Appendix 1

Response to comments made in the Second, Third, Fifth and Sixth Reports of 2012

The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Mr Harry Jenkins MP
Chair, Joint Parliamentary Committee on Human Rights
PO Box 6100
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CANBERRA ACT 2600

Dear Mr Jenkins

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012

I refer to your letter of 22 August 2012 and thank you for the opportunity to comment on the compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Act) with Australia's human rights obligations.

As you note, the Government is not under an obligation to table a human rights compatibility statement in relation to the Act because the relevant Bill was originally introduced into Parliament prior to the commencement of the requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Nonetheless, I am happy to confirm the Government's clear view that the Act complies with Australia's human rights obligations.

While the Act does not breach any of Australia's human rights obligations, as you would appreciate, the absence of inconsistency alone does not guarantee compliance with human rights standards. Rather, compliance with Australia's international obligations extends to what Australia does *in toto* by way of legislation, administration and practice. The Government considers that the actions taken under the Act to date also comply with Australia's international obligations.

The Act raises human rights considerations relating to detention, use of force, non-refoulement and family and children.

The Act does not engage rights relating to freedom of movement (Article 12 of the International Covenant on Civil and Political Rights (ICCPR)) or the expulsion of aliens (Article 13 of the ICCPR), as these provisions relate to rights for persons who are lawfully in a country and to the right to enter one's own country.

The Act operates in relation to people who are not lawfully in Australia and where Australia is not identified as their own country. Further, Article 14 of the ICCPR is

not engaged as it relates to the right to a fair hearing in respect of criminal charges only.

Detention

Article 9 of the ICCPR

Australia takes its obligations in relation to people in detention very seriously.

Article 9 of the ICCPR relates to the right to security of the person and freedom from arbitrary arrest or detention. The Government's position is that the detention of asylum seekers is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether proper grounds for the detention continue to exist.

In the context of Article 9, 'arbitrary' means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

The Act amended subsection 189(3) of the *Migration Act 1958* to remove the discretion to detain an offshore entry person (OEP) arriving at an excised offshore place and make detention mandatory. This change brought detention of unlawful non-citizens who arrived at excised offshore places in line with the detention of unlawful non-citizens who arrived elsewhere, reflecting what generally occurs in practice. This is consistent with Government policy that, in the absence of specific reasons not to detain, all OEPs should be detained for identity, security and other relevant checks.

However, the primary purpose of the temporary detention of OEPs under this amendment is to facilitate their removal to a regional processing country.

Insofar as the Act facilitates the detention of OEPs for the purpose of identity and security checks, and for the ultimate purpose of facilitating their transfer to a regional processing country (as defined by the *Migration Act 1958*), the Act cannot be said to be arbitrary or unreasonable. Further, OEPs can challenge the lawfulness of their detention in the High Court in accordance with the requirements of Article 9(4) of the ICCPR.

Article 10 of the ICCPR

Article 10 requires that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This article aims to ensure that persons deprived of their liberty enjoy all the rights set out in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

Article 10(1) has been interpreted as requiring state parties to provide detainees with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, etc).

Great care is taken by the Government to ensure that people in immigration detention are treated with respect and dignity, are provided with appropriate accommodation and services in a safe and secure environment.
The Detention Services Provider maintains a presence at all immigration detention facilities and is contracted to provide security, meaningful activities, food and other living necessities to individuals accommodated there. The Detention Services Provider is supported by many other organizations such as the International Health and Medical Service, including the Psychological Support Program and Torture and Trauma Counsellors, Life Without Barriers, Translating and Interpreting Service and the Red Cross.

My Department ensures services delivered by contracted service providers are provided in a fair, reasonable and humane manner, through implementation of performance standards in each contract which are focused on service outcomes to people in detention.

Immigration detention required by Australian law is also subject to external scrutiny by the Commonwealth Ombudsman, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees and the Australian Red Cross to ensure people in immigration detention are treated humanely, decently and fairly.

Use of force

The Act permits an officer to use such force is as reasonably necessary to facilitate the movement of OEPs to a designated country.

The use of force authorised by the Act does not amount to torture or cruel, inhuman or degrading treatment or punishment set out Article 7 of the ICCPR. This is because the use of force contemplated by the Act extends only to the placement, restraint or removal of an OEP for the legitimate and lawful objective of removing that person to a designated country. Moreover, the force authorised by the Act is limited to such force as is necessary and reasonable to achieve that objective.

As such, the use of force contemplated by the Act is consistent with Australia's obligations under Article 7 of the ICCPR.

Non-refoulement

In addition to the *non-refoulement* (non-return) obligation under the Refugees Convention (which is not one of the treaties specified in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*), Australia has an obligation to not send a person:

- To a country where they are at a real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 of the ICCPR, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)); or
- to a country which would send the person to another country where they would face such a risk.

As noted above, any legislative scheme – including that which provides for the taking of persons from Australia – is not expected to expressly guarantee compliance with these obligations so long as the combination of legislation, policies, procedures and practices enables Australia to so comply.

Subsection 198AB(1) of the *Migration Act 1958*, as inserted by the Act, provides that the Minister may designate, by legislative instrument, that a country is a regional processing country. The only condition for the exercise of the power under subsection 198AB(1) is that the Minister thinks it is in the national interest to so designate a country (s198AB(2)).

In considering the national interest, the Minister must have regard to whether or not the country has given Australia any assurances to the effect that the country will not expel or return a person taken to the country to another country where their life or freedom would be threatened for a Refugees Convention reason, and whether the country will make a refugee status assessment in respect of a transferee, or permit such an assessment to be made.

Moreover, new paragraph 198AB(3)(b) of the *Migration Act 1958* provides that the Minister, in considering the national interest for the purposes of s198AB(2), may have regard to any other matter which, in the opinion of the Minister, relates to the national interest. This confers on the Minister a discretion to take into account other matters. These matters could include, for example, whether or not the country has given Australia any assurances that the country will not send a transferred person to another country where there is real risk that the person will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or the imposition of the death penalty.

The Act further provides a mechanism for the Minister to determine that new section 198AD of the *Migration Act 1958* (which provides for the taking of offshore entry persons to a regional processing country) does not apply to an OEP, if the Minister thinks it is in the public interest to do so. This is a personal, non-compellable power that allows the Minister to exempt persons from the operation of section 198AD should, for example, issues arise in relation to obligations under the CAT or ICCPR.

Rights relating to families and children

Under Article 3 of the Convention on the Rights of the Child (CROC), Australia also has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children.

This does not mean these interests must be the overriding or only consideration. Rather, the best interests of the child must be a "primary" consideration, which must be considered with other primary considerations, including those outlined in the *Migration Act 1958* and the *Migration Regulations 1994*.

Article 3 of the CROC does not create any specific rights in respect of immigration. Consideration of the best interests of a child does not necessarily require a decision

to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.

An important competing consideration is one of the central objectives underlying the Act, which is to prevent children from taking the dangerous boat journey to Australia. Further, national interest considerations, including the integrity of Australia's migration system, are primary considerations which in this context will generally outweigh the preference and interests of the child to remain in Australia.

In addition to its obligations under CROC, Australia has obligations in relation to families under the ICCPR.

Article 17 of the ICCPR states that no-one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The protection of the family unit under Articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest more generally.

In this context, "arbitrary" interference involves elements of injustice, unpredictability and unreasonableness. "Unlawful" interference means interference that is contrary to domestic law. Accordingly, interference with family is permissible where it is not arbitrary and where it is lawful at domestic law. Australia does not consider that the measures outlined in the Act amount to separation of family, noting that persons who travel to Australia together will not ordinarily be separated when taken to a regional processing country.

Further, to the extent that these measures may be perceived as interference with family, the Government maintains that these measures seek to achieve a legitimate purpose of preventing unlawful non-citizens from travelling to Australia by irregular means and are not arbitrary or unlawful and thus are consistent with Australia's obligations under Articles 17 and 23 of the ICCPR.

Article 24(1) of the ICCPR provides for the protection of children by the State, without discrimination, as required by their status as children. It is the Government's view that Article 24 does not give rise to an automatic right to remain in Australia. While in Australia's jurisdiction, however, the needs of children will be met according to their environment.

I have consistently worked to ensure that children are placed with their family in the least restrictive form of immigration detention possible and have access to the services discussed in relation to Article 10 of the ICCPR, above. If a child is an unaccompanied minor and falls under my responsibilities under the *Immigration (Guardianship of Children) Act 1946*, their needs are met through contracted service providers.

It is also relevant to note that subsection 199(4) of the *Migration Act 1958,* inserted by the Act, also provides a mechanism for the spouse or de facto partner of an OEP who is being taken, or about to be taken, to a regional processing country, to request that they also be taken or for an OEP to request that a dependent child or children be taken to a regional processing country with them.

I hope this information is of assistance.

Yours sincerely

CHRIS BOWEN

15 NOV 2012

NICK XENOPHON
Independent Senator *for* South Australia
AUSTRALIAN SENATE

Our ref: JEN–N/HW

The Hon. Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Chair

Thank you for your letter dated 12 September 2012, regarding the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*. I note the concerns raised in your letter on behalf of the committee, and I seek to address these below.

The measures proposed in this bill aim to address the significant pressure placed on small businesses by penalty rates.

The importance of small businesses to the Australian economy cannot be underestimated. Information from Restaurant and Catering Industry Australia indicates that penalty rates could be threatening the viability of some 40,000 restaurant and catering businesses in Australia, putting some 250,000 jobs at risk.

A recent benchmarking report by the industry also indicated that, as a result of increase to penalty rates, 18.2 percent of businesses were closed on weekends and 33 percent were closed on public holidays. Based on the average shift length of four hours, over half a million shifts were lost during the year due to these closures.

This is a bad outcome for both small businesses and their employees. Putting this sector under further strain will lead to additional job losses and fewer employment opportunities, as well as less competition.

This bill applies to businesses with fewer than 20 full-time equivalent employees in the restaurant and catering, and retail industries. This definition is consistent with that of a 'small business' according to the Australian Bureau of Statistics.

The bill focuses on these industries as the most common to employ shift workers (particularly casuals) and to have a significant number of small businesses in their make-up.

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It is no exaggeration to say that many employees of small businesses are already disadvantaged because that business is closed on Sundays or the owners do not offer shifts on that day because of penalty rates. In the end, many employees may be better off because they will be able to work on that day, even if their penalty rates are limited.

Ultimately, while I acknowledge that this bill affects the circumstances in which some employees will be able to earn penalty rates, I believe this is outweighed by the overall benefit to both the economy and employment rates.

The bill does not engage the rights laid out in article 8(1)(a) of the International Covenant on Economics, Social and Cultural Rights.

I would welcome the committee's direction on whether an amended statement of compatibility should be tabled to address the above issues.

I hope this information is helpful. Please do not hesitate to contact me if the Committee would like any further details.

Yours sincerely

NICK XENOPHON

14 / 11 / 2012

SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100 Parliament House
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Dear Mr Jenkins

Thank you for your letter of September 19 2012 regarding the International Fund for Agricultural Development (IFAD) Amendment Bill 2012.

As noted in your letter, the IFAD Amendment Bill 2012 was introduced into Parliament without a Statement of Compatibility with Human Rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Australian Agency for International Development (AusAID) has now developed the Statement in consultation with the Attorney-General's Department, please find this attached.

As outlined in the Statement, the IFAD Amendment Bill 2012 is compatible with human rights and does not raise any human rights issues.

It would be appreciated if the Parliamentary Joint Committee on Human Rights could consider this Statement of Compatibility by October 31 2012, which is the tentative timeframe by which the Joint Standing Committee on Foreign Affairs, Defence and Trade will consider this legislation.

For further assistance please contact Mr Paul Wojciechowski, Assistant Director General, Multilateral Policy and Partnerships Branch, AusAID on 6178 4035 or via email paul.wojciechowski@ausaid.gov.au.

Thank you for bringing this matter to my attention.

Yours sincerely

Bob Carr

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Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

International Fund for Agricultural Development Amendment Bill (No.) 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill makes technical amendments to the International Fund for Agricultural Development Act (1977), enabling Australia to accede to the International Fund for Agricultural Development Agreement under domestic law.

The amendments include revising the definition of Agreement in Section 3 so it refers to the version of the International Fund for Agricultural Development Treaty to which Australia would be acceding, removes Section 4 of the Act as it is ineffective, and updating the Schedule to the Act to reference the current Agreement Establishing the International Fund for Agricultural Development (IFAD), as it has been amended since the original legislation was enacted.

The legislation approves Australia's membership of IFAD which was not repealed at the time of Australia's withdrawal from IFAD in 2004.

None of these amendments make any changes to the law.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

[Circulated by authority of Senator the Hon Bob Carr, Minister for Foreign Affairs]

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Science and Research

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins / Harry

I write in response to your letter of 10 October 2012 on behalf of the Parliamentary Joint Committee on Human Rights relating to the Higher Education Support Amendment (Streamlining and Other Measures) Bill 2012 (the Bill).

The amendments in the Bill will enable the Government to strengthen the quality and accountability framework underpinning its income-contingent loan programs. Accordingly, I am pleased to provide the Committee with further information to support its determination on whether the Bill is compatible with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*. You raised two specific matters, firstly the impact, if any, these measures may have on students receiving FEE-HELP or VET FEE-HELP assistance, in circumstances where the organisation providing their education or training has its approval revoked with immediate effect; and secondly, regarding the information sharing provision in the Bill and the right to privacy.

In response to the first matter, the *Higher Education Support Act 2003* (the Act) expressly provides safeguards for students who are currently receiving FEE-HELP or VET FEE-HELP for studies undertaken through a provider that has been revoked. For FEE-HELP, under section 22-25, and for VET FEE-HELP, under clause 35 of Schedule 1A to the Act, I or my delegate can determine that an approval as a provider can be retained in respect of existing students. This means that the revocation is of limited effect for the purposes of assistance payable for the revoked body's existing students.

Notwithstanding these provisions, the Act also requires approved providers to have tuition assurance in place to protect students in the case where a provider ceases to offer a course. Where a provider is revoked and unable to deliver its courses, tuition assurance mechanisms would be activated (either under the Act or the legislation under the relevant national or state education regulators, whichever is appropriate). Students are either placed in a comparable course or provided with a refund of any upfront tuition fees paid.

In response to the second matter, while the Bill does not contain explicit provisions with regards to the storage, handling and disposal of any information collected (which may include personal information), any personal information collected under the proposed changes to the Act will be regulated by the *Privacy Act 1988* (the Privacy Act) as well as the *Archives Act 1983* (the Archives Act).

The information sharing provisions contained in Part 2 of Schedule 2 of the Bill will allow the Minister to seek information (which may include personal information) from the relevant national education regulators, Tertiary Education Quality and Standards Agency and the Australian Skills Quality Authority as well as the vocational education and training regulators of Victoria and Western Australia.

Commonwealth Ministers, as well as agencies, are required by section 16 of the Privacy Act not to do an act, or engage in a practice, that breaches an Information Privacy Principle (IPP). The IPPs regulate, amongst other things, the way in which government agencies collect, store, use and disclose personal information. The proposed changes to the Act would have the effect of authorising the collection of personal information for the purpose of IPP 2. In addition, IPP 4 will ensure that the Minister and the Department will be obliged to ensure that the record is protected by such security safeguards as it is reasonable in the circumstances to ensure that the record is not lost, used, modified, disclosed, accessed in an unauthorised manner or otherwise misused. Additionally the *Plain English Guidelines to Information Privacy Principles* requires most federal agencies, including the Department, to handle information consistently with the 11 IPPs.

Any destruction of personal information carried out by the Department will be done in accordance with the Archives Act.

To provide further information on the statements contained within the Explanatory Memorandum, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. As this Bill seeks to lawfully collect information (which may include personal information), this Bill, in conjunction with the Privacy Act, will not unlawfully interfere with a person's privacy.

As the legitimate policy purposes for the information sharing provisions will be to improve the decision making for application, administrative compliance, suspension and revocation for the FEE-HELP and VET FEE-HELP programs, this will be consistent with the aims and objectives of the ICCPR as this will promote the right to education. The Bill will therefore not be arbitrary and will be consistent with the right to privacy.

Additionally the Bill will promote the protection of any personal information collected in the information sharing provisions through the offence provisions in Division 179 and Division 14 of Schedule 1A to the Act as it is currently in force. These Divisions operate to provide that the unauthorised disclosure or access of personal information will be an offence. The penalty for this offence is 2 years imprisonment.

Given the strength of these penalty provisions, the Bill promotes the protection of the personal information that may be collected within the information sharing provisions.

I trust the information provided is helpful.

Yours sincerely

CHRIS EVANS

28.10.12

THE HON JASON CLARE MP
Minister for Home Affairs
Minister for Justice

MC12/14718

Mr Harry Jenkins MP
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Dear Mr Jenkins

Thank you for your letter dated 10 October 2012 regarding the Law Enforcement Integrity Legislation Amendment Bill 2012. I note that following the Committee's preliminary examination of this Bill the Committee now seeks my clarification on a range of matters. I have provided further information on the issues raised below.

I note also that the Committee has raised concerns regarding the adequacy of the statement of compatibility with human rights contained within the Bill's explanatory memorandum. I intend to revise the statement of compatibility to address the issues raised by the Committee prior to the introduction of the Bill into the Senate.

Integrity testing

Whether the use of intercept evidence in integrity testing operations is compatible with the right to a fair trial in article 14 of the International Covenant on Civil and Political Rights (ICCPR)

The Committee notes that there is no inherent human rights objection to the use of intercept evidence in criminal trials, and that overall compatibility with the right to a fair trial will depend on whether a fair balance is struck between the public interest in not disclosing sensitive information and the defendant's right to the disclosure of evidence that might assist their defence.

I consider that any use of intercept evidence in criminal proceedings arising from an integrity testing operation will be compatible with the right to a fair trial in article 14 of the ICCPR. Where the evidence is intended to be used in proceedings it will be made available to the defendant. The court will retain the discretion to exclude evidence should it appear to limit the defendant's ability to obtain a fair trial.

What, if any, interaction the proposed scheme would have with entrapment laws

Integrity testing operations will not constitute 'entrapment'. Entrapment is where a person is induced to commit an offence that they would not otherwise have committed. Integrity

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testing operations will be designed to ensure that the subject of a test is provided with an equal opportunity to pass or fail the test, rather than be induced to fail the test.

Furthermore, if the outcome of an integrity test is sought to be used as evidence for criminal proceedings, the court will retain the discretion to exclude the evidence if it considers that it was obtained through entrapment.

The lack of explicit provision in the Bill for independent oversight by the Ombudsman

The Committee correctly notes that the Bill does not establish a new role for the Ombudsman in relation to integrity testing operations. The Ombudsman will continue to have an oversight role in relation to covert powers that agencies will use in conducting of integrity testing, including controlled operations, surveillance devices and the use of telecommunications interception information. This oversight role is as follows:

- The *Crimes Act 1914* requires the Ombudsman to inspect the controlled operations records of agencies to determine the extent of compliance by the agency with the requirements of the relevant provisions of the Crimes Act. The Ombudsman must also submit a report to me, as the responsible Minister, each year on the outcome of this oversight, which must be tabled in Parliament. The Ombudsman also receives six-monthly reports from agencies containing details of all controlled operations authorised in the preceding six months.
- Under the *Surveillance Devices Act 2004* agencies must report to the Attorney-General on each surveillance device warrant or authorisation. Agencies are required to keep records of warrants and authorisations, and also records of where information obtained is either used or communicated. This will include where warrants are issued for the purposes of integrity testing and where information is used in an integrity testing operation. The Ombudsman must inspect these records and report to the Attorney-General at six monthly intervals. This report must be tabled in Parliament.
- Under the *Telecommunications (Interception and Access) Act 1979* agencies are required to keep records of all occasions where intercepted information is used or communicated. This would include occasions where it is used or communicated for integrity testing purposes. These records must be inspected by the Ombudsman at least twice each year, and the Ombudsman must report to the Attorney-General on this each year.

I consider that these arrangements will provide a sufficient level of oversight by the Ombudsman of the conduct of integrity testing. As the Committee has noted the Bill includes a range of other oversight mechanisms for integrity testing. Agencies will be required to notify the Integrity Commissioner as soon as practicable after the authorisation of each integrity test. Where integrity testing is authorised to investigate a 'corruption issue' (as defined in the *Law Enforcement Integrity Commissioner Act 2006*) the oversight role for the Integrity Commissioner in relation to the conduct of corruption investigations by agencies set out in that Act will continue to apply.

The Bill will also require that each agency report to me as the responsible minister every 12 months on the number of integrity tests authorised and the nature of suspected criminal activity at which each test was targeted.

Expansion of ACLEI jurisdiction

Whether the immunity provided by the Law Enforcement Integrity Commissioner Act 2006 *to restrict the use of answers given in relation to compulsory questioning includes both a use and derivative use immunity*

While the Bill expands the range of Commonwealth agencies in which the Integrity Commissioner can investigate corruption, it does not alter the powers available to the Integrity Commissioner to do so. The immunity provided by section 80 and section 96 of the *Law Enforcement Integrity Commissioner Act 2006*, in relation to self-incriminatory information compelled from a witness, is a 'use' immunity and not a 'derivative use' immunity. This has been the case since the establishment of the office of Integrity Commissioner in 2006.

Customs – drug and alcohol screening tests

The lack of safeguards in the bill for conducting testing, including the absence of controls for the types of tests that could be ordered, given the tests could reveal a range of information about the person which is unrelated to the purposes of screening.

The introduction of drug and alcohol testing will be part of a broader Drug and Alcohol Management Program put in place by Customs and Border Protection. It is intended that this program will meet the Australian standards for drug and alcohol testing and will include an education component to ensure Customs and Border Protection workers are aware of their responsibilities and rights. Customs and Border Protection is currently working with staff and their representatives to develop policies that are transparent, fair and consistent and allow the agency to ensure integrity.

It is intended that the Customs and Border Protection Drug and Alcohol Management Program will implement current 'best practice' to meet the Australian standards. These standards (Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (AS/NZS 4308:2008)) are reflected in the anticipated arrangements set out below.

In the absence of a positive test, it is expected that details of Customs workers subject to drug and alcohol testing will only be accessible to:

- members of the Drug and Alcohol Management Program team
- the laboratory technicians analysing the collected samples, and
- the Medical Review Officer.

In relation to drug testing procedures it is intended that each sample will only be identified by a reference number, therefore neither the laboratory staff nor the Medical Review Officer will know the identities of the persons being tested until such time the Medical Review Officer verifies a sample has returned a 'positive' test. Prior to a test being it is anticipated that only members of the Drug and Alcohol Management Program will be able to match a reference number to an individual staff member.

It is intended that prior to action being taken by Customs and Border Protection, the person being tested will have an opportunity to discuss the results with the Medical Review Officer. This information will be used by the Medical Review Officer in determining whether a

verified positive result is within acceptable parameters considering any declaration made by the individual being tested.

It is intended that any other information revealed about the person during this process will only be transmitted to Customs and Border Protection where it is determined the information is likely to cause a significant hazard to the workplace and where it has a direct relationship to the individual's functions and potential integrity. An example may include where a worker in a designated 'use of force' position has not declared they are taking medications that the Medical Review Officer considers may impact on their ability to use a firearm.

In relation to alcohol testing procedures, it is anticipated that Customs and Border Protection will use evidentiary breath analysing instruments which are recognised by Australian courts. This will ensure the integrity of the results.

The absence of a threshold trigger for exercising power in section 16C. By contract, the power in 16B requires 'reasonable suspicion' before it can be exercised, and the power in section 16D is triggered by the occurrence of particular incidents.

The Bill will provide for three categories of drug and alcohol testing. These include:

- Intelligence led (targeted) Testing – testing as the result of an allegation (section 16B)
- Mandatory Testing – random testing across the workforce to ensure compliance with Customs and Border Protection integrity standards (section 16C)
- Certain Incident Testing – testing of persons involved in certain incidents (section 16D)

It is correct that testing under section 16C will not rely on a threshold 'trigger' in the same way that testing under the other provisions will. Section 16C provides for the implementation of random testing, to which every Customs and Border Protection employee will be subject.

The ability to have a randomised approach is essential to ensure that Customs and Border Protection remains drug and alcohol free and will support an effective internal control framework. The reliance on 'triggers' – which will rely on both a Customs and Border Protection worker performing a certain act and other workers being able to recognise particular behaviours does not ensure this goal is met. The reliance on triggers means an incident will have already occurred by the time Customs and Border Protection identifies there is a problem. Section 16C will allow Customs and Border Protection to proactively manage potential integrity issues, strengthening the internal control framework.

The potential for the definition of 'prohibited drug' to be overly broad and in particular the absence of any specific criteria that the CEO must consider before specifying a drug as a 'prohibited drug' under section 16H.

I note the concern of the Committee, however, I also note that it is not always appropriate to be overly prescriptive in primary legislation. I believe the benefits of providing a definition are outweighed by the risks arising from evolving and changing nature of the drug environment. For example, The United Nations Office of Drugs and Crime reports in the 2012 World Drug Report:

> new psychoactive synthetic substances that mimic the effects of controlled substances and are chemically engineered to remain outside international control continues to evolve rapidly, with new substances being identified in the market.

and;

> in recent years, the market for new psychoactive substances has evolved rapidly. Unprecedented numbers and varieties of new psychoactive substances… are appearing on the market.

These examples highlight how new drugs and their variants are continually entering the market. I consider that providing a definition of 'prohibited drug' will confine the ability of Customs and Border Protection to meet the challenges presented by new drugs and will undermine the ability of the agency to maintain a drug free workplace. Defining the term 'prohibited drug' by legislative instrument will provide a lawful and flexible mechanism to allow the CEO of Customs and Border Protection to respond quickly to this ever-changing environment.

Further, this instrument is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the CEO will be subject to oversight by Parliament.

Further information on the safeguards that are applicable with regard to the use and disclosure of information collected.

As previously mentioned, it is intended that the information collected under the Drug and Alcohol Management Program will be subject to a number of safeguards, including the following:

- workers subject to testing will be identified by a reference number.
- access to the information collected as part of the drug and alcohol testing will be restricted to staff involved in the management of the Drug and Alcohol Management Program (as the area responsible for the management of the program, the selection of staff and facilitators between Customs and Border Protection and the persons performing the drug and alcohol testing), and
- the information will only be used by, or disclosed to, other workers/agencies in accordance with the Information Privacy Principles in section 14 of the *Privacy Act 1988* (Privacy Act).

In addition, it is anticipated that the information collected by the medical review officer will be treated as 'medical-in-confidence' until such time the Medical Review Officer verifies a test as being 'positive'. At this time only the relevant information (that is, the results of a positive test and any information that the person is likely to cause a significant hazard to the workplace and where it has a direct relationship to the individual's functions and potential integrity) will be released to the Professional Standards Coordination Unit. This information will subsequently be treated in accordance with the Privacy Act and existing information management guidelines.

In addition, the information released to Customs and Border Protection as part of this process will not include any information a worker may provide to the Medical Review Officer as mitigation of the positive result. This information will be retained by the Medical Review Officer and will be treated as 'medical-in-confidence'. The medical provider is also required to comply with the requirements under the Privacy Act in collecting, using and disclosing personal information.

It is anticipated that the Medical Review Officer will only be able to provide information relating to the detection of other substances to the Professional Standards Coordination Unit if he/she forms the opinion that the substances detected are likely to present a significant hazard to the workplace. This will be the case for designated positions (such as 'use of force' positions) where the use of drugs may present a workplace hazard and should have already been declared by the worker.

Whether these measures could lead to discrimination on the basis of an actual or perceived disability, contrary to article 26 of ICCPR and article 27 of the Convention on the Rights of Persons with Disabilities.

Customs and Border Protection has a responsibility under Commonwealth and State legislation to ensure that employees are not subjected to behaviour that may constitute unlawful harassment, discrimination or victimisation. Customs and Border Protection is committed to providing a work environment that is safe, fair and free from harassment, discrimination or bullying. All Customs workers have a responsibility to ensure that harassment is not tolerated.

This Bill does not limit the obligations of Customs and Border Protection under the existing Commonwealth and State legislation, related to equal opportunity, discrimination or harassment. In addition to legislation, inappropriate conduct may be a breach of the Australian Public Service Code of Conduct.

Customs – declaration of 'serious misconduct'

Whether a dismissal would be subject to any alternative review on its merits; and if not the reasons for considering that judicial review would be sufficient to remedy any flaws in the original decision making process.

The proposed power to make a declaration of serious misconduct only applies once a person has been dismissed and is separate to the dismissal process. The new power provided in the Bill does not alter or reduce the obligation on the agency to accord the person fair process when determining whether or not they have breached the Code of Conduct, and if they have, whether they should be dismissed as a sanction for that breach.

The declaration does not impact legal rights provided by other legislation or the common law, such as a General Protections claim under Part 3-1 of the *Fair Work Act*, claims under anti-discrimination legislation or judicial review (including under the A*dministrative Decisions (Judicial Review) Act 1977*.

Whether the requirement to provide the worker with a copy of the declaration under s 15(A)6 would include information on the grounds for the declaration; and if not, what impact this might have on the effectiveness of judicial review.

The power to issue the declaration only applies in the 24 hours after dismissal. As part of the dismissal process the affected employee will receive notice of the ground(s) for his or her dismissal. Additionally, the employee receives written details of the allegations as part of the investigation process, the opportunity to respond to those allegations, as well as the opportunity to respond to the decision maker's finding and the proposed sanction of dismissal. This is part of the existing procedural requirements mandated by the *Public Service Act 1999* for determining breaches of the Code of Conduct.

It is anticipated that the agency's procedures will be amended to provide that where a sanction delegate is considering termination of employment as a sanction for misconduct, the delegate will also be required to consider whether or not the matter is one for which it may be appropriate for the CEO to consider a declaration of serious misconduct if the delegate does terminate employment. If a matter for which a delegate proposes termination of employment as the appropriate sanction is, in the delegate's view, also a matter that may warrant the making of a declaration, then the procedures will require that the delegate indicate this to the employee as part of the correspondence that goes to the employee from the delegate asking the employee to 'show cause' as to why his or her employment should not be terminated.

Without pre-judging the issue of sanction, this correspondence would outline the reasons why, in the delegate's view, if the sanction of dismissal is imposed that dismissal would warrant a referral to the CEO for consideration of a declaration of misconduct. This ensures that, in responding to the 'show cause' letter, the employee understands the not only the implications of the potential sanction but also understands that the delegate considers that the case may satisfy the criteria for the making of a declaration of serious misconduct such that the employee can address that issue as well as providing any mitigating information going to why dismissal is not an appropriate sanction in the circumstances.

Whether the measures will be subject to any independent oversight, other than the requirement to report to the Minister under s15A(7)

As noted in my second reading speech, Customs and Border Protection will put in place arrangements for a panel of persons independent of the CEO to advise the CEO on each occasion use of the power is being considered. The role of the panel would be to advise the CEO whether or not a written declaration of serious misconduct is appropriate, given the details of particular dismissal, the legislative criteria and the connection necessary to the agency's law enforcement functions.

Customs – orders by CEO

Examples of the types of situations contemplated where the objective of the measures might be frustrated by the inclusion of a derivative use immunity in new section 4C.

The intention of the power for the CEO to impose mandatory reporting requirements is to promote full disclosure by Customs workers of misconduct which they observe or are involved in, so that action can be taken against Customs workers involved in corruption. It is important that Customs be able to act on and undertake further investigations in relation to information obtained under these powers.

The effect of a derivative use immunity would be to ensure that any information derived by Customs, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure. Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions. If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person.

Whether consideration has been given to applying a narrower abrogation of the right against self-incrimination, for example, by retaining a derivative use immunity for evidence that could have been obtained without compelling the person to speak, but allowing other compelled evidence (such as results of drug tests and documents) to remain admissible.

The Bill provides for the CEO to be able to make orders about mandatory reporting as well as other matters regarding the administration of Customs and Border Protection. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. It was considered that the current provision provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting Customs and Border Protection and the privilege against self-incrimination.

I thank the Committee for its consideration of this Bill and trust that this information is of use in any further consideration.

The action officer for this matter in the Attorney-General's Department is Cameron Rapmund who can be contacted on (02) 6141 4185.

Yours sincerely

Jason Clare

29 OCT 2012

THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT

12/5914

12 NOV 2012

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins Mary

I am writing to address issues raised by the Parliamentary Joint Committee on Human Rights in its Sixth Report of 2012 in relation to the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012.

The Committee has sought clarification as to whether an evidential burden would be an alternative way to achieve the purpose of proposed sections 372.1A and 376.3, which would impose a legal burden on a defendant to rebut the presumption that a carriage service was used in relation to those offences.

The Committee has also sought further information in relation to several aspects of the proposed amendments to the *Crimes (Superannuation Benefits) Act 1989* and *Australian Federal Police Act 1979*, which relate to superannuation orders.

Identity crime offences; false identity and air travel

The Committee has sought my views on whether it would be possible to impose an evidential burden, rather than a legal burden, on a defendant to rebut the presumption that a carriage service was used in relation to the offences in proposed section 372.1A and proposed section 376.3.

The presumptions apply where the prosecution is able to prove beyond reasonable doubt a specific element of the offences. In relation to proposed section 372.1A, the prosecution must prove that the person dealt in or obtained identification information. In relation to proposed section 376.3, the prosecution must prove that an air passenger ticket was obtained. If the prosecution does so, the effect of the presumption is that it is presumed that a person used a carriage service to do so, unless the defendant proves to the contrary.

The presumption places a legal burden on the defendant. This is consistent with section 13.4 of the Criminal Code Act 1995, which provides for the imposition of a legal burden of proof on a defendant where a law expressly creates a presumption that the matter exists unless the contrary is proven. In accordance with section 13.5 of the Criminal Code, a legal burden on the defendant must be discharged on the balance of probabilities.

The Committee has sought my views as to whether an evidential burden may offer a less restrictive alternative for achieving the provision's purpose. In my view, the use of an evidential burden would negate the value of including the presumption in the first place.

In accordance with subsection 13.3(6) of the Criminal Code, an evidential burden can be discharged by adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. An evidential burden does not displace the burden on the prosecution to prove a matter beyond a reasonable doubt, but rather acts to defer the burden. In the case of the offence in proposed section 372.1A, the defendant could potentially discharge the evidential burden simply by giving testimony that he or she did not use a carriage service. The burden would then fall back on the prosecution to disprove that matter beyond a reasonable doubt.

This would not avoid the practical problems encountered by law enforcement agencies in proving beyond a reasonable doubt that a carriage service was used to engage in the criminal conduct. Examples of the challenges faced by law enforcement agencies are set out at pages 6 and 42 of the Explanatory Memorandum for the Bill.

Superannuation forfeiture and recovery orders

The *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979* provide for the forfeiture and recovery of employer funded superannuation benefits that are payable, or have been paid, to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months' imprisonment. This legislative scheme has been in place since 1989.

Part 3 of Schedule 3 of the Bill amends the Crimes (Superannuation Benefits) Act and the Australian Federal Police Act (AFP Act) to clarify the operation of a long-standing legislative scheme to ensure that all employees who are convicted of corruption offences and sentenced to more than 12 months' imprisonment will be subject to the forfeiture and recovery of their employer funded superannuation.

The Committee believes that the amendments would expand the operation of the existing scheme and potentially involves substantial financial detriment for individuals and their dependents. The Committee has asked for further information about why it is necessary to clarify the existing law; whether the amendments have a retrospective effect; whether the amendments are consistent with the right to social security; whether the amendments amount to a disproportionate limitation on rights; and whether the affected individuals will be notified and have the opportunity to be heard before a forfeiture or recovery order is made.

The impetus for these amendments was the decision of the decision of the New South Wales Supreme Court in *Director of Public Prosecutions (Cth) v Della-Vedova* (2010) 75 NSWLR 602. In that case, the defendant was employed by the Commonwealth for three separate and distinct periods of employment. The defendant was convicted of two corruption offences,

which were both committed during the third period of Commonwealth employment. The court held that a superannuation order could not be made in relation to employer funded superannuation benefits paid in relation to a person for separate and distinct periods of Commonwealth employment that preceded the commission of the offences that gave rise to the making of the superannuation order.

If the legislation is not amended, it may apply less favourably to those employees who have one continuous period of employment as opposed to those who have had several separate periods of employment. For example, upon committing a corruption offence, a person with one long and continuous period of employment may have a superannuation order made against all their employer funded superannuation benefits. In contrast, a person with separate periods of employment may have a superannuation order made only in respect of the employer funded superannuation benefits that accrued during the period in which they committed the corruption offence. These amendments will ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee.

Prior to this case, it was thought that the existing scheme applied equally to employees who have one continuous period of employment, as well as to those who have had several separate periods of employment. Therefore, my view is that Commonwealth employees who committed a corruption offence prior to the commencement of the amendments, and are convicted and sentenced to more than 12 months' imprisonment, would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme.

It is very important that all employees are treated equally, regardless of whether they have one continuous period of employment or several separate periods of employment. This supports the implementation of a clear public policy objective of ensuring that superannuation benefits are not paid from public monies to Commonwealth employees convicted of corruption offences committed in the course of their employment.

The amendments are not retrospective. The amendments will apply to offences that were committed before or after commencement, but only if an application for a superannuation order is made in relation to those offences on or after the commencement date. This does not amount to an infringement of the prohibition on retrospective criminal laws, or laws imposing greater punishments than those which would have been available at the time the acts were done.

In relation to the Committee's concerns about the right to social security, the right to privacy (including the rights of family and children) and disproportionality, the amendments will not affect these rights.

The right to social security requires that a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Neither the amendments nor the existing legislative scheme limits a person's access to social security benefits, payments for medical benefits and hospital services (Medicare) or associated schemes.

Further, in relation to the protection of the home and family, and the rights of family and children, I note that if a person suffers financial detriment as a result of being convicted of serious corruption offences and losing their employer funded superannuation contributions as a result, this does not preclude the person from working in other employment or accessing social security benefits.

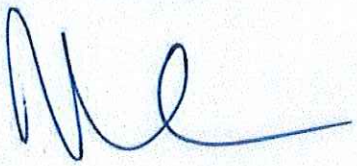
Under the existing scheme, a court cannot take into account the effect of a forfeiture or recovery order on a family or children, or determine that only a proportion of employer funded contributions should be forfeited or recovered. However, the existing scheme does not amount to a disproportionate limitation on rights. The purpose of the existing scheme is to provide a strong financial disincentive to ensure that the consequences of serious criminal activity, such as official corruption, are less attractive. Minor offences are effectively outside the scope of the scheme, which only operates where a person is sentenced to more than 12 months' imprisonment in relation to a corruption offence. It is a matter for the sentencing court to determine the person's level of culpability and the seriousness of the offence. The employee's own superannuation contributions (and interest on that sum) cannot be subject to forfeiture or recovery.

The amendments do not affect the notification arrangements under the existing scheme. Before I authorise the Commonwealth Director of Public Prosecution (CDPP) to make an application to a court for a superannuation order, as a matter of administrative practice, my Department notifies affected individuals about proposed forfeiture or recovery action and seeks their responses. Further, the CDPP is required to take reasonable steps to give written notice to the person in respect of whom the superannuation order is sought. The person may also make submissions to the court about applications for a superannuation order. The court's decision is subject to the usual avenues of appeal available from that court. Superannuation orders are automatically revoked if the person's conviction is later quashed, or the person's sentence is reduced or otherwise changed so that it no longer meets the condition precedent of 12 months' imprisonment.

For the reasons outlined above, I consider the approach set out in the amendments to be appropriate. The amendments do not significantly expand the operation of the existing scheme, but rather ensure that the scheme will apply equally to all employees in accordance with the long-standing public policy objective of deterring official corruption.

I hope this information assist the Committee.

Yours in friendship



NICOLA ROXON

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

26 NOV 2012

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letter of 31 October 2012 in relation to the Fair Entitlements Guarantee Bill 2012 (the Bill).

I note that the letter seeks clarification on several matters set out in the Parliamentary Joint Committee on Human Rights' (the Committee's) Sixth Report of 2012 and trust that this response addresses the Committee's concerns.

Right to Privacy – clauses 42 to 45

The Committee has sought advice about whether consideration should be given to including express privacy obligations for contractors in the Bill. Clause 42 of the Bill permits the Department of Education, Employment and Workplace Relations to disclose personal information about an employer or employee to a person who is contracted by the Commonwealth for the purposes of passing on payments made under the Act to recipients. In practice, such contractors will almost always be large professional organisations, for example, accounting firms and firms specialising in insolvency.

As noted in the statement of compatibility with human rights, contractors will be bound by the relevant privacy clauses in their contracts. In addition, contractors will hold professional obligations and may also have obligations under the National Privacy Principles in the *Privacy Act 1988.*

It is considered a contractor's contractual obligations, together with their professional regulation and obligations under the *Privacy Act 1988*, will constitute adequate safeguards to prevent the arbitrary use of personal information. As such, it is not considered necessary to include express privacy obligations for contractors in the legislation.

The Committee has also sought advice about why the Bill does not explicitly prohibit the unauthorised disclosure of personal information. Clauses 42 to 45 of the Bill specify the parties to which personal information may be disclosed and the purposes for which such disclosure may take place. Importantly, any disclosure of personal information made under the Bill would be covered by the Information Privacy Principles or if applicable may be covered by National Privacy Principles in the *Privacy Act 1988.* As these principles prohibit

the unauthorised disclosure of personal information, it is not considered necessary to include express provisions prohibiting the unauthorised disclosure of personal information in the Bill.

Rights to Social Security and Non-discrimination – clauses 11 to 13

The Committee has requested advice about the compatibility of clauses 11, 12 and 13 of the Bill with the right to social security in article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) and the right to non-discrimination in article 26 of the International Covenant on Civil and Political Rights (the ICCPR). The rights to social security and non-discrimination are not absolute rights and can be subjected to permissible limits.

Clauses 11 to 13 of the Bill exclude certain persons from being eligible to receive an advance limiting rights to social security and non-discrimination for those persons. Set out below are explanations about the objectives of each clause, and why the exclusions from eligibility are reasonable, necessary and proportionate to those objectives.

Clause 11

Subclause 11(1) of the Bill provides a person who is an 'excluded employee' for the purposes of section 556 of the *Corporations Act 2001* will not be eligible for an advance under the Act. This encompasses an employee who, at any time in the 12 months prior to the winding up, was a director, spouse of a director, or a relative of a director of the employer being wound up. Subclause 11(2) of the Bill provides that a relative, spouse or de facto partner of an employer who is or was bankrupt under the *Bankruptcy Act 1966* is not eligible for an advance. Subclause 11(3) of the Bill provides a similar exclusion for relative, spouse or de facto partner of a partner in a partnership.

Clause 11 of the Bill excludes the abovementioned persons from receiving an advance to prevent a person who had a direct relationship with the director, employer or partner of a business from financially benefiting from the wind up or bankruptcy of a business. This approach reflects the policy intent of section 556 of the *Corporations Act 2011* and is consistent with principles of good corporate governance. Further, in the absence of such a provision, the Bill would authorise payments for entitlements that are not payable to such persons in winding up proceedings.

It is considered consistency with corporations law is a legitimate objective and excluding directors, employers and partners or their spouses, de facto partners or relatives from receiving an advance under the Bill is reasonable, necessary and proportionate to that objective.

Clause 12

Clause 12 of the Bill provides that a person is not eligible for an advance where the Secretary is satisfied that:

- a person had been engaged under other arrangements (such as a contractor) and transfers to employment within 6 months of the end of the employment or the appointment of an insolvency practitioner for the employer; and
- it was reasonable to expect at the start of that employment that the employer would not be able to meet the employer's obligations under the terms and conditions of that employment for the actual duration and end of that employment.

Clause 12 prevents employers from employing a person solely for the purposes of ensuring that a person will be eligible for an advance under the Act. Importantly, subclause 12(1)(c) ensures that a person is excluded from receiving an advance only where it was 'reasonable' to expect that the employer would not be able to continue employing the person under the same terms and conditions beyond the end of their employment. As such, this clause pursues a legitimate objective as it prevents an employer from undermining the Act through employment arrangements which are established solely for the purpose of receiving an advance. It is considered that excluding persons employed under such arrangements from receiving an advance is reasonable, necessary and proportionate to that objective.

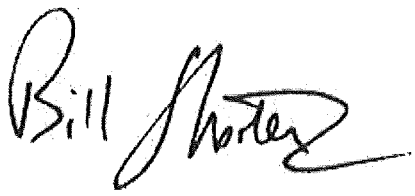
Clause 13

Clause 13 of the Bill provides that a person is not eligible for an advance if their former employer was within the scope of the Special Employee Entitlements Scheme for Ansett group employees (SEESA). SEESA was established to provide financial assistance to Ansett group employees whose employment was terminated on or after 12 September 2001. It enabled former employees to receive unpaid wages, annual leave, long service leave, pay in lieu of notice and up to a maximum of eight weeks of their redundancy entitlement.

Clause 13 excludes this class of persons from receiving an advance under the Act to prevent such persons from receiving financial assistance from two analogous schemes or selecting a scheme that would provide the most favourable outcome. In this way, clause 13 ensures that the payment of financial assistance for Ansett group employees is equitable. In addition, this clause preserves the status quo under the General Employee Entitlements and Redundancy Scheme (GEERS). As such, it is considered that clause 13 pursues a legitimate objective and excluding persons who fall within the scope of SEESA from receiving an advance under the Bill is reasonable, necessary and proportionate to that objective.

I trust the information provided is helpful.

Regards



BILL SHORTEN

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
MINISTER ASSISTING THE PRIME MINISTER ON DIGITAL PRODUCTIVITY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

31 OCT 2012

Dear Mr Harry Jenkins

Broadcasting Services (Simulcast Period End Date – Remote Licence Areas) Determination 2012

Thank you for your letter of 12 September 2012 concerning the statement of compatibility with human rights (SOC) accompanying the above determination.

The Australian Communications and Media Authority (ACMA), which made the determination, has advised that the reference to an Australian reservation to Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) is incorrect and was made in error.

The ACMA advises that it takes its compliance with matters related to human rights very seriously and regrets the error. The ACMA confirms that the above determination engages the human rights and freedoms protected by Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 19(2) of the ICCPR. Article 15(1) of the ICESCR protects the right of everyone to take part in cultural life. Article 19(2) of the ICCPR protects freedom of expression, including the right to seek, receive and impart information and ideas of all kinds, and the means of their dissemination. I am advised that the determination is compatible with those human rights.

The ACMA advises that the effect of the determination is that broadcasters must cease transmitting services in analog mode in the remote licence areas and only digital transmissions are permitted after that time. The ACMA further advises that the change in the transmission mode does not limit the fundamental rights to freedom of expression and cultural participation, as the viewer continues to have access to broadcasting services. This change to digital mode is part of a progressive switchover from analog to digital television services across Australia, which will deliver spectrally more efficient and higher quality transmissions that will enhance the viewer experience.

Parliament House, CANBERRA ACT 2600 | **Tel** 02 6277 7480 | **Fax** 02 6273 4154 | **Email** minister@dbcde.gov.au

I trust this information addresses the Committee's concerns. Thank you for bringing those concerns to my attention.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

29 OCT 2012

Harry

Dear Chair

Thank you for your letter of 10 October 2012 concerning the statement of compatibility with human rights for the *Coal Mining Industry (Long Service Leave) Legislation Amendment Regulation 2012* ('the Regulation').

In your letter, you seek clarification on the regulation's compatibility with article 7 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').

Background to the Regulation

The background to the Regulation is that on 1 January 2012, the *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011* ('the Amendment Act') commenced. The Amendment Act established a statutory long service scheme for all eligible employees in the black coal mining industry where previously the long service leave scheme in that industry had been awards-based or agreement-based.

Prior to the Amendment Act, an employee in the black coal mining industry could generally only have a break in service in that industry of 3 months before losing any period of qualifying service they had completed prior to their break of more than 3 months. Although in some circumstances, an employee could have a break of more than 3 months without losing their prior qualifying service, this was often discretionary and was not a right.

From 1 January 2012, because of the Amendment Act, an employee in the black coal mining industry can have a break in service in that industry of up to 8 years without losing their prior qualifying service.

Schedule 5 of the 2011 Amendment Act contained transitional provisions which allowed eligible employees, and former eligible employees to claim for periods of qualifying service between 1 January 2000 and 31 December 2011, if the periods of qualifying service were not separated by a break of 8 years or more from another period of qualifying service.

Effect of the Regulation

For the Coal Mining Industry (Long Service Leave Funding) Corporation ('the Corporation') to recognise the qualifying service as provided for by Item 3 of Schedule 5 of the Amendment Act, former eligible employees were required to provide the Corporation with certain information before 30 September 2012 (or such later date as prescribed by the regulations). The 31 March 2013 is now prescribed by clause 4 of the Regulation.

The Corporation is then required to calculate and notify the person of the records the Corporation has on the person's long service leave entitlement on or before 31 December 2012 (or such later date as prescribed by the regulations). The 30 June 2013 is now prescribed by clause 6 the Regulation.

In practice, this allows former eligible employees an additional 6 months to apply for recognition of their prior qualifying service, and, consequentially, the Corporation an additional 6 months to notify former eligible employees of the records it had relating to their long service leave entitlements.

The Corporation was also required by item 6 of Schedule 5 of the Amendment Act to calculate and notify eligible employees of the records the Corporation has on the person's long service leave entitlement on or before 30 September 2012 (or such later date as prescribed by the regulations). The 30 March 2013 is now prescribed by clause 5 the Regulation.

The changes in date provided for by the Regulation do not affect an eligible employee or former eligible employee's entitlement to long service leave.

Finally, the Corporation is given an additional 9 months to seek actuarial advice on the sufficiency of the Coal Mining Industry (Long Service Leave) Fund, to allow time for the data in the employer returns due 28 July 2013 to be incorporated in the request for actuarial advice.

These extensions were necessary because it was realised by the Corporation that the calculation and notification process would take longer than originally expected, and the extension in time would allow for the process to be carried out correctly and comprehensively. It is also reasonable to extend the time by 6 months as the employee's entitlement is not affected by the delay. Further, the employees did not have the new entitlement until the commencement of the Amendment Act on 1 January 2012. That is, the employees would not have had a reliance on or expectation of the entitlement given by the Amendment Act until 1 January 2012 at the earliest.

Article 7 of ICESCR

The Regulation supports the Amendment Act in its object, among others, of providing minimum entitlements and rights in respect of long service for eligible employees. Further, the Regulation gives former eligible employees an extra 6 months in which to apply to the Corporation to recognise their service as provided for by the Amendment Act. Consequently, it is reasonable that the Corporation is allowed an extra 6 months to calculate and notify them of their entitlements as recorded by the Corporation.

By extending the time available for employees to lodge applications to the Corporation, the Regulation promotes a person's right to enjoyment of just and favourable conditions of work, and in particular, periodic holidays with pay, as contained in article 7 of the ICESCR.

Because the Corporation is permitted to take an extra 6 months in addition to the time provided for in the Amendment Act to notify an existing eligible employee of their long service leave entitlement as recorded by the Corporation, the possibility that some employees will miss this opportunity to qualify for long service leave is reduced. This also promotes a person's right to enjoyment of just and favourable conditions of work, and in particular, periodic holidays with pay, as contained in article 7 of the ICESCR.

I trust the information provided is helpful.

Regards

Bill Shorten

BILL SHORTEN

29 OCT 2012