



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

SEVENTH REPORT
OF
2014

25 June 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

SEVENTH REPORT OF 2014

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

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

Bills	Page No.
Responsiveness to committee requests for information	283
Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014	287
Dental Benefits Legislation Amendment Bill 2014	291
Major Sporting Events (Indicia and Images) Protection Bill 2014	298

Responsiveness to requests for further information

The committee recently resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process, whereby the committee frequently writes to the minister, member or senator who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the Government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness to 24 June 2014

Bill	Portfolio	Correspondence	
		Due	Received
Building and Construction Industry (Improving Productivity) Bill 2013 (Further response)	Employment	17/04/14	14/05/14
Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014	Attorney-General	17/04/14	29/04/14
Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014	Treasury	30/05/14	19/06/14
Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014	Justice	11/04/14	22/04/14
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014	Defence	30/05/14	17/06/14
Dental Benefits Legislation Amendment Bill 2014	Health	30/05/14	18/06/14
Farm Household Support (Consequential and Transitional Provisions) Bill 2014	Agriculture	11/04/14	14/04/14

Bill	Portfolio	Correspondence	
		Due	Received
Farm Household Support Bill 2014	Agriculture	11/04/14	14/04/14
Major Sporting Events (Indicia and Images) Protection Bill 2014	Sport	30/05/14	18/06/14
Migration Amendment Bill 2013 (<i>Further response</i>)	Immigration and Border Protection	11/04/14	15/04/14
Migration Legislation Amendment (No. 1) Bill 2014	Immigration and Border Protection	30/05/14	03/06/14
Quarantine charges (Collection) Bill 2014	Agriculture	11/04/14	14/04/14
Quarantine Charges (Imposition-Customs) Bill 2014	Agriculture	11/04/14	14/04/14
Quarantine Charges (Imposition-Excise) Bill 2014	Agriculture	11/04/14	14/04/14
Quarantine Charges (Imposition-General) Bill 2014	Agriculture	11/04/14	14/04/14
Public Governance, Performance and Accountability Amendment Bill 2014	Finance	03/07/14	<i>Not yet due</i>
Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014	Environment	03/07/14	<i>Not yet due</i>
Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014	Environment	03/07/14	<i>Not yet due</i>
Energy Efficiency Opportunities (Repeal) Bill 2014	Industry	03/07/14	<i>Not yet due</i>
Trade Support Loans Bill 2014	Industry	03/07/14	<i>Not yet due</i>
Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014	Treasury	03/07/14	<i>Not yet due</i>

Bill	Portfolio	Correspondence	
		Due	Received
Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014	Treasury	03/07/14	<i>Not yet due</i>
Asset Recycling Fund Bill 2014	Finance	03/07/14	<i>Not yet due</i>
Student Identifiers Bill 2014	Industry	30/05/14	30/05/14
<i>Further response required</i>		03/07/14	<i>Not yet due</i>
Business Services Wage Assessment Tool Payment Scheme Bill 2014	Social Services	03/07/14	<i>Not yet due</i>

* not yet received

Members/Senators responsiveness to 24 June 2014

Bill	Member/Senator	Correspondence
		Received
Criminal Code Amendment (Harming Australians) Bill 2013	Senator Xenophon	*
Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	Senator Xenophon	*
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013	Senator Farrell	*
Great Barrier Reef Legislation Amendment Bill 2013	Senator Waters	*
Live Animal Export Prohibition (Ending Cruelty) Bill 2014	Mr Wilkie	*
Privacy Amendment (Privacy Alerts) Bill 2014	Senator Singh	*
Save Our Sharks Bill 2014	Senator Siewert	*

* not yet received

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Acting Assistant Treasurer responded to the committee's comments in a letter dated 18 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to amend Part 7.7A the *Corporations Act 2001* (in relation to the financial advice industry) to:

- remove the need for clients to renew their ongoing fee arrangement with their financial adviser every two years;
- make the requirement that financial advisers provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- remove paragraph 961B(2)(g) (the 'catch-all' provision) from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- facilitate the provision of scaled advice; and
- provide a targeted exemption for general advice from the ban on conflicted remuneration in certain circumstances.

Retrospective application

Legislation by press release

The explanatory memorandum (at p. 5) indicates that until the amendments proposed by this bill are in place, ASIC has indicated that it will take 'a facilitative approach to the FOFA reforms until mid-2014'. In particular, 'ASIC has indicated that it will not take enforcement action in relation to the specific FOFA provisions that the government is planning to repeal through this Bill and the associated regulations'. The only explanation of this approach is that it is consistent with ASIC's 'stance during the introduction of other

major policy reforms’ and that ‘ASICs stance does not remove a client’s right to take private action against a provider in the event they feel they are disadvantaged’.

The committee has a long-standing concern about the practice of ‘legislation by press release’, where the government treats proposed legislation as being the law from the time the intention to introduce it is made public. This expectation may mean that persons and officials may face uncertainty as to whether they should act on the basis of the law as it is planned to be enacted or the law as it currently exists. The underlying principle at stake is that it is for the Parliament, not the Executive branch of government, to determine persons’ legal rights and obligations. As such the committee is concerned that the regulator has announced that it will not enforce existing legal requirements but will act on the assumption that the bill will be passed in its current form. The committee notes that the bill proposes to remove regulatory requirements and that this may be considered to diminish legal protections currently enjoyed by clients of financial advisers. **The committee therefore seeks the Parliamentary Secretary’s advice as to the justification for the proposed approach.**

Pending the Parliamentary Secretary’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

In response to the Committee's request for information made in its *Alert Digest No. 5 of 2014*, I refer the Committee to the following media releases made by the Australian Securities and Investments Commission (ASIC): Media Release 12-257 (23 October 2012); Media Release 13-007 (25 January 2013); and Media Release 13-355 (20 December 2013).

I note that ASIC's facilitative compliance approach is consistent with its stance during the introduction of other major policy reforms, such as the national credit laws and Stronger Super. The approach assists industry participants complying with new laws, and is consistent with the requirement - as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) - for ASIC to administer the law effectively and with minimal procedural requirements. As part of this approach, ASIC has indicated that it will take enforcement action where it sees deliberate breaches of the law or a failure to make reasonable efforts to comply.

I also note that ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* and related legislation. Under its governing statute - the ASIC Act - ASIC performs its day-to-day functions at arm's-length from the

executive government. If the Committee wishes further information about ASIC's facilitative compliance approach, it can contact ASIC.

I trust this information will be of assistance to you.

Committee Response

The committee thanks the Minister for this response and reiterates its long-standing concern about the practice of 'legislation by press release', whereby the government, including its statutory agencies, treats proposed legislation as being the law from the time the intention to introduce it is announced publicly.

The committee accepts the Minister's advice that ASIC has taken a facilitative compliance approach in the past, but notes that these appear to have been where major reforms *have already been passed by the Parliament*. For example, on 25 January 2013, ASIC announced that it would 'take a facilitative approach for the first 12 months of the FOFA reforms' that were assented to on 27 June 2012. In relation to this approach, ASIC stated that while it would expect industry participants to make a reasonable effort to comply with the new regime, ASIC would take a measured approach where inadvertent breaches arose or where system changes were underway. ASIC further stated that where deliberate and systemic breaches were found stronger regulatory action would be undertaken (ASIC media release 13-007).

The committee understands that such a facilitative approach may be warranted for a short period after major reforms have been introduced *and passed by the Parliament*. The committee, however, may have scrutiny concerns where a facilitative approach is taken to measures that have not yet passed the Parliament. As noted above, it appears that such an approach is being taken in relation to the amendments proposed by this bill. In this regard, ASIC stated that it will not take enforcement action in relation to the specific FOFA provisions that the government is planning to repeal. For example, ASIC states that it will not take action for breaches of current section 962S of the *Corporations Act 2001*, which requires fee disclosure statements to be provided to retail clients with ongoing fee arrangements entered into before 1 July 2013 (ASIC media release 13-355). While the committee is mindful that ASIC's approach is intended to assist those likely to be affected by the proposal, it remains concerned about the underlying scrutiny principle. **With this scrutiny concern in mind, the committee will contact ASIC to clarify aspects of its facilitative compliance approach to major policy reforms, such as the FOFA proposals.**

(continued)

In addition to the above, in order to assist in the committee's further consideration of the bill, **the committee requests further information from the Minister in relation to the 'time-sensitive amendments' which may be reflected in the Corporations Regulations (see explanatory memorandum, p. 4). In particular, the committee is interested in the nature of the changes that may be made through the regulations, whether the content would be more appropriate for Parliamentary enactment, and how these changes would interact with the provisions in the bill (including if the bill is amended, or not passed, by the Parliament).**

The committee draws this matter to the attention of the Senate Regulations and Ordinances Committee for information in relation to this proposed use of legislative instruments and whether any instruments made would be more suitable for parliamentary enactment.

The committee would also welcome any remarks that the Minister may have in relation to the committee's comments about ASIC's facilitative compliance approach when the legislative proposal is still to be considered by the Parliament (outlined above).

Dental Benefits Legislation Amendment Bill 2014

Introduced into the House of Representatives 26 March 2014

Portfolio: Health

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 17 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to amend the *Health Insurance Act 1973* and the *Dental Benefits Act 2008* to:

- require the Chief Executive Medicare (CEM) to waive certain debts incurred by dentists in relation to the Chronic Disease Dental Scheme (CDDS);
- enable the CEM or their delegate to obtain certain documents from dentists to substantiate the payments of benefits under the Child Dental Benefits Schedule (CDBS);
- delegate ministerial functions and powers;
- amend the definition of 'dental practitioner';
- enable the disclosure of certain protected information; and
- make a technical amendment.

Merits review

Schedule 1, item 28

This item amends the *Health Insurance Act 1973* to make provision for the waiver of certain debts incurred by dentists under the Chronic Disease Dental Scheme. It is not clear whether decisions made in the administration of these debt waivers will be subject to merits review in the Administrative Appeals Tribunal. As the determination of whether or not a person is eligible for a debt waiver appears to be a decision for which merit review should be available, **the committee seeks the Minister's advice as to whether such**

decisions are reviewable and, if not, why such decisions are not subject to merits review.

Pending the Minister's reply, the committee draws Senators' attention to this 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 – Schedule 1, item 28

The Committee has sought advice as to whether decisions around the waiver of certain debts incurred by dentists under the former Chronic Disease Dental Scheme (CDDS) are reviewable and, if not, why such decisions are not subject to merits review.

Decisions made under Schedule 1, item 28, the administration of the waiver of certain debts incurred by dentists under the former CDDS, will not be subject to the merits review in the Administrative Appeals Tribunal.

Using powers in the *Health Insurance Act 1973* (the Act), these certain debts were raised against dentists by the Department of Human Services (DHS) due to noncompliance with subsection 10(2) of the CDDS legislation, the Health Insurance (Dental Services) Determination 2007 (the Determination). Subsection 10(2) of the Determination required a dentist to provide a treatment plan to the referring medical practitioner and the patient before starting treatment. It also required a dentist to provide a quotation to the patient before starting treatment.

When the CDDS services provided by a dentist were audited by DHS, the dentist had the opportunity to provide evidence that they had complied with subsection 10(2). Dentists were again provided the opportunity to provide evidence that they had complied after being notified by DHS of a debt being raised against them for non-compliance with subsection 10(2).

In addition, under section 129AAJ of the HI Act, dentists had the opportunity to request DHS to perform an internal review of any debts raised against them.

Under Schedule 1, item 28 of the Bill, debts raised due to non-compliance with subsection 10(2) will be waived under certain circumstances.

All debts that were raised solely as a result of non-compliance with subsection 10(2) that were provided before 1 April 2010 will be waived. A merits review is not necessary in this

circumstance given that these debts have been raised through a separate process, and that there is little room for discretion in the waiving of these debts given the simple criteria.

All debts that were raised solely as a result of non-compliance with subsection 10(2) that were provided on or after 1 April 2010, will be waived as long as the dentist can demonstrate before the end of 30 November 2014, to the Chief Executive Medicare (CEM), that there was an intent to comply with subsection 10(2).

In this circumstance, given that dentists had multiple opportunities to demonstrate that they had complied with section 10(2), that they have until 30 November 2014 to demonstrate an intention to comply, that the dentist had access to internal review of the raising of the debt and that the waiver provision has generally objective criteria with little scope for the CEM to exercise judgement, a merits review is not included.

Committee Response

The committee thanks the Minister for this detailed response. **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. 5 of 2014 - extract

Undue trespass on personal rights and liberties—reversal of onus of proof Schedule 1, item 31, proposed subsection 32D(2)

This proposed subsection provides that a person who would otherwise contravene a civil penalty provision requiring them to comply with a notice (to produce information), will have a defence if they can prove (on the balance of probabilities) that the failure to comply with the notice was brought about through circumstances outside of their control or if they could not be reasonably expected to guard against the failure. Other than noting that the provisions in Part 3 of Schedule 1 of the bill are generally modelled closely on equivalent powers set out in the *Health Insurance Act 1973*, the explanatory memorandum does not justify placing a legal burden of proof on persons who seek to rely on this defence. While the committee considers whether similar provisions exist in other legislation, whether the approach is appropriate in the current context depends on the specific circumstances of each case so the committee looks for a comprehensive rationale to be provided in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to this 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

Reversal of onus of proof – Schedule 1, item 31, proposed subsection 32D(2)

The Committee has sought advice as to the justification on placing the legal burden of proof on persons who seek to rely on the defence proposed in subsection 32D(2).

Section 32C provides that the CEM may require by written notice a person who the CEM reasonably believes has possession, custody or control of documents relevant to ascertaining whether a benefit has been overpaid to produce them to the CEM or Human Services employee, or make a copy available.

Past experience has shown that a significant proportion of practitioners refuse to cooperate with requests for information where there is no power to require that cooperation. Section 32D addresses this issue by establishing a civil penalty that applies to a person who fails to comply with section 32C. The provision is required to encourage parties who might control relevant documents to comply during the auditing of Child Dental Benefit Schedule (CDBS) services.

These compliance powers are required to ensure that the significant Commonwealth funding available through the CDBS is used appropriately.

Subsection 32D(2) provides that it is a defence for a person to contravene subsection 32D(1) if the failure is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure. The reversal of onus of proof is reasonable and necessary in the context of subsection 32D(2) because the dentist alone will have knowledge of the circumstances that might reasonably excuse non-compliance.

Committee Response

The committee thanks the Minister for this response. The committee notes that the response provides an explanation as to why the offence is considered necessary and that it suggests that it is appropriate to place the burden of proof on the defendant as the facts relevant to establishing the defence may be said to be peculiarly within the knowledge of the defendant.

Although the committee has accepted that it may be appropriate to place the burden of proof on defendants in circumstances where the facts relevant to establishing the defence may be said to be peculiarly within the knowledge of the defendant, the default expectation is that the burden of proof placed on a defendant in such circumstances will be an evidential burden, not the higher legal burden. This default position is reflected in the Criminal Code. The default provision reflects the fact that an evidential burden is easier for a defendant to discharge and does not completely displace the prosecutor's burden, and therefore the threat posed to the fundamental common law presumption that a defendant is innocent until proven guilty is lesser than the risk posed by placing the legal burden of proof on a defendant.

Subsection 32D(2) will require defendants to discharge a legal burden of proof. The committee's preference is that provisions placing a legal burden of proof on defendants should be kept to a minimum and it therefore expects explanatory memoranda to provide a detailed justification of why a legal burden is necessary. Such a justification should explain why an evidential burden will not be adequate in the particular circumstances. **The committee therefore requests further information from the Minister in relation to why it is considered necessary to place a legal burden of proof on the defendant, rather than an evidential one.**

Alert Digest No. 5 of 2014 - extract

Merits review

Schedule 1, item 37, proposed section 56D

This section provides for the internal review of decisions made by Medicare to claim a debt against a dentist. These debts arise where a person fails to comply with a notice under proposed section 32C, or where a person complies with the notice, but the information contained in the document does not substantiate the amount of benefit paid.

The explanatory memorandum (at p. 11) states that, consistent with similar provisions in the *Health Insurance Act 1973*, external merits review is not available in relation to these decisions. In justifying this approach, the explanatory memorandum states that ‘[e]xperience under that Act has been that the existing internal review processes are rarely used, possibly because the decision to claim a debt is based on largely objective decisions with little scope for discretion on the part of the [Chief Executive of Medicare]’.

The committee has a long practice of drawing attention to provisions that fail to provide for effective merits review. The committee notes that (1) the infrequent use of internal review does not, of itself, indicate that external merits review is inappropriate, (2) merits review is able to provide a relatively low cost alternative to court proceedings even in relation to decisions which are based on ‘largely objective’ criteria, and (3) as debts do not become due if the person concerned ‘satisfies the Chief Executive Medicare that the person’s non-compliance is due to circumstances beyond the person’s control’ (see proposed subsections 56A(2), (4), and (6)), it is quite possible that disputes may arise about decisions to claim an amount as a debt.

Based on the information currently available the committee is concerned that the proposed approach may not be justified. **The committee therefore seeks the Minister’s further advice as to the justification for the proposed approach.**

Pending the Minister’s reply, the committee draws Senators’ attention to this 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 - Schedule 1, item 37, proposed section 56D

The Committee has sought advice as to the justification for not making the external merits review available in relation to decisions under section 56D.

Under section 56D, a person may, within 28 days of being notified, ask the CEM to review a decision to claim a debt against a CDBS service. Schedule 1, part 3, the compliance framework for the CDBS, which includes section 56D, is based on similar provisions in the Act. Section 56D is based on and is consistent with section 129AAJ of the Act, which does not make an external merits review in the Administrative Appeals Tribunal (AAT) available.

Given that the dentist will have the opportunity to demonstrate compliance with the requirements of the CDBS at the time of audit, and that the decision to raise debts for

CDBS services are largely based on objective evidence with little scope for discretion, and that a similar framework operates under the Act, an external merits review in the AAT is not included.

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

Committee Response

The committee thanks the Minister for this response. The committee notes the response largely repeats information provided in the explanatory memorandum and therefore its scrutiny concerns in relation to the provision of external merits review remain, especially as there is a possibility that disputes may arise as to whether 'non-compliance is due to circumstances beyond the person's control'. **The committee draws this issue to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as whole.**

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.

Major Sporting Events (Indicia and Images) Protection Bill 2014

Introduced into the House of Representatives 26 March 2014

Portfolio: Sport

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 17 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill prevents the unauthorised commercial use of certain indicia and images associated with the Asian Football Confederation Asian Cup 2015, the International Cricket Council Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games.

Delegation of legislative power

Schedule 1, item 4

Schedule 2, item 4

Schedule 3, item 4

Item 4 of each of Schedules 1, 2 and 3 allow the rules to prescribe additional expressions or combinations of expressions to be included within the 'protected indicia' for the major event dealt with by each schedule. The protection afforded to event sponsors may thus be extended through additional indicia associated with a major event being prescribed by the rules. The committee expects that important matters will be included in primary legislation unless a sound justification for the use of delegated legislation is provided. As the explanatory material does not address why it is necessary to enable the rules to widen the scope of application of the legislative scheme in this way **the committee seeks the Minister's advice as to the justification for the proposed approach.**

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

Delegation of legislative power

Schedule 1, item 5

Schedule 2, item 5

Schedule 3, item 5

Item 5 of each of Schedules 1, 2 and 3 provide that the rules can modify when protected indicia and images relate to an event body for the specified major event. The reasons as to why it is necessary to regulate when protected indicia and images relate to an event body in the rules (as opposed to the primary legislation) are not explained in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

The Committee has sought clarification relating to the delegation of legislative power in items 4 and 5 of each of Schedules 1, 2 and 3.

The policy intent of the legislation is to protect against the unauthorised use of certain indicia and images associated with the Asian Cup 2015, the Cricket World Cup 2015 and the 2018 Commonwealth Games.

The Australian Government commitments, which underpinned the decision to award the events to Australia and which received bipartisan support, required protections to be in place by 1 July 2014. However, at the time of introducing the legislation the marketing and advertising campaigns for the events protected under the Bill were still being finalised and only known indicia and images could be included.

The power to prescribe additional event related indicia and images through regulation is included in the legislation to ensure the final suite of event indicia and images can be protected. Any additions would be in accordance with the policy intent of the legislation and consistent with those included in the primary legislation.

In relation to event bodies, a similar rationale applies. There is a likelihood that event bodies may need to include additional indicia and images, particularly as the events are still several months away (or years, in the case of the Commonwealth Games), and marketing and advertising campaigns may require new indicia and images around marketing themes, event mascots etc. As stated above, the additions would need to be

consistent with the intent of the legislation and consistent with the items protected in the primary legislation.

It is proposed that scrutiny of any additional indicia and images, to be introduced by legislative instrument, would also be undertaken by IP Australia, in consultation with all interested agencies, prior to recommendations being presented to the Minister for Sport for approval.

Committee Response

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

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

Senator Helen Polley
Chair



**Minister for Finance
Acting Assistant Treasurer**

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


Dear Senator Polley

Thank you for your letter of 15 May 2014 to the Parliamentary Secretary to the Treasurer in relation to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014. Your letter has been referred to me as I have portfolio responsibility for this matter in my capacity as Acting Assistant Treasurer.

In response to the Committee's request for information made in its *Alert Digest No. 5 of 2014*, I refer the Committee to the following media releases made by the Australian Securities and Investments Commission (ASIC): Media Release 12-257 (23 October 2012); Media Release 13-007 (25 January 2013); and Media Release 13-355 (20 December 2013).

I note that ASIC's facilitative compliance approach is consistent with its stance during the introduction of other major policy reforms, such as the national credit laws and Stronger Super. The approach assists industry participants complying with new laws, and is consistent with the requirement – as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) – for ASIC to administer the law effectively and with minimal procedural requirements. As part of this approach, ASIC has indicated that it will take enforcement action where it sees deliberate breaches of the law or a failure to make reasonable efforts to comply.

I also note that ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* and related legislation. Under its governing statute – the ASIC Act – ASIC performs its day-to-day functions at arm's-length from the executive government. If the Committee wishes further information about ASIC's facilitative compliance approach, it can contact ASIC.

I trust this information will be of assistance to you.

Kind regards /

/ MATHIAS CORMANN

IP June 2014



**THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT**

Ref No: MC14-007196

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

Dear Chair

Thank you for your representations of 15 May 2014 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Dental Benefits Legislation Amendment Bill 2014 (the Bill). I apologise for the delay in responding.

The Committee has sought advice on matters relating to external merits reviews and on the reversal of onus of proof.

Merits review – Schedule 1, item 28

The Committee has sought advice as to whether decisions around the waiver of certain debts incurred by dentists under the former Chronic Disease Dental Scheme (CDDS) are reviewable and, if not, why such decisions are not subject to merits review.

Decisions made under Schedule 1, item 28, the administration of the waiver of certain debts incurred by dentists under the former CDDS, will not be subject to the merits review in the Administrative Appeals Tribunal.

Using powers in the *Health Insurance Act 1973* (the Act), these certain debts were raised against dentists by the Department of Human Services (DHS) due to non-compliance with subsection 10(2) of the CDDS legislation, the Health Insurance (Dental Services) Determination 2007 (the Determination). Subsection 10(2) of the Determination required a dentist to provide a treatment plan to the referring medical practitioner and the patient before starting treatment. It also required a dentist to provide a quotation to the patient before starting treatment.

When the CDDS services provided by a dentist were audited by DHS, the dentist had the opportunity to provide evidence that they had complied with subsection 10(2). Dentists were again provided the opportunity to provide evidence that they had complied after being notified by DHS of a debt being raised against them for non-compliance with subsection 10(2).

In addition, under section 129AAJ of the HI Act, Dentists had the opportunity to request DHS to perform an internal review of any debts raised against them.

Under Schedule 1, item 28 of the Bill, debts raised due to non-compliance with subsection 10(2) will be waived under certain circumstances.

All debts that were raised solely as a result of non-compliance with subsection 10(2) that were provided before 1 April 2010 will be waived. A merits review is not necessary in this circumstance given that these debts have been raised through a separate process, and that there is little room for discretion in the waiving of these debts given the simple criteria.

All debts that were raised solely as a result of non-compliance with subsection 10(2) that were provided on or after 1 April 2010, will be waived as long as the dentist can demonstrate before the end of 30 November 2014, to the Chief Executive Medicare (CEM), that there was an intent to comply with subsection 10(2).

In this circumstance, given that dentists had multiple opportunities to demonstrate that they had complied with section 10(2), that they have until 30 November 2014 to demonstrate an intention to comply, that the dentist had access to internal review of the raising of the debt and that the waiver provision has generally objective criteria with little scope for the CEM to exercise judgement, a merits review is not included.

Reversal of onus of proof – Schedule 1, item 31, proposed subsection 32D(2)

The Committee has sought advice as to the justification on placing the legal burden of proof on persons who seek to rely on the defence proposed in subsection 32D(2).

Section 32C provides that the CEM may require by written notice a person who the CEM reasonably believes has possession, custody or control of documents relevant to ascertaining whether a benefit has been overpaid to produce them to the CEM or Human Services employee, or make a copy available.

Past experience has shown that a significant proportion of practitioners refuse to cooperate with requests for information where there is no power to require that cooperation. Section 32D addresses this issue by establishing a civil penalty that applies to a person who fails to comply with section 32C. The provision is required to encourage parties who might control relevant documents to comply during the auditing of Child Dental Benefit Schedule (CDBS) services.

These compliance powers are required to ensure that the significant Commonwealth funding available through the CDBS is used appropriately.

Subsection 32D(2) provides that it is a defence for a person to contravene subsection 32D(1) if the failure is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure. The reversal of onus of proof is reasonable and necessary in the context of subsection 32D(2) because the dentist alone will have knowledge of the circumstances that might reasonably excuse non-compliance.

Merits review – Schedule 1, item 37, proposed section 56D

The Committee has sought advice as to the justification for not making the external merits review available in relation to decisions under section 56D.

Under section 56D, a person may, within 28 days of being notified, ask the CEM to review a decision to claim a debt against a CDBS service. Schedule 1, part 3, the compliance framework for the CDBS, which includes section 56D, is based on similar provisions in the Act. Section 56D is based on and is consistent with section 129AAJ of the Act, which does not make an external merits review in the Administrative Appeals Tribunal (AAT) available.

Given that the dentist will have the opportunity to demonstrate compliance with the requirements of the CDBS at the time of audit, and that the decision to raise debts for CDBS services are largely based on objective evidence with little scope for discretion, and that a similar framework operates under the Act, an external merits review in the AAT is not included.

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

Yours sincerely

PETER DUTTON

cc: scrutiny.sen@aph.gov.au



**THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT**

Ref: MC14-007197

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Chair

Thank you for your correspondence of 15 May 2014 in relation to the Senate Scrutiny of Bills Committee comments with regard to the Major Sporting Events (Indicia and Images) Protection Bill 2014 (the Bill). I apologise for the delay in responding.

I note the legislation received Royal Assent on 27 May 2014 and is due to commence on 1 July 2014.

The Committee has sought clarification relating to the delegation of legislative power in items 4 and 5 of each of Schedules 1, 2 and 3.

The policy intent of the legislation is to protect against the unauthorised use of certain indicia and images associated with the Asian Cup 2015, the Cricket World Cup 2015 and the 2018 Commonwealth Games.

The Australian Government commitments, which underpinned the decision to award the events to Australia and which received bipartisan support, required protections to be in place by 1 July 2014. However, at the time of introducing the legislation the marketing and advertising campaigns for the events protected under the Bill were still being finalised and only known indicia and images could be included.

The power to prescribe additional event related indicia and images through regulation is included in the legislation to ensure the final suite of event indicia and images can be protected. Any additions would be in accordance with the policy intent of the legislation and consistent with those included in the primary legislation.

In relation to event bodies, a similar rationale applies. There is a likelihood that event bodies may need to include additional indicia and images, particularly as the events are still several months away (or years, in the case of the Commonwealth Games), and marketing and advertising campaigns may require new indicia and images around marketing themes, event mascots etc. As stated above, the additions would need to be consistent with the intent of the legislation and consistent with the items protected in the primary legislation.

It is proposed that scrutiny of any additional indicia and images, to be introduced by legislative instrument, would also be undertaken by IP Australia, in consultation with all interested agencies, prior to recommendations being presented to the Minister for Sport for approval.

Yours sincerely

PETER DUTTON

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