes are in different countries. As noted above, the

provisions in the POC Act, as amended by the Bill, only allow a person to disclose information to appropriate foreign authorities for the limited purposes of assisting in the identification, location, tracing, investigation or confiscation of proceeds of crime, and only if the Australian authorities believe on reasonable grounds the disclosure will serve this purpose.

All disclosures of information between foreign law enforcement authorities and Australian law enforcement authorities involve undertaking a broad assessment of whether the requesting country will treat information for the limited purposes for which it is shared and how the requesting country has previously dealt with information that has been disclosed for similar purposes. It is open to Australia to reject the request to provide specific assistance to the requesting foreign authority.

Given the increasingly international nature of many crimes, including money laundering, drug trafficking and fraud, increased cooperation between Australia and foreign counterparts to target the criminal economy is required. To impose a requirement to undertake a detailed and specific assessment in all circumstances about whether the requesting country's laws prevent further disclosure of shared information and to put in place processes to audit such an arrangement with respect to all requesting authorities is not feasible.

### **Undue trespass on personal rights and liberties—right to a fair hearing (Item 3)**

The Committee noted that provisions in the Bill that prevent a person from meeting their legal costs from restrained property may unduly trespass on the right to a fair trial.

As noted by the Committee, these provisions are intended to guard against the risk, identified by the Parliamentary Joint Committee on Law Enforcement in the 2012 report of its inquiry into Commonwealth unexplained wealth legislation and arrangements, of a person actively frustrating unexplained wealth proceedings through spending on frivolous or unreasonable legal expenses.

The amendments made by the Bill ensure that a person who is subject to unexplained wealth proceedings has access to legal aid, where that person is unable to meet their legal expenses using their other (unrestrained) assets. Legal aid commissions will continue to be entitled to be reimbursed for legal costs incurred in representing people whose property is covered by a restraining order (including unexplained wealth restraining orders).

The Committee has accepted the explanation for the provisions as outlined in the supporting materials for the Bill and has indicated that it does not seek to make further comment on this issue, but leaves the question as to whether there is any undue trespass on the right to a fair hearing to the Senate as a whole.

### **Undue trespass on personal rights and liberties—retrospective application (Item 34)**

Finally, the Committee noted that provisions in the Bill have a partially retrospective effect. Provisions that have retrospective application are of concern to the Committee when they involve detriment to any person.

The Committee's comments refer to provisions in the Bill that provide that, although amendments to the relevant sections of the POC Act will only apply to restraining orders, unexplained wealth orders and preliminary unexplained wealth orders made *on or after*

commencement, the orders (as amended) may be applied in relation to offences committed *before* commencement of the Bill, as well as to wealth that was acquired *before* commencement.

It is necessary for the amendments to apply in this partially retrospective manner to ensure the effective operation of the Bill. As noted in the Bill's explanatory material, the suspected criminal conduct from which a person may have profited or gained property may have continued over several years (including prior to the commencement of the Bill) and may not be discovered immediately. If the Bill did not apply in a partially retrospective manner, it would be necessary for authorities to attribute wealth to a specific date, which would undermine the intent and practical effect of the Bill. The amendments do not make a person retrospectively liable for criminal offences to which a proceeds of crime proceeding may relate.

I note that the Committee has accepted the explanation for the provisions as outlined in the supporting materials for the Bill and has indicated that it does not seek to make further comment on this issue, but leaves the question as to whether the proposed approach as a whole is appropriate to the Senate.

The responsible adviser for this matter in my office is Tim Wellington who can be contacted on

Thank you again for writing on this matter.

Yours sincerely

**Michael Keenan**

11 APR 2014



The Hon. Barnaby Joyce MP

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Minister for Agriculture  
Federal Member for New England

Ref: MNMC2014-02918

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Dear Senator Polley

I refer to the letter from the Senate Scrutiny of Bills Committee (the Committee) dated 20 March 2014 in relation to the Farm Household Support Bills and Quarantine Charges Bills.

The letter from the Committee sought clarification on a number of matters in relation to the Farm Household Support Bill 2014, Farm Household (Consequential and Transitional Provisions) Bill 2014, Quarantine Charges (Imposition-General) Bill 2014, Quarantine Charges (Imposition-Customs) Bill 2014, Quarantine Charges (Imposition-Excise) Bill 2014 and the Quarantine Charges (Collection) Bill 2014 which are outlined in the Committee's *Alert Digest No. 3 of 2014* (the Digest). My response to the issues raised by the Committee in relation to the Bills is set out below.

**Farm Household Support Bill 2014**

Delegation of legislative power – Henry VIII clause

The Digest seeks information as to the justification for the delegation of powers under subclauses 5(2) and 5(3) of the Farm Household Support Bill 2014 (the Bill).

Subclause 5(2) provides that definitions under the *Social Security Act 1991* (the Social Security Act) have the same meaning under the Bill, subject to subsection 5(1) and Part 5 of the Bill. Subclause 5(3) allows for expressions to be prescribed where there is a need to do so. This provision is necessary due to the complex interaction between the Social Security Act and the Bill. The Bill is deliberately structured in a way that allows for provisions in the Social Security Act and the *Social Security Administration Act 1999* to apply unless their operation is turned off or modified. Due to the close relationship between this legislation, it is important that they work consistently with each other and, as a result, amendments to social security law may automatically apply to the Bill. Despite our best efforts however, I acknowledge that the potential exists for unintended consequences to result from the close interaction between this legislation. Subclause 5(3) allows for modifications to be made to

expressions used in the Social Security Act for the efficient and effective operation of the Bill without the need for further legislative change.

No expressions requiring a rule to be made under subclause 5(3) have been identified at this time because the payment provided for under the Bill – the Farm Household Allowance – has not yet commenced. However, issues may arise following the implementation of the Farm Household Allowance that may require expressions in the Social Security Act to be modified.

#### Delegations of legislative power

The Digest seeks clarification as to the justification for the delegations of power under subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3) of the Bill.

The Bill provides the Secretary of the Department of Agriculture with powers to make rules in circumstances where prescribing something in the legislation could be unintentionally and unnecessarily prescriptive, effectively limiting access to the payment. These rules are disallowable instruments. The operation of the delegations of legislative power under subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3) of the Bill will provide the flexibility required to accommodate the diverse and changing range of circumstances faced by farmers in hardship while ensuring the payment is delivered in accordance with the objects of the Act.

#### Merits Review

The Digest seeks further explanation for the exclusion of merits review in subclause 20(2) in relation to decisions made under subclause 20(1)(b).

Section 20 of the Bill sets out who an appropriately qualified person is for the purpose of providing training. Subsection 20(2) provides that the Secretary's decision to approve a person or body to provide training is not reviewable by a tribunal. A decision by the Secretary under paragraph 20(1)(b) is not taken to be a decision under social security law. This is because the decision relates to the approval of a person or body, which is not a registered training organisation, as a provider of training for the purpose of this Bill. A decision made under this subclause is not a decision relating to a person's entitlement to a payment under the Bill, which will be reviewable as is currently the case under social security law. If a person or body is not satisfied with the Secretary's decision under paragraph 20(1)(b), there is no impediment to them applying to be a registered training organisation and satisfy the requirement in paragraph 20(1)(a).

#### Delegation of legislative power – standing appropriation

The Digest seeks justification for including a standing appropriation and the exclusion of the appropriation from parliamentary scrutiny under clause 105 of the Bill.

Clause 105 of the Bill provides for all amounts payable to a person because of their qualification for Farm Household Allowance (FHA) are payable out of the Consolidated Revenue Fund. The Financial Impact Statement on page 6 of the Explanatory Memorandum to the Bill states "FHA is uncapped and demand-driven, which means funding will increase in times of higher demand". This provision reflects the policy authority for the allowance and associated benefits and supplements. There is no funding limit or sunset clause in the bill.

Expenditure estimates will be adjusted as part of the normal Budget process and validated by the Department of Finance.

#### Delegation of legislative power

The Digest seeks clarification regarding the delegation of legislative power under clause 106 of the Bill. Please see the enclosed advice from Mr Peter Quiggin, PSM, First Parliamentary Counsel of the Office of Parliamentary Counsel to myself in relation to this matter.

### **Farm Household (Consequential and Transitional Provisions) Bill 2014**

#### Delegation of legislative power – Henry VIII clause Schedule 3, subitem 2(2)

The Digest seeks a justification for the proposed approach. The inclusion of a Henry VIII clause in the Farm Household Support (Consequential and Transitional Provisions) Bill 2014 enables the Minister for Agriculture to make rules to address unintended consequences related to matters of a transitional nature that may arise because of amendment or repeals made by the *Farm Household Support Act 2014*. This provision will also allow modifications for the efficient and effective operation of the Act without the need for further legislative change.

Due to the complex interaction between the Farm Household Support Act, which may be altered by a rule under subclause 2(2), the rule may also apply to the *Social Security Act 1991* and the *Social Security Administration Act 1999*. The explanatory memorandum to the Farm Household (Consequential and Transitional Provisions) Bill 2014 explains that the transitional rules may be necessary to provide for saving or application provisions in relation the *Farm Household Support Act 2014* or the social security acts, as well as to facilitate a smooth transition for recipients of the Interim Farm Household Support to the Farm Household Allowance.

### **Quarantine Charges (Collection) Bill 2014**

#### Undue trespass on person rights and liberties – fair notice

The Digest seeks clarification regarding the provision of written notice where a permit or other right is suspended or revoked by a Director of Quarantine due to non-payment of a charge or fee under clause 14.

Subclauses 14(2) and 14(3) provides that written notice is required to notify a person of any suspension or revocation of a permit or other right by a Director of Quarantine. Subclauses 14(2) and 14(3) state, “A Director of Quarantine may, *by written notice to the person...*”. I believe that this clause provides for fair notice before any right or liberty is affected by a decision under the Bill.

#### Undue trespass on personal rights and liberties – reversal of the onus of proof

The Digest seeks clarification regarding whether the reversing of the onus of proof under clauses 19(2) and 25(2) appropriately reflects Commonwealth best practice.

Subclauses 19(2) and 25(2) provide a defence to the offences outlined in subclauses 19(1) and 25(1). Subclauses 19(2) and 25(2) state that in the event that a person is authorised to move,

deal with or interfere with the goods or vessel under this Act, the *Quarantine Act 1908* (Quarantine Act), or under another Australian law, the defendant is responsible for adducing evidence to rely on these defences in the identified subsections.

Whether or not the defendant is authorised to engage in the conduct is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the Commonwealth to establish that the defendant was not authorised under any Australian law than for the defendant to establish that he or she was authorised under such a law. Under such circumstances, I believe that this reflects Commonwealth best practice.

#### Level of penalties

The Digest seeks clarification about the level of penalty associated with clauses 19 and 25.

An offence under subclauses 19(1) and 25(1) could incur a maximum penalty of 2 years imprisonment or 120 penalty units, or both. The level of penalty is consistent with offences of a similar kind under the Bill and also complements the penalty and offence levels in the Quarantine Act. The ratio of penalty units to months imprisonment is consistent with the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Processes*.

#### Broad discretionary power

The Digest seeks clarification about the discretionary power under clause 38.

This clause provides that the Minister may remit or refund a quarantine charge or a late payment fee, if the Minister is satisfied that there are exceptional circumstances that justify doing so. This may be done on the Minister's initiative or on written application.

Rigorous administrative processes are in place to ensure that the exercise of this power is transparent and consistent. The provision mirrors the current arrangements under section 86E of Quarantine Act for the remit or refund of fees. This ensures that the remit and refund of quarantine fees, and the remit and refund of quarantine charges are managed in a consistent manner.

#### Delegation of legislative power

The Digest seeks clarification about the delegation of legislative power with regard to the matters relating to giving notices and directions.

Subclause 45(2) of the Bill is a general regulation making provision that facilitates the procedural operation of the legislation. This subclause ensures that there is sufficient flexibility relating to the giving of a notice or direction or other requirement under the legislation.

This subclause operates alongside clause 43 of the Bill which prescribes the permissible ways in which a direction under the legislation may be given (orally or in writing). The operation of clause 43 provides certainty as to how directions under the legislation may be given.

The Department of Agriculture does not anticipate having to utilise this subclause on a regular basis, however it is vital to ensuring that the legislation is able to adapt to changes in procedure as they arise in the future.

### **Quarantine Charges (Imposition-General) Bill 2014, Quarantine Charges (Imposition-Customs) Bill 2014 and Quarantine Charges (Imposition-Excise) Bill 2014**

#### Delegation of legislative power

The Digest seeks clarification about the delegation of legislative power regarding the rate of charge and reporting requirements that would facilitate an appropriate level of parliamentary scrutiny.

The amount of a charge prescribed under clause 8 must be consistent with the *Australian Government Cost Recovery Guidelines* and will be subject to a Cost Recovery Impact Statement every 3-5 years. In addition, the Minister must also be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with an indirect biosecurity service that has been provided.

The nature and value of charges imposed under this bill will be identical to the value of Items 2, 3 and 5 currently imposed under the *Quarantine Service Fees Determination 2005*. The regulations will be a disallowable instrument and will be available for parliamentary scrutiny during the disallowance period.

#### Undue trespass on personal rights and liberties

The Digest seeks clarification about whether clause 11 unduly trespasses on rights and liberties by retrospectively validating charges under the Quarantine Act. This clause resolves legal ambiguity around the validity of fees already imposed under the Quarantine Act by ensuring that the charges are validly imposed.

Clause 11 further ensures that those liable to pay fees imposed under the Quarantine Act remain liable to pay those fees despite the operation of the Bill. This ensures that persons liable to pay for indirect biosecurity and quarantine services are required to pay for the provision of those services but will not be charged under both the Quarantine Act and this Bill.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Barnaby Joyce MP

12 APR 2014



**Australian Government**  
**Office of Parliamentary Counsel**

**First Parliamentary Counsel**

The Hon. Barnaby Joyce MP  
Minister for Agriculture  
Parliament House  
CANBERRA ACT 2600

Dear Minister

***Farm Household Support Bill 2014*—Request for information from Senate  
Standing Committee for the Scrutiny of Bills**

1 The Senate Standing Committee for the Scrutiny of Bills has asked you for further information in relation to the Farm Household Support Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.

2 The issue raised by the Committee was as follows:

**Delegation of Legislative Power**

**Clause 106**

This clause provides that both the Minister and the Secretary may prescribe rules by legislative instrument. The committee notes that the provision of a power to prescribe rules rather than regulations is consistent with the Office of Parliamentary Counsel's recently revised *Drafting Direction 3.8*. For example, paragraph 2 states:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so.

The committee understands that the making of *regulations* is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and also to the Federal Executive Council approval process (currently detailed in the *Federal Executive Council Handbook*, September 2009). To the extent that these requirements appear to provide an additional layer of scrutiny when matters are proposed to be prescribed by regulation, it is not clear whether they will also apply to legislative *rules* (such as those provided for in clause 106) and, if not, whether there are any implications for both the quality, and level, of executive scrutiny applied to such instruments.

Given that delegations of Parliamentary power to the executive already result in a modified level of parliamentary scrutiny and reverse the commencement process (through the disallowance procedure), the committee is concerned to ensure that delegations of power are appropriate, including that adequate levels of scrutiny will continue to apply to the making of legislative instruments other than regulation.

**The committee therefore requests the Minister's advice about the above matters, and particularly as to the scrutiny implications, if any, in relation to these powers to prescribe rules rather than regulations.**

### ***Existing uses of legislative instruments***

3 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. These have included rules (sometimes more recently tagged as “legislative rules”). For example, the following Acts provide for the prescribing of matters by rules:

- *Financial Sector (Business Transfer and Group Restructure) Act 1999*, section 46 (rules made by APRA)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 229 (rules made by the AUSTRAC CEO)
- *Dental Benefits Act 2008 Part7* (rules made by Minister)
- *Personally Controlled Electronic Health Records Act 2012* , section 109 (rules made by the Minister)
- *Stronger Futures in the Northern Territory Act 2012*, section 119 (rules made by the Minister).

4 Similarly, the following Acts provide for matters to be prescribed by orders and by-laws:

- *Customs Act 1901*, section 271 (by-laws made by the Customs CEO)
- *Excise Act 1901*, section 165 (by-laws made by CEO (the Commissioner of Taxation))
- *Superannuation Act 1922*, section 93DE (orders made by the Minister)
- *Defence Forces Retirement Benefits Act 1948*, section 80E (orders made by the Minister)
- *Parliamentary Contributory Superannuation Act 1948*, section 22CK (orders made by the Minister)
- *Defence Force Retirement and Death Benefits Act 1973*, section 49F (orders made by the Minister)
- *Superannuation Act 1976*, section 146MH (orders made by the Minister).

5 Commonly, instrument-making powers are in the form of (or include) a power to “prescribe” particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976) provides as follows:

- (1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

*(underlining added)*

6 Thus, the approach taken in clause 106 of the Farm Household Support Bill 2014 is not novel. (See also the examples in paragraph 12.)

### ***What are the ramifications for quality and scrutiny of legislative rules?***

7 Since the transfer of a subordinate legislation drafting function from the Attorney-General’s Department to OPC in 2012, OPC has reviewed the cases in which it is appropriate to use legislative instruments (as distinct from regulations). OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

8 OPC’s view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth’s principal drafting office, unless there is a strong justification for prescribing those provisions in another type of legislative instrument. These include the following types of provisions:

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions;
- (e) seizure provisions.

9 OPC’s view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise. Further details about OPC’s approach are set out in Drafting Direction 3.8, which is available on OPC’s website at [http://www.opc.gov.au/about/draft\\_directions.htm](http://www.opc.gov.au/about/draft_directions.htm).

10 Since the transfer of the subordinate legislation drafting function to OPC in 2012, the power to prescribe legislative rules has been included in the following Acts:

- *Income Tax Assessment Act 1997*, section 415-100 (rules made by the Minister)

- *Asbestos Safety and Eradication Agency Act 2013*, section 48 (rules made by the Minister)
- *Australia Council Act 2013*, section 52 (rules made by the Minister)
- *Australian Jobs Act 2013*, section 128 (rules made by the Minister)
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*, section 10 (rules made by the Minister)
- *National Disability Insurance Scheme Act 2013*, section 209 (rules made by the Minister)
- *Public Governance, Performance and Accountability Act 2013*, section 101 (rules made by the Finance Minister)
- *Public Interest Disclosure Act 2013*, section 83 (rules made by the Minister)
- *Sugar Research and Development Services Act 2013*, section 14 (rules made by the Minister).

11 OPC's approach is consistent with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel's functions and responsibilities under the LIA. Under the LIA all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny. Also, under the LIA the First Parliamentary Counsel's responsibility to encourage high standards in drafting of legislative instruments applies to all legislative instruments and not just regulations.

12 Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to the other legislative instruments that are not required to be drafted by OPC.

13 I would be happy to provide further information if that would be of assistance.

Yours sincerely

Peter Quiggin PSM  
First Parliamentary Counsel  
25 March 2014



**The Hon Scott Morrison MP**  
Minister for Immigration and Border Protection

Reference: 1403/02043

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

Dear Senator Polley

**Senate Scrutiny of Bills Committee - Migration Amendment Bill 2013**

Thank you for your letter dated 20 March 2014 in relation to the comments made in the Committee's *Alert Digest No. 3 of 2014 (Alert Digest)* tabled on 19 March 2014 regarding the Migration Amendment Bill 2013 (the Bill).

I note that the Committee has acknowledged receipt of the information I provided in my letter to the Committee dated 6 March 2014 in regards to the adequacy of review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis.

I further note that the committee remains interested in this matter and has requested that I provide further advice. I would like to provide the following information to the Committee in response to the further request.

**Under the heading "Trespass on personal rights and freedoms – personal liberty; Rights and liberties unduly dependent on non-reviewable decisions – adequacy of merits review rights; Schedule 3, item 1, proposed new subsection 36(1A) and (1B)" of the *Alert Digest*, the Committee on page 77 states "However, the committee remains concerned about persons being subject to indefinite detention on the basis of an adverse security assessment given the concerns raised about the review mechanism for these assessments. The committee remains interested in whether it would be appropriate, in the context of the amendments proposed in this bill, to ensure that the independent review process is placed on a statutory basis. The committee therefore seeks the Minister's further advice about this matter".**

As noted in my response to the Committee of 6 March 2014, the adequacy of review mechanisms for adverse security assessments from the Australian Security Intelligence Organisation (ASIO) and whether it would be more appropriate for an independent review process to be placed on a statutory basis are issues that are not appropriate to address within the *Migration Act 1958*.

Placing the independent review process on a statutory basis is beyond the policy intent of the Bill, which is to address the number of recent court and tribunal decisions that significantly affect the operations of the Department of Immigration and Border Protection, including the processing of visa applications made by asylum seekers and other non-citizens.

The Australian Government respects the professional judgment of ASIO. At the same time, the government supports appropriate oversight arrangement of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security.

As the Committee is aware there is also the Independent Reviewer of Adverse Security Assessments, who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. The government does not consider it appropriate or necessary that the Independent Reviewer of Adverse Security Assessments be established on a statutory basis.

Yours sincerely

The Hon Scott Morrison MP

**Minister for Immigration and Border Protection**

( 5 / 1 / 2014



RECEIVED

17 APR 2014

Senate Standing C'ttee  
for the Scrutiny  
of Bills

**Senator the Hon. Michael Ronaldson**

Minister for Veterans' Affairs

Minister Assisting the Prime Minister for the Centenary of ANZAC  
Special Minister of State

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

  
Dear Senator Polley,

I refer to the Committee Secretary's letter of 6 March 2014, recommending that I consider amending the *Military Rehabilitation and Compensation Act 2004* (MRCA) to explicitly declare that a particular 'notice in writing' is a legislative instrument.

I enclose for your information a copy of the relevant provision (subsection 328(6)) of the MRCA, as amended by the *Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Act 2013*, which provides that the interval between required medical examinations may be specified by the Minister by legislative instrument.

As advised in my letter of 26 February 2014, the *Legislative Instruments Act 2003* (LIA) and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provide that all legislative instruments are disallowable unless they are specifically exempted. Section 44 of the LIA and Schedule 2 of the *Legislative Instruments Regulations 2004* list certain legislative instruments that are not disallowable.

All legislative instruments made under the MRCA are disallowable instruments under the LIA with the exception of determinations of warlike or non-warlike service made by the Defence Minister under subsection 6(1).

I hope the information I have provided is of assistance to the Committee.

Yours sincerely

  
**SENATOR THE HON. MICHAEL RONALDSON**

ENCL

 7 APR 2014

### **328 Power to require medical examination**

- (1) This section applies if a claim is made under section 319 by or on behalf of a person who is member or a former member.
- (2) The Commission may, at any time after the claim is made, require the person to undergo an examination by one medical practitioner nominated by the Commission.
- (3) The Commonwealth is liable to pay the cost of conducting the examination.
- (4) The Commonwealth is liable to pay compensation to the person for any costs the Commission determines are reasonably incurred by the person:
  - (a) in making a necessary journey in connection with the examination; or
  - (b) in remaining, for the purpose of the examination, at a place to which the person has made a journey for that purpose.
- (5) In making a determination under subsection (4), the Commission must have regard to:
  - (a) the means of transport available to the person for the journey; and
  - (b) the route or routes by which the person could have travelled; and
  - (c) the accommodation available to the person.
- (6) A person must not be required to undergo an examination under this section at more frequent intervals than are specified by the Minister by legislative instrument.