SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2010

12 May 2010

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 2010

The Committee presents its Fifth Report of 2009 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:

Anti-People Smuggling and Other Measures Bill 2010
ComSuper Bill 2010
Governance of Australian Government Superannuation Schemes Bill 2010
National Broadcasting Legislation Amendment Bill 2009
Personal Property Securities (Corporations and Other Amendments) Bill 2010
Superannuation Legislation (Consequential and Transitional Provisions) Bill 2010
Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010

Anti-People Smuggling and Other Measures Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2010*. The Attorney-General responded to the Committee's comments in a letter dated 16 March 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.3 of 2010

Introduced into the House of Representatives on 24 February 2010
Portfolio: Attorney-General

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979*, the *Criminal Code Act 1995*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

The purpose of this bill is to amend the Commonwealth's anti-people smuggling legislative framework by broadening the range of offences are available to target and deter people smuggling activity and by creating greater harmonisation across Commonwealth legislation. The bill will put in place laws to provide greater deterrence of people smuggling activity and to address the serious consequences of such activity. The bill will also provide greater capacity for Australian Government agencies to investigate and disrupt people smuggling networks.

Mandatory minimum penalties
Item 10, Schedule 1, Part 1, proposed new provision 236B

Item 10 of Schedule 1 to this bill proposes to insert new section 236B in the *Migration Act 1958*. As outlined in the explanatory memorandum (at page 16) this new provision adopts existing section 233C, which imposes mandatory minimum sentences for various offences under that Act, and expands it to apply to a broader range of circumstances including to the offences proposed in this bill.

In general, mandatory sentences limit the usual judicial discretion exercised when determining a proper sentence given all the circumstances of a particular offence.

The Committee commented adversely in *Alert Digest 13/01* when the existing mandatory penalties were proposed in the Border Protection (Validation and Enforcement Powers) Bill 2001 and the then Minister's reply was outlined in the Committee's Report No. 1 of 2002.

While the Committee notes that the proposed approach is consistent with existing provisions in the *Migration Act 1958*, the Committee remains concerned about the use of mandatory penalties (including mandatory minimum penalties) and therefore **seeks the Minister's advice** as to the scope of all the offences to which this section applies and why it is appropriate to give the Executive control by limiting judicial discretion in these circumstances.

Relevant extract from the response from the Minister

Scope of minimum mandatory penalties in the Migration Act

Existing mandatory minimum penalty provision

Current section 233C of the Migration Act applies mandatory minimum penalties to the most serious kinds of people smuggling conduct. Mandatory minimum penalties apply to the following two offences:

- section 232A - organising bringing groups of non-citizens into Australia, and
- section 233A - the offence of false documents or false or misleading information relating to a group of at least five non-citizens.

Mandatory minimum penalties for the above two offences involve at least five years imprisonment and a three year non-parole period. However, a person convicted for a 'repeat offence' receives at least eight years imprisonment and a five year non-parole period. The higher mandatory minimum penalty for a person who commits a 'repeat offence' currently only applies if on a **previous occasion** the person has been convicted of a people smuggling offence to which section 233C applies.

Proposed changes to the scope of mandatory minimum penalties

Proposed section 236B changes the scope of the existing mandatory minimum penalties in two ways. The new provision will:

- also apply mandatory minimum penalties for convictions of the new offence of people smuggling involving exploitation, or the danger of death or serious harm (proposed section 233B), and

- broaden the definition of 'repeat offence' to cover an additional circumstance where a person is convicted of another people smuggling offence to which proposed section 236B applies in the same proceedings.

I have attached to this letter a detailed summary of the scope of the offences to which existing mandatory minimum penalties apply as well as the changes to those provisions proposed in the Bill.

The appropriateness of mandatory minimum sentences

As noted above, mandatory minimum penalties currently apply to aggravated people smuggling offences already in the Migration Act. The application of the mandatory minimum penalty to the new aggravated offence in proposed section 233B-people smuggling involving exploitation, or the danger of death or serious harm-is consistent with the current framework in the Act. It will ensure that mandatory minimum penalties are in place consistently for the most serious people smuggling offences.

The application of mandatory minimum penalties to the most serious people smuggling offences is intended deter that conduct. People smuggling risks the lives of those seeking protection, and the Government treats it as a serious threat to Australia's territorial and border integrity.

Amending the definition of 'repeat offence' will ensure that higher mandatory minimum penalties will apply where a person is convicted of multiple aggravated people smuggling offences in the same proceeding. This will correct an anomaly which means that, currently, higher mandatory minimum penalties apply for 'repeat offences' only if the person has been previously convicted of a people smuggling offence to which current section 233C applies.

The High Court has indicated it is well within the power of the Parliament to direct the judiciary to determine an appropriate mandatory minimum sentence, but only in limited circumstances. In *Palling* v *Corfield* (1970) 123 CLR 52 (the *Palling* case), Barwick CJ said (at 58):

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates... .If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded...It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment.

I would note that proposed section 236B does not 'give the executive control by limiting judicial discretion'. If Parliament passes the Bill, the Parliament will have set parameters for the judiciary to independently determine:

- whether a person the executive alleges to have committed an aggravated people smuggling offence is guilty of that offence, and
- an appropriate sentence for the person who is convicted of a people smuggling offence between the prescribed minimum and maximum penalties.

Accordingly, the courts retain responsibility for determining a person's guilt or innocence, with the statute setting out the minimum penalty in the event that a person is convicted of one of the aggravated people smuggling offences. The courts acknowledge deterrence as an important element in sentencing as well as the circumstances of risk of loss of life and hardship imposed on the persons smuggled.

Attachment - Summary of the scope of mandatory minimum penalties in the *Migration Act* 1958 and changes proposed in the Anti-People Smuggling Bill 2010

Current scope of mandatory minimum penalties in the Migration Act

Existing section 233C of the Migration Act applies mandatory minimum penalties to the following offences:

- section 232A - organising bringing groups of non-citizens into Australia. This offence applies if the offender organises or facilitates a group of at least five non-citizens to come to Australia. The persons must have no lawful right to come to Australia for the offence to apply. The Anti-People Smuggling and Other Measures Bill 2010 will renumber this provision as proposed section 233C and retitles it as an aggravated offence.
- section 233A - the offence of false documents or false or misleading information relating to a group of at least five non-citizens. This offence applies in circumstances where forged documents or false or misleading information or statements are provided to a person exercising a power under the Migration Act. The Bill will renumber this provision as proposed section 234A and retitles it as an aggravated offence.

These offences carry a maximum penalty of 20 years imprisonment, a fine of $220,000, or both.

Current section 233C sets out mandatory minimum penalties for the above two offences and applies as follows:

- A person convicted as a first time offender receives at least five years imprisonment and a three year non-parole period.
- A person convicted for a 'repeat offence' receives at least eight years imprisonment and a five year non-parole period.

The higher mandatory minimum penalty for a person who commits a 'repeat offence' currently only applies if on a previous occasion the person has been convicted of an aggravated people smuggling offence.

Mandatory minimum penalties do not apply to persons who are found, on the balance of probabilities, to be under 18 years of age at the time the offence is committed.

Scope of proposed new section 233B - aggravated people smuggling offence of exploitation, danger of death or serious harm

Proposed section 236B will apply mandatory minimum penalties to convictions for proposed new section 233B - the aggravated offence of people smuggling involving exploitation, or a danger of death or serious harm. For this to occur, the following elements would need to be satisfied:

- the perpetrator organises or facilitates a non-citizen to come to Australia where the non-citizen has no lawful right to enter Australia (current section 233, proposed section 233A - the offence of people smuggling), and
- the perpetrator:
    - intends that the non-citizen be exploited after that person enters Australia
    - subjects the non-citizen to cruel, inhuman or degrading treatment, or
    - is reckless that his or her conduct in committing the offence gives rise to a danger of death or serious harm to the non-citizen.

This new offence carries a maximum penalty of 20 years imprisonment, a fine of $220,000, or both.

Mandatory minimum penalties will **not** apply to the following sections:

- proposed section 233A (current section 233) establishing the primary offence of people smuggling
- proposed section 233D establishing the new offence of supporting the offence of people smuggling, or
- proposed section 233E - concealing or harbouring non-citizens.

These offences carry a lower maximum penalty of 10 years imprisonment, a fine of $110,000, or both.

Scope of broader definition of 'repeat offence' in section 236B

Proposed section 236B also broadens the definition of 'repeat offence' to cover an additional circumstance where a person is convicted of another people smuggling offence to which the section applies in the **same proceedings.** This means a 'repeat offence' covers the circumstances where a person is charged with multiple people smuggling offences to

which the section applies and a court hears those matters concurrently. It will also continue to cover a person who is convicted on a previous occasion of an offence to which the section applies.

The Committee thanks the Minister for this comprehensive response, which addresses the Committee's concerns.

ComSuper Bill 2010

Introduced into the House of Representatives on 4 February 2010
Portfolio: Finance and Deregulation

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Finance and Deregulation responded to the Committee's comments in a letter dated 10 May 2010. A copy of the letter is attached to this report.

Background

This bill is a part of a package of three bills which give effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and consistent with the broader superannuation industry.

The bill will establish ComSuper as a statutory agency for the purposes of the *Public Service Act 1999*, consisting of a Chief Executive Officer (CEO) and staff. The CEO, an independent statutory officeholder, will be the head of ComSuper. ComSuper will also be a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*, and that Act will apply to the operations of the agency.

'Henry VIII' clause
Possible insufficient Parliamentary scrutiny
Part 3, Division 1, item 8(6)

This item provides that regulations may provide that subsections (1) and (3) outlining the CEO's functions (in relation to the Public Sector Superannuation Accumulation Plan only) operate subject to modifications prescribed in the regulations or cease to have effect at a specified time. These are 'Henry VIII' clauses.

A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

The Committee notes that the explanatory memorandum states that ‘it is intended that this provision has sufficient flexibility to allow the administration of PSSAP to be outsourced to the available competitive market.' The usual scrutiny and disallowance mechanisms will apply to any regulations made under the provision.

Nonetheless, the Committee is concerned that a future decision to outsource the administration of a government superannuation scheme established by an Act of Parliament should be implemented by a future Act of Parliament. The Committee therefore **seeks the Minister's advice** on whether a decision to outsource the administration of the PSSAP will be made in primary legislation; and whether it is appropriate for this power in item 8(6) to be delegated to subordinate legislation.

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

Relevant extract from the response from the Minister

ComSuper Bill 2010

'Henry VIII' clause - possible insufficient Parliamentary scrutiny - Part 3, Division 1, *item 8(6)*

Part 3, Division 1, item 8(6) of the ComSuper Bill provides that subsections (1) and (3) outlining the CEO's functions in relation to the Public Sector Superannuation Accumulation Plan (PSSAP) operate subject to modifications prescribed in the regulations or cease to have effect at a specified time. These provisions have been included to ensure that there is flexibility to allow the administration of PSSAP to be outsourced to the available competitive market and thus allow PSSAP administration to be delivered efficiently and effectively in line with superannuation industry better practice.

Any regulations that are made will be subject to the usual parliamentary scrutiny and disallowance mechanisms.

The Committee thanks the Minister for this response. The Committee is concerned that the response does not add any information to that already available to the Committee from the explanatory memorandum, as noted in the Committee's comments in *Alert Digest No. 2 of 2010*. Therefore the Committee **seeks the Minister's further advice** about the justification for delegating the ability to outsource the administration of PSSAP to subordinate legislation rather than including it in future primary legislation.

Governance of Australian Government Superannuation Schemes Bill 2010

Introduced into the House of Representatives on 4 February 2009
Portfolio: Finance and Deregulation

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Finance and Deregulation responded to the Committee's comments in a letter dated 10 May 2010. A copy of the letter is attached to this report.

Background

This bill is part of a package of three bills giving effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and more consistent with the broader superannuation industry.

The bill gives effect to the Government's announcement in October 2008 to merge the Australian Reward Investment Alliance (ARIA), the Military Superannuation and Benefits Board (MSB Board) and the Defence Force Retirement and Death Benefits Authority (DFRDB Authority) to form a single trustee body from 1 July 2010.

Explanatory memorandum
Part 2, Division 1, Sub-clause 5(1)

Clause 5 of the bill seeks to exclude the Commonwealth Superannuation Corporation from the operation of section 15 of the *Commonwealth Authorities and Companies Act 1997*. The explanatory memorandum notes (at p. 9) that this section places an obligation on a Commonwealth authority to notify the responsible Minister of significant events. The explanatory memorandum states that the section 'will not apply in relation to the management and investment of scheme funds by CSC', but it does not articulate the reason for this approach.

The Committee **seeks the Minister's advice** on the reason for this approach and whether consideration can be given to including this information in the explanatory memorandum.

Relevant extract from the response from the Minister

Governance of Australian Government Superannuation Schemes Bill 2010

Explanatory Memorandum - Part 2, *Division* 1, *Sub-clause 5(1)*

The Committee notes that clause 5 of this Bill seeks to exclude the Commonwealth Superannuation Corporation (CSC) from the operation of section 15 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), in relation to the management and investment of scheme funds. It has also asked that consideration be given to explaining the reasons for the provision in the Explanatory Memorandum.

Section 15 of the CAC Act places an obligation on a Commonwealth authority to notify the Minister of significant events, which include (but are not limited to):

- the formation, or participation in the formation, of a company;
- participation in a significant partnership, trust, unincorporated joint venture or similar arrangement; and
- acquiring or disposing of a significant shareholding in a company.

Unlike other bodies, a core part of the functions of a superannuation trustee is the management and investment of superannuation funds. The investment function can involve the above transactions in the ordinary course of business.

Accordingly, this section, if applied literally, would impose overly onerous and unnecessary requirements on CSC when carrying out these activities.

Importantly, the management and investment of scheme funds by CSC will be regulated by the *Superannuation Industry (Supervision) Act* 1993 and Regulations (SIS legislation). The SIS legislation contains the prudential standards that are applicable for the management and investment of superannuation savings. Accordingly, the proposed provision will not affect the interests of members in the
superannuation schemes.

I have asked officials in my department to include further information in the explanatory memorandum, where circumstances allow.

The Committee thanks the Minister for this comprehensive response and acknowledges the Minister's commitment to include further information in the explanatory memorandum where circumstances allow.

Wide delegation of power
Division 3, clause 35

This clause provides that CSC may delegate any or all of its powers under an Act administered by CSC or relevant regulations to a very broad range of persons, including a member of staff of CSC or ComSuper and APS employee in the department or a member of the Australian Defence Force. The clause also provides that sub-delegations are possible. The only limit on the power is that CSC may only delegate its power to reconsider its decisions, or decisions of its delegates, to specified committees.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices, persons with relevant qualifications or expertise, or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum (at p. 20) outlines the effect of the clause, but does not state why this wide delegation of power is necessary. Therefore, the Committee **seeks the Minister's advice** on the reasons for the wide delegation of power and whether consideration can be given to confining the powers delegated or limiting the delegation to members of the Senior Executive Service.

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

Relevant extract from the response from the Minister

Delegation of power - Division 3, clause 35

The Committee notes that clause 35 permits CSC to delegate its powers to a broad range of persons.

The proposed delegation power is equivalent to the delegation power of the existing trustee for the civilian superannuation schemes, which is currently set out in the legislation governing the scheme. It has a narrower scope than the current delegation power of the existing military boards. Clause 35 will consolidate the delegation arrangements for the single trustee in respect of all the schemes for which it will be responsible.

In preparing the legislation, consideration was given to the classes of persons to whom CSC can delegate powers. I consider the range of persons is appropriate in light of the operation of the superannuation schemes, whereby much of the day to day operation of the schemes is carried out by the staff of the trustee and ComSuper through delegated powers. This is the case under the separate trustee boards and will continue under the new trustee arrangements.

While I appreciate the Committee's concerns regarding the delegation of powers to persons where there is no specificity as to the qualifications and attributes of those persons, I note there are additional safeguards under the new arrangements. Specifically, the CAC Act (under which the trustee will operate) provides that directors must ensure that the delegation is given to an appropriate person, including by making proper inquiries where the circumstances indicate a need.

On this basis, I do not consider it necessary to limit the delegation to a more specific class of persons, such as members of the Senior Executive Service.

The Committee thanks the Minister for this comprehensive response, which addresses its concerns.

National Broadcasting Legislation Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2009*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter received on 3 February 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.14 of 2009

Introduced into the House of Representatives on 29 October 2009
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Corporation Act 1991* to implement a new merit-based appointment process for the ABC and SBS Boards. The bill also reinstates the position of staff-elected Director to the ABC Board.

In particular, the bill:

- provides for the assessment of applicants' claims to be undertaken by an independent Nomination Panel established at arms length from the government;
- requires vacancies to be widely advertised, at a minimum in national and/or state and territory newspapers, and on the website of the Department of Broadband, Communications and the Digital Economy;
- provides for the assessment of candidates to be made against a core set of selection criteria, supplemented where necessary by additional criteria as determined by the Minister; and
- requires a report containing a short-list of recommended candidates to be provided to either the Minister or Prime Minister by the Nomination Panel.

Trespass unduly on rights and liberties
Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

Proposed new subsection 12(5A) of the ABC Act, to be inserted by item 12 of Schedule 1, provides that certain persons are not eligible for appointment as the Chairperson or a Director of the ABC Board. These persons are: members or former members of the Commonwealth Parliament (paragraph 12(5A)(a)); members or former members of state or territory parliaments (paragraph 12(5A)(b)); or a person who is or was a senior political staff member (paragraph 12(5A)(c)). Proposed new subsection 17(2A) of the SBS Act, to be inserted by item 24 of Schedule 1, duplicates this disqualification for non-executive Directors of the SBS Board.

The term 'senior political staff member' is defined as a person included in a class of persons specified by legislative instrument (proposed new subsection 3(3) of the ABC Act, to be inserted by item 3 of Schedule 1). The explanatory memorandum gives examples (at page 3) of the positions expected to be included in the legislative instrument: Chief of Staff, Special Adviser, Principal Adviser, Senior Adviser, Media Adviser and Adviser. The concept is not intended to extend to more junior positions such as Electorate Officer or Departmental Liaison Officer.

Legislation regularly stipulates the knowledge, skills and experience needed for Commonwealth positions and disqualification from office is generally based on criminal record, bankruptcy or similar lack of fitness for office. Unusually, proposed new subsections 12(5A) and 17(2A) base the disqualification from office on a person's previous public employment. The explanatory memorandum states (at pages 6 and 15) that the exclusion of former politicians and senior staffers from consideration for ABC and SBS Board positions is intended to strengthen the independence and impartiality of the Boards (consistent with Board duties) and to overcome past perceptions of political bias.

While cognisant of the clear intent of the bill, the Committee notes that discrimination based on political opinion is contrary to human rights (see, for example, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights); and freedom of expression is a recognised human right (see Article 19 of the International Covenant on Civil and Political Rights). Further, political opinion is not necessarily a selection criterion for senior political staff positions.

Such disqualification is based on bias – actual, perceived or vicarious – and the disqualification of all those covered by the provisions is for life. Importantly, it would apply to people who occupied the relevant positions prior to the commencement of the legislation. The Committee **seeks the Minister's advice** as to the rationale for why this is considered appropriate, as well as the particular reasons why appointment to the ABC and SBS Boards is considered 'different' or 'special' to other appointments. The Committee also **seeks the Minister's advice** as to why the term 'senior political staff member' will be defined by legislative instrument rather than being defined in the bill itself (which would provide certainty as to the precise positions intended to be covered).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities
Schedule* J*, items* 12 *and* 24*, new subsections 12(5A) and 17(2A)

The national broadcasters - the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) - play an important role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. To this end, the Bill establishes a statutory merit-based and transparent selection process for the appointment of non-executive directors to the ABC and SBS Boards.

To complement the new merit-based selection process, the Bill would also exclude current and former politicians and senior political staff from appointment to the ABC and SBS Boards (see Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)). These measures are intended to strengthen the independence and integrity of the ABC and SBS Boards, which is consistent with the statutory duties of the Boards (see s 8 of the *Australian Broadcasting Corporation Act* 1983 and s 10 of the *Special Broadcasting Service Act 1991).*

I do not agree that the exclusion of politicians and senior political staff from appointment to the Boards of the national broadcasters unduly trespasses on the rights and liberties of those affected by the rule. Rather, the new exclusion rule is a response to longstanding public concerns that ABC and, to a lesser extent, SBS Board appointments have been politically motivated. Such concerns have the potential to undermine public confidence, not only in the process whereby appointments are made to the Boards, but also in the management of the national broadcasters.

The ability of the national broadcasters to shape and influence public opinion is significant. It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory Charters in a manner that is impartial and independent from the Government of

the day. To this end, the new exclusion rule, along with the statutory appointment process, will ensure that appointments to the Boards of the national broadcasters are merit-based.

Further, it should be noted that the exclusion rule would only apply to a limited class of persons irrespective of their political persuasion or opinion, and would in no way curtail any person's freedom to express an opinion or view.

The term 'senior political staff member' is intended to cover a class of persons ineligible for appointment to the ABC and SBS Boards. It is anticipated that such a class of persons would include those who serve, or have served, politicians as Chiefs of Staff, Special Advisers, Principal Advisers, Senior Advisers, Media Advisers and Advisers. The roles and responsibilities attaching to these positions, as well as the position titles themselves, have changed over time and it is likely that they will continue to evolve and adapt. Defining the term 'senior political staff member' via legislative instrument provides the flexibility necessary to ensure that the definition remains relevant and up-to-date should job titles and responsibilities change or become redundant, or where new positions are created, without the need to amend primary legislation.

The Committee thanks the Minister for this response and draws it to the attention of the Senate. The Committee also seeks further clarification about these items. The Committee acknowledges the intention of the policy, but is not satisfied that the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee **seeks the Minister's further advice** about whether consideration has been given to removing the retrospective application of the requirement so that it will only apply to those people who undertake or remain in 'senior political staff member' positions after commencement of the bill; and whether consideration has been given to limiting the period of exclusion (so that a person would be eligible to apply if they had not been in a proscribed position for a specified period of time). The Committee notes that clause 7 of the *Lobbying Code of Conduct* establishes exclusion periods of 18 months for former Ministers or Parliamentary Secretaries and 12 months for other specified employment (including persons employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at adviser level and above).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities
Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

The decision to exclude current and former politicians and senior political staff from appointment to the Boards of the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (S13S) was an election commitment that addressed longstanding public perceptions that ABC and to a lesser extent, SBS Board appointments have been politically biased. This new exclusion rule, along with the statutory appointment process, is intended to strengthen the independence of the national broadcasters and will ensure that appointments to their Boards are merit-based and not politically motivated.

The Government considers that the proposed exclusion rule is appropriately narrow in its intended application and effect. Specifically, the rule would only apply to a limited class of persons irrespective of their political persuasion. It would in no way curtail any person's freedom to express an opinion or view. The rule is also limited to appointments of non-executive Directors to the Boards of the national broadcasters. It has no application outside this limited context. For these reasons, I do not consider it appropriate to further limit the scope of the rule's application.

I reiterate the points I made in my letter of 3 February 2010. The ability of the national broadcasters to shape and influence public opinion is significant.

It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory duties and uphold their Charters in a manner that both appears to be and, as far as reasonably possible, is impartial and independent from the Government of the day. These amendments are intended to achieve this objective.

The Committee thanks the Minister for his response. The Committee has considered the points made, but retains its concern about whether the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee draws the provisions to the attention of the Senators and **leaves to the Senate as a whole** the question of whether they trespass unduly on personal rights and liberties.

Personal Property Securities (Corporations and Other Amendments) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2010*. The Attorney-General responded to the Committee's comments in a letter dated 8 April 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.4 of 2010

Introduced into the House of Representatives on 10 March 2010
Portfolio: Attorney-General

Background

Following the passage of the *Personal Property Securities Act 2009* (PPS Act) and the *Personal Property (Consequential Amendments) Act 2009*, this bill amends the *Corporations Act 2001* (Cth) and also makes minor amendments to the PPS Act and other Commonwealth legislation. The bill contains 3 schedules with the following amendments:

Schedule 1

Amends the *Corporations Act 2001* to align with the PPS Act by:

- amending terminology used in the Corporations Act to apply the functional approach of the PPS Act to those sections of the Corporations Act that deal with charges;
- extends the Corporations Act concept of property to include PPSA retention of title property;
- replaces Chapter 2K (Registration of company charges) because the PPS Act provides for the registration of security interests in personal property but retain provisions equivalent to sections 266 and 267 in Chapter 2K (which provide that charges are void against an administrator or liquidator in certain circumstances);

- applies appropriate transitional and application provisions; and
- changes references to floating and fixed charges to circulating and non-circulating charges respectively but with the intention of maintaining existing rights, for example, employee preferences under the Corporations Act (section 561).

Schedule 2

Amends the PPS Act to simplify the transitional provisions and makes the PPS Act consistent with existing State and Territory provisions on the enforcement of security interests in agricultural products.

Schedule 3

Provides for minor consequential amendments to Commonwealth legislation.

Constructive knowledge
Shifting onus of proof
Schedule 1, Part 9, proposed subsection 588FK(3) and proposed sections 588FL, 588FM and 588FN; and Schedule 2, Part 1, item 110, proposed subsection 267A(2)

The statutory imputation of knowledge to a person or entity ('constructive knowledge') is an area of concern to the Committee because the standard of knowledge being applied for legal purposes is necessarily different from the person's actual knowledge. The Committee agrees that it may be an appropriate standard in some circumstances so that a defendant cannot avoid liability by wilfully remaining ignorant of relevant information, but in order to avoid trespassing unduly on personal rights and liberties the Committee expects that the approach is taken only in limited circumstances and that a full justification is provided in the accompanying explanatory memorandum.

The existing Act includes provisions (sections 297 to 300) detailing the operation of constructive knowledge for the purposes of the Act, and the effect of this bill is to also rely on these provisions.

Proposed subsection 588FK(3) explains that existing sections 297 to 300 of the *Personal Property Securities Act 2009* apply to new Division 2A of the *Corporations Act 2001* for the purposes of determining whether actual or constructive knowledge exists.

An additional burden is placed on a defendant when the onus in relation to constructive knowledge is shifted to the defendant by requiring him or her to prove that property was acquired *without* actual or constructive knowledge.

This issue was raised by the Committee in relation to the Personal Property Securities Bill 2009 in *Alert Digest 9/09* which requested further information about the particular provision from the Attorney-General. The Attorney-General's reply was discussed in Report 11/09 and the further information in that instance alleviated the Committee's concern.

An explanation of the effect of proposed provisions 588FL, 588FM and 588FN is found at pages 13 to 16 of the explanatory memorandum. In relation to shifting the onus of proving that the defendant had no actual or constructive knowledge of the relevant matters to the defendant the explanatory memorandum (at page 16) states that:

> The reason for reversing the onus is that the matters requiring proof would usually be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge (item 183, proposed subsection 588FL(6)). This provision is intended to protect bona fide purchasers for value while ensuring that fraudulent transactions designed to frustrate the payment of funds to creditors are void.

Schedule 1, Part 9, proposed subsections 588FP(7)(b) and 588FP(9) relate to preventing a company granting security interests to persons associated with the company. The explanatory memorandum discusses section 588FP at pages 15 and 16, but there does not appear to be a clear justification for the use of constructive knowledge in these subsections.

The purpose of Schedule 2, Part 1, item 110, proposed subsection 267A(2) is described in the explanatory memorandum (page 43) as being:

> … to protect an innocent purchaser of the collateral and [to] offer them the same protection as is offered purchasers under the vesting rule in [existing] subsection 267(3) [of the Corporations Act 2001]…

Again, however, there is no explanation of the constructive knowledge component in 267A(2)(b).

The Committee appreciates that this is complex legislation which relates to a national scheme, but considers that these circumstances make it especially important to ensure that all provisions are appropriate and that they are adequately explained. Therefore, the Committee **seeks the Attorney-General's advice** about the need and justification for each instance of constructive knowledge in this bill.

Relevant extract from the response from the Minister

Proposed subsections 588FP(7) and 588FP(9) - Exception for security interests in PPSA retention of title property Subsection 588FP(7) of the Amendment Bill mirrors subsection 267(3) of the *Personal Property Securities Act 2009* (PPS Act) to protect property transfers to third parties in certain circumstances. Section 267 of the PPS Act sets out the general rule that an unperfected security interest will ordinarily vest in the grantor on the grantor's winding up or bankruptcy. This has the effect that the secured party will lose its security interest. Subsection 267(3) of the PPS Act provides an exception to that rule where a third party acquires property from a secured party for new value without actual or constructive knowledge of the winding up or bankruptcy. This is designed to protect 'innocent' third party purchasers from an unduly harsh result.

Proposed subsection 588FP(7) of the Amendment Bill provides an analogous exception to the general rule in section 588FP, which would void a security interest granted in favour of an officer of a company in certain circumstances. If a third party acquires property for new value without actual or constructive knowledge that the seller is a secured party or acting on behalf of a secured party, the general rule will not apply and the 'innocent' third party will be protected.

The constructive knowledge test is used in both the PPS Act and the Amendment Bill, because they relate to circumstances where a third party might gain an advantage by deliberately not making the inquiries a reasonable person would make. The constructive knowledge test is appropriate because it would impute to the third party the knowledge they would have, if they had made the inquiries that an honest and prudent person would ordinarily have made in their situation, or the inquiries that an honest and prudent person would have made with their actual knowledge and in their situation (s 297, PPS Act).

Subsection 588FP(9) of the Amendment Bill provides that the onus for proving that a person acquires property without actual or constructive knowledge lies with the person asserting that fact. The reason for reversing the onus is because the matters to be proved - that is, the knowledge of the defendant - would be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge. The PPS Act contains an equivalent provision (s 296) in relation to the actual or constructive knowledge referred to in subsection 267(3) of the PPS Act. In both cases, the reversal of the onus of proof is part of the scheme to protect bona fide

purchasers for value while ensuring that fraudulent transactions designed to avoid obligations to creditors arc void.

Proposed subsection 267A(2) - Property acquired for new value without knowledge

Proposed section 267A of the Amendment Bill is based on section 267 of the PPS Act discussed above, but provides for the circumstances where the security interest attaches to the property after the winding up or bankruptcy occurs. Subsection 267A(2) therefore replicates the exception in subsection 267(3), where property is acquired for new value without knowledge to protect 'innocent' third party purchasers. In line with subsection 267(3), subsection 267A(2)(b) includes the actual or constructive knowledge test.

As with section 267 of the PPS Act, the constructive knowledge test is used in this provision because it relates to circumstances where a person might gain an advantage by deliberately not making the inquiries a reasonable person would make. It is therefore appropriate to apply the constructive knowledge test in this provision and to impute to the third party the knowledge they would have, if they had made the inquiries that an honest and prudent person would ordinarily have made in their situation, or if they had made the inquiries that an honest and prudent person would have made with their actual knowledge and in their situation (s 297, PPS Act).

In line with section 267, the onus of proving these facts in section 267A lies with the person asserting those facts (s 267A, Amendment Bill). The reason for reversing the onus is that the matters requiring proof would usually be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge. This provision would therefore protect bona fide purchasers for value while ensuring that fraudulent transactions designed to avoid obligations to creditors are void.

The Committee thanks the Minister for this comprehensive response and notes that it would have been helpful if an extract of this information was included in the explanatory memorandum.

Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010

Introduced into the House of Representatives on 4 February 2009
Portfolio: Finance and Deregulation

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Finance and Deregulation responded to the Committee's comments in a letter dated 10 May 2010. A copy of the letter is attached to this report.

Background

This bill is a part of a package of three bills which give effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and consistent with the broader superannuation industry.

The bill contains a number of transitional provisions to deal with matters arising from the amendments in the bill, the *Governance of Australian Government Superannuation Schemes Bill 2010* and the *ComSuper Bill 2010*. These transitional provisions are intended to address any impact on the entitlements of scheme members and the operation of the respective superannuation schemes from the reforms being made by the package of three Bills.

As part of modernising civilian superannuation arrangements the Bill also makes amendments to:

- facilitate public sector employees being able to consolidate their superannuation savings under the management of CSC, should a decision be made to allow this in the future. Any decision in this regard would be subject to Parliamentary scrutiny;
- allows for Parliamentary scrutiny of Deeds made under the *Military Superannuation and Benefits Act 1991*, which is consistent with the requirement applying to Deeds made under the *Superannuation Act 1990*; and

- validates the past payment of fees made by the trustee boards to the Auditor-General for the audit of financial statements related to the respective superannuation funds.

Insufficient Parliamentary scrutiny
Various

A key aspect of this bill is described in the explanatory memorandum (at p.4) as being to:

- facilitate public sector employees being able to consolidate their superannuation savings under the management of CSC, should a decision to made to allow this in the future. Any decision in this regard would be subject to Parliamentary scrutiny.

The explanatory memorandum does not identify whether a future decision would be facilitated through consideration of primary legislation, or whether it will be proposed in delegated legislation. The Committee is concerned about whether this aspect bill should be deferred until the key issue of whether public sector employees can consolidate their superannuation under the management of CSC is settled.

Therefore, the Committee **seeks the Minister's advice** on whether consideration has been given to deferring the amendments relating to this issue for consideration with the question of whether public sector employees can consolidate their superannuation under the management of CSC; and whether the ability to consolidate will be proposed in primary or delegated legislation.

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.

Relevant extract from the response from the Minister

Superannuation Legislation (Consequential and Transitional Provisions) Bill 2010

Insufficient Parliamentary scrutiny – various

In relation to the Committee's questions concerning public sector employees being able to consolidate their superannuation savings under the management of CSC, it is proposed that

any future decision on this matter would be made through delegated legislation, in the form of amendments to the PSSAP Trust Deed.

This would be consistent with the legislative framework applying to the operation of the PSSAP. While the PSSAP is established by the *Superannuation Act 2005*, the substantive provisions in relation to the operation of the scheme, including the form and type of benefits provided to members, are contained within the PSSAP Trust Deed. Amendments to the PSSAP Trust Deed are subject to parliamentary scrutiny and disallowance mechanisms.

The Committee thanks the Minister for this response, noting that the approach is consistent with the legislative framework applying to the operation of the PSSAP and will be subject to parliamentary scrutiny and disallowance mechanisms.

Wide delegation of power
Schedule 1, Part 1, item 201

Item 201 will allow the Minister to delegate his or her powers to a director of CSC, the CEO of ComSuper or a staff member of ComSuper.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum states that the 'amendment is consequential on the establishment of CSC as the responsible trustee and the abolition of the position of Commissioner for Superannuation and replacement with the position of CEO of ComSuper.' However, beyond being consistent with the existing practice the explanatory memorandum does not provide a justification for authorising the Minister to delegate Ministerial powers so broadly.

Therefore, the Committee **seeks the Minister's advice** about the rationale for the authority for a Minister to delegate his or her powers to a 'staff member of ComSuper' and whether consideration was given to limiting the powers that might be delegated or confining the delegation to members of the Senior Executive Service.

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

Relevant extract from the response from the Minister

Wide delegation of power- Schedule 1, Part 1, item 201

The Committee notes that item 201 of Schedule 1 provides the Finance Minister with the power to delegate functions under the *Superannuation Act* 1976 (1976 Act) to a director of CSC, the CEO of ComSuper or a staff member of ComSuper.

As noted in the explanatory memorandum, this provision is consistent with the current delegation power in the 1976 Act and, as such, there is no change to the existing arrangements. This item merely updates the existing provision to reflect the changes in the responsibility for these roles.

The Committee thanks the Minister for this response. The Committee generally considers that even when the purpose of an amendment is to update or make a consequential change, it is still appropriate to ensure that the previous policy justification for a provision still applies. The Committee therefore **leaves to the consideration of the Senate as a whole** the question of whether the provision delegates legislative power inappropriately.

Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010

Introduced into the House of Representatives on 11 March 2010
Portfolio: Transport, Regional Development and Local Government

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2010*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 5 May 2010. A copy of the letter is attached to this report.

Background

This bill amends the *Aviation Transport Security Act 2004* (the ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the MTOFSA) to implement changes designed to strengthen aviation security.

The bill will make changes to ATSA:

- to allow the prohibited items list to be made in a legislative instrument, and

- to enable the Secretary to delegate all or any of his or her powers and functions to an SES employee in the Attorney-General's Department (AGD), in preparation for the establishment of the 'Commonwealth' Incident Coordinator' position within the AGD from 1 July 2010.

In relation to MTOFSA, the bill will:

- insert the ability to conduct frisk searches for screening and clearing passengers and crew boarding security regulated passenger ships;

- enable certain persons to be appointed as 'security assessment inspectors' to conduct security assessments of maritime industry participants;

- extend the existing power for maritime security inspectors to take still photographs to include the ability to take moving images or recordings; and

- make other amendments including to existing requirements for Ship Security Plans, International Ship Security Certificates and to enable the Secretary to delegate powers to Agency Heads and specified SES officers.

Trespass unduly on personal rights and liberties
Items 17, 18 and 19

The explanatory memorandum (at page 10) explains that items 17 and 18 will update the existing ability of maritime security inspectors to take still photos on board a security regulated ship and on a security regulated offshore facility. The new power provides for the ability to 'make any still or moving image or any recording (for example a digital image or video) of equipment on the ship or offshore facility.'

Item 19 inserts additional scope to this power so that a maritime security inspector can also 'make any still or moving image or any recording of equipment in a place, vehicle or vessel under the control of a regulated maritime industry participant' (see page 10 of the explanatory memorandum). The explanation for this approach is described at page 10 of the explanatory memorandum:

> This is an oversight from when the powers of maritime security inspectors were first created. The amendment addresses this and ensures powers of maritime security inspectors with regard to image recording are consistent.

The Committee recognises that there can be sound reasons for extending the powers of security personnel, but expects that proposals to do so fully articulate the justification for the approach and ensure that appropriate safeguards and oversight are in place.

In this case, the explanatory memorandum states at page 10 that the provisions 'modernise the options for recording media', but there is no detail about whether this is for the convenience of security inspectors or is substantively warranted, what safeguards are in place to prevent the misuse of the power and whether the use of these powers can be audited generally or individually reviewed if a person has a complaint. The Committee is therefore concerned that these provisions may trespass unduly on personal rights and liberties and **seeks the Minister's advice** about the justification and need for them.

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

Relevant extract from the response from the Minister

Trespass unduly on personal rights and liberties
Items 17, 18 and 19

The Committee seeks the Minister's advice about the justification and need for provisions which modernise the options for recording media.

Currently, maritime security inspectors are unduly hampered by their inability to utilise modem recording media, such as digital video; this has potential to impact on their ability to investigate possible contraventions of the *Maritime Transport and Offshore Facilities Security Act 2003* (the Act) and associated regulations. The modernisation of options for recording media for maritime security inspectors will enhance the ability of inspectors to accurately and effectively carry out their functions in accordance with their legislative responsibilities.

To ensure that powers contained in proposed sections 139, 140A and item 19 do not trespass unduly on personal rights and liberties, the circumstances in which these powers may be exercised is clearly set out in the Bill. With respect to the powers in section 139, section 140 explicitly provides for where those powers may be exercised and in what circumstances. With respect to the powers in section 140A, section 1408 explicitly provides for where those powers may be exercised and in what circumstances. With respect to the power inserted at item 19, section 142 explicitly provides for where those powers may be exercised and in what circumstances. In all instances the Act provides that in exercising their powers maritime security inspectors must not subject a person to greater indignity than is necessary and reasonable for the exercise of the power. To inspect the private living areas of a ship or offshore facility maritime security inspectors must have an inspection warrant issued by a magistrate.

The Committee thanks the Minister for this detailed response, but notes that it would have been helpful if information about the need for the provision had been included in the explanatory memorandum.

Trespass unduly on personal rights and liberties
Item 20, proposed sections 145D, 145E and 145F

The bill proposes to enable the Secretary to appoint a person as a security assessment inspector if that person meets criteria to be specified in regulations. The explanatory memorandum accompanying the bill explains (at page 5) that:

> Appointed security assessment inspectors will be able to survey the extant security environment at a regulated maritime site and examine the effectiveness of current security policies; this will enable timely responses to changing and emerging threats to be developed to identify systemic policy and operational weaknesses.
>
> Currently the [Act] does not have any explicit powers of entry into security regulated areas other than for Departmental [officers] and law enforcement officers.

Proposed section 145E specifies the powers of an inspector, which include the ability to enter and inspect an area under the control of a maritime industry participant, to make any recordings of the area, observe the operating procedures and discuss them with an employee or another maritime participant. Proposed section 145F provides that powers may be exercised without notice at a security regulated port or otherwise after giving reasonable notice to the maritime participant. Subsection 145E(3) will provide that 'a security assessment inspector must not subject a person to greater indignity than is necessary and reasonable for the exercise of the power.'

In addition to the justification outlined above, the explanatory memorandum notes (at page 5) that access to security regulated areas is currently limited to departmental and law enforcement officers, and:

> [e]ven then, activities are restricted to ensuring compliance with the [Act] or investigating suspected breaches. There is no ability to enter a site for any other purpose or activity required for the effective administration of the [Act] and [regulations] or for effective regulatory policy development. This amendment seeks to address this problem.

While the Committee recognises the importance of ensuring that security measures are available and effective, it is also important to ensure that an appropriate balance is struck between the proposed action and any trespass on personal rights and that a full justification of the powers is included in the explanatory memorandum accompanying the bill.

An outline of principles the Committee considers relevant to enter and search proposals is found in Part 9 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Guide explains (at page 75) that any proposal to confer entry, search and seizure powers on an agency other than the AFP should address:

- accountability
- training
- resources; and
- risk management strategies

Although there is some explanation of the need to appoint security assessment inspectors (outlined above), the Committee **seeks the advice of the Minister** about the way in which the scheme will operate, and in particular what accountability, review, training and risk management protections apply to it; and whether the powers and safeguards are consistent with the maritime security inspector regime and aviation security measures.

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

Relevant extract from the response from the Minister

Trespass unduly on personal rights and liberties
Item 20, proposed sections 145D, 145E and 145F

The Committee seeks the advice of the Minister about the way in which the [security assessment inspector] scheme will operate, and in particular what accountability, review, training and risk management protections apply to it; and whether the powers and safeguards are consistent with the maritime security inspector regime and aviation security measures.

In the current security environment, the ability of security assessment inspectors to examine the effectiveness of current security policies is critical to ensuring that Australia's maritime transport system continues to remain secure from the threat of terrorism and unlawful interference. The powers and safeguards created at item 20 are consistent with

those provided for maritime security inspectors and aviation security inspectors, although limited in that security assessment inspectors will not be able to enter residences (for example a ship's quarters).

The specific powers of a security assessment inspector are clearly defined at proposed subsection 145E(I). Proposed section I45(F) explicitly provides for where those powers may be exercised and in what circumstances. In exercising a power under proposed section 145E, a security assessment inspector will be accompanied by a maritime security inspector. A security assessment inspector must not subject a person to greater indignity that is necessary and reasonable for the exercise of this power.

The Secretary of my Department may appoint persons as security assessment inspectors only if they satisfy criteria as prescribed in the regulations. This approach is comparable with the appointment of maritime security guards under the Act and airport security guards under the *Aviation Transport Security Act 2004;* both Acts require that regulations must establish requirements to be met before a person can become a security guard. The regulations then require potential maritime and aviation security guards to meet specific training and qualification requirements.

Criteria for the appointment of security assessment inspectors would be the subject of consultation with industry and relevant government agencies. In addition, the regulations would be subject to the scrutiny of the Senate Standing Committee on Regulations and Ordinances. Appointments of security assessment inspectors are for a specified period and can be revoked at any time.

The Committee thanks the Minister for this response, noting that criteria for the appointment of security assessment inspectors will be the subject of consultation with industry and relevant government agencies. The Committee suggests that it would have been helpful if this information about the process for establishing criteria for the appointment of inspectors had been included in the explanatory memorandum.

Strict liability
Reversal of onus
Item 20, proposed section 145G; item 22 proposed sections 166B and 166C

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

In addition, as a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

Proposed new section 145G will establish a new offence when a persons attempts to hinder a security assessment inspector in the exercise of a power. This is a strict liability offence (subsection 145G(3)), but an offence will not have been committed if the person has a reasonable excuse (subsection 145G(2)). It will be up to the defendant to prove on the balance of probabilities that his or her excuse is reasonable (see note to subsection 145G(2) in the explanatory memorandum).

The justification for the application of strict liability is outlined in detail in the explanatory memorandum (at page 6):

> This offence has been framed as a strict liability offence to maximise consistency with penalties for existing offences of a similar kind in the MTOFSA. For example, the offence of hindering or obstructing a maritime security inspector, provided for at section 143 of the MTOFSA, is also a strict liability offence punishable by a penalty of 50 penalty units. Similarly, the offence of hindering or obstructing a duly authorised officer (section 149) is also a strict liability offence punishable by a penalty of 50 penalty units.
>
> The specific use of strict liability in this new offence, as with similar existing offences described above, is also necessary to ensure the continued integrity of the maritime security regulatory regime. In particular it underscores the importance of officials empowered under the MTOFSA being able to carry out their duties and responsibilities in such a way that significantly deters would be offenders from hindering and obstructing these officials, which would compromise the integrity of the regime.

The Committee notes that the explanatory memorandum does not refer to the *Guide*, and no explanation is given for placing on the defendant the burden of proving that he or she had a reasonable excuse for the conduct.

Proposed new section 166B is explained at page 10 of the explanatory memorandum:

> Where a screening officer cannot clear a person through the screening methods permitted in the [*Maritime Transport and Offshore Facilities Security Act 2003* and regulations], the operation of the [Act] does not allow the person to pass through the screening point but also does not offer any other means of clearing that person. Item 22 would allow the use of frisk searches for screening and clearing passengers and crew in certain circumstances.

Proposed new section 166C will allow frisk searches in additional circumstances, but again only with the consent of the person requiring screening (see page 11 of the explanatory memorandum).

In light of these proposed powers, the bill will make it an offence for a screening officer to conduct unauthorised searches or to otherwise exceed his or her powers under 166B and 166C. They are strict liability offences attracting (subsections 166B(5) and 166C(5)) attracting 50 penalty units each, but offences will not have been committed if the officer has a reasonable excuse (subsections 166B(4) and 166C(4)).

The justification for the approach outlined in the explanatory memorandum at page 11 is identical for both offences:

> The use of strict liability in this situation is likely to significantly minimise any contraventions by screening officers when conducting frisk searches, given the strong deterrent message it sends. It aims to safeguard the travelling public from potential abuses of power by screening officers.

The Committee appreciates the significance of the intention to prevent abuses of power, but is also mindful of the importance of ensuring that offences of strict liability are created only when absolutely necessary and in accordance with the *Guide*, which also refers to the Committee's Report 6/2002 *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*.

The Committee notes that again no explanation is given for placing on the defendant the burden of proving that he or she had a reasonable excuse for the conduct

The Committee therefore **seeks the Minister's advice** about the justification for the use of strict liability in these offences and for placing the initial onus of proof on the defendant in relation to the availability of a reasonable excuse for his or her actions.

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

Relevant extract from the response from the Minister

Strict liability
Reversal of onus
Item 20, proposed section 145G; item 22 proposed sections 166B and 166C

The Committee seeks the Minister's advice about the justification for the use of strict liability in these offences and for placing the initial onus of proof on the defendant in relation to the availability of a reasonable excuse for his or her actions.

The use of strict liability in the identified offences is necessary to ensure the continued integrity of the maritime security regulatory regime. This is consistent with the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) and the Committee's Report 6/2002 *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (the Report). Consistent with the Report, the use of strict liability has been applied where the penalties do not include imprisonment and where there is a cap on monetary penalties (page 284 of the report). Further, the penalties identified are consistent with those for existing offences of a similar kind the Act. This is consistent with the Guide which states 'Penalties should be framed to maximise consistency with penalties for existing offences of a similar kind or seriousness.'

The initial onus of proof on the defendant in relation to the availability of a reasonable excuse for his or her actions is consistent with section 6.1 of the Commonwealth Criminal Code which provides if a law that creates an offence provides that the offence is an offence of strict liability, the defence of mistake of fact under section 9.2 is available.

The Committee thanks the Minister for this response, but notes that it would have been helpful if information about the justification for the provisions had been included in the explanatory memorandum.

Senator the Hon Helen Coonan
Chair

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

09/26321

Senator the Hon Helen Coonan
Committee Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

16 MAR 2010

Dear Senator Coonan

I refer to the Committee Secretary's letter of 11 March 2010 to my Office seeking my advice on the issues identified in *Alert Digest No 3 of 2010* on the Anti-People Smuggling and Other Measures Bill 2010. The Committee sought advice on the scope of all the offences to which proposed section 236B of the *Migration Act 1958* would apply, and why mandatory minimum sentences are considered appropriate.

Scope of minimum mandatory penalties in the Migration Act

Existing mandatory minimum penalty provision

Current section 233C of the Migration Act applies mandatory minimum penalties to the most serious kinds of people smuggling conduct. Mandatory minimum penalties apply to the following two offences:

- section 232A – organising bringing groups of non-citizens into Australia, and
- section 233A – the offence of false documents or false or misleading information relating to a group of at least five non-citizens.

Mandatory minimum penalties for the above two offences involve at least five years imprisonment and a three year non-parole period. However, a person convicted for a 'repeat offence' receives at least eight years imprisonment and a five year non-parole period. The higher mandatory minimum penalty for a person who commits a 'repeat offence' currently only applies if on a **previous occasion** the person has been convicted of a people smuggling offence to which section 233C applies.

Proposed changes to the scope of mandatory minimum penalties

Proposed section 236B changes the scope of the existing mandatory minimum penalties in two ways. The new provision will:

- also apply mandatory minimum penalties for convictions of the new offence of people smuggling involving exploitation, or the danger of death or serious harm (proposed section 233B), and

- broaden the definition of 'repeat offence' to cover an additional circumstance where a person is convicted of another people smuggling offence to which proposed section 236B applies in the **same proceedings**.

I have attached to this letter a detailed summary of the scope of the offences to which existing mandatory minimum penalties apply as well as the changes to those provisions proposed in the Bill.

The appropriateness of mandatory minimum sentences

As noted above, mandatory minimum penalties currently apply to aggravated people smuggling offences already in the Migration Act. The application of the mandatory minimum penalty to the new aggravated offence in proposed section 233B—people smuggling involving exploitation, or the danger of death or serious harm—is consistent with the current framework in the Act. It will ensure that mandatory minimum penalties are in place consistently for the most serious people smuggling offences.

The application of mandatory minimum penalties to the most serious people smuggling offences is intended deter that conduct. People smuggling risks the lives of those seeking protection, and the Government treats it as a serious threat to Australia's territorial and border integrity.

Amending the definition of 'repeat offence' will ensure that higher mandatory minimum penalties will apply where a person is convicted of multiple aggravated people smuggling offences in the same proceeding. This will correct an anomaly which means that, currently, higher mandatory minimum penalties apply for 'repeat offences' only if the person has been previously convicted of a people smuggling offence to which current section 233C applies.

The High Court has indicated it is well within the power of the Parliament to direct the judiciary to determine an appropriate mandatory minimum sentence, but only in limited circumstances. In *Palling v Corfield* (1970) 123 CLR 52 (the *Palling* case), Barwick CJ said (at 58):

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates....If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded...It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment.

I would note that proposed section 236B does not 'give the executive control by limiting judicial discretion'. If Parliament passes the Bill, the Parliament will have set parameters for the judiciary to independently determine:

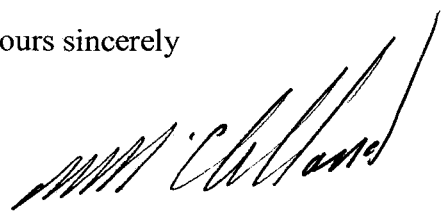
- whether a person the executive alleges to have committed an aggravated people smuggling offence is guilty of that offence, and

- an appropriate sentence for the person who is convicted of a people smuggling offence between the prescribed minimum and maximum penalties.

Accordingly, the courts retain responsibility for determining a person's guilt or innocence, with the statute setting out the minimum penalty in the event that a person is convicted of one of the aggravated people smuggling offences. The courts acknowledge deterrence as an important element in sentencing as well as the circumstances of risk of loss of life and hardship imposed on the persons smuggled.

The action officer for this matter in my Department is Doug Rutherford who can be contacted on 02 6141 3353.

Yours sincerely



Robert McClelland

Attachment – Summary of the scope of mandatory minimum penalties in the *Migration Act 1958* and changes proposed in the Anti-People Smuggling Bill 2010

Current scope of mandatory minimum penalties in the Migration Act

Existing section 233C of the Migration Act applies mandatory minimum penalties to the following offences:

- section 232A – organising bringing groups of non-citizens into Australia. This offence applies if the offender organises or facilitates a group of at least five non-citizens to come to Australia. The persons must have no lawful right to come to Australia for the offence to apply. The Anti-People Smuggling and Other Measures Bill 2010 will renumber this provision as proposed section 233C and retitles it as an aggravated offence.

- section 233A – the offence of false documents or false or misleading information relating to a group of at least five non-citizens. This offence applies in circumstances where forged documents or false or misleading information or statements are provided to a person exercising a power under the Migration Act. The Bill will renumber this provision as proposed section 234A and retitles it as an aggravated offence.

These offences carry a maximum penalty of 20 years imprisonment, a fine of $220,000, or both.

Current section 233C sets out mandatory minimum penalties for the above two offences and applies as follows:

- A person convicted as a first time offender receives at least five years imprisonment and a three year non-parole period.

- A person convicted for a 'repeat offence' receives at least eight years imprisonment and a five year non-parole period.

The higher mandatory minimum penalty for a person who commits a 'repeat offence' currently only applies if on a **previous occasion** the person has been convicted of an aggravated people smuggling offence.

Mandatory minimum penalties do not apply to persons who are found, on the balance of probabilities, to be under 18 years of age at the time the offence is committed.

Scope of proposed new section 233B – aggravated people smuggling offence of exploitation, danger of death or serious harm

Proposed section 236B will apply mandatory minimum penalties to convictions for proposed new section 233B – the aggravated offence of people smuggling involving exploitation, or a

danger of death or serious harm. For this to occur, the following elements would need to be satisfied:

- the perpetrator organises or facilitates a non-citizen to come to Australia where the non-citizen has no lawful right to enter Australia (current section 233, proposed section 233A – the offence of people smuggling), and

- the perpetrator:

    - intends that the non-citizen be exploited after that person enters Australia

    - subjects the non-citizen to cruel, inhuman or degrading treatment, or

    - is reckless that his or her conduct in committing the offence gives rise to a danger of death or serious harm to the non-citizen.

This new offence carries a maximum penalty of 20 years imprisonment, a fine of $220,000, or both.

Mandatory minimum penalties will **not** apply to the following sections:

- proposed section 233A (current section 233) establishing the primary offence of people smuggling

- proposed section 233D establishing the new offence of supporting the offence of people smuggling, or

- proposed section 233E – concealing or harbouring non-citizens.

These offences carry a lower maximum penalty of 10 years imprisonment, a fine of $110,000, or both.

Scope of broader definition of 'repeat offence' in section 236B

Proposed section 236B also broadens the definition of 'repeat offence' to cover an additional circumstance where a person is convicted of another people smuggling offence to which the section applies in the **same proceedings**. This means a 'repeat offence' covers the circumstances where a person is charged with multiple people smuggling offences to which the section applies and a court hears those matters concurrently. It will also continue to cover a person who is convicted on a previous occasion of an offence to which the section applies.

THE HON LINDSAY TANNER MP

Minister for Finance and Deregulation
Member for Melbourne

REF:C10/523

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in response to comments contained in the Scrutiny of Bills Committee's *Alert Digest No. 2 of 2010* (24 February 2010) in relation to the *Governance of Australian Government Superannuation Schemes Bill 2010*, the *ComSuper Bill 2010* and the *Superannuation Legislation (Consequential and Transitional Provisions) Bill 2010*. I note that these Bills were introduced as a package into the House of Representatives on 4 February 2010.

The Committee has sought my advice on five issues in these Bills and I would like to address each in turn.

Governance of Australian Government Superannuation Schemes Bill 2010

Explanatory Memorandum – Part 2, Division 1, Sub-clause 5(1)

The Committee notes that clause 5 of this Bill seeks to exclude the Commonwealth Superannuation Corporation (CSC) from the operation of section 15 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), in relation to the management and investment of scheme funds. It has also asked that consideration be given to explaining the reasons for the provision in the Explanatory Memorandum.

Section 15 of the CAC Act places an obligation on a Commonwealth authority to notify the Minister of significant events, which include (but are not limited to):

- the formation, or participation in the formation, of a company;
- participation in a significant partnership, trust, unincorporated joint venture or similar arrangement; and
- acquiring or disposing of a significant shareholding in a company.

Unlike other bodies, a core part of the functions of a superannuation trustee is the management and investment of superannuation funds. The investment function can involve the above transactions in the ordinary course of business.

Accordingly, this section, if applied literally, would impose overly onerous and unnecessary requirements on CSC when carrying out these activities.

Importantly, the management and investment of scheme funds by CSC will be regulated by the *Superannuation Industry (Supervision) Act 1993* and Regulations (SIS legislation). The SIS legislation contains the prudential standards that are applicable for the management and investment of superannuation savings. Accordingly, the proposed provision will not affect the interests of members in the superannuation schemes.

I have asked officials in my department to include further information in the explanatory memorandum, where circumstances allow.

Delegation of power – Division 3, clause 35

The Committee notes that clause 35 permits CSC to delegate its powers to a broad range of persons.

The proposed delegation power is equivalent to the delegation power of the existing trustee for the civilian superannuation schemes, which is currently set out in the legislation governing the scheme. It has a narrower scope than the current delegation power of the existing military boards. Clause 35 will consolidate the delegation arrangements for the single trustee in respect of all the schemes for which it will be responsible.

In preparing the legislation, consideration was given to the classes of persons to whom CSC can delegate powers. I consider the range of persons is appropriate in light of the operation of the superannuation schemes, whereby much of the day to day operation of the schemes is carried out by the staff of the trustee and ComSuper through delegated powers. This is the case under the separate trustee boards and will continue under the new trustee arrangements.

While I appreciate the Committee's concerns regarding the delegation of powers to persons where there is no specificity as to the qualifications and attributes of those persons, I note there are additional safeguards under the new arrangements. Specifically, the CAC Act (under which the trustee will operate) provides that directors must ensure that the delegation is given to an appropriate person, including by making proper inquiries where the circumstances indicate a need.

On this basis, I do not consider it necessary to limit the delegation to a more specific class of persons, such as members of the Senior Executive Service.

<u>ComSuper Bill 2010</u>

'Henry VIII' clause – possible insufficient Parliamentary scrutiny – Part 3, Division 1, item 8(6)

Part 3, Division 1, item 8(6) of the ComSuper Bill provides that subsections (1) and (3) outlining the CEO's functions in relation to the Public Sector Superannuation Accumulation Plan (PSSAP) operate subject to modifications prescribed in the regulations or cease to have effect at a specified time.

These provisions have been included to ensure that there is flexibility to allow the administration of PSSAP to be outsourced to the available competitive market and thus allow PSSAP administration to be delivered efficiently and effectively in line with superannuation industry better practice.

Any regulations that are made will be subject to the usual parliamentary scrutiny and disallowance mechanisms.

Superannuation Legislation (Consequential and Transitional Provisions) Bill 2010

Insufficient Parliamentary scrutiny - various

In relation to the Committee's questions concerning public sector employees being able to consolidate their superannuation savings under the management of CSC, it is proposed that any future decision on this matter would be made through delegated legislation, in the form of amendments to the PSSAP Trust Deed.

This would be consistent with the legislative framework applying to the operation of the PSSAP. While the PSSAP is established by the *Superannuation Act 2005*, the substantive provisions in relation to the operation of the scheme, including the form and type of benefits provided to members, are contained within the PSSAP Trust Deed. Amendments to the PSSAP Trust Deed are subject to parliamentary scrutiny and disallowance mechanisms.

Wide delegation of power – Schedule 1, Part 1, item 201

The Committee notes that item 201 of Schedule 1 provides the Finance Minister with the power to delegate functions under the *Superannuation Act 1976* (1976 Act) to a director of CSC, the CEO of ComSuper or a staff member of ComSuper.

As noted in the explanatory memorandum, this provision is consistent with the current delegation power in the 1976 Act and, as such, there is no change to the existing arrangements. This item merely updates the existing provision to reflect the changes in the responsibility for these roles.

I trust this information will be of assistance to the Committee.

Yours sincerely

Lindsay Tanner

10 MAY 2010

SENATOR THE HON STEPHEN CONROY
MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

21 APR 2010

Senator the Hon Helen Coonan
Chair, Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

National Broadcasting Legislation Amendment Bill 2009

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 24 February 2010, requesting a response to an issue relating to the National Broadcasting Legislation Amendment Bill 2009 (the Bill) identified in the Committee's *Second Report of 2010* dated 24 February 2010. My response follows.

Trespass unduly on rights and liabilities
Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

The decision to exclude current and former politicians and senior political staff from appointment to the Boards of the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) was an election commitment that addressed longstanding public perceptions that ABC and to a lesser extent, SBS Board appointments have been politically biased. This new exclusion rule, along with the statutory appointment process, is intended to strengthen the independence of the national broadcasters and will ensure that appointments to their Boards are merit-based and not politically motivated.

The Government considers that the proposed exclusion rule is appropriately narrow in its intended application and effect. Specifically, the rule would only apply to a limited class of persons irrespective of their political persuasion. It would in no way curtail any person's freedom to express an opinion or view. The rule is also limited to appointments of non-executive Directors to the Boards of the national broadcasters. It has no application outside this limited context. For these reasons, I do not consider it appropriate to further limit the scope of the rule's application.

I reiterate the points I made in my letter of 3 February 2010. The ability of the national broadcasters to shape and influence public opinion is significant.

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

It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory duties and uphold their Charters in a manner that both appears to be and, as far as reasonably possible, is impartial and independent from the Government of the day. These amendments are intended to achieve this objective.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

8 APR 2010

09/28217-04, MC10/3416

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

On 17 March 2010, the Secretary of the Senate Standing Committee for the Scrutiny of Bills invited me to respond to comments on the Personal Property Securities (Corporations and Other Amendments) Bill 2010 (the Amendment Bill) in the Scrutiny of Bills *Alert Digest No 4 of 2010*.

I wish to provide the following comments in response to the concerns raised.

Proposed subsections 588FP(7) and 588FP(9) – Exception for security interests in PPSA retention of title property

Subsection 588FP(7) of the Amendment Bill mirrors subsection 267(3) of the *Personal Property Securities Act 2009* (PPS Act) to protect property transfers to third parties in certain circumstances. Section 267 of the PPS Act sets out the general rule that an unperfected security interest will ordinarily vest in the grantor on the grantor's winding up or bankruptcy. This has the effect that the secured party will lose its security interest. Subsection 267(3) of the PPS Act provides an exception to that rule where a third party acquires property from a secured party for new value without actual or constructive knowledge of the winding up or bankruptcy. This is designed to protect 'innocent' third party purchasers from an unduly harsh result.

Proposed subsection 588FP(7) of the Amendment Bill provides an analogous exception to the general rule in section 588FP, which would void a security interest granted in favour of an officer of a company in certain circumstances. If a third party acquires property for new value without actual or constructive knowledge that the seller is a secured party or acting on behalf of a secured party, the general rule will not apply and the 'innocent' third party will be protected.

The constructive knowledge test is used in both the PPS Act and the Amendment Bill, because they relate to circumstances where a third party might gain an advantage by deliberately not making the inquiries a reasonable person would make. The constructive

knowledge test is appropriate because it would impute to the third party the knowledge they would have, if they had made the inquiries that an honest and prudent person would ordinarily have made in their situation, or the inquiries that an honest and prudent person would have made with their actual knowledge and in their situation (s 297, PPS Act).

Subsection 588FP(9) of the Amendment Bill provides that the onus for proving that a person acquires property without actual or constructive knowledge lies with the person asserting that fact. The reason for reversing the onus is because the matters to be proved - that is, the knowledge of the defendant - would be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge. The PPS Act contains an equivalent provision (s 296) in relation to the actual or constructive knowledge referred to in subsection 267(3) of the PPS Act. In both cases, the reversal of the onus of proof is part of the scheme to protect bona fide purchasers for value while ensuring that fraudulent transactions designed to avoid obligations to creditors are void.

Proposed subsection 267A(2) - Property acquired for new value without knowledge

Proposed section 267A of the Amendment Bill is based on section 267 of the PPS Act discussed above, but provides for the circumstances where the security interest attaches to the property after the winding up or bankruptcy occurs. Subsection 267A(2) therefore replicates the exception in subsection 267(3), where property is acquired for new value without knowledge to protect 'innocent' third party purchasers. In line with subsection 267(3), subsection 267A(2)(b) includes the actual or constructive knowledge test.

As with section 267 of the PPS Act, the constructive knowledge test is used in this provision because it relates to circumstances where a person might gain an advantage by deliberately not making the inquiries a reasonable person would make. It is therefore appropriate to apply the constructive knowledge test in this provision and to impute to the third party the knowledge they would have, if they had made the inquiries that an honest and prudent person would ordinarily have made in their situation, or if they had made the inquiries that an honest and prudent person would have made with their actual knowledge and in their situation (s 297, PPS Act).

In line with section 267, the onus of proving these facts in section 267A lies with the person asserting those facts (s 267A, Amendment Bill). The reason for reversing the onus is that the matters requiring proof would usually be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge. This provision would therefore protect bona fide purchasers for value while ensuring that fraudulent transactions designed to avoid obligations to creditors are void.

I trust this information addresses the Committee's concerns.

The action officer for this matter in my Department is Andra Eisenberg who can be contacted on (02) 6141 3624.

Yours sincerely

Robert McClelland

The Hon Anthony Albanese MP
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

- 5 MAY 2010

Reference: 02083-2010

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen,

Thank you for your letter dated 17 March 2010 about the Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010 (the Bill).

I note the concerns raised by the Standing Committee for the Scrutiny of Bills (the Committee) as contained in its *Alert Digest No.4 of 2010*. I have provided a response in relation to each of the issues as an attachment to this letter.

I trust this addresses the concerns of the Committee in relation to the amending Bill.

Yours sincerely

ANTHONY ALBANESE

Enc

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Trespass unduly on personal rights and liberties
Items 17, 18 and 19

The Committee seeks the Minister's advice about the justification and need for provisions which modernise the options for recording media.

Currently, maritime security inspectors are unduly hampered by their inability to utilise modern recording media, such as digital video; this has potential to impact on their ability to investigate possible contraventions of the *Maritime Transport and Offshore Facilities Security Act 2003* (the Act) and associated regulations. The modernisation of options for recording media for maritime security inspectors will enhance the ability of inspectors to accurately and effectively carry out their functions in accordance with their legislative responsibilities.

To ensure that powers contained in proposed sections 139, 140A and item 19 do not trespass unduly on personal rights and liberties, the circumstances in which these powers may be exercised is clearly set out in the Bill. With respect to the powers in section 139, section 140 explicitly provides for where those powers may be exercised and in what circumstances. With respect to the powers in section 140A, section 140B explicitly provides for where those powers may be exercised and in what circumstances. With respect to the power inserted at item 19, section 142 explicitly provides for where those powers may be exercised and in what circumstances. In all instances the Act provides that in exercising their powers maritime security inspectors must not subject a person to greater indignity than is necessary and reasonable for the exercise of the power. To inspect the private living areas of a ship or offshore facility maritime security inspectors must have an inspection warrant issued by a magistrate.

Trespass unduly on personal rights and liberties
Item 20, proposed sections 145D, 145E and 145F

The Committee seeks the advice of the Minister about the way in which the [security assessment inspector] scheme will operate, and in particular what accountability, review, training and risk management protections apply to it; and whether the powers and safeguards are consistent with the maritime security inspector regime and aviation security measures.

In the current security environment, the ability of security assessment inspectors to examine the effectiveness of current security policies is critical to ensuring that Australia's maritime transport system continues to remain secure from the threat of terrorism and unlawful interference. The powers and safeguards created at item 20 are consistent with those provided for maritime security inspectors and aviation security inspectors, although limited in that security assessment inspectors will not be able to enter residences (for example a ship's quarters).

The specific powers of a security assessment inspector are clearly defined at proposed subsection 145E(1). Proposed section 145(F) explicitly provides for where those powers may be exercised and in what circumstances. In exercising a power under proposed section 145E, a security assessment inspector will be accompanied by a maritime security inspector. A

security assessment inspector must not subject a person to greater indignity that is necessary and reasonable for the exercise of this power.

The Secretary of my Department may appoint persons as security assessment inspectors only if they satisfy criteria as prescribed in the regulations. This approach is comparable with the appointment of maritime security guards under the Act and airport security guards under the *Aviation Transport Security Act 2004*; both Acts require that regulations must establish requirements to be met before a person can become a security guard. The regulations then require potential maritime and aviation security guards to meet specific training and qualification requirements.

Criteria for the appointment of security assessment inspectors would be the subject of consultation with industry and relevant government agencies. In addition, the regulations would be subject to the scrutiny of the Senate Standing Committee on Regulations and Ordinances. Appointments of security assessment inspectors are for a specified period and can be revoked at any time.

Strict liability
Reversal of onus
Item 20, proposed section 145G; item 22 proposed sections 166B and 166C

The Committee seeks the Minister's advice about the justification for the use of strict liability in these offences and for placing the initial onus of proof on the defendant in relation to the availability of a reasonable excuse for his or her actions.

The use of strict liability in the identified offences is necessary to ensure the continued integrity of the maritime security regulatory regime. This is consistent with the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) and the Committee's Report 6/2002 *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (the Report). Consistent with the Report, the use of strict liability has been applied where the penalties do not include imprisonment and where there is a cap on monetary penalties (page 284 of the report). Further, the penalties identified are consistent with those for existing offences of a similar kind the Act. This is consistent with the Guide which states 'Penalties should be framed to maximise consistency with penalties for existing offences of a similar kind or seriousness.'

The initial onus of proof on the defendant in relation to the availability of a reasonable excuse for his or her actions is consistent with section 6.1 of the Commonwealth Criminal Code which provides if a law that creates an offence provides that the offence is an offence of strict liability, the defence of mistake of fact under section 9.2 is available.