SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH 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 or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 2014

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

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

Appropriation Bill (No. 1) 2014-2015

Introduced into the House of Representatives on 13 May 2014
This bill received the Royal Assent on 30 June 2014
Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No.7 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

Background

This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government.

The issues raised in relation to this bill apply generally to bills appropriating money for the ordinary annual services of the government, including Appropriation Bill (No. 5) 2013-2014.

Insufficient parliamentary scrutiny of legislative power
Various provisions

The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v)).

By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years (50th Report, p. 3).

The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure (45th Report, p. 2). The Senate has not accepted this assumption.

As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved:

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:

    a) the construction of public works and buildings;

    b) the acquisition of sites and buildings;

    c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);

    d) grants to the states under section 96 of the Constitution;

    e) new policies not previously authorised by special legislation;

    f) items regarded as equity injections and loans; and

    g) existing asset replacement (which is to be regarded as depreciation),

    are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services. (*Journals of the Senate*, 22 June 2010, pp 3642–3643).

The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> …completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas. (45th Report, p. 2).

Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills. For example, it seems that the initial expenditure in relation to the following items may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 1) 2014-2015 which is not amendable by the Senate):

- Infrastructure Growth Package — Western Sydney Infrastructure Unit — establishment (2014-15 Budget Paper No. 2, p. 177)
- Solar Towns — establishment (2014-15 Budget Paper No. 2, p. 110)
- Stronger Relationships Trial (2014-15 Budget Paper No. 2, p. 211)
- Students First — Early Language Learning Australia — trial (2014-15 Budget Paper No. 2, p. 90)
- Tasmanian Major Projects Approval Agency — establishment (2014-15 Budget Paper No. 2, p. 171)

The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government (45th Report, p. 2).

The Scrutiny of Bills Committee notes the 2010 Senate resolution outlined above and, in particular, that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects. The committee therefore seeks the Minister's advice as to whether, and if so what, consideration has been given to addressing this issue.

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

Your Committee sought my advice as to what consideration has been given to the classification of items in Appropriation Bills. The Committee specifically raised the classification of five items in Bill No. 1 as potentially not being for the ordinary annual services of the Government.

As you would be aware, in 1965 the Senate and the then Government largely worked through the classification of appropriation items that constitute the ordinary annual services of the Government. This was updated in 1998-99 for the introduction of accrual budgeting from 1 July 1999. The outcome of these arrangements is generally referred to as the Senate-Executive Compact.

A key aspect of the arrangements was set out in correspondence on 10 February 1999 by the then Minister for Finance and Administration, the Hon John Fahey MP. The attached overview of the Compact explained that new administered expenses that fall within an existing outcome would be included in Bill No. 1. Also, amounts appropriated for departmental expenses, which were equivalent to the previous concept of running costs, would continue to be appropriated in Bill No. 1.

On 11 March 1999 the then President of the Senate, Senator the Hon Margaret Reid, replied to Mr Fahey and stated that the Senate Standing Committee on Appropriations and Staffing had agreed to the proposed adjustments to the Compact proposed in his letter of 10 February 1999 and statement attached to that letter. On 22 April 1999, a resolution of the Senate endorsed the Committee's recommendation proposed by Mr Fahey.

On 14 July 2010, the Hon Lindsay Tanner MP, the then Minister for Finance and Deregulation, wrote to Senator the Hon John Hogg, the then President of the Senate, about the 2010 Senate resolution on the classification of appropriation items. Mr Tanner stated that the then Government had reached a position that it saw no need to change the interpretation of the Senate-Executive Compact.

This Government continues to prepare Appropriation Bills in a manner consistent with this application of the Senate-Executive Compact from 1999.

In general, the application of the Senate-Executive Compact means that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. Appropriations to the States, large non-operating

appropriations, and appropriations for measures that require a new administered outcome not previously authorised by Parliament, are appropriated in the even-numbered Bills.

Advice to this effect continues to be made available on the website of my Department, and represents the Government's consideration of principles for the classification of items in Appropriation Bills.

Your Committee also asked whether five specific measures may have been inappropriately classified as ordinary annual services of the Government.

Two of these measures are for departmental expenditure: the Infrastructure Growth Package; and the Tasmanian Major Projects Approval Agency. Departmental expenditure includes continuing and new departmental activities, and accordingly, amounts for these departmental measures were included in Bill No. 1.

The other three measures (Solar Towns, the Stronger Relationships Trial, and the Students First - Early Language Learning Australia) involve administered expenditure that falls within existing or restated outcomes. Accordingly these administered measures were included in Bill No. 1.

Thank you for advising me of the view of your committee.

Committee Response

The committee thanks the Minister for this response and notes that the government does not intend to reconsider its approach to the classification of items that constitute ordinary annual services of the government.

However, the committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure. The history of this matter set out in Appendix 1 to the Appropriation and Staffing Committee's 2005-06 Annual Report shows that the Senate has not accepted this mistaken assumption.

Further, as the Minister notes in his response, the government's current approach to this matter is not consistent with the Senate resolution of 22 June 2010.

The committee therefore intends to draw this matter to the attention of Senators under principle 1(a)(v) of the committee's terms of reference where appropriate in the future. 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.

Business Services Wage Assessment Tool Payment Scheme Bill 2014

Introduced into the House of Representatives on 5 June 2014
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 5 August 2014. A copy of the letter is attached to this report.

This committee has deferred consideration of the Minister's and First Parliamentary Counsel's response in relation to the provision of a general rule-making power in clause 102 of the bill.

Alert Digest No. 6 of 2014 - extract

Background

This bill responds to the Federal Court's decision in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 by seeking to establish a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises who previously had their wages assessed under the Business Services Wage Assessment Tool.

Merits Review
Part 3, Division 5

This Division of the bill sets out a scheme for external merits review. The external reviewer is able to affirm the determination under review or to set it aside and substitute a new determination (subclause 28(1)).

Subclause 27(1) provides that the Secretary may, on receipt of an application for external review, appoint an 'external reviewer' to review the determination. Subclause 27(2) provides that a person may be appointed as an external reviewer only if (a) the person has been (but is no longer) a Justice of the High Court or a judge of another federal court or of a court of a State or Territory' or (b) 'the person is a legal practitioner who has been enrolled for at least 10 years'. The explanatory memorandum indicates that the 'Secretary anticipates that those legal practitioners appointed as external reviewers will be senior members of the bar or of the profession, who have experience with undertaking reviews with similar schemes' (at p. 21).

It is unclear why it is necessary to appoint external reviewers on an ad hoc basis when the Administrative Appeals Tribunal (AAT) may be given jurisdiction to deal with applications for review of decisions made under this bill. The AAT is a generalist external review body that has established a reputation for independence and high standards in the conduct of merits review in numerous statutory contexts. It is noted that whereas under subclause 28(2) it is provided that an 'external reviewer must, in conducting the review, comply with any requirements prescribed by the rules', the AAT has well established decision-making practices and procedures. It is also noted that that the independence of the AAT is not only secured by the involvement of judges and members of the legal profession but through statutorily guaranteed terms of appointment. In contrast, 'external reviewers' are appointed by the Secretary to review decisions made by the Secretary. Such persons are 'to be paid the remuneration and allowances determined in writing by the Secretary in accordance with the rules (if any)' (subclause 27(4)).

Under the scheme for 'external review' envisaged by the bill, the Secretary is thus responsible for (1) the making of the decisions under review, (2) the appointment of the external reviewers, and (3) the remuneration and allowances enjoyed by external reviewers. **The committee therefore seeks the Minister's advice as to why it has been concluded that this system of review has been preferred to conferring jurisdiction to review on the AAT, given its well-established reputation for the effective exercise of independent, external merits review functions in a wide variety of statutory contexts.**

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

Minister's response - extract

As noted by the Committee the Administrative Appeals Tribunal (AAT) has a well established reputation for the exercise of independent and external merits review in a wide range of statutory contexts.

External reviewers will review (if required) two decisions of the Secretary under the BSWAT Payment Scheme. The first decision relates to eligibility; the second to the amount of the payment amount offered. The external reviewer system of review to be established under the BSWAT Payment Scheme was preferred for the following reasons:

- The decisions of the Secretary are not final decisions. The final decision is the decision to accept an offer of a payment under the Scheme and that decision is a decision for the supported employee.

- The Scheme is time limited in its existence, as is the time available to a person to apply for and accept an offer under the Scheme. The Scheme will be in existence

for just over two years. Further, the time limits set out in the Bill for taking actions require an external review process which is flexible and can be accessed quickly, efficiently and with little or no formality.

- External reviewers have been identified as individuals with adequate professional expertise and experience (subsection 27(2)) to assure confidence in their decisions.

Committee Response

The committee thanks the Minister for this detailed response. However, the committee retains concerns about the level of institutional independence envisaged by the proposed scheme of external review. The reviewable decisions appear to be sufficiently final to be reviewable by the AAT and it is also not clear to the committee why the temporary nature of the scheme would make AAT review unworkable.

Given that the AAT is required to carry out its functions in a manner that is 'fair, just, economical, informal and quick' (section 2A of the *Administrative Appeals Tribunal Act 1975*) and to conduct proceedings with as 'little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit' (paragraph 33(1)(b) of the AAT Act), it is unclear why the AAT could not proceed with the desired flexibility.

The committee also notes that it is not possible to form a view about the appropriateness of the processes envisaged for external review as these are not provided for in the bill. Although lack of formality can have advantages it can also, if it is unsupported by appropriate and transparent structures and processes, compromise fairness.

In these circumstances, the committee draws the proposed scheme of merits review to the attention of Senators and leaves its appropriateness to the Senate as a 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.

Alert Digest No. 6 of 2014 - extract

Delegation of legislative power—important matters in rules
Clause 56

Clause 56 provides that the rules may prescribe (a) requirements with which the Secretary must comply relating to the appointment of nominees or the cancellation or suspension of the appointment of nominees, and (b) criteria the Secretary is to apply, or matters to which the Secretary is to have regard, in appointing nominees or cancelling or suspending the appointment of nominees.

These matters are of considerable importance to participants in this scheme given the important role played by nominees and the vulnerability of some participants in the scheme based on either physical or intellectual impairment. As there is no explanation in the explanatory memorandum addressing the need for these matters to be prescribed in the rules rather than addressed in the primary legislation, **the committee seeks the Minister's advice as to the justification for having these matters addressed in the rules rather than in the primary legislation.**

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

Minister's response - extract

The primary legislation goes to some lengths to outline the circumstances in which a nominee may be appointed, or have their appointment cancelled or suspended. Sections 51 to 55 of Part 3 of the legislation prescribes requirements with which the Secretary must comply relating to the appointment, cancellation or suspension of the appointment of nominees: for example subsection 51(1) provides:

> The Secretary must not appoint a person as a nominee of a participant under section 50 except:
>
> (a) with the written consent of the appointee; and
>
> (b) after taking into consideration the preferences (if any) of the participant regarding the making of the appointment.

These matters are addressed in the primary legislation. However, if enacted, the Bill will be supplemented by rules, to be made as disallowable legislative instruments. The BSWAT Payment Scheme is a new scheme with applicants who are people with intellectual impairment. While it is entirely possible that the primary legislation covers all potential circumstances with which the Secretary must comply relating to the appointment, suspension and cancellation of nominees, there may be other considerations not addressed sufficiently within sections 51 to 55 that only come to light as the scheme commences operation. Therefore the ability to make additional requirements, if needed, within the rules, allows sufficient flexibility for responsiveness as the scheme is implemented. The rules, therefore, provide an additional safeguard in this circumstance.

Similarly, the primary legislation allows the Secretary to have regard to certain criteria in appointing, suspending or cancelling nominees: for example, the ability to suspend or cancel the appointment of a nominee in cases of physical, mental or financial harm. In appointing the nominee, the Secretary must consider whether the proposed nominee is able to comply with the requirements of section 46. The ability to add additional requirements to criteria the Secretary must consider in appointing, suspending or cancelling nominees provides an additional safeguard as the scheme is implemented should it be required.

Committee Response

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

Alert Digest No. 6 of 2014 - extract

Merits Review
Part 4, Division 4

This Division provides for the internal review of certain decisions about the appointment of nominees. Clause 58 provides for a review to be initiated by the Secretary, while Clause 59 provides for a review to be commenced on application from a person whose interests are affected by a decision on an appointment, or the suspension or cancellation of an appointment.

Given the significance of these powers, it is not clear why it is not also appropriate to include provision for external merits review to an independent tribunal such as the Administrative Appeals Tribunal. As the explanatory memorandum does not address this

matter, **the committee seeks advice from the Minister as to why an external merits review is not available.**

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

Minister's response - extract

As noted by the Committee, external merits review of certain decisions in relation to the appointment and cancellation of the appointment of a person's nominee arc not subject to external review.

The BSWAT payment scheme is a scheme which, if enacted, will accept applications from and make offers to eligible applicants for just over two years. The selection and appointment of a nominee will be very important to many eligible applicants. The time limited existence of the Scheme and the time frames within which a person must make decisions meant that the current legislative structure allow a more timely process in relation to this particular decision.

An applicant may seek review of the Secretary's decision to appoint a nominee or cancel the appointment of a nominee. The decision to appoint a nominee or cancel the appointment of a nominee will initially be made by a delegate of the Secretary. Reviews of these decisions will be made by another more senior officer of the Department.

The Secretary must take into account when making determinations in relation to nominees, the preferences of the applicant.

Committee Response

The committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 6 of 2014 - extract

Trespass on personal rights and liberties—reversal of onus of proof
Subclause 73(2)

Subclause 73(1) provides that it is an offence if a person refuses or fails to comply with a requirement (under clauses 69, 70 and 71) to give information or produce a document. The penalty for this offence is 30 penalty units, which appears to be line with Commonwealth penalties for similar offences (see *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Annexure A).

Subclause 73(2) provides for a 'reasonable excuse' defence to this offence, and the *Note* to the subclause explains that a defendant bears an evidential burden of proof in relation to establishing such an excuse. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at 52) correctly notes that the reasonable excuse defence is 'open-ended' and that it may be difficult for defendants to rely upon it 'because it is unclear what needs to be established'. The open-ended nature of the defence also means that it is difficult for the committee to determine whether the reversal of onus entailed by a defence is appropriate. More specifically, it is difficult to determine whether the matters on which the defendant must adduce evidence are 'peculiarly within the knowledge of the defendant' and 'would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' (*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 50). The explanatory memorandum (at p. 41) simply states the effect of the subclause, but does not explain why this approach has been adopted. **The committee therefore seeks the Minister's advice as to the justification for reversing the onus of proof without providing further detail as to what would constitute a reasonable excuse defence.**

> *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

As noted by the Committee, the offence in clause 73 is subject to the defence of 'reasonable excuse' (subclause 73(2)). The inclusion of the 'reasonable excuse' defence means that a defendant who denies criminal responsibility may adduce or point to evidence that he or she had a reasonable excuse for refusing or failing to comply with a notice or a requirement under clause 73 (see subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code)).

In the context of the BSWAT payment scheme it is not possible to anticipate the full range of circumstance in which a person - particularly an individual - might refuse or fail to comply with the requirements of a notice issued under section 73. As the existence of a reasonable excuse would be peculiarly within the knowledge of the person it was considered appropriate to include some flexibility in the range of excuses in respect of which a defence could point to or adduce evidence.

Committee Response

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

Alert Digest No. 6 of 2014 - extract

Trespass on personal rights and liberties—privacy
Delegation of legislative power
Clause 81

Paragraph 81(1)(a) gives the Secretary the power to disclose protected information if the Secretary certifies that it is necessary in the public interest to do so. In such circumstances the Secretary can disclose the information 'to such persons and for such purposes as the Secretary determines'. Paragraph 81(1)(b) gives the Secretary the power to disclose protected information to (i) the Secretary of a Department of State of the Commonwealth or the head of a Commonwealth authority, (ii) to a person who has the express or implied consent of the person to whom the information relates to collect it, (iii) to the Chief Executive of Centrelink for the purposes of a Centrelink program, and (iv) to the Chief Executive of Medicare for the purposes of a Medicare program.

Subclause 81(2) provides that in certifying for the purposes of paragraph 81(1)(a) or disclosing information for the purposes of subparagraph 81(1)(b)(i), the Secretary must act in accordance with any rules made for these purposes under clause 82. Although the rules may constrain the Secretary's powers to disclose protected information under subclause 81(1), including the authority to certify whether or not it is 'in the public interest to do so' in paragraph 81(1)(a), it is unclear to the committee without having seen the rules what the criteria are for determining what the public interest requires. Further, the authority under subparagraph 81(b)(i) to disclose information to the head of a Department of State or and Agency 'for the purposes of that Department or authority' is framed very broadly.

In these circumstances, and in the absence of a comprehensive justification in the explanatory memorandum, the committee seeks the Minister's advice as to why the clause 81 disclosure powers are considered necessary and, also, whether consideration has been given to including the constraining powers to be provided by the rules in clause 82 in the primary legislation rather than in the rules.

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, and may also 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

Careful consideration has been given to ensuring that any sensitive personal information held by the Department or other agencies for the purposes of operating the Scheme is given due and proper protection.

The approach taken to the BSWAT Payment Scheme Bill is comparable to that taken in legislation such as the family assistance law, social security law, and the National Disability Insurance Scheme all of which require the collection of sensitive personal information. The BSWAT Payment Scheme Bill contains offence provisions in sections 76–80 governing the disclosure of information consistent with similar offences in the *Social Security (Administration) Act 1999* (see section 202). Information collected by this scheme will be limited, however this information may be required to be disclosed. The Bill provides the same powers for disclosure as arc provided under the family assistance law, the social security law and the National Disability Insurance Scheme.

The relevant provisions of the BSWAT Payment Scheme Bill and the *Privacy Act 1988* (Cth) will operate concurrently, and a person will be subject to, and must observe, both laws.

The use of the rules to set out in detail the considerations for the disclosure of information under clause 81 is consistent with the practice of the family assistance, social security law and the National Disability Insurance Scheme.

Committee Response

The committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 6 of 2014 - extract

Delegation of administrative powers
Clause 100

Clause 100 provides that the Secretary may delegate any or all of the powers or functions of the Secretary under this Act to 'an officer'. The explanatory memorandum (at p. 49) states that this power is necessary as the payment scheme may have up to 15 000 applicants, and that a 'scheme of this size and duration will require a suitable number of departmental officers at varying levels to undertake the administration of the scheme'. The explanatory memorandum continues by stating that the 'officers undertaking the work will be led by an experienced team of Senior Executive Service Officers. It is anticipated that decision-making will take place at the Executive level.'

Although the necessity of the power of delegation may be accepted, the question may be asked whether this broad power of delegation is appropriate in relation to all of the powers and functions of the Secretary. For example, it is not clear why delegation of the powers to undertake internal review and to appoint external reviewers should not be limited to senior decision-makers. A further example of a power that might be appropriately limited to senior decision-makers may be the Secretary's power to approve forms for the purposes of the rules (clause 101). **The committee seeks the Minister's advice as to whether consideration has been given to expressly limiting the exercise of some of the powers and functions of the Secretary to senior executive officers, including those referred to above.**

> *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

The BSWAT Payment Scheme Bill, if enacted, allows the Secretary to have sole consideration of the appropriateness of delegating functions and powers to officers. The Minister is of the view that the Secretary is rightly able to consider both seniority and skill set in making determinations in relation to delegation.

Committee Response

The committee thanks the Minister for this response. Although the committee accepts that reasons of administrative necessity can justify delegation of powers or functions in some circumstances, the committee retains concerns that some powers are inappropriate for delegation to all levels and looks to appropriate limitations to be set. For example, the delegation of powers in relation to important matters, such as internal and external review mechanisms, would more appropriately be limited to senior officers.

The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Carbon Farming Initiative Amendment Bill 2014

Introduced into the House of Representatives on 18 June 2014
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 14 July 2014. The committee sought further information and the Minister responded (in relation to the issue of migrating the content of regulations into legislative rules) in a letter dated 14 August 2014. A copy of the letter is attached to this report.

The committee has been advised that a response in relation to the issue of incorporating material by reference will be provided to the committee soon. The committee will comment on any response received in relation to this issue in a future Report.

Alert Digest No. 7 of 2014 - extract

Background

This bill seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the *National Greenhouse and Energy Reporting Act 2007*, the *Australian National Registry of Emissions Units Act 2011* and the *Clean Energy Regulator Act 2011* to provide for the establishment of the Emissions Reduction Fund.

Delegation of legislative power – migrating the content of regulations into legislative rules
Schedule 1, item 14

With regard to the second issue the committee would consider it helpful if the relationship between rules and regulations under the Act could be further explained. Although it is noted in the explanatory memorandum that it is envisaged that at least some of the current content in the regulations will be migrated to the rules, it is unclear how much of the content. Given the possibility of conflict between the rules and regulations **the committee seeks the Minister's advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.**

> *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 - migrating the content of regulations into legislative rules
Schedule 1, item 14

The Committee identified that it may be possible for conflict between the rules and regulations to arise as both are able to deal with the same range of matters.

When legislative rules are made or amended to deal with a particular matter under the Act, any relevant regulations in force under the Act will be amended so that they do not also deal with that matter. Accordingly, the regulations and the legislative rules will deal with discrete and non-overlapping matters and there will be few, if any, opportunities for conflict between the legislative rules and the regulations. If any conflict were to emerge between the legislative rules and the regulations, that conflict would be resolved by the ordinary principles of statutory interpretation, and there is a well-developed body of case law that would assist in this.

I am grateful that the Committee has highlighted the importance of this issue. I will ensure that my Departmental officers and legislative drafters pay particular attention to any potential conflict, and that there is a robust administrative framework in place for managing the development of legislative rules.

Information provided to the Minister from Mr Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel - extract

The second issue raised by the Committee: how the possibility of conflict between the rules and regulations may be avoided or resolved

36 The Bill would result in the regulations and the rules both being able to deal with the same range of matters. The Committee identified that it is therefore possible there could be a conflict between the rules and regulations. The Committee sought advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.

37 The Act, the regulations and the rules will all be administered by your Department. Good administration should be sufficient to ensure that the rules do not conflict with the regulations. We understand that the relevant officers of your Department appreciate the administrative and legislative ambiguity conflict between rules and regulations might introduce and are aware of the need to avoid any such conflict.

38 In existing legislative schemes that provide for regulations and some other kind of instrument to be able to deal with an overlapping range of matters, the issue of possible conflict is addressed in some, but not all, cases.

Committee's first response

The committee thanks the Minister for this response and for providing the First Parliamentary Counsel's supplementary advice about this issue. The committee notes the Minister's commitment to ensuring that those involved pay particular attention to any potential conflict and to establishing and maintaining a robust administrative framework for managing the development of legislative rules, which should assist to avoid or minimise conflicts.

However, while principles of statutory interpretation may assist the courts to minimise areas of conflict between rules and regulations (for example, through reading the rules and regulations as part of a legislative scheme), it remains unclear to the committee how principles of statutory interpretation would be applied to resolve direct conflicts between rules and regulations in the absence of a priority rule.

The committee is therefore concerned that the introduction of a general rule-making power in addition to a power to make regulations has the potential to give rise to unnecessary legal uncertainty in particular cases. Unless the principles of statutory interpretation would yield a clear answer to any conflict the committee is not convinced that the problem of legal uncertainty created by conflicts between rules and regulations should be left to the courts to resolve. **In these circumstances, the committee therefore seeks further advice on whether consideration can be given to making it clear in the legislation that in cases of conflicts regulations will prevail.**

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

Minister's further response - extract

As outlined in my letter of 14 June 2014 to you, I understand the potential for conflict to arise between regulations and legislative rules and I am grateful that the Committee has again highlighted the importance of this issue. I have considered the matter in a broad, legislative context and I am confident the process that is in place to address this risk is appropriate and effective.

First, I would like to clarify that the nature and scope of the regulations and legislative rules is such that the implications of any conflict would be negligible. The Bill prescribes the core legislative framework for the implementation of the Emissions Reduction Fund, while any regulations and rules are intended only to provide further detail on specific matters, such as purchasing of Australian carbon credit units or reporting and audit provisions. Consequently, any discrepancy that may arise would be minor and could be resolved by the ordinary principles of statutory interpretation. There is a well-developed body of case law that would assist in this.

As previously mentioned, a robust administrative framework for managing the development of legislative rules is critical. I have ensured that this is embedded in the relevant area of the Department of the Environment, and that the departmental officers and legislative drafters pay particular attention to any potential areas of conflict.

I also note the Committee's suggestion to specify in legislation that, in the case of conflict, regulations will prevail over legislative rules. However, such a provision may result in unintended outcomes in this instance, due in part to the process of transferring regulations to rules. New and revised provisions are likely to be contained in the rules rather than the regulations.

I trust that the advice outlined here adequately addresses the Committee's request, and I would be more than happy to provide further information on this matter if necessary. My Office will be able to assist with this should you require more detail.

Committee's further response

The committee thanks the Minister for this detailed response and notes the advice that significant conflicts are unlikely to arise in practice. The committee also notes, however, that it is not aware of a body of case law directed to the resolution of conflicts between rules and regulations which are enacted pursuant to provisions which enable matters that are 'required or permitted' to be prescribed or are 'necessary or convenient' to be prescribed for carrying out or giving effect to the primary Act. **As such, the committee retains its concerns about this provision and the resolution of any conflict arising between the rules and the regulations. In these circumstances, the committee draws the proposed provision to the attention of Senators and leaves its appropriateness to the Senate as whole.**

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

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014
This bill was negatived in the Senate on 10 July 2014
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No. 8 of 2014*. The Minister responded to the committee's comments in a letter received 15 August 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2014 - extract

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee commented on the bill in *Alert Digest No. 8 of 2013*. The Minister's response to the committee's comments was published in its *First Report of 2014*.

Background

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

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

The bill also:

- makes consequential amendments to other legislation referring to the CE Act and the carbon pricing mechanism;

- provides for the collection of all carbon tax liabilities for 2012-13 and 2013-14 financial years;

- introduces new powers for the ACCC to take action to ensure price reductions relating to the carbon tax repeal are passed on to consumers; and

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

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

In relation to the carbon tax repeal, proposed section 60D of the *Competition and Consumer Act 2010* empowers the ACCC to issue a written notice to a corporation if it is considered that the corporation has engaged in price exploitation, the definition of which relates to unreasonably high prices being charged (see proposed section 60C). Proposed subsection 60D(3) provides that such a notice will be prima facie evidence in any proceedings that the price charged for the supply was unreasonably high, and that the unreasonably high price was not attributable to matters to be taken into account under proposed section 60C, which are relevant to a conclusion of price exploitation.

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

In response the Minister noted that such a provision is not unprecedented as Section 151AN of the *Competition and Consumer Act 2010* makes similar provision in relation to the issuing of competition notices given under section 151AL (located within Part XJB). The Minister also justified the reversal of onus on the grounds that 'this is an instance where the relevant evidence is peculiarly within the knowledge of the defendant, it would be significantly more difficult and costly for the Commission to prove than for the defendant'.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *First Report of 2014*, p. 4). **The**

committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Minister's response - extract

I have considered the Committee's comments and below is a response to the committee's request that additional information on proposed subsection 60D(3) of the *Competition and Consumer Act 2010* be included in the explanatory memorandum.

Minor edits were made to the explanatory memorandum to revise the financial impacts table in order to more accurately reflect the impacts from repeal of the carbon tax using updated information available at the time of the introduction of the bill. However, I decided that no revisions were required to be made to the explanatory memorandum in relation to how specific provisions operate, to reduce the potential for confusion about any differences between the bills. To address the Committee's concerns, I propose to publish a copy of my letter to you dated 29 January 2014 on the webpage concerning carbon tax repeal on the Department of the Environment's website, along with links to the relevant webpages for the Committee's First Report and Alert Digest.

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

Committee Response

The committee thanks the Minister for this response and thanks the Minister for his proposal to publish a copy of his letter of 29 January 2014 and links to the relevant webpages of the committee's *First Report of 2014* in order to provide access to relevant information that was omitted from the explanatory memorandum. The committee notes that this will be particularly useful as a similar issue in relation to onus of proof arises in the revised version of subsection 60D(3) of the *Competition and Consumer Act 2010* passed by the Parliament in the Clean Energy Legislation (Carbon Tax Repeal) Bill 2014.

While the committee notes that special circumstances exist in this case, the committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill. **Therefore, the committee's general preference is that such material be included in the explanatory memorandum itself, which may be more likely to be accessed by a person with an interest in the bill. However, noting that there have been several versions of this bill, in these circumstances the committee reiterates its thanks to the Minister for his commitment to make this information publicly available on the department's website.**

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

Introduced into the House of Representatives on 15 May 2014
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 26 June 2014. The committee sought further information and the Minister responded in a letter received on 24 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

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

Delegation of legislative power
Schedule 1, item 8, proposed subsection 283AA(4)

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

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

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

Minister's first response - extract

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

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

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

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

Committee's first response

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

Minister's further response - extract

The Committee seeks further information on whether the availability of simple corporate bonds depository interests will be simultaneous with applicable consumer protection requirements. The Committee continues on by asking that if that is not the case, whether there will be a period of time during which offers of simple corporate bonds depository interests will be available, but will not have the same level of disclosure as offers of simple corporate bonds to the retail market.

It is intended that offers of simple corporate bonds depository interests will operate with the same level of consumer protection as that of offers of simple corporate bonds. This requirement will be brought forward in further amendments to the corporations law that will put in place the detail required for the depository interest mechanism to operate. It is intended that these further amendments will include the requirement that offers of simple corporate bonds depository interests will only be able to be made available to the retail market where they have the same level of disclosure as offers of simple corporate bonds. Public consultation will be undertaken on the legislative provisions to put in place the detail required for the depository interest mechanism.

Committee's further response

The committee thanks the Minister for this response. The committee notes the Minister's advice that it is intended that further amendments to the corporations law will be brought forward in relation to consumer protection for offers of simple corporate bonds depository interests. It is proposed that these foreshadowed amendments will include the requirement that such offers 'will only be able to be made available to the retail market where they have the same level of disclosure as offers of simple corporate bonds.' **The committee leaves the question of whether the current provision should proceed in advance of the proposed further amendments (in relation to the consumer protection safeguards) to the consideration of the Senate as a whole.**

Energy Efficiency Opportunities (Repeal) Bill 2014

Introduced into the House of Representatives on 15 May 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to terminate the Energy Efficiency Opportunities Program on 29 June 2014 by repealing the *Energy Efficiency Opportunities Act 2006.*

Retrospective application
Legislation by press release

The statement of compatibility with human rights (in the explanatory memorandum at p. 2) states that:

> [In] the event the Bill, once enacted, receives Royal Assent after 29 June 2014, the Act will be repealed retrospectively. The purpose of providing a fixed day on which the Act will be repealed is to provide clarity to companies and stakeholders that obligations under the program will cease on 29 June 2014, notwithstanding any delays in the passage of the Bill.

However the statement of compatibility continues that although, in these circumstances, the bill would commence retrospectively:

> …it would not disadvantage any person because the repeal of the Act is beneficial in nature as it removes the obligation to undertake compliance activities after 29 June 2014.

It may be accepted that the possible retrospective commencement of the bill will not have an adverse effect on those currently required to undertake compliance activities under the *Energy Efficiency Opportunities Act 2006*. Nevertheless, the general practice of 'legislation by press release', whereby the executive government announces measures planned to be enacted into law with the expectation that those measures may be treated as law prior to

their formal enactment, raises further issues of interest to the committee under its terms of reference.

Legislation by press release may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, as the practice is liable to create uncertainty in the minds of officials and regulated entities. Further, by (in practical effect) attempting to implement proposed legislative changes prior to their enactment into law, the Parliament is deprived of its normal role in scrutinising legislation before it is enacted and implemented.

The committee notes that the justification for the approach in this instance refers merely to the purpose of providing clarity to companies and stakeholders. This justification is general and may be overly-broad, as it could apply to many instances in which the government intends to change regulatory obligations, but envisages that there may be delays in the passage of legislation. For this reason **the committee seeks a more detailed justification from the Minister for the possible retrospective commencement of this bill.**

> *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 and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Minister's response - extract

The Repeal Bill was introduced into Parliament on 15 May 2014 to repeal the *Energy Efficiency Opportunities Act 2006* (the Act) and terminate its implementing programme. The rights and liabilities established by the Act specifically apply to constitutional corporations operating within Australia and relate to registration, submissions of assessment plans, carrying out of approved assessment plans, reporting and record keeping. This measure aligned with the Mid-Year Economic Fiscal Outlook announcement in December 2013 to cease funding for the scheme from 1 July 2014.

I note that the Scrutiny of Bills Committee (the Committee) seeks a more detailed justification for the possible retrospective commencement of the Repeal Bill in relation to two particular concerns; the potential that the retrospective operation may be considered to trespass unduly on personal rights and liberties; and that it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The purpose of the Repeal Bill's fixed date commencement is to provide a clear statement of the Australian Government's policy intention to remove compliance obligations given its decision to repeal the Act and its implementing programme. Introduction of the Repeal Bill

with a commencement date of 29 June 2014 signalled to corporations that the Government did not propose to require corporations to submit variations to assessment plans after 30 June 2014. Corporations affected by the requirement to submit variations would have incurred significant costs in preparing and providing the required documentation and assurances of compliance.

Whilst the possibility of the Repeal Bill's commencement after 30 June 2014 was considered at the time of drafting, the risk of offending principle 1(a)(v) was mitigated by the introduction of the Repeal Bill during week 1 of the current sittings, being the earliest possible opportunity, to allow for its consideration by the Parliament within the timeframe afforded by the Winter sittings before 30 June 2014.

The House of Representatives passed the Repeal Bill on 2 June 2014. As a consequence of the delay in the Senate's consideration of the Bill, its commencement will now result in the Repeal Bill taking effect retrospectively, if in fact the Repeal Bill is passed.

Notwithstanding the possibility of the Repeal Bill's retrospective operation, the fixed date commencement was considered beneficial, and to that extent, does not have the potential to expose those affected by the Repeal Bill's provisions to any trespass upon their rights and liberties (in contravention of principle l(a)(i) of the Committee's terms of reference) when the Bill eventually came into force. To the contrary, it would not, for example, make past behaviour subject to criminal sanctions, and would not purport to retrospectively acquire any person's property or negate any legal rights against the Commonwealth or a third party. In this regard, the Bill's commencement will only result in the removal of compliance obligations and their related costs for affected corporations in relation to assessment plan variations required for new development projects.

Committee Response

The committee thanks the Minister for this detailed response, but notes that it does not directly address the concern that legislation by press release can create uncertainty in the minds of officials and regulated entities and, therefore, may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. This uncertainty may arise because it is the Parliament, not the Executive, that must enact the policy intention into law. As noted in the response, the Repeal Bill will commence with retrospective effect only ‘if in fact the Repeal Bill is passed’.

Nevertheless, the committee notes the information that the retrospective commencement of the bill, if passed, is considered to be beneficial to those affected by the existing regulatory scheme and **leaves the appropriateness of the retrospective commencement of the bill to the Senate as a whole.**

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

Introduced into the House of Representatives on 14 May 2014
This bill received the Royal Assent on 30 June 2014
Portfolio: Environment

Introduction

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

Alert Digest No. 6 of 2014 - extract

Background

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

Insufficiently defined administrative power—determining fees by an administrative determination
Parliamentary scrutiny of legislative power
Schedule 1, item 13, proposed section 170CA

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

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

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

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

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

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

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

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

a) whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and

b) if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.

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

Minister's response - extract

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

a. whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and

b. if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.

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

The cost recovery arrangements for environmental assessments are included in a Cost Recovery Impact Statement published on the Department of the Environment's website at: www.environment.gov.au/resource/cost-recovery-under-environment-protection-and-biodiversity-conservation-act-l 999-epbc-act. The Cost Recovery Impact Statement details the levels of fees applicable for environmental assessments and the method by which the Department determined those fees. This includes fees for various stages of assessment based on the actual costs of conducting those assessments, and a method for determining additional costs based on the complexity of a particular action.

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

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

Committee's first response

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

Alert Digest No. 6 of 2014 - extract

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

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

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

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

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

Minister's response - extract

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

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

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

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

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

Committee's first response

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

Minister's further response - extract

The Committee sought further information on why the EPBC Act itself could not include limits or other parameters on the level of fees, and why the cost recovery provisions could not include safeguards or 'other important parameters'. The new provisions do in fact set parameters – the fee must be a fee for services provided under the EPBC Act. The new section 520(4A) states: 'the regulations may prescribe fees that are payable for services the Minister or Secretary provides in performing functions, or exercising powers, under this Act or the regulations'. These services are in turn determined by the provisions of the EPBC Act.

The Minister's ability to set the fees is therefore constrained by the service which the Minister or Secretary perform. Any limits or parameters in the legislation risk constraining the extent to which the fee reflects the actual costs of the service which is provided by the Minister or Secretary, and changing its characterisation as a fee for service. The Committee in its report noted that the line between a tax and a fee can be difficult to draw, but in this case the fee is a fee for service, which is why it has not been included in a separate Bill relating to taxation. The nature of the fee therefore means that the only

necessary and appropriate limits or parameters are that the fee reflects the actual costs of providing the relevant service.

I also note that the Australian Government Cost Recovery Guidelines provide the framework for the implementation of cost recovery schemes and the Department of the Environment has followed these Guidelines. These Guidelines provide extra assurance that the fees payable are for services provided under the EPBC Act. The Guidelines require extensive consultation on a Cost Recovery Impact Statement to ensure that the method the Department of the Environment uses to determine the value of services provided accurately reflects the efficient provision of those services.

The Guidelines also require ongoing monitoring and regular review. The Cost Recovery Impact Statement commits the Department to reviewing the cost recovery arrangements following the implementation of the One-Stop Shop. This will allow for further consideration of whether the fees set still reflect the service provided following reforms to the environmental approval system. For example, where the Department is able to find more efficient ways of providing relevant services, those efficiencies will be reflected in reduced fees which can be implemented through amendments to the Regulations.

Committee's further response

The committee thanks the Minister for this response and notes the information provided in relation to the safeguards provided by the Australian Government Cost Recovery Guidelines and the possibility that any limits or parameters in legislation risks constraining the extent to which the fee reflects the actual cost of the service. The committee notes that in the future it may be useful to consider whether it would be appropriate for at least some elements of the Cost Recovery Guidelines to be included in primary legislation.

While this bill has already been passed by the Parliament, the committee notes that it would have been useful if the key information above was included in the explanatory memorandum.

Alert Digest No. 6 of 2014 - extract

Merits review
Schedule 1, item 15, proposed part 19A

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

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

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

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

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

Minister's response - extract

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

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

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

Committee's first response

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

Minister's further response - extract

Finally, the Committee sought advice on why assessments of the complexity of projects currently subject to internal merits review cannot be subject to external merits review. As noted in the explanatory memorandum, the method for assessing fees involves the

categorisation of referred actions into varying levels of complexity. More complex actions require more resources to assess the action, increasing the cost of providing the service.

Factors which affect the determination of complexity include:

- the number listed threatened species the action will have an impact on;
- the status of those species (threatened, endangered, critically endangered or extinct in the wild);
- the number of project components; and
- likely impacts of the project.

These are largely objective criteria which will be identified in the referral documentation. The provision for internal merits review allows for the correction of errors, but external merits review is not necessary given the limited discretion involved in the decisions.

Committee's further response

The committee thanks the Minister for this response. It is not clear to the committee that a decision will necessarily involve limited discretion (for example, where there is consideration of the likely impacts of a project), but on this occasion **notes that the bill has passed and makes no further comment.**

Migration Amendment (Protection and Other Measures) Bill 2014

Introduced into the House of Representatives on 25 June 2014
Portfolio: Immigration and Border Protection

Introduction

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

Alert Digest No. 8 of 2014 - extract

Background

This bill seeks to amend the *Migration Act 1958* to:

- clarify that it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;

- provide for the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence that are raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation to justify why those claims and evidence were not raised before a primary decision was made;

- create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so, including when an applicant provides bogus documents to establish their identity or either destroys or discards such evidence, or has caused that evidence to be destroyed or discarded;

- clarify when an applicant who applies for a protection visa, where a criterion for the grant of a visa is that they are a member of the same family unit of a person who engages Australia's protection obligations, is to make their application for a protection visa;

- define the risk threshold for assessing Australia's protection obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention*

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);

- simplify the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa;

- amend the processing and administrative duties of the Migration Review Tribunal including:
  - a Principal Member being able to issue guidance decisions and practice directions;
  - enabling Tribunals to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons; and
  - Tribunals will be able to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so, then being able to reinstate the application where an applicant applies for reinstatement within a specified period of time; and

- make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Migration Act is 'finally determined'.

Adequacy of merits review rights
Schedule 1, item 14, proposed section 423A

The proposed new section provides that, if an applicant raises a claim or presents evidence relevant to a protection visa not previously placed before the original decision-maker in relation to an application for review of an Refugee Review Tribunal reviewable decision, then the tribunal is required to draw an unfavourable inference about the credibility of the claim or evidence. However, this unfavourable inference is only to be drawn 'if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made'. The explanatory memorandum states that the purpose of this amendment 'is to ensure that protection visa applicants are forthcoming with all of their claims and evidence as soon as possible' (at p. 14).

Merits review tribunals are, in general, given the task of making the 'correct or preferable' decision. In performing this function it has long been accepted that the critical question for a merits review tribunal is not whether the decision which the original decision-maker was the correct or preferable decision one *on the material before the original decision-maker*. Rather, the question for a merits review tribunal is what the correct or preferable decision should be *on the material before the tribunal*. This explains why the courts have concluded that a proper exercise of the function of merits review will, as a general rule, involve 'contemporaneous review' whereby applicants are entitled to introduce new facts

to support their applications at the time of the tribunal hearing (see *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286).

Thus, limiting merits review tribunals to facts and claims presented in an original application is a significant departure from their typical and distinctive function. Although the courts have recognised that it may be that contemporaneous review is inappropriate given the nature of a particular decision-making power, it is not immediately apparent why the nature of decisions concerning protection visas would justify a departure from the normal approach to merits review, which derives from the overriding function of making the correct or preferable decision. Arguably, the importance of ensuring compliance with Australia's international obligations in relation to refugees indicates that departure from contemporaneous review in the context of merits review of decisions to refuse protection visas should be well justified in the explanatory memorandum.

The committee also notes that the appropriateness of the proposed amendment is difficult to evaluate given that the circumstances which may support the Tribunal being satisfied that there is a 'reasonable explanation' for the failure to raise a claim or present evidence to the original decision-maker remain unspecified in the legislation. **The committee therefore seeks the Minister's advice as to the justification for departing from the general approach to the role played by merits review.**

In addition to the general response sought above, the committee also seeks the Minister's advice on the following specific issues:

1. **The extent of any practical problem created for the Refugee Review Tribunal in dealing with claims raised and evidence presented during a review application which were not raised earlier by applicants;**
2. **Why any such problem could not be dealt with by a provision which *allows* rather than *requires* an adverse inference to be drawn. Such an approach would appear to be less likely to result in outcomes which depart from the general function of merits review to reach the correct and preferable decision by enabling the Tribunal to consider the appropriateness of its factual inferences in the individual circumstances of particular cases.**
3. **Whether it is possible to give greater legislative guidance as to the meaning of 'reasonable explanation'. In this respect the committee notes that the explanatory memorandum does little to clarify what circumstances might legitimately lead the Tribunal to be satisfied that a reasonable explanation has been provided.**

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

Adequacy of merits review rights
Schedule 1, item 14, proposed section 423A

The committee therefore seeks the Minister's advice as to the justification for departing from the general approach to the role played by merits review.

The committee has expressed concern that proposed section 423A involves a departure from the general approach to the role played by merits review, namely that the Refugee Review Tribunal (RRT) would be restricted to making the correct and preferable decision "on the material before the original decision-maker" rather than "on the material before the tribunal". The committee supports an applicant's entitlement to introduce new facts to support their Protection visa application.

In response, I note that section 423A does not limit the RRT to the facts and evidence before the original decision-maker. Rather, it clarifies the manner in which the RRT is to consider any new claims and evidence presented to it. Applicants may continue to introduce new claims and evidence to support their application at the review stage. However, if the RRT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, the Tribunal will draw an inference unfavourable to the credibility of the new claims or evidence raised.

As stated in the Second Reading speech, the intention of this provision is to "enable timely, efficient and quality protection outcomes" by discouraging late claims. This measure benefits all applicants with genuine claims to protection in Australia. Early and full presentation of claims and supporting evidence allows people entitled to protection to be recognised at the earliest opportunity.

It is the Government's position that it is reasonable to expect claims and supporting evidence to be provided as soon as possible. It is also reasonable to seek an explanation as to why claims and evidence were not presented at the earliest available opportunity.

Encouraging all claims to be presented at the earliest opportunity is consistent with guidelines issued by the United Nations High Commissioner for Refugees (UNHCR). The current UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* state that an applicant should "assist the examiner in full in establishing the facts of his case" and "supply all pertinent information...in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40, December 2011).

A key aim of merits review generally is that it needs to be economical, just and efficient. This amendment is consistent with improving efficiency in the merits review process. The

measure will not impact on the just resolution of claims in that new claims and evidence can still be considered.

In addition to the general response sought above, the committee also seeks the Minister's advice on the following specific issues:

1. ***The extent of any practical problem created for the Refugee Review Tribunal in dealing with claims raised and evidence presented during a review application which were not raised earlier by applicants;***

While this measure does not involve practical problems for the RRT, it does involve a number of practical considerations, particularly:

- Appropriate notice to applicants regarding new claims and evidence;
- Identifying new claims and evidence;
- Provision of a reasonable explanation for new claims and evidence;
- Providing natural justice to applicants who do not provide a reasonable explanation.

The practicalities of each point are addressed below.

Notice to applicants

In addition to publicly available information on the departmental website, including the Protection Application Information and Guides (PAIG), all Protection visa applicants will be advised of requirements to present claims and evidence at the primary stage in the initial letter they receive from the department, once their application has been lodged.

The RRT may reinforce this advice to applicants through the Tribunal website, in general information available to applicants (eg. the RRT form *Information on making an Application for review to the Refugee Review Tribunal).*

Identifying new claims and evidence

Identifying new claims and evidence does not present practical difficulties as a Tribunal member must currently consider all claims for protection made by a Protection visa applicant, and address each claim. Identifying new claims and evidence will be a minor additional step when documenting those claims.

Section 423A does not allow or require the RRT to disregard new claims or evidence. All claims and evidence presented must be considered and evaluated. It is only once all claims have been considered that a Tribunal member can determine whether an applicant's explanation for presenting new claims or evidence is reasonable.

Provision of a reasonable explanation

According to the proposed section 423A, if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the new claims or evidence were not presented before the primary decision was made, the Tribunal is to draw an inference unfavourable to the credibility of the new claims or evidence.

Where a reasonable explanation has not already been provided by the applicant, it is open to the RRT to seek such an explanation. The manner in which that explanation is sought is a matter for the Tribunal.

It is open to the Tribunal to determine whether or not a reasonable explanation is implicit in the new claims or evidence. For instance, there may have been a significant change in the home country after the primary decision was made, so it may not have been possible for the applicant to make the new claims or provide relevant evidence earlier. An applicant may also experience a direct and obvious change to their circumstances, for instance, the birth of a child who may have protection claims in their own right. In such cases, the Tribunal member may consider a reasonable explanation to be self-evident.

Appropriate reference will be made to the applicant's explanation in the RRT reasons for decision.

Natural justice

Where a member of the Tribunal is not satisfied that the explanation provided for new claims and evidence is reasonable, the applicant will be afforded natural justice, in accordance with requirements for procedural fairness codified in the Migration Act.

2. ***Why any such problem could not be dealt with by a provision which allows rather than requires an adverse inference to be drawn. Such an approach would appear to be less likely to result in outcomes which depart from the general function of merits review to reach the correct and preferable decision by enabling the Tribunal to consider the appropriateness of its factual inferences in the individual circumstances of particular cases.***

Consistent with the proposed section 5AAA, the wording of section 423A reflects the legitimate objective of making it extremely clear that it is the responsibility of a non-citizen to specify all particulars of a claim for protection in Australia, and to do so as soon as possible. To specify that the RRT may draw an unfavourable inference, rather than stating that the RRT is to do so, would simply reflect current Tribunal policy and practice and not effectively achieve the Government's policy objective.

As previously stated, this measure does not prevent applicants making, nor the RRT considering, new claims and evidence. It does, however, require the Tribunal to consider the credibility of any new claims or evidence. It also provides an appropriate mechanism to support the RRT to make an adverse credibility finding with regard to new claims and

evidence if it is satisfied that the applicant does not have a reasonable explanation. It is the role of the Tribunal to determine whether an explanation for new claims and evidence is reasonable, with regard to the individual circumstances of the applicant.

3. ***Whether it is possible to give greater legislative guidance as to the meaning of 'reasonable explanation'. In this respect the committee notes that the explanatory memorandum does little to clarify what circumstances might legitimately lead the Tribunal to be satisfied that a reasonable explanation has been provided.***

Greater guidance with regard to "reasonable explanation" is not required within this provision itself. The general principles of administrative law and reasonable decision-making apply and the Tribunal will consider what is reasonable in all of the circumstances of the case. It will be a matter for the RRT to develop guidelines to assist in the interpretation of this phrase, which has been deliberately left undefined as circumstances will differ from case to case.

A reasonable explanation may include, but is not limited to:

- no reasonable opportunity to present the claim, eg. interpreting or translating error made in the primary stage of the application;
- a change in the country situation affecting human rights occurred after the primary decision was made;
- new information relevant to the application became available, eg. new documentary evidence of identity was forthcoming from the authorities in the home country;
- a change in personal circumstances al lowing presentation of new claims, eg. a new relationship (spouse or child) with a person who has protection claims in their own right; or
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate persecution claims.

Committee Response

The committee thanks the Minister for this detailed response and notes the useful information provided. **The committee requests that the key information above be included in the explanatory memorandum.** While it remains unclear to the committee why it is necessary to *require* the tribunal to draw an unfavourable inference in specified circumstances, **in light of the information provided the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2014 - extract

Procedural fairness—Fair hearing
Schedule 1, item 1, proposed section 5AAA
Schedule 1, item 14, proposed section 423A

Proposed new section 5AAA provides that a non-citizen making protection claims has the responsibility to 'specify all particulars of his or her claim' and 'to provide sufficient evidence to establish the claim' (proposed subsection 5AAA(2)). Proposed new section 423A provides that, if an applicant raises a claim or presents evidence relevant to a protection visa not previously placed before the original decision-maker in relation to an application for review of an RRT-reviewable decision, then the Tribunal is to draw an unfavourable inference about the credibility of the claim or evidence.

If the function of merits review in the RRT remains to decide applications according to the correct or preferable decision, then an applicant's access to a fair hearing may be compromised to the extent they are unaware that they bear this onus to bring forward all claims and evidence relevant to their case. It is apparent that levels of English language and legal literacy amongst some persons within the class of applicants may raise particular problems in this regard. This problem may be amplified in relation to children or other persons that may be considered to be vulnerable.

The Statement of Compatibility with Human Rights notes that non-citizens claiming protection in Australia 'including unaccompanied minors or vulnerable people' may make private arrangements to be represented by a Registered Migration Agent. It is further noted that (1) those applicants who have arrived 'lawfully' and are 'disadvantaged and face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme', and (2) the 'Government will provide a small amount of additional support to illegal arrivals who are considered vulnerable, including unaccompanied minors' (though the details are yet to be determined) (at p. 4).

Based on this information it is difficult to determine whether the assistance provided to visa applicants will, in particular cases, result in fairness despite preventing an applicant from raising new evidence or claims during a RRT hearing. The committee is concerned that the proposed approach could mean that a fair hearing may be compromised in individual cases. **However, in light of the above justificatory material the committee draws the matter of whether proposed sections 5AAA and 423A may compromise a fair hearing for an applicant for a protection visa to the attention of Senators, and leaves the appropriateness of this approach to the Senate as a whole.**

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.

Further, there is no legislative obligation on the Minister to inform prospective applicants of the consequences of failure to raise evidence and claims at the first instance. The Statement of Compatibility with Human Rights states that 'Departmental policy and procedures for decision makers' will require decision-makers to ensure that non-citizens are made aware of the consequences of the amendments, including the 'consequences of not providing all claims and information at the earliest opportunity'. However the committee is concerned that such procedures and policy would lack the force of law. In particular, non-compliance by the department would not change or alter the obligation placed on the RRT by section 423A to draw adverse inferences as to the credibility of the claim. Whether or not a fair hearing was ensured may depend on the RRT's application of the vague criterion of a 'reasonable explanation' for a failure to raise a claim or present evidence in the circumstances. **Given the importance of clear notice about the consequences of section 5AAA and section 423A to the provision of a fair hearing, the committee seeks the Minister's advice as to whether this could be dealt with in the legislation rather than policy.**

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

Minister's response - extract

Procedural fairness - Fair hearing
Schedule 1, item 1, proposed section 5AAA
Schedule 1, item 14, proposed section 423A

Given the importance of clear notice about the consequences of section 5AAA and section 423A to the provision of a fair hearing, the committee seeks the Minister's advice as to whether this could be dealt with in the legislation rather than policy.

Although this could be dealt with in legislation, it is the Government's view that it is not necessary to specify the need to give clear notice about the consequences of section 5AAA or section 423A in legislation, in order to provide non-citizens seeking protection in Australia with a fair hearing. Section 5AAA states basic expectations of the Australian community and government, as well as an acknowledged principle of refugee status determination - that the "burden of proof' in establishing claims for protection rests with the asylum seeker (UNHCR Handbook, para 196).

The proposed sections 5AAA and 423A clarify that the role of the departmental and RRT decision-maker is to decide whether the protection visa applicant meets the visa criteria, in particular to be satisfied that Australian has protection obligations to the visa applicant, not to advocate on behalf of a non-citizen seeking protection. These provisions do not change the decision-maker's obligation to assess claims for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and decision-maker, consistent with UNHCR guidelines. Decision-makers evaluate each case on its individual merits with regard to the circumstances in the home country or countries. During the application process, including merits review before the RRT, Protection visa applicants have repeated opportunities to present and clarify claims and supporting evidence. People seeking protection in Australia may also seek judicial review.

The Government is aware that public messaging is important to ensure that people seeking protection are aware of their obligations to provide all claims and supporting evidence as soon as possible. Non-citizens claiming protection in Australia will be advised of these responsibilities through general public information, including that available on the departmental website and Protection Application Information and Guides, as well as through initial written communication with applicants. As previously noted, the RRT may also reinforce that advice through the Tribunal website, in general information available to applicants.

It is in the interests of the applicant, and the process as a whole, to ensure consistent and clear information is provided about responsibilities under section 5AAA and section 423A, and the consequences of not complying with those provisions. The requirements for procedural fairness codified in the Migration Act will continue to apply to decision-makers during the primary and review stages.

Section 423A does not prevent an applicant from raising new claims and evidence during the RRT hearing, as is claimed on page 19 of the Alert Digest 8/14. Related points have been addressed in earlier questions, and provide greater detail regarding that measure.

Committee Response

The committee thanks the Minister for this detailed response, which provides information about the provision of clear notice of the consequences of section 5AAA and section 423A. As the committee considers that this is essential to facilitate a fair hearing, it would still prefer that the approach had a direct legislative foundation. **However, in light of the information provided the committee leaves the question of whether such notice should be legislatively mandated to the consideration of the Senate as a whole**.

Alert Digest No. 8 of 2014 - extract

Retrospective commencement—application of amendments
Schedule 2, Part 2, item 8

This is an application provision which provides that the new (heightened) risk threshold will apply to new assessments, and also to assessments made as a result of an application for a visa or as part of an administrative process which commenced prior to the commencement of this Part. Although it may be considered that the commencement of the provision is not, technically speaking, retrospective—it applies the new law to antecedent fact—there is a question of fairness as to whether applications or administrative processes which have already been commenced should be dealt with by reference to the law as it existed at the time of the application or when the administrative processes were commenced. Neither the explanatory memorandum nor the Statement of Compatibility addresses this issue. **The committee therefore seeks the Minister's advice as to the justification for this approach.**

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

Retrospective commencement - application of amendments
Schedule 2, Part 2, item 8

There is a question of fairness as to whether applications or administrative processes which have already been commenced should be dealt with by reference to the law as it existed at the time of the application or when the administrative processes were commenced...The committee therefore seeks the Minister's advice as to the justification for this approach.

As acknowledged on page 20 of the Alert Digest 8/14, these amendments do not take effect prior to their commencement date, but operate prospectively, albeit in respect of already existing Protection visa applications or administrative assessments.

This amendment expresses a clear legislative intent for the threshold test to apply to any non-citizen who has not yet had their Protection visa application finally determined, or an administrative assessment finalised, prior to the commencement of Schedule 2 of the Bill. This intent overrides any rights that may have been accrued by a non-citizen to have their

application or administrative assessment considered in accordance with the law that existed at the time they applied or when the administrative process commenced. It is the Government's view that all "complementary protection" assessments be considered under the same law and against Parliament's intended interpretation of Australia's *non-refoulement* obligations under the Convention Against Torture and the International Covenant on Civil and Political Rights. This approach is consistent with the fact that the amendment expresses the threshold at the level intended by Parliament when the complementary protection provisions were introduced into the Act in March 2012.

Committee Response

The committee thanks the Minister for this response. **It remains concerned about applying the new law to antecedent facts, but in light of the explanation provided leaves the question of the fairness of the proposed approach to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2014 - extract

Undefined scope of administrative power
Delegation of legislative power
Schedule 4, Part 1, item 7, proposed section 353B
Schedule 4, Part 1, item 22, proposed section 420B

Proposed subsection 353B(1) provides that the Principal Member of the Migration Review Tribunal (MRT) may, in writing, direct that a decision (a 'guidance decision') of the MRT specified in the direction is to be complied with by the MRT in reaching a decision on review of cases involving similar facts and circumstances. Proposed subsection 420B provides the same powers in relation to the Refugee Review Tribunal (RRT).

Proposed subsections 353B(2) and 420B(2) provide that 'in reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision'.

It is not immediately apparent what it means to 'comply' with a 'decision', as opposed to a rule or standard. It may not be clear which of the facts or reasons accepted in a guidance decision have binding force and are considered to have general application. This may create uncertainty as to how the rights of applicants to the MRT are affected by a direction that a guidance decision is to be complied with.

The explanatory memorandum (at pp 36 and 48) states that a 'guidance decision' will relate to 'identifiable common issues in matters before the MRT and RRT, and Members of the MRT and RRT would be expected to follow them unless the facts or circumstances in the current matter before them could be distinguished'. The purpose of the provision is thus said to 'promote consistency in decision-making…in relation to common issues and/or the same or similar facts or circumstances'. It may be accepted that consistency in decision-making is a legitimate objective for merits review tribunals. However, it remains the case that this proposed section does little to indicate what aspects of a 'guidance decision' are considered binding (unless distinguishable) and the sense in which the decision has binding force.

One possible way of understanding this provision is that it enables the Principal Member to create something like a judicially created precedent. A guidance decision plays a determinative role in establishing an applicant's rights (because the application of the law to facts in the guidance decision *must* be complied with). For this reason, the power to issue a guidance decision may take on the character of an exercise of judicial power. The creation of binding legal precedent is typically thought to be an exercise of judicial rather than administrative power.

If, however, the power to issue a guidance decision is not characterised as an exercise of judicial power (judicial powers cannot, in general, be conferred on administrators for constitutional reasons), questions arise about whether a guidance decision constitutes an exercise of legislative power as it appears to determine how the law should be applied in a general category of cases. If this interpretation is accurate, then it would seem that this power falls within the definition of a legislative instrument in the *Legislative Instruments Act 2003* (the LI Act). Section 5 of the LI Act provides that an instrument will be 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.

In light of the above comments the committee seeks the Minister's advice as to whether the proposed sections are to be characterised as:

a) an exercise in judicial power and, if so, whether it is appropriate to confer them on an administrator; or

b) legislative in character and subject to disallowance under the *Legislative Instruments Act 2003*.

In addition, in light of the Minister's response to the above, the committee requests the Minister's further advice as to what aspects (facts or reasons) of a 'guidance decision' will be binding and how a decision-maker will be able to identify them.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to constitute an inappropriate review of

decisions, in breach of principle 1(a)(iii) of the committee's terms of reference. The provisions may also delegate Parliament's powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

Undefined scope of administrative power
Delegation of legislative power
Schedule 4, Part 1, item 7, proposed section 353B
Schedule 4, Part 1, item 22, proposed section 420B

In light of the above comments the committee seeks the Minister's advice as to whether the proposed sections are to be characterised as:

a) an exercise in judicial power and, if so, whether it is appropriate to confer them on an administrator; or

b) legislative in character and subject to disallowance under the Legislative Instruments Act 2003.

The amendments under proposed sections 353B and 420B will align and reduce inconsistencies in decision-making and increase efficiency by enabling the Principal Member of the Migration Review Tribunal (MRT) and RRT to issue guidance decisions. Guidance decisions are intended to be issued by the Principal Member in relation to identifiable common issues in matters before the MRT and RRT respectively, and tribunal members would be expected to follow them unless the facts or circumstances in the current matter before them could be distinguished. Use of the powers created by these amendments will promote consistency in decision-making across the MRT and RRT respectively in relation to common issues and/or the same or similar facts or circumstances.

Guidance decisions are not intended to go to the conduct of the review, but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases. Proposed subsections 3538(2) and 420B(2) provide that while tribunal members are required to comply with a guidance decision in reaching a decision on review in cases with like issues and evidence, the tribunal does not need to comply with the guidance decision if the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision. In addition, proposed subsections 353B(3) and 420B(3) provide that non-compliance by tribunal members does not mean that the tribunal's decision on a review is an invalid decision.

The power of the Principal Member of the MRT and RRT to issue guidance decisions is not an exercise of judicial power. Only the courts stipulated in section 71 of the

Constitution can exercise the judicial power of the Commonwealth[1]. A person or body which is part of the executive government, such as the Principal Member of the MRT and RRT, cannot exercise the judicial power of the Commonwealth. As such, proposed sections 353B and 420B will involve the exercise of legislative power by the Principal Member.

The guidance decision is an exercise of legislative power, but is not subject to disallowance under the *Legislative Instruments Act 2003* (LIA). Section 7 of the LIA provides for instruments declared not to be legislative instruments. Paragraph 7(1)(a) of the LIA provides that an instrument is not a legislative instrument for the purposes of the LIA if it is included in the table in section 7. Item 24 of that table relevantly provides that instruments that are prescribed by the regulations for the purposes of this table are not legislative instruments.

Regulation 7 of the *Legislative Instruments Regulations 2004* (LIR) provides that for item 24 of the table in subsection 7(1) of the LIA, and subject to section 6 and 7 of the LIA, instruments mentioned in Schedule I of the LIR are prescribed. Item 6 of Part 1 of Schedule I provides that a practice direction made by a court or tribunal are not legislative instruments. As such the direction of a Principal Member in relation to a guidance decision is not a legislative instrument for the purposes of the LIA and is not subject to disallowance.

In addition, in light of the Minister's response to the above, the committee requests the Minister's further advice as to what aspects (facts or reasons) of a 'guidance decision' will be binding and how a decision-maker will be able to identify them.

What aspects of a guidance decision will be required to be complied with is a matter for the Principal Member when deciding to issue a guidance decision. The Principal Member will issue a direction that the guidance decision is to be complied with when the Tribunal is reaching a decision of a kind specified in the direction. The issuance of the direction allows the Principal Member the flexibility to tell the decision maker what needs to be complied with to assist the tribunal members. A guidance decision will not be complied with where members are satisfied that the facts or circumstances of the decision under review are clearly distinguishable from that of the particular guidance decision. Non-compliance by Tribunal members with a guidance decision will not invalidate that decision on a review.

Committee Response

The committee thanks the Minister for this detailed response and **requests that the key information be included in the explanatory memorandum.**

(continued)

[1] *R v Kirby; Ex partre Boilermakers' Society of Australia* (1956) 94 CLR 254.

The committee remains unclear about what it means to comply with a guidance decision if, as explained, such decisions relate to issues of fact. **However, in light of the explanation offered, the committee leaves to the Senate as a whole the question of whether the requirement on tribunal members to comply with such decisions leaves the scope of the administrative powers being exercised sufficiently well defined.**

The committee, however, is interested in a further explanation of the rationale for the exemption of guidance decisions from the requirements of the LI Act as it is concerned that the exemption for tribunal and court 'practice directions' may not be appropriate in this instance. Practice directions (in general) concern matters of procedure whereas guidance decisions clearly raise issues of substance. **The committee therefore seeks the Minister's advice as to why the general exemption from the LI Act for practice directions is appropriate in relation to 'guidance decisions'. The committee would also be interested to know whether there are other examples of practice directions, covered by the exemption from the LI Act, which relate to questions of substance falling for determination by a Court or Tribunal.**

The committee draws this matter to the attention of the Senate Regulations and Ordinances Committee for information in relation to this proposed exemption from the requirements of the LI Act.

Alert Digest No. 8 of 2014 - extract

Procedural Fairness
Broad discretionary power
Schedule 4, item 11, proposed subsection 362(1A)
Schedule 4, item 26, proposed subsection 424A(1A)

The effect of these items is to enable the MRT to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so. Proposed subsection 362(1C) requires the Tribunal to, on application for reinstatement in accordance with subsection (1B), reinstate the application if it considers it appropriate to do so. Proposed subsection 424A(1A) confers the same powers in relation to the RRT.

In circumstances where there are legitimate reasons why an applicant fails to appear before the Tribunal, the exercise of the power under proposed subsection 362(1A) to dismiss an application may result in procedural unfairness by depriving an applicant of a fair opportunity to present their case. Although proposed subsection 362(1C) provides for the reinstatement of cases so decided, it does not specify the circumstances in which it is

appropriate to do so or provide any guidance as to how the Tribunal is to make this determination. **Given the importance of the exercise of this power to ensure that a fair hearing is provided, the committee seeks the Minister's advice as to the appropriateness of the overall approach.**

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

Minister's response - extract

Procedural Fairness
Broad discretionary power
Schedule 4, item 11, proposed subsection 362(1A)
Schedule 4, item 26, proposed subsection 424A(1A)

Given the importance of the exercise of this power to ensure that a/air hearing is provided, the committee seeks the Minister's advice as to the appropriateness of the overall approach.

The purpose of the amendment under proposed subsection 3628(1A) is to clarify that if a review applicant fails to appear before the MRT, in response to an invitation under section 360 of the Act, the MRT has the option of dismissing the application or making a decision on the review, as is the case under current subsection 362B(1). Proposed subsection 426A(1A) mirrors in subsection 362B(1A) for matters before the RRT.

The Government is committed to ensuring that MRT and RRT review applicants remain entitled to a fair hearing.

The power to dismiss a review application for non-attendance is not intended to impact on procedural fairness already codified in the Act. It is intended to increase tribunal efficiency by providing for a quick resolution of a case where, following the usual accordance of procedural fairness, the applicant for review has not attended the hearing. Dismissal for failure to attend a hearing is one of three possible options the tribunals may consider for non-attendance by an applicant at a hearing. The other options are either to proceed to a decision on the review or reschedule the hearing.

If dismissal is chosen, the tribunals will have a power to reinstate an application where the applicant applies within a certain time period and the relevant tribunal considers it appropriate to reinstate the application.

Review applicants will be made aware in the invitat ion to hearing letter that, if they do not attend a hearing after being invited to do so, their application may be dismissed for failing to appear. The tribunals will be required to notify the applicant of the decision to dismiss the application for failure to appear. The notice will also include information that sets out how the review applicant can seek reinstatement of their review application within a specified timeframe. Where the tribunals reinstate a review application, the applicant will be notified that their application is taken never to have been dis missed and the review will continue.

The tribunals are required to afford procedural fairness in accordance with the Migration Act. The Government notes that, in the migration and refugee context, there is a high incentive for merits review to be used by unsuccessful visa applicants and asylum seekers with unmeritorious claims to delay their removal from Australia. The Government therefore considers that a power enabling review applications at the MRT and RRT to be dismissed for non-attendance at a scheduled hearing would allow the tribunals to focus resources away from matters that are not actively being pursued by the review applicant.

This proposed measure applies to all individuals within the MRT and RRT's jurisdiction and will support the Government's legitimate objective of strengthening the administrative efficiency and processes of the tribunals to support the integrity of the merits review process The measure does not limit the right set out in the Migration Act to a hearing by the RRT or MRT, rather it provides for a new consequence if the person does not exercise that right.

Committee Response

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

Public Governance, Performance and Accountability Amendment Bill 2014

Introduced into the House of Representatives on 29 May 2014
This bill received the Royal Assent on 26 June 2014
Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 15 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to amend the *Public Governance, Performance and Accountability Act 2013* to:

- provide certainty over the use and management of public resources and the capacity of an accountable authority to issue instructions on resource management and governance matters within entities;
- include a requirement that Commonwealth entities must provide annual reports to their Minister by the 15th day of the fourth month after the end of the reporting period;
- clarify the nature of various legislative instruments, including the introduction of a new Part to the PGPA Act (Part 4-1A) to deal with other instruments that are not subject to disallowance, but are subject to appropriate scrutiny as they relate to procurement and grant activities and arrangements covering intelligence or security agencies and listed law enforcement agencies; and
- make technical amendments to clarify the operation of the Act.

Insufficiently subject legislative power to scrutiny
Schedule 1, item 43, proposed new subsection 57(2)
Schedule 1, item 44, proposed new subsection 58(9)

These items would add new subsections, 57(2) and 58(9) to recognise that an authorisation under paragraph 57(1)(b) or under subsection 58(6) (relating to borrowing by a corporate

Commonwealth entity) is a legislative instrument, but the subsections ensure that section 42 of the *Legislative Instruments Act 2003* (relating to disallowance) does not apply. The explanatory memorandum (at pp 14–15) argues in relation to subsection 57(2) that the exemption from the normal disallowance regime is necessary as 'such activities are integral to the effective operation of Executive Government and subjecting the authorisations to disallowance would undermine commercial certainty for both the corporate Commonwealth entities and the parties with whom they would engage.' In relation to subsection 58(9) the explanatory memorandum argues that 'The activities covered under these investment provisions are integral to the internal operations of the Executive Government and, while the authorisations will be properly disclosed, any possibility of disallowance would constrain the ability of the Commonwealth and other parties to enter into arrangements with commercial certainty' (p 15).

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

> *The committee draws Senators' attention to the provisions, as they 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

1. Borrowing by corporate Commonwealth entities (section 57) and Investment by the Commonwealth (section 58)

Relevant provisions:

- Schedule 1, item 43, subsection 57(2)
- Schedule I, item 44, subsection 58(9)

Issue: Whether these subsections may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Response:

Subsection 57(2) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) clarifies that section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to instruments issued by the Finance Minister authorising certain types of borrowing for corporate Commonwealth entities under paragraph 57(1)(b). This is consistent with the treatment of authorisations provided by the Finance Minister when the power to borrow is contained in an entity's enabling legislation.

Disallowance of such an instrument would adversely impact on the operations of government and limit the ability of corporate Commonwealth entities to manage their resources in a cost effective and sustainable manner.

Accountability for the management of borrowing rests with the accountable authority of the entity under the PGPA Act, with details of borrowing subject to review by the Auditor-General and included in the financial statements and annual reports presented to the Parliament.

Reinvestments by the Commonwealth under subsection 58(6) can be authorised in writing by the Finance Minister or Treasurer. Reinvestments are administrative in nature, representing decisions based on sound commercial practice to optimise the financial position of the Commonwealth in a range of circumstances. While the authorisations will be properly disclosed, any possibility of disallowance would constrain the ability of the Commonwealth and other parties to enter into arrangements with commercial certainty.

In both cases, Parliamentary scrutiny is more practically directed towards the statutory authority rather than subsidiary transactions. These instruments do not impact on the purposes or functions of entities; they are designed to support the efficient resource management of entities. From a practical perspective if these authorisations were subject to disallowance it would create uncertainty for impacted entities. The disallowance of these instruments cannot undo any existing contractual obligations. Entities would have to terminate existing borrowing or investment arrangements in order to be compliant with legislative requirements if the authorisations were disallowed-generally there is a significant cost to early termination.

Committee Response

The committee thanks the Minister for this response and for taking the opportunity to provide this additional advice.

Alert Digest No. 6 of 2014 - extract

Broad discretionary power
Schedule 1, item 48, proposed new section 63
Schedule 1, item 52, proposed new subsection 65(2)

The proposed replacement section 63 will ‘more clearly confer two distinct powers—a power to waive an amount owing to the Commonwealth, and a power to modify payment terms attaching to such amounts’ (explanatory memorandum, p. 14). Proposed subsection 63(1) gives the Finance Minister the power to authorise the waiving of an amount owing or to modify the terms and conditions on which an amount owing is to be paid. Proposed subsection 63(5) provides that an authorisation of a waiver or modification is not a legislative instrument.

Item 52 proposes a substitute subsection 65(2) that will provide for 'the authorisation of any payment to be in accordance with any requirements prescribed by the rules' (explanatory memorandum p. 15). A further two new subsections are proposed: 65(3) will allow the Finance Minister to attach terms and conditions to an act of grace payment; and 65(4) provides that an authorisation of a waiver or modification is not a legislative instrument.

The explanatory memorandum argues in relation to both items that these provisions are not substantive exemptions from the *Legislative Instruments Act 2003* as any authorisation is ‘of an administrative rather than a legislative nature’. While that may be accepted, the committee is concerned that the bill does not contain express requirements that would guide or limit the exercise of the Minister’s significant powers to waive or modify amounts owed to the Commonwealth. It is noted that proposed subsection 63(2) provides that the Minister’s authorisation of ‘a waiver or modification must be in accordance with any requirements prescribed by the rules’. However, there is no requirement that the rules provide for such requirements, nor does the explanatory memorandum indicate the nature of limits envisaged pursuant to the rules. **The committee therefore seeks the Minister's advice as to whether consideration has been given to whether the bill could require the rules to include limits or guidance on the exercise of this broad discretionary power.**

> *Pending the Minister's reply, the committee draws Senators’ attention to the provisions, as they 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

2. Waiver of amounts or modifications of payment terms (section 63) and Act of grace payments by the Commonwealth (section 65)

Relevant provisions:

- Schedule 1, item 48, section 63
- Schedule 1, item 52, subsection 65(2)

Issue: Whether these provisions may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks advice as to whether consideration has been given to whether the Act could require the rules to include limits or guidance on the exercise of this broad discretionary power.

Response:

The Finance Minister has discretionary powers under paragraph 63(1)(a), subsection 64(1)and subsection 65(1) of the PGPA Act to authorise waiver, set-off or modification of amounts and to authorise act of grace payments by the Commonwealth.

The waiver of amounts or modification of payment terms are administrative mechanisms used to manage existing relationships between the Commonwealth and individuals or entities. Similarly, authorisations of act of grace payments are of an administrative rather than a legislative nature. Subsections 63(5) and 65(4) clarify that the Finance Minister's authorisations in these situations do not fall within the scope of section 5 of the *Legislative Instruments Act 2003.*

Exercising these powers often requires consideration of the personal and financial circumstances of the parties involved, who maybe in financial stress. Cases may involve tax confidentiality laws or other privacy regimes. It is therefore appropriate that the Finance Minister retains sufficient flexibility to exercise this power in a way that can accommodate the broad range of personal circumstances that may be the subject of such a request.

There is an accountability mechanism for the exercise of this power in the PGPA Rules.

Consistent with arrangements under sections 33 and 34 of the *Financial Management and Accountability Act 1997* (FMA Act) and regulation 29 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations); sections 63 and 65 of the PGPA Act and section 24 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) requires the Finance Minister to consider (but not be bound by) the report of an advisory committee (comprising Commonwealth public servants of three different agencies) before making authorisations that involve amounts of money above a certain threshold.

Section 24 of the PGPA Rule ensures transparency for any waiver of debts, modifications and set-offs of amounts owing to the Commonwealth and act of grace payments that are above a $500,000 threshold. The PGPA Rule increases this threshold amount from $250,000 to $500,000 in recognition of movements in values since the time the FMA amount was set.

Consistent with the FMA framework, the delegation of these powers is limited to a small number of individuals within the Commonwealth with specific financial thresholds.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum.**

Alert Digest No. 6 of 2014 - extract

Delegation of legislative power—Henry VIII clause
Schedule 1, item 70, proposed section 104

This item substitutes section 104 to permit rules to be made 'to modify the application of not only the PGPA Act, but also to modify the PGPA rules or an instrument made under proposed sections 105B or 105C, to the [Commonwealth Superannuation Corporation]' (explanatory memorandum p. 19).

Such 'Henry VIII' clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. It is the practice of the committee to comment on them when the rationale for their use is not clear. As there is no explanation as to the appropriateness of allowing the rules (delegated legislation) to modify the operation of the *Public Governance, Performance and Accountability Act 2013* (primary legislation) in this regard, **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 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

3. Rules relating to the Commonwealth Superannuation Corporation (section 104)

Relevant provision:

- Schedule 1, item 70, section 104

Issue: Whether this section may be considered to delegate legislative powers inappropriately. The Committee seeks justification for the proposed approach

Response:

Section 104 of the PGPA Act previously allowed for rules to be made to modify the application of the Act and the PGPA rules in relation to the Commonwealth Superannuation Corporation (CSC) and in relation to intelligence or security agencies or listed law enforcement agencies.

The *Public Governance, Performance and Accountability Amendment Act 2014* (PGPA Amendment Act) does not change the position of the PGPA Act in relation to CSC from that approved by the Parliament in June 2013. As the revised explanatory memorandum to the PGPA Act explained, 'modifications may also be necessary in the case of the Commonwealth Superannuation Corporation (CSC) so as not to interfere with its specific obligations as the corporate trustee of the Australian Government's main civilian and military superannuation schemes under a range of Commonwealth legislation, including the *Governance of Australian Government Superannuation Schemes Act 2011*, several Commonwealth Superannuation Acts and the prudential framework for superannuation in the *Superannuation Industry (Supervision) Act 1993'*.

However, the PGPA Amendment Act does make two amendments to section 104. The first of these is to add a reference to modification instruments made under the Act. The reason for this amendment is that prior to the application of PGPA Amendment Act, procurement and grant arrangements were to be applied through the use of rules, whereas these will now be made as another form of legislative instrument other than a rule. Further explanation about these arrangements can be found under item 4 of this response.

The second amendment is to relocate arrangements for intelligence or security agencies or listed law enforcement agencies to another section of the Act (section 105D). Further explanation about the operation of section 105D can be found under item 5 of this response.

Committee Response

The committee thanks the Minister for this response.

Alert Digest No. 6 of 2014 - extract

Parliamentary scrutiny of legislative power
Schedule 1, item 72, proposed subsections 105B(2) and 105C(2)

Proposed subsection 105B(1) provides that the Finance Minister may, by written instrument, make provision about procurement by the Commonwealth, corporate Commonwealth entities prescribed by the rules, or wholly-owned Commonwealth companies prescribed by the rules. Proposed subsection 105B(2) provides that although such an instrument is a legislative instrument section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to it.

The explanatory memorandum justifies this approach as follows: (1) it is consistent with current practice under the FMA regulations; and (2) it is important that such instruments are exempt from section 42 of the LI Act 'because they are significantly based on Australia's obligations under the Free Trade Agreement with the United States' (at p. 20).

A similar issue arises in relation to proposed section 105C(2), which provides that a legislative instrument under subsection 105C(1) (to make provision about Commonwealth grants) is not subject to the disallowance provision of the LI Act. In relation to this provision the justification is (1) that the current practice under the FMA regulations does not enable such instruments to be disallowed by the Parliament; and (2) that grant arrangements are 'integral to the internal operations of governments' and the 'possibility of disallowance would undermine commercial certainty in arrangements key to the government's delivery of programs and services'.

Instruments relating to procurement and also to non-statutory grants raise important questions of policy in relation to matters that involve significant amounts of Commonwealth expenditure. The above explanations for exempting such instruments from the usual capacity of Parliament to disallow instruments under the LI Act are noted, but they are insufficiently detailed to enable the committee to properly consider the appropriateness of the approach. In particular, the committee would benefit from specific examples of the sorts of problems which might arise were section 42 of the LI Act to apply. It is unclear why the Parliament would exercise its powers without regard to the issues identified or whether modified disallowance procedures may be able to address the concerns identified. **The committee therefore seeks the Minister's further advice as to the justification for preventing Parliament from having the opportunity to disallow instruments that potentially expend significant amounts of Commonwealth funds. The committee also requests the provision of specific examples of potential problems if these instruments were subject to disallowance provisions and information as to whether modified disallowance procedures could address any concerns.**

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

4. Instruments relating to procurement (section 105B) and Instruments relating to grants (section 105C)

Relevant provisions:

- Schedule 1, item 72, subsections 105B(2) and 105C(2)

Issue: Whether these subsections insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks justification for preventing Parliament from having the opportunity to disallow instruments that potentially expend significant amounts of Commonwealth funds. The Committee also requests the provision of specific examples of potential problems if these instruments were subject to disallowance provisions and information as to whether modified disallowance procedures could address any concerns.

Response:

The committee notes that significant amounts of Commonwealth funds are expended through procurement and non-statutory grant processes. However, the legislative instruments that the Finance Minister may make under sections 105B and 105C do not, in themselves, expend significant amounts of Commonwealth funds. The instruments establish additional requirements for making decisions to undertake procurement or make grants, beyond the core disallowable requirements of the PGPA Act and PGPA Rule. For example, requirements in relation to the actual approval of commitments of relevant money are found in section 18 of the PGPA Rule, which is a separate provision subject to disallowance.

The procurement and grant arrangements under the FMA Act and FMA Regulations are not disallowable; and the PGPA Act continues the same approach. The possibility of disallowance of procurement and grant instruments would undermine the commercial certainty of arrangements made pursuant to these instruments that are key to the government's delivery of programmes and services.

Disallowance of the Commonwealth Grants Rules and Guidelines (CGRGs) could severely impact non-government stakeholders currently involved in a grants process. It is not uncommon for grant applicants to spend considerable time and money developing applications in accordance with government grant programme guidelines. For example, on average, consultants charge $5000 to develop a grant application. Changing the

requirements under the CGRGs may require applicants to redevelop and resubmit applications; affect the outcomes of assessment processes, unfairly disadvantaging applicants; affect ongoing negotiations of grant agreements; and cause existing grant agreements to be inconsistent with the Commonwealth grants policy framework.

The instrument relating to procurement, known as the Commonwealth Procurement Rules (CPRs), is the key instrument for implementation and compliance with Australia's international government procurement obligations. These international agreements are subject to parliamentary inquiry prior to their entry into force. Australia cannot amend the obligations in our international agreements, except with the support of the other countries.

The CPRs assist Commonwealth entities with compliance by compiling and interpreting the obligations from multiple agreements into a single rule set. If the CPRs were disallowed, each Commonwealth entity would need to establish its own comprehensive procurement framework to meet the obligations in our international agreements. This would result in a significant duplication of effort and resources across the government. There would also be reduced transparency and certainty for suppliers regarding the government's procurement processes.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum.**

Alert Digest No. 6 of 2014 - extract

Delegation of legislative power—Parliamentary scrutiny
Schedule 1, item 72, proposed subsections 105D(3) and (6)

Proposed section 105D sets out a scheme pursuant to which the PGPA Act, rules and instruments in relation to designated activities of intelligence or security agencies or listed law enforcement agencies can be modified.

Proposed subsection 105D(3) enables the Finance Minister to determine (by written instrument), modifications to a number of specified provisions of the PGPA Act, any other provisions of the PGPA prescribed by the rules, the rules themselves, and instruments made in relation to procurement and grants (pursuant to section 105B or 105C).

Proposed subsection 105D(6) provides that instruments made which also determine which activities are caught by these provisions and which also modify the operation of the legislation, rules and instruments are not subject to the standard requirements of LI Act.

The explanatory memorandum justifies the approach by noting that the determinations 'would be unsuitable for publication on the Federal Register of Legislative Instruments as they would contain information relating to national security that would be unsuitable for public dissemination' and as existing 'accountability measures which are in place for these entities will continue to provide oversight in relation to designated activities' (at p. 21). The explanatory memorandum also notes that proposed subsection 105D(5) would require that determinations made for the purposes of this section must be reviewed at least once every three years or if the activities of the entity change significantly.

The proposed powers enable the Minister to modify the application of an Act of Parliament (and rules, for which Parliament remains responsible) without any parliamentary oversight. **The committee notes the explanation provided, but the explanatory memorandum is insufficiently detailed for the committee to properly assess the appropriateness of the proposed approach. The committee therefore seeks the Minister's further advice as to:**

a) the necessity of this approach;
b) why particularly the various requirements of the LI Act are considered inappropriate; and
c) why publication of the instruments on FRLI is likely to compromise national security.

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. It may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Minister's response - extract

5. Instruments relating to intelligence or security agencies or listed law enforcement agencies (section 105D)

Relevant provisions:

- Schedule 1, item 72, subsections 105D(3) and (6)

Issue: Whether these subsections may be considered to delegate legislative powers inappropriately and insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks advice as to: a) the necessity of this approach; b) why

various requirements of the *Legislative Instruments Act 2003* are considered inappropriate; and c) why publication of the instruments on the Federal Register of Legislative Instruments (FRLI) is likely to compromise national security.

Response:

Section 105D of the PGPA Act provides that the Finance Minister and Ministers responsible for intelligence or security agencies (ISAs) and listed law enforcement agencies (LEAs) may make determinations by written instruments relating to ISAs and LEAs. This is to modify the application of the finance law to protect against the compromise of certain designated operations of these entities. These operations may involve sensitive operational activities, where disclosing financial and performance information to the full extent required by the PGPA Act may compromise national security, protection of the peace or the safeguarding of individuals.

Prior to the commencement of the PGPA Act on 1 July 2014, application of the financial framework to ISAs and LEAs, including the manner in which they disclosed their use of resources, was based on a mixture of legislation, regulation and administrative agreements.

Section 58 of the FMA Act provided for the modification of the FMA Act. Regulations 27, 28, 28A and Schedule 2 of the FMA Regulations modify the application of the FMA Act to ISAs and prescribed law enforcement agencies (PLEAs). Meanwhile, section 46 of CAC Act provided that the application of that Act for a company conducted for the purposes of an ISA is subject to any modifications that are prescribed by the CAC Regulations. In addition the Finance Minister's delegation and Ministerial determinations provided for modified application of the framework in relation to banking, financial reporting and other aspects of certain operations.

The new arrangements seek to improve on these existing modification arrangements by placing in the primary legislation the provisions which may be modified and requiring the modification to be articulated through ministerial determinations.

Responsible Ministers of ISAs and LEAs determine the scope of designated activities subject to modification, to ensure their operational responsibilities are not compromised. Functions and/or powers of ISAs and LEAs are already provided for in other Commonwealth legislation, including the *Intelligence Services Act 2001*.

The Finance Minister determines how the PGPA Act, its rules and instruments apply to support of the designated activities of ISAs and LEAs. However, subsection 105D(3) limits the scope of modifications that may be made by the Finance Minister. These determinations do not automatically 'turn off the requirements of the PGPA Act, they may provide for alternate publication requirements or other mechanisms. Under this framework the scope of each determination is able to be tailored to individual agencies.

Subsection 105D(6) of the PGPA Act provides that determinations made under section 105D of the PGPA Act are not legislative instruments. Determinations made under section

105D of the PGPA Act will not be published on FRLI nor their contents communicated. This approach was deemed appropriate to protect Australia's national security and its interests, where the designated activities of ISAs and LEAs are concerned. Information as to the nature of any such determinations is provided for in subsection 105D(3) of the PGPA Act.

There are a number of additional accountability measures in place that may review and provide oversight of the administration and expenditure of entities that form the Australian Intelligence Community and Commonwealth law enforcement agencies. These include the Parliamentary Joint Committee on Intelligence and Security, Parliamentary Joint Committee on Law Enforcement, the Inspector-General of Intelligence and Security and the Auditor-General. Further, subsection 105D(5) of the PGPA Act requires that these determinations must be reviewed at least once every 3 years; or if the activities of the entity change significantly. This is to ensure that the modification of the application of the PGPA Act remains appropriate.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum. The committee notes that the bill has passed and as a result makes no further comment.**

Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

Introduced into the House of Representatives on 18 June 2014
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

Background

This bill seeks to amend various Acts relating to social security, family assistance, veterans' entitlements, military rehabilitation and compensation and farm household support to:

- cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014;
- rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014;
- implement the following changes to Australian Government payments:
    - pause indexation for three years of the income free areas and assets value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014;
    - index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014; and
    - pause indexation for three years of several family tax benefit free areas from 1 July 2014.
- review disability support pension recipients under age 35 against revised impairment tables and apply the Program of Support requirements from 1 July 2014;

- limit the six-week overseas portability period for student payments from 1 October 2014;

- extend and simplify the ordinary waiting period for all working age payments from 1 October 2014; and

- maintain the family tax benefit Part A and family tax benefit Part B standard payment rates for two years from 1 July 2014.

The bill will also seek to add the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, allowing payment of Commonwealth supplementation to service providers affected by the decision.

Delegation of legislative power—important matters in legislative instrument Schedule 6, item 1, proposed subsection 19DA(3)

This proposed subsection provides that the Secretary may, by legislative instrument, prescribe circumstances that are required for a person to, pursuant to subsection 19DA(1), qualify as experiencing a personal financial crisis. These prescribed circumstances will form part of the requirements necessary to establish an exception to ordinary waiting periods (that is, a period which must be served before certain allowances are payable). The explanatory memorandum does not explain why these matters, which may have an important impact on entitlements to benefits when a person is in severe financial crisis, cannot be provided for in the primary legislation. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Because the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

Proposed subsection 19DA(3) allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to

prescribe, by legislative instrument, the circumstances which constitute a personal financial crisis for the purposes of waiving the Ordinary Waiting Period.

This provision provides the Secretary with the flexibility to consider any unforeseeable or extreme circumstances which are identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. I note that this power can only be used beneficially and that any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.

Committee Response

The committee thanks the Minister for this response. The committee notes the justification for the proposed delegation of legislative power provided by the Minister and the fact that any instruments made under the power will be subject to disallowance. **The committee leaves the appropriateness of this approach to the Senate as a whole.**

Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

Introduced into the House of Representatives on 18 June 2014
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

Background

This bill seeks to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to:

- implement the following changes to Australian Government payments:
  - pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;
  - pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017;
  - ensure all pensions are indexed to the Consumer Price Index only, by removing from 20 September 2017:
    - benchmarking to Male Total Average Weekly Earnings;
    - indexation to the Pensioner and Beneficiary Living Cost Index.
- reset the social security and veterans' entitlements income test deeming thresholds to $30,000 for single income support recipients, $50,000 combined for pensioner couples, and $25,000 for a member of a couple other than a pensioner couple from 20 September 2017;
- generally limit the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015;

- exclude from the social security and veterans' entitlements income test any payments made under the new Young Carer Bursary Programme from 1 January 2015;

- include untaxed superannuation income in the assessment for the Commonwealth Seniors Health Card (with products purchased before 1 January 2015 by existing cardholders exempt from the new arrangements), and extend from six to 19 weeks the portability period for cardholders;

- remove relocation scholarship assistance for students relocating within and between major cities from 1 January 2015;

- cease pensioner education supplement from 1 January 2015;

- cease the education entry payment from 1 January 2015;

- extend youth allowance (other) to 22 to 24 year olds in lieu of newstart allowance and sickness allowance From 1 January 2015;

- require young people with full capacity to learn, earn or Work for the Dole from 1 January 2015;

- implement the following family payment reforms from 1 July 2015:

    - limit the family tax benefit Part A large family supplement to families with four or more children;

    - remove the family tax benefit Part A per-child add-on to the higher income free area for each additional child after the first;

    - revise the family tax benefit end-of-year supplements to their original values and cease indexation;

    - improve targeting of family tax benefit Part B by reducing the primary earner income limit from $150,000 a year to $100,000 a year;

    - limit family tax benefit Part B to families with children under six years of age, with transitional arrangements applying to current recipients with children above the new age limit for two years; and

    - introduce a new allowance for single parents on the maximum rate of family tax benefit Part A for each child aged six to 12 years inclusive, and not receiving family tax benefit Part B.

- increase the qualifying age for age pension, and the non-veteran pension age, to 70, increasing by six months every two years and starting on 1 July 2025; and

- remove the three months' backdating of the disability pension under the *Veterans' Entitlements Act 1986* from 1 January 2015.

Delegation of legislative power—important matters in legislative instrument
Schedule 9, proposed subsection 1157AB(3)

This subsection provides that the Minister may, by legislative instrument, determine (a) the kind of social security pensions and benefits for the purposes of item 1 of the table in subsection (2) and (b) conditions for the purposes of that table item.

The table in subsection 1157AB(2) indicates that a person will not be subject to a Part 3.12B exclusion period if they are transferring from a pension or benefit of a kind determined by the Minister in a legislative instrument and where the Minister has determined conditions which have been met. Given the significance of the policy decisions as to when a person under 30 will be excluded from receipt of the Newstart allowance, it is unclear why these matters should not be dealt with in the primary legislation. **As such the committee seeks further advice as to the justification for these matters to be determined by legislative instrument rather than being included in the bill itself.**

> *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

Proposed subsection 1157AB(3) provides flexibility for the Minister to prescribe, by legislative instrument, the conditions when a person transferring from another pension or benefit will not be subject to a part 3.12B exclusion period.

This provision within the Bill will enable the Minister to exempt persons who transfer from certain payments, under certain circumstances, from the initial waiting period. Giving the Minister the flexibility to determine these exemptions via an instrument will reduce the risk of the legislation unintentionally applying an exclusion period to people whose circumstances fall within the Government's exemptions policy. I note that this power can only be used beneficially and that any instrument issued by the Minister would be subject to Parliamentary scrutiny and disallowance.

Committee Response

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

Alert Digest No. 6 of 2014 - extract

Delegation of legislative power—important matters in legislative instrument Schedule 9, proposed subsections 1157AC(3), 1157AE(4) and 1157AE(6)

Proposed subsection 1157AC(3) provides that the Minister may, by legislative instrument, determine what previous periods of gainful work cause a reduced waiting period to apply, what particular kinds of gainful work do not cause a reduced waiting period to apply, and a method for working out the reduced period. Proposed subsection 1157AE(4) provides for the Minister to determine the extension of the exclusion period for failures to comply with requirements of an employment pathway plan, and proposed subsection 1157AE(6) may determine the method for working out the number of weeks a person's waiting period may be extended by as a penalty for providing false or misleading information.

Given the practical importance of these matters to eligibility to newstart allowance for affected persons and the committee's expectation that important matters will be included in primary legislation unless a comprehensive justification is provided, it is unclear why they should not be dealt with in the bill itself. This approach would have the advantage that Parliament would be better able to evaluate the overall policy approach envisaged by this schedule in relation to waiting periods for newstart allowances. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

Proposed subsection 1157AC(3) of the Bill enables the Minister to prescribe, by legislative instrument, the circumstances when gainful work may cause a reduced waiting period to apply, and a method for working out the reduced period.

This will allow the Minister to prescribe the specific formula for taking periods of gainful work into account and also to ensure that certain activities are excluded, such as criminal activities. Using an instrument will allow the Minister to refine the policy to ensure that it is operating efficiently and fairly without having to amend the primary legislation.

Proposed subsection 1157AE(4) allows the Employment Minister to determine, by legislative instrument, the extension periods applying for failures to enter into employment pathway plans, and failures to comply with particular requirements in employment pathway plans.

Proposed subsection 1157AE(6) allows the Minister to, by legislative instrument, determine a method for working out the number of weeks to extend a part 3.12B waiting period, and a method for working out the duration and commencement day for a part 3.12B penalty period, both imposed as consequences for the provision of false or misleading information.

Again, these instrument making powers will ensure that the Minister is able to refine the rules to ensure that these compliance related elements of the policy operate efficiently and fairly.

Taking into account that any instrument seeking to alter application of the provisions will be subject to the scrutiny of Parliament, I do not consider the provisions in Schedule 6, proposed subsection 19DA(3) of Bill No. 1 and in Schedule 9, proposed subsections 1157AB(3), 1157AC(3), 1157AE(4) and 1157AE(6) of Bill No. 2 to be an inappropriate delegation of power.

Committee Response

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

Trade Support Loans Bill 2014

Introduced into the House of Representatives on 4 June 2014
This bill received the Royal Assent on 17 July 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. A copy of the letter is attached to this report.

This committee has deferred consideration of the Minister's and First Parliamentary Counsel's response in relation to the provision of a general rule-making power in clause 106 of the bill.

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to establish the Trade Support Loans Programme to provide concessional, income-contingent loans of up to $20 000 over four years to certain apprentices which will be repayable when the individual‘s income reaches the Higher Education Loan Program repayment threshold.

Delegation of legislative power
Clause 8

Subclause 8(1) sets out the qualification requirements a person must meet to qualify for a trade support loan (TSL). Paragraph 8(1)(d) provides that further conditions for qualification may be prescribed by the rules. Subclauses 8(2) and 8(3) provide that the rules may prescribe a level at which a qualifying apprenticeship is to be undertaken and the circumstances in which a person is or is not taken to be undertaking a qualifying apprenticeship.

Although good reasons may well be available for using rules to deal with such further matters relevant to qualification for a TSL, it is noted that the explanatory memorandum merely repeats the effect of these provisions without explaining the reasons why a person's entitlement to a TSL cannot be dealt with comprehensively in the primary legislation. **The committee therefore seeks the Minister's advice as to why the further conditions for qualification for a TSL could not be included in the primary legislation rather than being left to the rules.**

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

The Committee has asked why further conditions for qualification (ss 8(l)(d), 8(2)(a)(i) and 8(3)) have been allowed to be prescribed in the rules as opposed to the primary legislation. These matters have been left to the rules to provide some degree of flexibility to adapt qualification for trade support loans to deal with future changes. Given that Australian apprenticeships are regulated by states and territories, flexibility is needed to ensure that where there are changes in level of qualifications, the qualification criteria for TSL can be adjusted accordingly.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum.**

Alert Digest No. 6 of 2014 - extract

Trespass on personal rights or liberties—penalty
Clauses 63 and 73

Subclause 63(1) provides that it is an offence if a person refuses or fails to comply with a requirement (under clauses 59, 60 or 61) to give information or produce a document. The penalty for this offence is 12 months imprisonment.
A similar issue arises in relation to clause 73, although the penalty for the offence of failing to inform the Secretary of a change of circumstances which may affect the qualification for a TSL is 6 months imprisonment.

The custodial penalties appear high given that a number of Commonwealth offences for withholding information set the penalty at 20–30 penalty units (see *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* Annexure A).

The committee therefore seeks the Minister's advice as to the justification for the imposition of custodial penalties of 12 months and 6 months respectively for these offences.

> *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

The Committee has asked for justification for the imposition of custodial penalties of 12 months and 6 months respectively for the offences in section 63 and 73. These penalties are consistent with Commonwealth policy regarding the setting of penalties. In particular, the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers provides that 'a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness' (page 39). This penalty is consistent with the penalty for similar offences in section 74 (Offence - Failure to comply with notice) and section 197 (Offence - Failure to comply with requirement) of the *Social Security (Administration) Act 1999*.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum. The committee notes that the bill has passed and as a result makes no further comment.**

Alert Digest No. 6 of 2014 - extract

Trespass on personal rights or liberties—onus of proof
Clauses 63 and 73

Subclause 63(2) provides for a 'reasonable excuse' defence to the offence under subclause 63(1), and the Note to the subclause explains that a defendant bears an evidential burden of proof in relation to establishing such an excuse. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 52) correctly notes that the reasonable excuse defence is 'open-ended' and that it may be difficult for defendants to

rely upon it 'because it is unclear what needs to be established'. The open-ended nature of the defence also means that it is difficult for the committee to determine whether the reversal of onus entailed by a defence is appropriate. More specifically, it is difficult to determine whether the matters on which the defendant must adduce evidence are 'peculiarly within the knowledge of the defendant' and 'would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' (*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 50).

A similar issue arises in clause 73 of the bill. This clause provides that it is an offence if a person fails to comply with a notice under clause 71. Subclause 73(2) provides for a 'reasonable excuse' defence to the offence.

As the explanatory memorandum in both cases does no more than repeat the effect of the subclause, **the committee seeks the Minister's advice as to the justification for reversing the onus of proof without providing further detail on what constitutes a reasonable excuse defence.**

> *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

The Committee has asked for justification for reversing the onus of proof without providing further detail on what constitutes a reasonable excuse defence. The decision to impose the penalties under sections 63 and 73 will only be made by a Court. It will be a matter for the Court to decide what is a reasonable excuse. The independence of the judiciary ensures that potential offenders will be provided with ample opportunity to argue that they had a reasonable excuse.

Committee Response

The committee thanks the Minister for this response. While the committee notes the information provided by the Minister in relation to the role of the judiciary, it reiterates its view that where a reasonable excuse defence is provided it is useful if examples or other guidance is provided as to what may constitute a 'reasonable excuse'. **The committee notes that the bill has passed and as a result makes no further comment.**

Alert Digest No. 6 of 2014 - extract

Delegation of administrative powers
Subclause 101(1)

This clause provides that the Secretary may delegate, in writing, all or any of the powers and functions of the Secretary under this Act to 'an officer'. Clause 5 defines officer to include any person engaged (as an employee or otherwise) by an Agency (within the meaning of the *Public Service Act 1999*), another authority of the Commonwealth, and 'a person or organisation that performs services for the Commonwealth'.

As the explanatory memorandum notes (at p. 33), this would enable some of the functions of the Secretary to be delegated 'to contracted service providers who may provide a range of other services such as receiving and processing applications for trade support loans as well as other Australian Apprenticeship initiatives'. According to the explanatory memorandum, this is 'appropriate as these functions are of an administrative nature and require a certain level of expertise in understanding the Trade Support Loan Programme'. It is further added that 'administrative guidelines will be developed which will provide advice about circumstances under which these delegations will be made'.

However, not all of the various forms of accountability that apply to public servants or statutory office holders necessarily apply to non-government decision-makers who are empowered to exercise statutory, administrative powers. **The committee therefore seeks further information as to which of the statutory functions of the Secretary may be delegated to non-government decision-makers and a more detailed justification of the appropriateness of this approach.**

The committee also seeks the Minister's advice as to whether it is possible to limit the delegation to non-government decision-makers to instances of powers or functions where necessity for doing so has been established.

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

Minister's response - extract

The Committee asked for further information regarding which of the Secretary's statutory functions may be delegated to non-government decisions makers and the appropriateness

of this approach. The Department of Industry has contracted with a number of entities to deliver support services to Australian apprentices and their employers. These entities are commonly referred to as Australian Apprenticeship Centres (AACs). AAC's perform a range of functions including assessing, approving and processing the payment of Australian Government incentives to eligible employers and personal benefits to eligible Australian Apprentices. Given the current services AAC's currently deliver, it is considered appropriate that they also be involved with the delivery of trade support loans.

Accordingly, it is expected that the Secretary will delegate to Australian Apprenticeships Centres powers and functions necessary to perform this delivery function. Broadly speaking, this will involve the delegation of powers or functions necessary to allow AAC's to accept and assess applications, make a decision on whether to grant or refuse an application, determine payability of trade support loan, cancel payments, issue and receive certain notices and review decisions.

The Committee also seeks the Minister's advice on whether it is possible to limit the delegation to non-government decision makers to instances of powers or functions where the necessity for doing so has been established. Under the current TSL Bill, the Secretary can delegate all or any of her powers or functions. It is a matter for the Secretary to decide which of her functions or powers she will delegate and to whom.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum**.

Alert Digest No. 6 of 2014 - extract

Standing appropriation
Clause 104

Clause 104 provides for a standing appropriation out of the Consolidated Revenue Fund. 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.

As there is no justification for the standing appropriation provided in the explanatory memorandum, **the committee seeks the Minister's advice as to the justification for the standing appropriation**.

> *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 Committee also sought a justification for the use of a standing appropriation for the TSL programme. A standing appropriation ensures the effective administration of the TSL programme, and gives certainty to Australian Apprentices that support will be available through this demand-driven programme. The volume of Trade Support Loan payments will depend on individual eligibility and cannot be predicted sufficiently accurately for the purposes of an annual appropriation. The standing appropriation model is also consistent with established appropriation models under social security law and family assistance law.

Committee Response

The committee thanks the Minister for this response.

Senator Helen Polley
Chair

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: B14/840

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

Dear Senator Polley

I refer to the letter of Thursday, 26 June 2014, sent to my senior advisor by Ms Toni Dawes, Secretary to the Senate's Standing Committee for the Scrutiny of Bills (the Committee).

That letter drew attention to the Committee's *Alert Digest No. 7 of 2014* (the Digest), which queried the classification of appropriation items in *Appropriation Bill (No. 1) 2014-2015* (Bill No. 1). The Digest also referred to the 50th report in June 2010 of the Senate Standing Committee on Appropriations and Staffing (the Appropriations Committee), which dealt with the ordinary annual services of the Government.

Your Committee sought my advice as to what consideration has been given to the classification of items in Appropriation Bills. The Committee specifically raised the classification of five items in Bill No. 1 as potentially not being for the ordinary annual services of the Government.

As you would be aware, in 1965 the Senate and the then Government largely worked through the classification of appropriation items that constitute the ordinary annual services of the Government. This was updated in 1998-99 for the introduction of accrual budgeting from 1 July 1999. The outcome of these arrangements is generally referred to as the Senate-Executive Compact.

A key aspect of the arrangements was set out in correspondence on 10 February 1999 by the then Minister for Finance and Administration, the Hon John Fahey MP. The attached overview of the Compact explained that new administered expenses that fall within an existing outcome would be included in Bill No. 1. Also, amounts appropriated for departmental expenses, which were equivalent to the previous concept of running costs, would continue to be appropriated in Bill No. 1.

On 11 March 1999 the then President of the Senate, Senator the Hon Margaret Reid, replied to Mr Fahey and stated that the Senate Standing Committee on Appropriations and Staffing had agreed to the proposed adjustments to the Compact proposed in his letter of 10 February 1999 and statement attached to that letter. On 22 April 1999, a resolution of the Senate endorsed the Committee's recommendation proposed by Mr Fahey.

On 14 July 2010, the Hon Lindsay Tanner MP, the then Minister for Finance and Deregulation, wrote to Senator the Hon John Hogg, the then President of the Senate, about the 2010 Senate resolution on the classification of appropriation items. Mr Tanner stated that the then Government had reached a position that it saw no need to change the interpretation of the Senate-Executive Compact.

This Government continues to prepare Appropriation Bills in a manner consistent with this application of the Senate-Executive Compact from 1999.

In general, the application of the Senate-Executive Compact means that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. Appropriations to the States, large non-operating appropriations, and appropriations for measures that require a new administered outcome not previously authorised by Parliament, are appropriated in the even-numbered Bills.

Advice to this effect continues to be made available on the website of my Department, and represents the Government's consideration of principles for the classification of items in Appropriation Bills.

Your Committee also asked whether five specific measures may have been inappropriately classified as ordinary annual services of the Government.

Two of these measures are for departmental expenditure: the Infrastructure Growth Package; and the Tasmanian Major Projects Approval Agency. Departmental expenditure includes continuing and new departmental activities, and accordingly, amounts for these departmental measures were included in Bill No. 1.

The other three measures (Solar Towns, the Stronger Relationships Trial, and the Students First – Early Language Learning Australia) involve administered expenditure that falls within existing or restated outcomes. Accordingly these administered measures were included in Bill No. 1.

Thank you for advising me of the view of your Committee.

Kind regards

Mathias Cormann
Minister for Finance

17 July 2014

The Hon Kevin Andrews MP
Minister for Social Services

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MC14-007776

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

5 AUG 2014

Dear Senator Polley

Correspondence dated 19 June 2014 has been received by my office from Ms Toni Dawes, Secretary of the Senate Scrutiny of Bills Committee, which includes a series of questions in relation to the Business Services Wage Assessment Tool Payment Scheme Bill 2014.

I am pleased to provide the Committee with responses to their questions, which are enclosed for your information.

Yours sincerely

KEVIN ANDREWS MP

Encl.

Scrutiny of Bills Committee

Business Services Wage Assessment Tool Payment Scheme Bill 2014

The Business Services Wage Assessment Tool (BSWAT) Payment Scheme is a payment scheme for supported employees with an intellectual impairment who had their wages assessed by the BSWAT. Entry to the Scheme is voluntary for those who are eligible. The decision to accept an offer of a payment under the Scheme is for the supported employee. The BSWAT Payment Scheme will operate from commencement until 31 December 2016.

Merits Review
Part 3, Division 5

'The committee therefore seeks the Minister's advice as to why it has been concluded that this system of review has been preferred to conferring jurisdiction to review on the Administrative Appeals Tribunal, given its well established reputation for the effective exercise of independent, external merits review functions in a wide variety of statutory contexts'.

As noted by the Committee the Administrative Appeals Tribunal (AAT) has a well established reputation for the exercise of independent and external merits review in a wide range of statutory contexts.

External reviewers will review (if required) two decisions of the Secretary under the BSWAT Payment Scheme. The first decision relates to eligibility; the second to the amount of the payment amount offered. The external reviewer system of review to be established under the BSWAT Payment Scheme was preferred for the following reasons:

- The decisions of the Secretary are not final decisions. The final decision is the decision to accept an offer of a payment under the Scheme and that decision is a decision for the supported employee.
- The Scheme is time limited in its existence, as is the time available to a person to apply for and accept an offer under the Scheme. The Scheme will be in existence for just over two years. Further, the time limits set out in the Bill for taking actions require an external review process which is flexible and can be accessed quickly, efficiently and with little or no formality.
- External reviewers have been identified as individuals with adequate professional expertise and experience (subsection 27(2)) to assure confidence in their decisions.

Delegation of Executive Power - important matters in rules – Clause 56

'The committee seeks the Minister's advice as to the justification of having these matters addressed in the rules rather than the primary legislation'.

The Scrutiny of Bills Committee requests the Minister consider how this provision may 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

The primary legislation goes to some lengths to outline the circumstances in which a nominee may be appointed, or have their appointment cancelled or suspended. Sections 51 to 55 of Part 3 of the legislation prescribes requirements with which the Secretary must comply relating to the appointment, cancellation or suspension of the appointment of nominees: for example subsection 51(1) provides:

The Secretary must not appoint a person as a nominee of a participant under section 50 except:

(a) with the written consent of the appointee; and
(b) after taking into consideration the preferences (if any) of the participant regarding the making of the appointment.

These matters are addressed in the primary legislation. However, if enacted, the Bill will be supplemented by rules, to be made as disallowable legislative instruments. The BSWAT Payment Scheme is a new scheme with applicants who are people with intellectual impairment. While it is entirely possible that the primary legislation covers all potential circumstances with which the Secretary must comply relating to the appointment, suspension and cancellation of nominees, there may be other considerations not addressed sufficiently within sections 51 to 55 that only come to light as the scheme commences operation. Therefore the ability to make additional requirements, if needed, within the rules, allows sufficient flexibility for responsiveness as the scheme is implemented. The rules, therefore, provide an additional safeguard in this circumstance.

Similarly, the primary legislation allows the Secretary to have regard to certain criteria in appointing, suspending or cancelling nominees: for example, the ability to suspend or cancel the appointment of a nominee in cases of physical, mental or financial harm. In appointing the nominee, the Secretary must consider whether the proposed nominee is able to comply with the requirements of section 46. The ability to add additional requirements to criteria the Secretary must consider in appointing, suspending or cancelling nominees provides an additional safeguard as the scheme is implemented should it be required.

Merits Review Part 4, Division 4

The committee seeks advice from the Minister as to why an external merits review is not available.

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

As noted by the Committee, external merits review of certain decisions in relation to the appointment and cancellation of the appointment of a person's nominee are not subject to external review.

The BSWAT payment scheme is a scheme which, if enacted, will accept applications from and make offers to eligible applicants for just over two years. The selection and appointment of a nominee will be very important to many eligible applicants. The time limited existence of the Scheme and the time frames within which a person must make decisions meant that the current legislative structure allow a more timely process in relation to this particular decision.

An applicant may seek review of the Secretary's decision to appoint a nominee or cancel the appointment of a nominee. The decision to appoint a nominee or cancel the appointment of a nominee will initially be made by a delegate of the Secretary. Reviews of these decisions will be made by another more senior officer of the Department.

The Secretary must take into account when making determinations in relation to nominees, the preferences of the applicant.

Trespass on personal rights and liberties – reversal of onus of proof Subclause 73 (2)

The committee seeks the Minister's advice as to justification for reversing the onus of proof without providing further details as to what would constitute a reasonable excuse defence.

As noted by the Committee, the offence in clause 73 is subject to the defence of 'reasonable excuse' (subclause 73(2)). The inclusion of the 'reasonable excuse' defence means that a defendant who denies criminal responsibility may adduce or point to evidence that he or she had a reasonable excuse for refusing or failing to comply with a notice or a requirement under clause 73 (see subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code)).

In the context of the BSWAT payment scheme it is not possible to anticipate the full range of circumstance in which a person – particularly an individual – might refuse or fail to comply with the requirements of a notice issued under section 73. As the existence of a reasonable excuse would be peculiarly within the knowledge of the person it was considered appropriate to include some flexibility in the range of excuses in respect of which a defence could point to or adduce evidence.

Trespass on personal rights and liberties – privacy

Delegation of legislative power

Clause 81

In these circumstances and in the absence of a comprehensive justification in the explanatory memorandum, the committee seeks the Minister's advice as to why the clause 81 disclosure powers are considered necessary and also, whether consideration has been given to including the constraining powers to be provided by the rules in clause 82 in the primary legislation rather than in the rules.

Careful consideration has been given to ensuring that any sensitive personal information held by the Department or other agencies for the purposes of operating the Scheme is given due and proper protection.

The approach taken to the BSWAT Payment Scheme Bill is comparable to that taken in legislation such as the family assistance law, social security law, and the National Disability Insurance Scheme all of which require the collection of sensitive personal information. The BSWAT Payment Scheme Bill contains offence provisions in sections 76 – 80 governing the disclosure of information consistent with similar offences in the *Social Security (Administration) Act 1999* (see section 202). Information collected by this scheme will be limited, however this information may be required to be disclosed. The Bill provides the same powers for disclosure as are provided under the family assistance law, the social security law and the National Disability Insurance Scheme.

The relevant provisions of the BSWAT Payment Scheme Bill and the Privacy Act 1988 (Cth) will operate concurrently, and a person will be subject to, and must observe, both laws.

The use of the rules to set out in detail the considerations for the disclosure of information under clause 81 is consistent with the practice of the family assistance, social security law and the National Disability Insurance Scheme.

Delegation of administrative powers

Clause 100

The committee seeks the Minister's advice as to whether consideration has been given to expressly limiting the exercise of some of the powers and functions of the Secretary to senior executive officers, including those referred to above.

The BSWAT Payment Scheme Bill, if enacted, allows the Secretary to have sole consideration of the appropriateness of delegating functions and powers to officers. The Minister is of the view that the Secretary is rightly able to consider both seniority and skill set in making determinations in relation to delegation.

Delegation of legislative power

Clause 102

Noting the above concerns and in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

Whether general rule making powers such as clause 102 would permit a rule maker to make the following types of provisions:

***Offence provisions**
***Powers of arrest or detention**
***Entry provisions**
***Search provisions**
***Seizure provisions**
***Provisions which make textual modifications ot Acts**
***Provisions where the operation of an Act is modified**
***Civil penalty provisions**
***Provisions which impose (or set or amend the rate) of taxes**
***Provisions which set the amount to be appropriated where an Act provides he appropriation and the authority to set the amount of the appropriation.**

In the context of the BSWAT Payment Scheme clause 102 will not be used to create provisions such as those set out by the Committee above.

Whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with guidance at paragraphs 2 to 7 of Drafting Direction 3.8)

Please see OPC's response to this question.

Australian Government
Office of Parliamentary Counsel

Our ref:
Your ref:

The Hon. Kevin Andrews MP
Minister for Social Services
Parliament House
CANBERRA ACT 2600

Dear Minister

Business Services Wage Assessment Tool Payment Scheme Bill 2014—Request for information from Senate Standing Committee for the Scrutiny of Bills

Background

1 In Alert Digest No. 6 of 2014, the Senate Standing Committee for the Scrutiny of Bills asked you for information on matters relating to the general rule making power in clause 102 of the Business Services Wage Assessment Tool Payment Scheme Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) in relation to those matters.

2 Clause 102 is as follows:

102 Rules

The Minister may, by legislative instrument, make rules prescribing matters:
(a) required or permitted by this Act to be prescribed by the rules; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The Committee's comments on the clause were as follows:

Delegation of legislative power
Clause 102

Clause 102 of this bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

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

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- **whether general rule-making powers, such as clause 102, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**

- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that**

would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).

Prescribing of matters by legislative rules

4 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).

Ramifications for the quality and scrutiny of legislative rules

5 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues. The information set out in the following paragraphs supplements the information previously provided to the Committee in a letter from me (the OPC Farm Household Support letter) responding to concerns raised by the Committee in Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014. Extracts of my letter were set out in the Committee's Fifth Report of 2014. Similar supplementary information has already been provided to the Senate Standing Committee on Regulations and Ordinances.

1. OPC's drafting functions

(a) OPC's drafting functions generally

6 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

7 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

8 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

9 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the

> freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

10 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

11 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

12 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

13 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

14 *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

15 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

16 I am also required to govern OPC in a way that promotes proper use and management of public resources for which I am responsible (see section 15 of the *Public Governance, Performance and Accountability Act 2013*), including resources allocated for the drafting of subordinate legislation.

17 I consider that DD3.8 is an appropriate response to this responsibility in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

18 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

19 As mentioned in the OPC Farm Household Support letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

20 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies" . The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

21 In my view, the Council's statement is still accurate today.

22 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

23 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will

therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

24 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

25 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

26 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

(d) Proliferation of number and kinds of legislative instruments

27 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

28 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

29 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

30 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

31 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

32 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

33 In response to the material in OPC Farm Household Support letter the Committee has stated, in its Fifth Report of 2014:

> 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.

34 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

The first issue raised by the Committee: whether general rule-making powers would permit a rule-maker to make certain kinds of provisions

35 The Committee has asked whether a general rule-making power would permit the rule-maker to make the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(e) seizure provisions;

(f) provisions which make textual modifications to Acts;

(g) provisions where the operation of an Act is modified;

(h) civil penalty provisions;

(i) provisions which impose (or set or amend the rate) of taxes;

(j) provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

36 The standard form of a general rule-making power contains:

(a) a "required or permitted" power; and

(b) a "necessary or convenient" power.

37 The Committee's question needs to be considered separately in relation to each of those powers.

The "required or permitted" power

38 The "required or permitted" power authorises the rule-maker to make rules prescribing matters "required or permitted by this Act to be prescribed by the rules". This is not a power at large. Its scope is entirely dependent on what other provisions of the same Act expressly say must or may be done in the rules.

39 Could another provision of the same Act expressly authorise the rules to include provisions of the kinds identified by the Committee? In theory yes, but there are some significant constraints on this.

40 The first constraint is that the provision containing the express authorisation must have been passed by both Houses of the Parliament. A Bill introduced into Parliament may contain clauses purporting to expressly allow rules to contain provisions of one or more of these kinds, but the question whether the clauses are agreed to by the Parliament is of course a matter for each of the Houses.

41 The second constraint arises out of OPC's drafting policy as set out in DD3.8. This sets out OPC's approach to drafting instrument-making powers, including general rule-making powers. It contains a number of paragraphs affecting the approach that the drafter of a Bill should take when drafting provisions that will allow matters to be dealt with by rules or regulations.

The "necessary or convenient" power

42 The "necessary or convenient" power authorises the rule-maker to make rules prescribing matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act." Like the "required or permitted" power, this is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act…will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to

the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition,* 2012 at 14.5). Only a provision of the latter kind is valid.

43 The Committee's list of kinds of provisions differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (http://www.ags.gov.au/publications/legal-briefing/br102.html).

44 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions in the Committee's list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

45 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

46 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency.

47 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

The second issue raised by the Committee: whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards

48 The Committee has asked whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of DD3.8).

49 All OPC drafters are required to comply with DD3.8. This is part of their broader obligation to comply with all the Drafting Directions.

50 OPC does not monitor whether legislative instruments drafted outside OPC comply with drafting standards (or Drafting Directions). OPC does not have resources to perform a monitoring role in relation to all such instruments, nor is it appropriate for it do so. The responsibility for ensuring that an instrument is within power, and complies with drafting standards, should lie with the rule-maker. The options mentioned in paragraphs 45 and 46 would assist a rule-maker's ability to ensure instruments are within power, and would emphasise the rule-maker's responsibility.

Conclusion

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

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
8 July 2014

The Hon Greg Hunt MP

Minister for the Environment

MC14-015033

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

14 AUG 2014

Dear Senator Polley Helen

I refer to correspondence of 17 July 2014 from Toni Dawes, Committee Secretary, setting out the Senate Scrutiny of Bills Committee's request for further information on the Carbon Farming Initiative Amendment Bill 2014, in particular whether consideration can be given to making it clear in the legislation that in cases of conflicts between regulations and legislative rules, the regulations will prevail.

As outlined in my letter of 14 June 2014 to you, I understand the potential for conflict to arise between regulations and legislative rules and I am grateful that the Committee has again highlighted the importance of this issue. I have considered the matter in a broad, legislative context and I am confident the process that is in place to address this risk is appropriate and effective.

First, I would like to clarify that the nature and scope of the regulations and legislative rules is such that the implications of any conflict would be negligible. The Bill prescribes the core legislative framework for the implementation of the Emissions Reduction Fund, while any regulations and rules are intended only to provide further detail on specific matters, such as purchasing of Australian carbon credit units or reporting and audit provisions. Consequently, any discrepancy that may arise would be minor and could be resolved by the ordinary principles of statutory interpretation. There is a well-developed body of case law that would assist in this.

As previously mentioned, a robust administrative framework for managing the development of legislative rules is critical. I have ensured that this is embedded in the relevant area of the Department of the Environment, and that the departmental officers and legislative drafters pay particular attention to any potential areas of conflict.

I also note the Committee's suggestion to specify in legislation that, in the case of conflict, regulations will prevail over legislative rules. However, such a provision may result in unintended outcomes in this instance, due in part to the process of transferring regulations to rules. New and revised provisions are likely to be contained in the rules rather than the regulations.

I trust that the advice outlined here adequately addresses the Committee's request, and I would be more than happy to provide further information on this matter if necessary. My Office will be able to assist with this should you require more detail.

Yours sincerely

Greg Hunt

The Hon Greg Hunt MP

Minister for the Environment

MC13-014578

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

1 2014

Dear Senator Polley Helen

I refer to the Senate Standing Committee's comments of 10 July 2014 regarding the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No.2], which was passed by the Parliament and received the Royal Assent on Thursday, 17 July 2014.

I have considered the Committee's comments and below is a response to the committee's request that additional information on proposed subsection 60D(3) of the *Competition and Consumer Act 2010* be included in the explanatory memorandum.

Minor edits were made to the explanatory memorandum to revise the financial impacts table in order to more accurately reflect the impacts from repeal of the carbon tax using updated information available at the time of the introduction of the bill. However, I decided that no revisions were required to be made to the explanatory memorandum in relation to how specific provisions operate, to reduce the potential for confusion about any differences between the bills. To address the Committee's concerns, I propose to publish a copy of my letter to you dated 29 January 2014 on the webpage concerning carbon tax repeal on the Department of the Environment's website, along with links to the relevant webpages for the Committee's First Report and Alert Digest.

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

Yours sincerely

Greg Hunt

Cc: Treasurer, the Hon Joe Hockey MP

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7920 Greg.Hunt.MP@environment.gov.au

TREASURER

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

Dear Senator Polley

I refer to the letter of 10 July 2014 from Ms Toni Dawes, Committee Secretary for the Senate Scrutiny of Bills Committee, seeking a response to the Committee's request for further information in relation to the Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014.

The Committee seeks further information on whether the availability of simple corporate bonds depository interests will be simultaneous with applicable consumer protection requirements. The Committee continues on by asking that if that is not the case, whether there will be a period of time during which offers of simple corporate bonds depository interests will be available, but will not have the same level of disclosure as offers of simple corporate bonds to the retail market.

It is intended that offers of simple corporate bonds depository interests will operate with the same level of consumer protection as that of offers of simple corporate bonds. This requirement will be brought forward in further amendments to the corporations law that will put in place the detail required for the depository interest mechanism to operate. It is intended that these further amendments will include the requirement that offers of simple corporate bonds depository interests will only be able to be made available to the retail market where they have the same level of disclosure as offers of simple corporate bonds. Public consultation will be undertaken on the legislative provisions to put in place the detail required for the depository interest mechanism.

I trust this information is of assistance to you.

Yours sincerely

HON J. B. HOCKEY MP

Parliament House Canberra ACT 2600
Australia
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THE HON IAN MACFARLANE MP

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17 JUL 2014

MC14-001872

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

Dear Senator Polley Helen

Thank you for your letter of 19 June 2014 concerning the Energy Efficiency Opportunities (Repeal) Bill 2014 (the Repeal Bill) and the Trade Support Loans Bill 2014 (TSL Bill).

The Repeal Bill was introduced into Parliament on 15 May 2014 to repeal the *Energy Efficiency Opportunities Act 2006* (the Act) and terminate its implementing programme. The rights and liabilities established by the Act specifically apply to constitutional corporations operating within Australia and relate to registration, submissions of assessment plans, carrying out of approved assessment plans, reporting and record keeping. This measure aligned with the Mid-Year Economic Fiscal Outlook announcement in December 2013 to cease funding for the scheme from 1 July 2014.

I note that the Scrutiny of Bills Committee (the Committee) seeks a more detailed justification for the possible retrospective commencement of the Repeal Bill in relation to two particular concerns; the potential that the retrospective operation may be considered to trespass unduly on personal rights and liberties; and that it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The purpose of the Repeal Bill's fixed date commencement is to provide a clear statement of the Australian Government's policy intention to remove compliance obligations given its decision to repeal the Act and its implementing programme. Introduction of the Repeal Bill with a commencement date of 29 June 2014 signalled to corporations that the Government did not propose to require corporations to submit variations to assessment plans after 30 June 2014. Corporations affected by the requirement to submit variations would have incurred significant costs in preparing and providing the required documentation and assurances of compliance.

Whilst the possibility of the Repeal Bill's commencement after 30 June 2014 was considered at the time of drafting, the risk of offending principle 1(a)(v) was mitigated by the introduction of the Repeal Bill during week 1 of the current sittings, being the earliest possible opportunity, to allow for its consideration by the Parliament within the timeframe afforded by the Winter sittings before 30 June 2014.

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The House of Representatives passed the Repeal Bill on 2 June 2014. As a consequence of the delay in the Senate's consideration of the Bill, its commencement will now result in the Repeal Bill taking effect retrospectively, if in fact the Repeal Bill is passed.

Notwithstanding the possibility of the Repeal Bill's retrospective operation, the fixed date commencement was considered beneficial, and to that extent, does not have the potential to expose those affected by the Repeal Bill's provisions to any trespass upon their rights and liberties (in contravention of principle 1(a)(i) of the Committee's terms of reference) when the Bill eventually came into force. To the contrary, it would not, for example, make past behaviour subject to criminal sanctions, and would not purport to retrospectively acquire any person's property or negate any legal rights against the Commonwealth or a third party. In this regard, the Bill's commencement will only result in the removal of compliance obligations and their related costs for affected corporations in relation to assessment plan variations required for new development projects.

I note the Committee also sought further information about the Trade Support Loans Bill 2014 (TSL Bill), in particular regarding custodial penalties, onus of proof, delegation of the Secretary's powers under the TSL Bill, the standing appropriation and the TSL Bill's related legislative instruments. The TSL Bill was introduced into Parliament on 4 June 2014 to introduce income contingent loans of up to $20,000 for apprentices.

The Committee has asked why further conditions for qualification (ss8(1)(d), 8(2)(a)(i) and 8(3)) have been allowed to be prescribed in the rules as opposed to the primary legislation. These matters have been left to the rules to provide some degree of flexibility to adapt qualification for trade support loans to deal with future changes. Given that Australian apprenticeships are regulated by states and territories, flexibility is needed to ensure that where there are changes in level of qualifications, the qualification criteria for TSL can be adjusted accordingly.

The Committee has asked for justification for the imposition of custodial penalties of 12 months and 6 months respectively for the offences in section 63 and 73. These penalties are consistent with Commonwealth policy regarding the setting of penalties. In particular, the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers provides that 'a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness' (page 39). This penalty is consistent with the penalty for similar offences in section 74 (Offence – Failure to comply with notice) and section 197 (Offence – Failure to comply with requirement) of the *Social Security (Administration) Act* 1999.

The Committee has asked for justification for reversing the onus of proof without providing further detail on what constitutes a reasonable excuse defence. The decision to impose the penalties under sections 63 and 73 will only be made by a Court. It will be a matter for the Court to decide what is a reasonable excuse. The independence of the judiciary ensures that potential offenders will be provided with ample opportunity to argue that they had a reasonable excuse.

The Committee asked for further information regarding which of the Secretary's statutory functions may be delegated to non-government decisions makers and the appropriateness of this approach. The Department of Industry has contracted with a number of entities to deliver support services to Australian apprentices and their employers. These entities are commonly referred to as Australian Apprenticeship Centres (AACs). AAC's perform a range of functions including assessing, approving and processing the payment of Australian Government incentives to eligible employers and personal benefits to eligible Australian Apprentices. Given the current services AAC's currently deliver, it is considered appropriate that they also be involved with the delivery of trade support loans.

Accordingly, it is expected that the Secretary will delegate to Australian Apprenticeships Centres powers and functions necessary to perform this delivery function. Broadly speaking, this will involve the delegation of powers or functions necessary to allow AAC's to accept and assess applications, make a decision on whether to grant or refuse an application, determine payability of trade support loan, cancel payments, issue and receive certain notices and review decisions.

The Committee also seeks the Minister's advice on whether it is possible to limit the delegation to non-government decision makers to instances of powers or functions where the necessity for doing so has been established. Under the current TSL Bill, the Secretary can delegate all or any of her powers or functions. It is a matter for the Secretary to decide which of her functions or powers she will delegate and to whom.

The Committee also sought a justification for the use of a standing appropriation for the TSL programme. A standing appropriation ensures the effective administration of the TSL programme, and gives certainty to Australian Apprentices that support will be available through this demand-driven programme. The volume of Trade Support Loan payments will depend on individual eligibility and cannot be predicted sufficiently accurately for the purposes of an annual appropriation. The standing appropriation model is also consistent with established appropriation models under social security law and family assistance law.

Finally, the Committee asked for information relating to the rule making power contained in clause 106 of the TSL Bill, in particular the breadth of power that may be prescribed therein. The Office of Parliamentary Council has provided a letter in response, found at Attachment A.

I hope the Committee finds this information of assistance.

Yours sincerely

Ian Macfarlane

Encl.

Australian Government
Office of Parliamentary Counsel

Our ref:
Your ref:

The Hon. Ian MacFarlane MP
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Dear Minister

Trade Support Loans Bill 2014—Request for information from Senate Standing Committee for the Scrutiny of Bills

Background

1 In Alert Digest No. 6 of 2014, the Senate Standing Committee for the Scrutiny of Bills asked you for information on matters relating to the general rule making power in clause 106 of the Trade Support Loans Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) in relation to those matters.

2 Clause 106 is as follows:

106 Rules

(1) The Minister may, by legislative instrument, make rules prescribing matters:
  (a) required or permitted by this Act to be prescribed by the rules; or
  (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), the rules may prescribe matters of a transitional nature (including prescribing any saving or application provisions) arising out of changes to the rules or changes to the administration of trade support loan.

3 The Committee's comments on the clause were as follows:

Delegation of legislative power
Clause 106

Clause 106 of this bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general

instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

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

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- **whether general rule-making powers, such as clause 106, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**

- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).**

Prescribing of matters by legislative rules

4 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).

Ramifications for the quality and scrutiny of legislative rules

5 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues. The information set out in the following paragraphs supplements the information previously provided to the Committee in a letter from me (the OPC Farm Household Support letter) responding to concerns raised by the Committee in Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014. Extracts of my letter were set out in the Committee's Fifth Report of 2014. Similar supplementary information has already been provided to the Senate Standing Committee on Regulations and Ordinances.

1. OPC's drafting functions

(a) OPC's drafting functions generally

6 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

7 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

8 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

9 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

10 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

11 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

12 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

13 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

14 *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

15 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

16 I am also required to govern OPC in a way that promotes proper use and management of public resources for which I am responsible (see section 15 of the *Public Governance, Performance and Accountability Act 2013*), including resources allocated for the drafting of subordinate legislation.

17 I consider that DD3.8 is an appropriate response to this responsibility in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

18 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

19 As mentioned in the OPC Farm Household Support letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

20 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies" . The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

21 In my view, the Council's statement is still accurate today.

22 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

23 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would

comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

24 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

25 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

26 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

(d) Proliferation of number and kinds of legislative instruments

27 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

28 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

29 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

30 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may

have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

31 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

32 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

33 In response to the material in OPC Farm Household Support letter the Committee has stated, in its Fifth Report of 2014:

> 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.

34 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

The first issue raised by the Committee: whether general rule-making powers would permit a rule-maker to make certain kinds of provisions

35 The Committee has asked whether a general rule-making power would permit the rule-maker to make the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(e) seizure provisions;

(f) provisions which make textual modifications to Acts;

(g) provisions where the operation of an Act is modified;

(h) civil penalty provisions;

(i) provisions which impose (or set or amend the rate) of taxes;

(j) provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

36 The standard form of a general rule-making power contains:

(a) a "required or permitted" power; and

(b) a "necessary or convenient" power.

37 The Committee's question needs to be considered separately in relation to each of those powers.

The "required or permitted" power

38 The "required or permitted" power authorises the rule-maker to make rules prescribing matters "required or permitted by this Act to be prescribed by the rules". This is not a power at large. Its scope is entirely dependent on what other provisions of the same Act expressly say must or may be done in the rules.

39 Could another provision of the same Act expressly authorise the rules to include provisions of the kinds identified by the Committee? In theory yes, but there are some significant constraints on this.

40 The first constraint is that the provision containing the express authorisation must have been passed by both Houses of the Parliament. A Bill introduced into Parliament may contain clauses purporting to expressly allow rules to contain provisions of one or more of these kinds, but the question whether the clauses are agreed to by the Parliament is of course a matter for each of the Houses.

41 The second constraint arises out of OPC's drafting policy as set out in DD3.8. This sets out OPC's approach to drafting instrument-making powers, including general rule-making powers. It contains a number of paragraphs affecting the approach that the drafter of a Bill should take when drafting provisions that will allow matters to be dealt with by rules or regulations.

The "necessary or convenient" power

42 The "necessary or convenient" power authorises the rule-maker to make rules prescribing matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act." Like the "required or permitted" power, this is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act…will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition,* 2012 at 14.5). Only a provision of the latter kind is valid.

43 The Committee's list of kinds of provisions differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (http://www.ags.gov.au/publications/legal-briefing/br102.html).

44 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions in the Committee's list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

45 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

46 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency.

47 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

The second issue raised by the Committee: whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards

48 The Committee has asked whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of DD3.8).

49 All OPC drafters are required to comply with DD3.8. This is part of their broader obligation to comply with all the Drafting Directions.

50 OPC does not monitor whether legislative instruments drafted outside OPC comply with drafting standards (or Drafting Directions). OPC does not have resources to perform a monitoring role in relation to all such instruments, nor is it appropriate for it do so. The responsibility for ensuring that an instrument is within power, and complies with drafting standards, should lie with the rule-maker. The options mentioned in paragraphs 45 and 46 would assist a rule-maker's ability to ensure instruments are within power, and would emphasise the rule-maker's responsibility.

Conclusion

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

52 Finally, I should mention that the Senate Standing Committee on Regulations and Ordinances, in commenting on instruments made under general rule-making powers, has raised some similar issues to those covered in this letter. I will be attending a briefing with that Committee next week.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
3 July 2014

The Hon Greg Hunt MP

Minister for the Environment

MC14-014577

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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18 JUL 2014

Dear Senator Polley Helen

I refer to correspondence of 10 July 2014 from Ms Toni Dawes, Committee Secretary, concerning the Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014. I note that the Standing Committee for the Scrutiny of Bills has sought further comments following my response of 6 July 2014. The Bill has now been passed by both Houses of Parliament and commenced on 1 July 2014, and the provisions are now part of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The Committee sought further information on why the EPBC Act itself could not include limits or other parameters on the level of fees, and why the cost recovery provisions could not include safeguards or 'other important parameters'. The new provisions do in fact set parameters - the fee must be a fee for services provided under the EPBC Act. The new section 520(4A) states: 'the regulations may prescribe fees that are payable for services the Minister or Secretary provides in performing functions, or exercising powers, under this Act or the regulations'. These services are in turn determined by the provisions of the EPBC Act.

The Minister's ability to set the fees is therefore constrained by the service which the Minister or Secretary perform. Any limits or parameters in the legislation risk constraining the extent to which the fee reflects the actual costs of the service which is provided by the Minister or Secretary, and changing its characterisation as a fee for service. The Committee in its report noted that the line between a tax and a fee can be difficult to draw, but in this case the fee is a fee for service, which is why it has not been included in a separate Bill relating to taxation. The nature of the fee therefore means that the only necessary and appropriate limits or parameters are that the fee reflects the actual costs of providing the relevant service.

I also note that the Australian Government Cost Recovery Guidelines provide the framework for the implementation of cost recovery schemes and the Department of the Environment has followed these Guidelines. These Guidelines provide extra assurance that the fees payable are for services provided under the EPBC Act. The Guidelines require extensive consultation on a Cost Recovery Impact Statement to ensure that the method the Department of the Environment uses to determine the value of services provided accurately reflects the efficient provision of those services.

The Guidelines also require ongoing monitoring and regular review. The Cost Recovery Impact Statement commits the Department to reviewing the cost recovery arrangements following the implementation of the One-Stop Shop. This will allow for further consideration of whether the fees set still reflect the service provided following reforms to the environmental approval system. For example, where the Department is able to find more efficient ways of providing relevant services, those efficiencies will be reflected in reduced fees which can be implemented through amendments to the Regulations.

Finally, the Committee sought advice on why assessments of the complexity of projects currently subject to internal merits review cannot be subject to external merits review. As noted in the explanatory memorandum, the method for assessing fees involves the categorisation of referred actions into varying levels of complexity. More complex actions require more resources to assess the action, increasing the cost of providing the service.

Factors which affect the determination of complexity include:

- the number listed threatened species the action will have an impact on,
- the status of those species (threatened, endangered, critically endangered or extinct in the wild),
- the number of project components, and
- likely impacts of the project.

These are largely objective criteria which will be identified in the referral documentation. The provision for internal merits review allows for the correction of errors, but external merits review is not necessary given the limited discretion involved in the decisions.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Senator the Hon Michaelia Cash
Assistant Minister for Immigration and Border Protection

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Dear Senator Polley

Migration Amendment (Protection and Other Measures) Bill 2014

Thank you for your letter dated 10 July 2014 in relation to comments made in the Committee's Alert Digest No. 8 of 2014 concerning the Migration Amendment (Protection and Other Measures) Bill 2014. I would like to provide the following advice to the Committee as a result of the comments in the Alert Digest.

Adequacy of merits review rights
Schedule 1, item 14, proposed section 423A

The committee therefore seeks the Minister's advice as to the justification for departing from the general approach to the role played by merits review.

The committee has expressed concern that proposed section 423A involves a departure from the general approach to the role played by merits review, namely that the Refugee Review Tribunal (RRT) would be restricted to making the correct and preferable decision "on the material before the original decision-maker" rather than "on the material before the tribunal". The committee supports an applicant's entitlement to introduce new facts to support their Protection visa application.

In response, I note that section 423A does not limit the RRT to the facts and evidence before the original decision-maker. Rather, it clarifies the manner in which the RRT is to consider any new claims and evidence presented to it. Applicants may continue to introduce new claims and evidence to support their application at the review stage. However, if the RRT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, the Tribunal will draw an inference unfavourable to the credibility of the new claims or evidence raised.

As stated in the Second Reading speech, the intention of this provision is to "enable timely, efficient and quality protection outcomes" by discouraging late claims. This measure benefits all applicants with genuine claims to protection in Australia. Early and full presentation of claims and supporting evidence allows people entitled to protection to be recognised at the earliest opportunity.

It is the Government's position that it is reasonable to expect claims and supporting evidence to be provided as soon as possible. It is also reasonable to seek an explanation as to why claims and evidence were not presented at the earliest available opportunity.

Encouraging all claims to be presented at the earliest opportunity is consistent with guidelines issued by the United Nations High Commissioner for Refugees (UNHCR). The current UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* state that an applicant should "assist the examiner in full in establishing the facts of his case" and "supply all pertinent information ... in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40, December 2011).

A key aim of merits review generally is that it needs to be economical, just and efficient. This amendment is consistent with improving efficiency in the merits review process. The measure will not impact on the just resolution of claims in that new claims and evidence can still be considered.

In addition to the general response sought above, the committee also seeks the Minister's advice on the following specific issues:

1. ***The extent of any practical problem created for the Refugee Review Tribunal in dealing with claims raised and evidence presented during a review application which were not raised earlier by applicants;***

While this measure does not involve practical problems for the RRT, it does involve a number of practical considerations, particularly:

- Appropriate notice to applicants regarding new claims and evidence;
- Identifying new claims and evidence;
- Provision of a reasonable explanation for new claims and evidence;
- Providing natural justice to applicants who do not provide a reasonable explanation.

The practicalities of each point are addressed below.

Notice to applicants

In addition to publicly available information on the departmental website, including the Protection Application Information and Guides (PAIG), all Protection visa applicants will be advised of requirements to present claims and evidence at the primary stage in the initial letter they receive from the department, once their application has been lodged.

The RRT may reinforce this advice to applicants through the Tribunal website, in general information available to applicants (eg. the RRT form *Information on making an Application for review to the Refugee Review Tribunal*).

Identifying new claims and evidence

Identifying new claims and evidence does not present practical difficulties as a Tribunal member must currently consider all claims for protection made by a Protection visa applicant, and address each claim. Identifying new claims and evidence will be a minor additional step when documenting those claims.

Section 423A does not allow or require the RRT to disregard new claims or evidence. All claims and evidence presented must be considered and evaluated. It is only once all claims have been considered that a Tribunal member can determine whether an applicant's explanation for presenting new claims or evidence is reasonable.

Provision of a reasonable explanation

According to the proposed section 423A, if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the new claims or evidence were not presented before the primary decision was made, the Tribunal is to draw an inference unfavourable to the credibility of the new claims or evidence.

Where a reasonable explanation has not already been provided by the applicant, it is open to the RRT to seek such an explanation. The manner in which that explanation is sought is a matter for the Tribunal.

It is open to the Tribunal to determine whether or not a reasonable explanation is implicit in the new claims or evidence. For instance, there may have been a significant change in the home country after the primary decision was made, so it may not have been possible for the applicant to make the new claims or provide relevant evidence earlier. An applicant may also experience a direct and obvious change to their circumstances, for instance, the birth of a child who may have protection claims in their own right. In such cases, the Tribunal member may consider a reasonable explanation to be self-evident.

Appropriate reference will be made to the applicant's explanation in the RRT reasons for decision.

Natural justice

Where a member of the Tribunal is not satisfied that the explanation provided for new claims and evidence is reasonable, the applicant will be afforded natural justice, in accordance with requirements for procedural fairness codified in the Migration Act.

2. ***Why any such problem could not be dealt with by a provision which allows rather than requires an adverse inference to be drawn. Such an approach would appear to be less likely to result in outcomes which depart from the general function of merits review to reach the correct and preferable decision by enabling the Tribunal to consider the appropriateness of its factual inferences in the individual circumstances of particular cases.***

Consistent with the proposed section 5AAA, the wording of section 423A reflects the legitimate objective of making it extremely clear that it is the responsibility of a non-citizen to specify all particulars of a claim for protection in Australia, and to do so as soon as possible. To specify that the RRT **may** draw an unfavourable inference, rather than stating that the RRT **is** to do so, would simply reflect current Tribunal policy and practice and not effectively achieve the Government's policy objective.

As previously stated, this measure does not prevent applicants making, nor the RRT considering, new claims and evidence. It does, however, require the Tribunal to consider the credibility of any new claims or evidence. It also provides an appropriate mechanism to support the RRT to make an adverse credibility finding with regard to new claims and evidence if it is satisfied that the applicant does not have a reasonable explanation. It is the role of the Tribunal to determine whether an explanation for new claims and evidence is reasonable, with regard to the individual circumstances of the applicant.

3. ***Whether it is possible to give greater legislative guidance as to the meaning of 'reasonable explanation'. In this respect the committee notes that the explanatory memorandum does little to clarify what circumstances might legitimately lead the Tribunal to be satisfied that a reasonable explanation has been provided.***

Greater guidance with regard to "reasonable explanation" is not required within this provision itself. The general principles of administrative law and reasonable decision-making apply and the Tribunal will consider what is reasonable in all of the circumstances of the case. It will be a matter for the RRT to develop guidelines to assist in the interpretation of this phrase, which has been deliberately left undefined as circumstances will differ from case to case.

A reasonable explanation may include, but is not limited to:

- no reasonable opportunity to present the claim, eg. interpreting or translating error made in the primary stage of the application;
- a change in the country situation affecting human rights occurred after the primary decision was made;
- new information relevant to the application became available, eg. new documentary evidence of identity was forthcoming from the authorities in the home country;
- a change in personal circumstances allowing presentation of new claims, eg. a new relationship (spouse or child) with a person who has protection claims in their own right; or
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate persecution claims.

Procedural fairness – Fair hearing
Schedule 1, item 1, proposed section 5AAA
Schedule 1, item 14, proposed section 423A

Given the importance of clear notice about the consequences of section 5AAA and section 423A to the provision of a fair hearing, the committee seeks the Minister's advice as to whether this could be dealt with in the legislation rather than policy.

Although this could be dealt with in legislation, it is the Government's view that it is not necessary to specify the need to give clear notice about the consequences of section 5AAA or section 423A in legislation, in order to provide non-citizens seeking protection in Australia with a fair hearing. Section 5AAA states basic expectations of the Australian community and government, as well as an acknowledged principle of refugee status determination – that the "burden of proof" in establishing claims for protection rests with the asylum seeker (UNHCR Handbook, para 196).

The proposed sections 5AAA and 423A clarify that the role of the departmental and RRT decision-maker is to decide whether the protection visa applicant meets the visa criteria, in particular to be satisfied that Australian has protection obligations to the visa applicant, not to advocate on behalf of a non-citizen seeking protection. These provisions do not change the decision-maker's obligation to assess claims for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and decision-maker, consistent with UNHCR guidelines. Decision-makers evaluate each case on its individual merits with regard to the circumstances in the home country or countries. During the application process, including merits review before the RRT, Protection visa applicants have repeated opportunities to present and clarify claims and supporting evidence. People seeking protection in Australia may also seek judicial review.

The Government is aware that public messaging is important to ensure that people seeking protection are aware of their obligations to provide all claims and supporting evidence as soon as possible. Non-citizens claiming protection in Australia will be advised of these responsibilities through general public information, including that available on the departmental website and Protection Application Information and Guides, as well as through initial written communication with applicants. As previously noted, the RRT may also reinforce that advice through the Tribunal website, in general information available to applicants.

It is in the interests of the applicant, and the process as a whole, to ensure consistent and clear information is provided about responsibilities under section 5AAA and section 423A, and the consequences of not complying with those provisions. The requirements for procedural fairness codified in the Migration Act will continue to apply to decision-makers during the primary and review stages.

Section 423A does not prevent an applicant from raising new claims and evidence during the RRT hearing, as is claimed on page 19 of the Alert Digest 8/14. Related points have been addressed in earlier questions, and provide greater detail regarding that measure.

Retrospective commencement – application of amendments
Schedule 2, Part 2, item 8

There is a question of fairness as to whether applications or administrative processes which have already been commenced should be dealt with by reference to the law as it existed at the time of the application or when the administrative processes were commenced … The committee therefore seeks the Minister's advice as to the justification for this approach.

As acknowledged on page 20 of the Alert Digest 8/14, these amendments do not take effect prior to their commencement date, but operate prospectively, albeit in respect of already existing Protection visa applications or administrative assessments.

This amendment expresses a clear legislative intent for the threshold test to apply to any non-citizen who has not yet had their Protection visa application finally determined, or an administrative assessment finalised, prior to the commencement of Schedule 2 of the Bill. This intent overrides any rights that may have been accrued by a non-citizen to have their application or administrative assessment considered in accordance with the law that existed at the time they applied or when the administrative process commenced. It is the Government's view that all "complementary protection" assessments be considered under the same law and against Parliament's intended interpretation of Australia's *non-refoulement* obligations under the Convention Against Torture and the International Covenant on Civil and Political Rights. This approach is consistent with the fact that the amendment expresses the threshold at the level intended by Parliament when the complementary protection provisions were introduced into the Act in March 2012.

Undefined scope of administrative power
Delegation of legislative power
Schedule 4, Part 1, item 7, proposed section 353B
Schedule 4, Part 1, item 22, proposed section 420B

In light of the above comments the committee seeks the Minister's advice as to whether the proposed sections are to be characterised as:

a) an exercise in judicial power and, if so, whether it is appropriate to confer them on an administrator; or

b) legislative in character and subject to disallowance under the Legislative Instruments Act 2003.

The amendments under proposed sections 353B and 420B will align and reduce inconsistencies in decision-making and increase efficiency by enabling the Principal Member of the Migration Review Tribunal (MRT) and RRT to issue guidance decisions. Guidance decisions are intended to be issued by the Principal Member in relation to identifiable common issues in matters before the MRT and RRT respectively, and tribunal members would be expected to follow them unless the facts or circumstances in the current matter before them could be distinguished. Use of the powers created by these amendments will promote consistency in decision-making across the MRT and RRT respectively in relation to common issues and/or the same or similar facts or circumstances.

Guidance decisions are not intended to go to the conduct of the review, but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases. Proposed subsections 353B(2) and 420B(2) provide that while tribunal members are required to comply with a guidance decision in reaching a decision on review in cases with like issues and evidence, the tribunal does not need to comply with the guidance decision if the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision. In addition, proposed subsections 353B(3) and 420B(3) provide that non-compliance by tribunal members does not mean that the tribunal's decision on a review is an invalid decision.

The power of the Principal Member of the MRT and RRT to issue guidance decisions is not an exercise of judicial power. Only the courts stipulated in section 71 of the Constitution can exercise the judicial power of the Commonwealth.[1] A person or body which is part of the executive government, such as the Principal Member of the MRT and RRT, cannot exercise the judicial power of the Commonwealth. As such, proposed sections 353B and 420B will involve the exercise of legislative power by the Principal Member.

The guidance decision is an exercise of legislative power, but is not subject to disallowance under the *Legislative Instruments Act 2003* (LIA). Section 7 of the LIA provides for instruments declared not to be legislative instruments. Paragraph 7(1)(a) of the LIA provides that an instrument is not a legislative instrument for the purposes of the LIA if it is included in the table in section 7. Item 24 of that table relevantly provides that instruments that are prescribed by the regulations for the purposes of this table are not legislative instruments.

[1] *R v Kirby; Ex partre Boilermakers' Society of Australia* (1956) 94 CLR 254).

Regulation 7 of the *Legislative Instruments Regulations 2004* (LIR) provides that for item 24 of the table in subsection 7(1) of the LIA, and subject to section 6 and 7 of the LIA, instruments mentioned in Schedule 1 of the LIR are prescribed. Item 6 of Part 1 of Schedule 1 provides that a practice direction made by a court or tribunal are not legislative instruments. As such the direction of a Principal Member in relation to a guidance decision is not a legislative instrument for the purposes of the LIA and is not subject to disallowance.

In addition, in light of the Minister's response to the above, the committee requests the Minister's further advice as to what aspects (facts or reasons) of a 'guidance decision' will be binding and how a decision-maker will be able to identify them.

What aspects of a guidance decision will be required to be complied with is a matter for the Principal Member when deciding to issue a guidance decision. The Principal Member will issue a direction that the guidance decision is to be complied with when the Tribunal is reaching a decision of a kind specified in the direction. The issuance of the direction allows the Principal Member the flexibility to tell the decision maker what needs to be complied with to assist the tribunal members. A guidance decision will not be complied with where members are satisfied that the facts or circumstances of the decision under review are clearly distinguishable from that of the particular guidance decision. Non-compliance by Tribunal members with a guidance decision will not invalidate that decision on a review.

Procedural Fairness
Broad discretionary power
Schedule 4, item 11, proposed subsection 362(1A)
Schedule 4, item 26, proposed subsection 424A(1A)

Given the importance of the exercise of this power to ensure that a fair hearing is provided, the committee seeks the Minister's advice as to the appropriateness of the overall approach.

The purpose of the amendment under proposed subsection 362B(1A) is to clarify that if a review applicant fails to appear before the MRT, in response to an invitation under section 360 of the Act, the MRT has the option of dismissing the application or making a decision on the review, as is the case under current subsection 362B(1). Proposed subsection 426A(1A) mirrors in subsection 362B(1A) for matters before the RRT.

The Government is committed to ensuring that MRT and RRT review applicants remain entitled to a fair hearing.

The power to dismiss a review application for non-attendance is not intended to impact on procedural fairness already codified in the Act. It is intended to increase tribunal efficiency by providing for a quick resolution of a case where, following the usual accordance of procedural fairness, the applicant for review has not attended the hearing. Dismissal for failure to attend a hearing is one of three possible options the tribunals may consider for non-attendance by an applicant at a hearing. The other options are either to proceed to a decision on the review or reschedule the hearing.

If dismissal is chosen, the tribunals will have a power to reinstate an application where the applicant applies within a certain time period and the relevant tribunal considers it appropriate to reinstate the application.

Review applicants will be made aware in the invitation to hearing letter that, if they do not attend a hearing after being invited to do so, their application may be dismissed for failing to appear. The tribunals will be required to notify the applicant of the decision to dismiss the application for failure to appear. The notice will also include information that sets out how the review applicant can seek reinstatement of their review application within a specified timeframe. Where the tribunals reinstate a review application, the applicant will be notified that their application is taken never to have been dismissed and the review will continue.

The tribunals are required to afford procedural fairness in accordance with the Migration Act. The Government notes that, in the migration and refugee context, there is a high incentive for merits review to be used by unsuccessful visa applicants and asylum seekers with unmeritorious claims to delay their removal from Australia. The Government therefore considers that a power enabling review applications at the MRT and RRT to be dismissed for non-attendance at a scheduled hearing would allow the tribunals to focus resources away from matters that are not actively being pursued by the review applicant.

This proposed measure applies to all individuals within the MRT and RRT's jurisdiction and will support the Government's legitimate objective of strengthening the administrative efficiency and processes of the tribunals to support the integrity of the merits review process The measure does not limit the right set out in the Migration Act to a hearing by the RRT or MRT, rather it provides for a new consequence if the person does not exercise that right.

Thank you for considering this advice. The contact officer in my Department is Karen Visser, Director, Protection and Humanitarian Policy Section, who can be contacted on (02) 6264 4124.

Yours sincerely

Senator the Honourable Michaelia Cash
Assistant Minister for Immigration and Border Protection
/ /2014

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: B14/827

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

Dear Senator

I refer to the letter of 19 June 2014 sent to my office from the Committee Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee) seeking my advice on the issues raised by the Committee about the *Public Governance, Performance and Accountability Amendment Act 2014* (PGPA Amendment Act).

Please find enclosed responses to each of these issues that explain the intent behind the relevant provisions. In most cases, there is no change from the prior policy approach under the *Financial Management and Accountability Act 1997* and *Commonwealth Authorities and Companies Act 1997*. Where modifications have been made to improve existing arrangements, this has been explained, and external sources of scrutiny have been mentioned, where applicable.

I trust this information addresses the Committee's concerns.

Kind regards

Mathias Cormann
Minister for Finance

15 July 2014

Response to Comments by the Senate Standing Committee for the Scrutiny of Bills on the *Public Governance, Performance and Accountability Amendment Act 2014* (PGPA Amendment Act)

1. Borrowing by corporate Commonwealth entities (section 57) and Investment by the Commonwealth (section 58)

Relevant provisions:

- Schedule 1, item 43, subsection 57(2)
- Schedule 1, item 44, subsection 58(9)

Issue: Whether these subsections may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Response:

Subsection 57(2) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) clarifies that section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to instruments issued by the Finance Minister authorising certain types of borrowing for corporate Commonwealth entities under paragraph 57(1)(b). This is consistent with the treatment of authorisations provided by the Finance Minister when the power to borrow is contained in an entity's enabling legislation.

Disallowance of such an instrument would adversely impact on the operations of government and limit the ability of corporate Commonwealth entities to manage their resources in a cost effective and sustainable manner.

Accountability for the management of borrowing rests with the accountable authority of the entity under the PGPA Act, with details of borrowing subject to review by the Auditor-General and included in the financial statements and annual reports presented to the Parliament.

Reinvestments by the Commonwealth under subsection 58(6) can be authorised in writing by the Finance Minister or Treasurer. Reinvestments are administrative in nature, representing decisions based on sound commercial practice to optimise the financial position of the Commonwealth in a range of circumstances. While the authorisations will be properly disclosed, any possibility of disallowance would constrain the ability of the Commonwealth and other parties to enter into arrangements with commercial certainty.

In both cases, Parliamentary scrutiny is more practically directed towards the statutory authority rather than subsidiary transactions. These instruments do not impact on the purposes or functions of entities; they are designed to support the efficient resource management of entities. From a practical perspective if these authorisations were subject to disallowance it would create uncertainty for impacted entities. The disallowance of these

instruments cannot undo any existing contractual obligations. Entities would have to terminate existing borrowing or investment arrangements in order to be compliant with legislative requirements if the authorisations were disallowed –generally there is a significant cost to early termination.

2. Waiver of amounts or modifications of payment terms (section 63) and Act of grace payments by the Commonwealth (section 65)

Relevant provisions:

- Schedule 1, item 48, section 63
- Schedule 1, item 52, subsection 65(2)

Issue: Whether these provisions may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks advice as to whether consideration has been given to whether the Act could require the rules to include limits or guidance on the exercise of this broad discretionary power.

Response:

The Finance Minister has discretionary powers under paragraph 63(1)(a), subsection 64(1)and subsection 65(1) of the PGPA Act to authorise waiver, set-off or modification of amounts and to authorise act of grace payments by the Commonwealth.

The waiver of amounts or modification of payment terms are administrative mechanisms used to manage existing relationships between the Commonwealth and individuals or entities. Similarly, authorisations of act of grace payments are of an administrative rather than a legislative nature. Subsections 63(5) and 65(4) clarify that the Finance Minister's authorisations in these situations do not fall within the scope of section 5 of the *Legislative Instruments Act 2003*.

Exercising these powers often requires consideration of the personal and financial circumstances of the parties involved, who maybe in financial stress. Cases may involve tax confidentiality laws or other privacy regimes. It is therefore appropriate that the Finance Minister retains sufficient flexibility to exercise this power in a way that can accommodate the broad range of personal circumstances that may be the subject of such a request.

There is an accountability mechanism for the exercise of this power in the PGPA Rules.

Consistent with arrangements under sections 33 and 34 of the *Financial Management and Accountability Act 1997* (FMA Act) and regulation 29 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations); sections 63 and 65 of the PGPA Act and section 24 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) requires the Finance Minister to consider (but not be bound by) the report of an advisory committee (comprising Commonwealth public servants of three different agencies) before making authorisations that involve amounts of money above a certain threshold.

Section 24 of the PGPA Rule ensures transparency for any waiver of debts, modifications and set-offs of amounts owing to the Commonwealth and act of grace payments that are above a

$500,000 threshold. The PGPA Rule increases this threshold amount from $250,000 to $500,000 in recognition of movements in values since the time the FMA amount was set.

Consistent with the FMA framework, the delegation of these powers is limited to a small number of individuals within the Commonwealth with specific financial thresholds.

3. Rules relating to the Commonwealth Superannuation Corporation (section 104)

Relevant provision:

- Schedule 1, item 70, section 104

Issue: Whether this section may be considered to delegate legislative powers inappropriately. The Committee seeks justification for the proposed approach

Response:

Section 104 of the PGPA Act previously allowed for rules to be made to modify the application of the Act and the PGPA rules in relation to the Commonwealth Superannuation Corporation (CSC) and in relation to intelligence or security agencies or listed law enforcement agencies.

The *Public Governance, Performance and Accountability Amendment Act 2014* (PGPA Amendment Act) does not change the position of the PGPA Act in relation to CSC from that approved by the Parliament in June 2013. As the revised explanatory memorandum to the PGPA Act explained, 'modifications may also be necessary in the case of the Commonwealth Superannuation Corporation (CSC) so as not to interfere with its specific obligations as the corporate trustee of the Australian Government's main civilian and military superannuation schemes under a range of Commonwealth legislation, including the *Governance of Australian Government Superannuation Schemes Act 2011*, several Commonwealth Superannuation Acts and the prudential framework for superannuation in the *Superannuation Industry (Supervision) Act 1993*'.

However, the PGPA Amendment Act does make two amendments to section 104. The first of these is to add a reference to modification instruments made under the Act. The reason for this amendment is that prior to the application of PGPA Amendment Act, procurement and grant arrangements were to be applied through the use of rules, whereas these will now be made as another form of legislative instrument other than a rule. Further explanation about these arrangements can be found under item 4 of this response.

The second amendment is to relocate arrangements for intelligence or security agencies or listed law enforcement agencies to another section of the Act (section 105D). Further explanation about the operation of section 105D can be found under item 5 of this response.

4. Instruments relating to procurement (section 105B) and Instruments relating to grants (section 105C)

Relevant provisions:

- Schedule 1, item 72, subsections 105B(2) and 105C(2)

Issue: Whether these subsections insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks justification for preventing Parliament from having the opportunity to disallow instruments that potentially expend significant amounts of Commonwealth funds. The Committee also requests the provision of specific examples of potential problems if these instruments were subject to disallowance provisions and information as to whether modified disallowance procedures could address any concerns.

Response:

The committee notes that significant amounts of Commonwealth funds are expended through procurement and non-statutory grant processes. However, the legislative instruments that the Finance Minister may make under sections 105B and 105C do not, in themselves, expend significant amounts of Commonwealth funds. The instruments establish additional requirements for making decisions to undertake procurement or make grants, beyond the core disallowable requirements of the PGPA Act and PGPA Rule. For example, requirements in relation to the actual approval of commitments of relevant money are found in section 18 of the PGPA Rule, which is a separate provision subject to disallowance.

The procurement and grant arrangements under the FMA Act and FMA Regulations are not disallowable; and the PGPA Act continues the same approach. The possibility of disallowance of procurement and grant instruments would undermine the commercial certainty of arrangements made pursuant to these instruments that are key to the government's delivery of programmes and services.

Disallowance of the Commonwealth Grants Rules and Guidelines (CGRGs) could severely impact non-government stakeholders currently involved in a grants process. It is not uncommon for grant applicants to spend considerable time and money developing applications in accordance with government grant programme guidelines. For example, on average, consultants charge $5000 to develop a grant application. Changing the requirements under the CGRGs may require applicants to redevelop and resubmit applications; affect the outcomes of assessment processes, unfairly disadvantaging applicants; affect ongoing negotiations of grant agreements; and cause existing grant agreements to be inconsistent with the Commonwealth grants policy framework.

The instrument relating to procurement, known as the Commonwealth Procurement Rules (CPRs), is the key instrument for implementation and compliance with Australia's

international government procurement obligations. These international agreements are subject to parliamentary inquiry prior to their entry into force. Australia cannot amend the obligations in our international agreements, except with the support of the other countries.

The CPRs assist Commonwealth entities with compliance by compiling and interpreting the obligations from multiple agreements into a single rule set. If the CPRs were disallowed, each Commonwealth entity would need to establish its own comprehensive procurement framework to meet the obligations in our international agreements. This would result in a significant duplication of effort and resources across the government. There would also be reduced transparency and certainty for suppliers regarding the government's procurement processes.

5. Instruments relating to intelligence or security agencies or listed law enforcement agencies (section 105D)

Relevant provisions:

- Schedule 1, item 72, subsections 105D(3) and (6)

Issue: Whether these subsections may be considered to delegate legislative powers inappropriately and insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee seeks advice as to: a) the necessity of this approach; b) why various requirements of the *Legislative Instruments Act 2003* are considered inappropriate; and c) why publication of the instruments on the Federal Register of Legislative Instruments (FRLI) is likely to compromise national security.

Response:

Section 105D of the PGPA Act provides that the Finance Minister and Ministers responsible for intelligence or security agencies (ISAs) and listed law enforcement agencies (LEAs) may make determinations by written instruments relating to ISAs and LEAs. This is to modify the application of the finance law to protect against the compromise of certain designated operations of these entities. These operations may involve sensitive operational activities, where disclosing financial and performance information to the full extent required by the PGPA Act may compromise national security, protection of the peace or the safeguarding of individuals.

Prior to the commencement of the PGPA Act on 1 July 2014, application of the financial framework to ISAs and LEAs, including the manner in which they disclosed their use of resources, was based on a mixture of legislation, regulation and administrative agreements.

Section 58 of the FMA Act provided for the modification of the FMA Act. Regulations 27, 28, 28A and Schedule 2 of the FMA Regulations modify the application of the FMA Act to ISAs and prescribed law enforcement agencies (PLEAs). Meanwhile, section 46 of CAC Act provided that the application of that Act for a company conducted for the purposes of an ISA is subject to any modifications that are prescribed by the CAC Regulations. In addition the Finance Minister's delegation and Ministerial determinations provided for modified application of the framework in relation to banking, financial reporting and other aspects of certain operations.

The new arrangements seek to improve on these existing modification arrangements by placing in the primary legislation the provisions which may be modified and requiring the modification to be articulated through ministerial determinations.

Responsible Ministers of ISAs and LEAs determine the scope of designated activities subject to modification, to ensure their operational responsibilities are not compromised. Functions

and/or powers of ISAs and LEAs are already provided for in other Commonwealth legislation, including the *Intelligence Services Act 2001*.

The Finance Minister determines how the PGPA Act, its rules and instruments apply to support of the designated activities of ISAs and LEAs. However, subsection 105D(3) limits the scope of modifications that may be made by the Finance Minister. These determinations do not automatically 'turn off' the requirements of the PGPA Act, they may provide for alternate publication requirements or other mechanisms. Under this framework the scope of each determination is able to be tailored to individual agencies.

Subsection 105D(6) of the PGPA Act provides that determinations made under section 105D of the PGPA Act are not legislative instruments. Determinations made under section 105D of the PGPA Act will not be published on FRLI nor their contents communicated. This approach was deemed appropriate to protect Australia's national security and its interests, where the designated activities of ISAs and LEAs are concerned. Information as to the nature of any such determinations is provided for in subsection 105D(3) of the PGPA Act.

There are a number of additional accountability measures in place that may review and provide oversight of the administration and expenditure of entities that form the Australian Intelligence Community and Commonwealth law enforcement agencies. These include the Parliamentary Joint Committee on Intelligence and Security, Parliamentary Joint Committee on Law Enforcement, the Inspector-General of Intelligence and Security and the Auditor-General. Further, subsection 105D(5) of the PGPA Act requires that these determinations must be reviewed at least once every 3 years; or if the activities of the entity change significantly. This is to ensure that the modification of the application of the PGPA Act remains appropriate.

The Hon Kevin Andrews MP
Minister for Social Services

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MC14-008695

17 JUL 2014

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

Dear Senator Helen,

I write in response to a request for information from the Senate Scrutiny of Bills Committee (the Committee), as outlined in *Alert Digest No. 7* on 25 June 2014, regarding Schedule 6, proposed subsection 19DA(3) of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (Bill No. 1) and Schedule 9, proposed subsections 1157AB(3), 1157AC(3), 1157AE(4) and 1157AE(6) of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (Bill No. 2).
The committee asked why instrument making powers were being sought.

Because the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

Proposed subsection 19DA(3) allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to prescribe, by legislative instrument, the circumstances which constitute a personal financial crisis for the purposes of waiving the Ordinary Waiting Period.

This provision provides the Secretary with the flexibility to consider any unforeseeable or extreme circumstances which are identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. I note that this power can only be used beneficially and that any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.

Proposed subsection 1157AB(3) provides flexibility for the Minister to prescribe, by legislative instrument, the conditions when a person transferring from another pension or benefit will not be subject to a part 3.12B exclusion period.

This provision within the Bill will enable the Minister to exempt persons who transfer from certain payments, under certain circumstances, from the initial waiting period. Giving the Minister the flexibility to determine these exemptions via an instrument will reduce the risk of the legislation unintentionally applying an exclusion period to people whose circumstances fall within the Government's exemptions policy. I note that this power can only be used beneficially and that any instrument issued by the Minister would be subject to Parliamentary scrutiny and disallowance.

Proposed subsection 1157AC(3) of the Bill enables the Minister to prescribe, by legislative instrument, the circumstances when gainful work may cause a reduced waiting period to apply, and a method for working out the reduced period.

This will allow the Minister to prescribe the specific formula for taking periods of gainful work into account and also to ensure that certain activities are excluded, such as criminal activities. Using an instrument will allow the Minister to refine the policy to ensure that it is operating efficiently and fairly without having to amend the primary legislation.

Proposed subsection 1157AE(4) allows the Employment Minister to determine, by legislative instrument, the extension periods applying for failures to enter into employment pathway plans, and failures to comply with particular requirements in employment pathway plans.

Proposed subsection 1157AE(6) allows the Minister to, by legislative instrument, determine a method for working out the number of weeks to extend a part 3.12B waiting period, and a method for working out the duration and commencement day for a part 3.12B penalty period, both imposed as consequences for the provision of false or misleading information.

Again, these instrument making powers will ensure that the Minister is able to refine the rules to ensure that these compliance related elements of the policy operate efficiently and fairly.

Taking into account that any instrument seeking to alter application of the provisions will be subject to the scrutiny of Parliament, I do not consider the provisions in Schedule 6, proposed subsection 19DA(3) of Bill No. 1 and in Schedule 9, proposed subsections 1157AB(3), 1157AC(3), 1157AE(4) and 1157AE(6) of Bill No. 2 to be an inappropriate delegation of power.

Should you or the Committee require further information, the policy contact within my Department is Mr Ty Emerson, Branch Manager, Labour Market Payments Policy Branch. Mr Emerson can be contacted on (02) 6146 5925 / 0418 544 014 or via email at ty.emerson@dss.gov.au.

I trust this information is of assistance.

Yours sincerely,

KEVIN ANDREWS MP