SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2010

24 November 2010

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator G Marshall
Senator L Pratt
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

TENTH REPORT OF 2010

The Committee presents its Tenth Report of 2010 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:

- Airports Amendment Bill 2010
- Autonomous Sanctions Bill 2010
- Corporations Amendment (No.1) 2010
- Education Services for Overseas Students Legislation Amendment Bill 2010
- Superannuation Legislation Amendment Bill 2010
- Tax Laws Amendment (2010 Measures No.4) Bill 2010
- Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010
- Therapeutic Goods Amendment (2010 Measures No.10 Bill 2010

Airports Amendment Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 30 September 2010
Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on X November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends *the Airports Act 1996* to give effect to the legislative reforms announced in the White Paper *Flight Path to the Future* on 16 December 2009 by the Government.

The bill seeks to make the following amendments:

- amend the requirements for airport master plans and major development plans to support more effective airport planning and better alignment with State, Territory and local planning;

- in relation to the first five years of a master plan, require additional information such as a ground transport plan and detailed information on proposed developments to be used for purposes not related to airport services (e.g. commercial, community, office or retail purposes);

- restructure the triggers for major development plans including capturing proposed developments with a significant community impact;

- prohibit specified types of development which are incompatible with the operation of an airport site as an airport. However, an airport-lessee company will have the opportunity to demonstrate to the Minister that such a development could proceed through a major development process because of exceptional circumstances;

- integrate the airport environment strategy into the master plan requiring only one public comment period for the combined document recognising that an airport environment strategy is better articulated in the context of the airport's master plan. Transitional provisions are included to address how the expiry dates of environment strategies will be aligned with the expiry dates of master plans; and

- clarify ambiguous provisions and making housekeeping amendments to update certain provisions of the Airports Act.

Strict liability
Penalty
Burden of proof
Schedule 1, item 46

Item 46 of Schedule 1 introduces a new section 89A into the Act, the effect of which is to make it an offence to carry out 'an incompatible development' without approval. Subsection 89A(3) indicates that strict liability applies to paragraph (2)(a) of section 89A, which states that a person commits an offence if 'the person is subject to a requirement under subsection (1)'. Subsection (1) provides that a person must not carry out or cause or permit to be carried out an incompatible development without an appropriate approval. Although there are circumstances in which the Committee has accepted strict liability as being appropriate, it has consistently taken the view that adequate justification for its use be provided in explanatory memoranda. In this case the issue is not addressed.

Further, in relation to strict liability offences, the normal penalty (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, p 27) is stated to be 300 units for a body corporate. Subsection 89A(2) sets the penalty for the offence at 400 penalty units, and no justification for this is provided in the explanatory memorandum.

Last, *Note 2* to subsection 89A(2) states that the defendant bears an evidential burden of proof in relation to the matters in paragraphs (1)(c) and (d). This is a drafting error as these paragraphs do not exist. The explanatory memorandum does not address the issue of the imposition of an evidential burden of proof.

The Committee therefore **seeks the Minister's advice** about the justification for the imposition of strict liability; the reasons for the level of penalty and particularly why it exceeds the amount recommended in the Guide; whether an evidential burden of proof applies and if so, why this approach has been taken, and whether the *Note* to subsection 89A(2) can be corrected.

> *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

As noted in the *Alert Digest*, the Bill introduces a new section 89A into the *Airports Act 1996* (the Act) which will prohibit certain "incompatible" developments except in exceptional circumstances and establish an offence for proceeding without approval. Subsection 89A(3) provides that strict liability applies only to paragraph 2(a) of section 89A.

The *Alert Digest* commented that the explanatory memorandum does not explain the justification for the imposition of strict liability. Furthermore, it stated that the normal penalty for a body corporate in relation to strict liability offences is 300 penalty units whereas subsection 89A(2) sets the penalty for the offence at 400 penalty units.

The Department of Infrastructure and Transport has consulted the Attorney-General's Department and it has been advised that section 89A of the Bill is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide).

The Australian Government considers the application of strict liability in relation to paragraph 89A(2)(a) is appropriate. Developments on leased federal airports are carried out by the airport lessee company or in some circumstances a sub-lessee. All should be well aware of the regulatory requirements for developments at the airport, which are designed to ensure the interests of the travelling public, the Commonwealth as lessor and the broader community are balanced with the lessee's objectives. Enforcement action for non-compliant developments will clearly be difficult if proof is required of the developer's actual state of mind in relation to the requirements of the relevant provision of the Act. Accordingly, requiring proof of fault in relation to that element may undermine deterrence. The creation of a strict liability offence in proposed subsection 89A(3) is consistent with other provisions in the Act-please refer to existing subsections 90(3A) and 90(7).

Furthermore, the Guide provides that a limit of 60 penalty units for an individual and 300 penalty units for a body corporate should be observed where strict liability is applied to all the physical elements of an offence. However, we have not adopted this aspect of the Guide and have limited strict liability offence to one element, paragraph 89A(2)(a). Elements of the offence relating to a person's conduct are not caught by the strict liability requirement and fault would still need to be proven with respect to the matters in paragraphs 89A(2)(b) and (c).

In relation to 'Note 2' under subsection 89A(2), you may be pleased to know that this drafting error will be rectified by the proposed government amendments.

Thank you for raising this matter and I trust the above information will be of assistance to the Committee.

Committee Response

The Committee thanks the Minister for this comprehensive response and suggests that it would be helpful for some of this information to be included in the explanatory memorandum.

Autonomous Sanctions Bill 2010

Introduced into the House of Representatives on 26 May 2010 reintroduced on 30 September 2010
Portfolio: Foreign Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Minister responded to the Committee's comments in a letter received on 23 November 2010 which also included additional information about the bill. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament.

Extract from Alert Digest No. 6 of 2010

Background

This bill provides a framework for the implementation in Australia of autonomous sanctions. The bill seeks to increase the range of measures Australia can implement, which is intended to match the scope and extent of measures implemented by like-minded countries. The bill will also assist the administration of, and compliance with, sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and UN sanction enforcement laws.

Incorporation by reference
Proposed clause 10

The regulation making power in clause 10 of the bill allows, in subclause 10(3), for material to be incorporated by reference to other instruments as they are in force or existence from time to time. The explanatory memorandum explains why these regulations may cover central features of the scheme—such as which persons or entities are proscribed and what activities are restricted—by reference to the need for 'flexibility to apply new, or amend existing, autonomous sanctions measures in response to international developments which change rapidly'. This justification, however, does not identify the necessity for the regulations to incorporate other instruments by reference. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to the justification for including this aspect of the regulation making power.

Pending the advice of the Minister, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Incorporation by reference
Proposed clause 10

The Committee has raised concerns about the regulation making power in proposed clause 10 of the Bill which allows, in subclause 10(3), for material to be incorporated by reference to other instruments as they are in force or existence from time to time. The provision corresponds to subsection 6(3) of the *Charter of the United Nations Act 1945* which was introduced into the *Charter of the United Nations Act 1945* in 2007.

Autonomous sanctions, like UNSC sanctions, are highly targeted measures, aimed at specific goods. or specific individuals and entities, which are contributing to the situation of international concern that the sanctions aim to mitigate or change. Subclause 10(3) will enable the Government both to prepare its own lists of goods, or persons and entities, to be subject to sanctions. It will also enable the Government to apply sanctions to lists of goods prepared by international export control regimes, such as the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group or the Wassenaar Arrangement.

It is imperative to the goal of autonomous sanctions - the need to ensure harmonised measures across a number of like-minded implementing countries, as well as the ability to respond quickly to rapidly changing circumstances in the situation to which the sanctions relate - that the Government have the requisite flexibility in setting the scope of sanctions measures, in terms of the goods, or the persons and entities, to which the sanctions apply.

Committee Response

The Committee thanks the Minister for this response, but **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Extract from Alert Digest No. 6 of 2010

Henry VIII
Proposed clause 12

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 can be a matter of concern to the Committee.

Clause 12 is a Henry VIII clause insofar as it ensures that regulations made under the bill (once enacted) will have effect despite a contrary provision in another Act. As the explanatory memorandum does not explain the necessity for this delegation of legislative power to the Governor-General under clause 10 of the bill, the Committee **seeks the Minister's advice** as to the justification for this approach.

> *Pending the advice of the Minister, 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

Henry VIII clause
Proposed clause 12

The Committee has raised concerns about proposed clause 12 of the Bill (known as a Henry VIII clause), which ensures that regulations made under the Bill (once enacted) will have effect despite a contrary provision in another Act. Proposed clause 12 substantially corresponds to section 9 of the *Charter of the United Nations Act 1945*, which was introduced by an amendment to that Act in 1993 and further amended in 2001

The decision to impose sanctions is properly one for the Executive as a matter of foreign policy, with the Parliament setting the framework and parameters for how such measures will be reflected in Australian law. The measures applied are highly targeted, applied only

to specific foreign governments, individuals and entities or to specific goods and services where there is a nexus to situations of international concern.

It is appropriate that measures applied with the intention of limiting the adverse consequences of a situation of international concern should not be prevented from taking effect as intended and should not be affected by pre-existing legislation or legislative instruments of the Commonwealth or a State or Territory.

Committee Response

The Committee thanks the Minister for this response, but **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Extract from Alert Digest No. 6 of 2010

Inappropriate delegation of legislative power
Proposed clause 13

Clause 13 of the bill is an interpretive provision, the effect of which is to require that a future Act of Parliament can only be taken as amending or repealing or otherwise altering a provision of Part 2 of this bill (once enacted) or of the regulations made under it, if the Act provides for this outcome expressly. This overrides the normal assumption that future legislation may impliedly repeal earlier legislation, and does so even with respect to regulations made under this Act. Although such an interpretive rule may be considered as appropriate in relation to legislation which is considered to be of special or quasi-constitutional importance, the explanatory memorandum does not explain why it is appropriate in this case. The Committee therefore **seeks the Minister's advice** as to why this rule is appropriate, especially in relation to matters determined in delegated legislation.

> *Pending the advice of the Minister, 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

Inappropriate delegation of legislative power
Proposed clause 13

The Committee has raised concerns about proposed clause 13 of the Bill, an interpretative provision, the effect of which is to require that a future Act of Parliament can only be taken as amending or repealing or otherwise altering a provision of Part 2 of the Bill (once enacted) or of the regulations made under it, if the Act provides for this outcome expressly. Proposed clause 13 substantially corresponds to section 10 of the *Charter o/the United Nations Act 1945,* introduced by amendment in 1993.

Sub-clause 13(2) of the Bill would allow Parliament to amend this provision though express reference. Therefore, the provision does not derogate from any power of the Parliament. Given the significance of the Bill and the Regulations in the context of seeking to deal with situations of international concern, including prevention of nuclear proliferation, it is appropriate that substantive changes to the Act or Regulations made under it only occur through the express actions of the Parliament, rather than through inadvertent or implied inconsistencies that might have unintended consequences.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Trespass on personal rights and liberties
Proposed subclause 14(5)

Subclause 14(5) of the bill would relieve the Attorney-General of the normal rule in civil cases that a person seeking an interim injunction give an undertaking in relation to damages. Although special considerations can arise in the context of public law cases (in which the Attorney-General is seeking to enforce the law) the explanatory memorandum does not address this issue. The Committee is concerned to ensure that there is no undue trespass on personal rights and liberties as a result of this provision and therefore **seeks the**

Minister's advice as to the justification for the provision and extent of any detriment persons may suffer as a result of it.

> *Pending the advice of the Minister, 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 on personal rights and liberties
Proposed sub-clause 14(5)

The Committee has raised concerns about proposed sub-clause 14(5) of the Bill, which relieves the Attorney-General of the requirement to give an undertaking as to damages when an interim injunction is sought. This provision substantially corresponds to section 13(5) of the *Charter of the United Nations Act 1945*, which was introduced by amendment in 1993.

The purpose for which the Attorney-General might seek an injunction under the Bill is to seek to prevent the commission of a serious criminal offence, that is, the contravention of a sanction law. In this context, the Government considers that it is not appropriate to require an undertaking as to damages in an injunction which seeks to prevent the commission of a criminal offence.

It is an established principle of law that liability shall not accrue with respect to a lawfully made decision of a Minister. A provision excluding the requirement to give an undertaking as to damages in these circumstances is consistent with this principle.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Determination of important matters by delegated legislation
Proposed clause 16

Clause 16 seeks to introduce offences for contraventions of a 'sanction law' and defines part of the offences by reference to what is, by a legislative instrument, specified as a 'sanction law' (pursuant to proposed clause 6). Offences committed by an individual can attract a penalty of imprisonment of 10 years or a fine of 2,500 penalty units. Given the seriousness and nature of the offences provided for under clause 16, the Committee **seeks the Minister's advice** as to whether it would be possible to prescribe mechanisms for ensuring that potentially affected persons receive appropriate notice that a particular law has, under clause 6, been specified as a 'sanction law'.

> *Pending the advice of the Attorney-General, 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

Determination of important matters by delegated legislation
Proposed clause 16

The Committee has raised concerns about proposed clause 16 of the Bill, which seeks to introduce offences for contraventions of a 'sanction law' and defines part of the offences by reference to what is, by legislative instrument, specified as a 'sanction law'. The proposed provision substantially corresponds to section 27 of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

The specification of a 'sanction law' by legislative instrument subjects the specification to parliamentary scrutiny as a disallowable instrument. Publishing such lists of 'sanction laws' provides transparency, as only laws so listed will be sanction laws.

The Government makes substantial efforts to ensure the public is advised of sanction laws. The Department of Foreign Affairs and Trade conducts extensive outreach activities to attempt to ensure potentially affected persons have relevant information on sanction laws. This includes targeted outreach activities throughout Australia with business and industry

(at least annually); maintenance of a comprehensive sanctions website which provides links to relevant legislation and legislative instruments; and operation of a public email inquiry service.

Committee Response

The Committee thanks the Minister for this comprehensive response and notes the efforts the Government usually makes to ensure that those affected by these laws are aware of them. The Committee **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Extract from Alert Digest No. 6 of 2010

Strict liability
Proposed clause 16

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.

If a body corporate contravenes a sanction law under proposed subsections 16(5) and 16(6) the offence is one of strict liability (subclause 16(8)) attracting fines of 3 times the value of the transaction or 10,000 penalty units (subsection 16(9)). Subsection 16(7) provides that an offence did not occur if the body corporate took all reasonable precautions and exercised due diligence to avoid the contravention. The explanatory memorandum notes the effect of these provisions, but does not explicitly discuss the justification for the application of strict liability to bodies corporate. The Committee therefore **seeks the Minister's advice** as to the reasons for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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 for contraventions by bodies corporate
Proposed clause 16

The Committee has raised concerns about the strict liability provisions in proposed clause 16 of the Bill which apply to bodies corporate that contravene a sanction law. These provisions correspond to the strict liability offences for bodies corporate contained in section 27 of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007. As the object and purpose of the Bill is to ensure identical consequences for a breach of Australian laws implementing both autonomous and UNSC sanctions, the Bill necessarily replicates the offence provisions of the *Charter of the United Nations Act 1945.*

The strict liability offence provisions do not apply to individuals.

The origin of the strict liability offence for bodies corporate in the *Charter of the United Nations Act 1945* is Recommendation 2 of the report, dated 24 November 2006, of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme conducted by Commissioner the Honourable Terence RH Cole AO RFD QC (the Cole Inquiry). Commissioner Cole proposed that there be new strict liability criminal offences with severe penalties - three times the value of the offending transactions, by way of monetary fine for corporations - for acting contrary to Australian law implementing UNSC sanctions to ensure that the penalties have a sufficient deterrent effect for bodies corporate.

The strict liability offence provisions for bodies corporate are balanced by an absolute defence for bodies corporate that can prove they took reasonable precautions, and exercised due diligence, to avoid contravening the sanctions law or authorisation concerned. This in turn is intended to promote a culture of corporate compliance.

The Government considers it is appropriate that the same penalty regime apply to autonomous sanctions. Such measures supplement UNSC sanctions regimes, either by implementing the non-mandatory categories of UNSC sanctions or by applying new measures aimed at reinforcing the impact of UNSC sanctions. They also apply in situations of grave international concern where the UNSC, through the limits of its mandate or its inability to agree on measures, has not imposed sanctions.

The situations to which autonomous sanctions apply will therefore be either the same as UNSC sanctions, or of the same gravity in terms of the extent to which they are of international concern. The Government's view is that it is appropriate that the consequences for contravening autonomous sanctions should therefore be the same as for contravening UNSC sanctions.

Committee Response

The Committee thanks the Minister for this comprehensive response and **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Extract from Alert Digest No. 6 of 2010

Privilege against self-incrimination
Proposed clause 22

Clause 22 abrogates the privilege against self-incrimination in relation to a requirement that an individual give information or a document under clause 19. The clause 19 requirement to give information is limited to information sought for the purpose of determining whether a sanction law has been or is being complied with.

Although the bill makes clear that it will operate subject to a 'use' immunity, there is no express inclusion of 'derivative use' immunity. This means that although information required to be given cannot be used against the person who makes the disclosure in court proceedings, it may be used indirectly to gather other evidence against the person. Although the privilege against self-incrimination should not be thought of as absolute, the Committee considers that any derogation of the privilege should be fully justified in the explanatory memorandum.

In this case the explanatory memorandum does not justify its abrogation nor provide reasons as to why the 'derivative use' immunity is not appropriate in these circumstances. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Attorney-General, 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

Privilege against self-incrimination
Proposed clause 22

The Committee has raised concerns about proposed clause 22 of the Bill, which abrogates the privilege against self-incrimination in relation to a requirement that an individual give information or a document under clause 19. Proposed clause 22 of the Bill corresponds to section 33 the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

Section 33 is one of a number of measures which implemented Recommendation 3 of the Cole Inquiry. Given the correspondence between autonomous and UNSC sanctions, it is appropriate that the same authority exists to enable sanctions enforcement agencies to monitor compliance with both UNSC and autonomous sanctions.

Proposed clause 22 provides that the individual is not excused from providing the document or information on the ground that the provision of the document or information may tend to incriminate the person. However, the information or document is not admissible in evidence against the person who made it available, other than in respect of an action with respect to giving false or misleading information in connection with a sanction law or failure to comply with the requirement to give information or a document.

Committee Response

The Committee thanks the Minister for this response and **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Extract from Alert Digest No. 6 of 2010

Possible inappropriate delegation of legislative power
Proposed clause 24

Subclause 24(2) sets out those to whom the CEO of a designated Commonwealth entity may disclose information. However, paragraph (f) of the subclause allows disclosure to any person or entity specified in a legislative instrument made by the Minister under subclause 24(3). The explanatory memorandum does not indicate why this is necessary nor in what sort of circumstances further entities or persons may need to be identified for this purpose. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

> *Pending the advice of the Minister, 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

Possible inappropriate delegation of legislative power
Proposed clause 24

The Committee has raised concerns about proposed clause 24 of the Bill, which sets out to whom the CEO of a designated Commonwealth entity may disclose information. These provisions correspond to paragraph 35(2)(f) and subsection 35(3) of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

The inclusion of the category of a person or entity specified by the Minister provides a limited degree of additional flexibility in the categories of persons or entities with whom information or documents can be shared. This helps to ensure that enforcement of sanction laws is not stymied through the incapacity to exchange information with relevant persons or entities.

Specification by legislative instrument, a disallowable instrument, subjects the specification to Parliamentary scrutiny.

Committee Response

The Committee thanks the Minister for this response but **leaves it the Senate as a whole** as to whether the proposed approach is appropriate in the circumstances.

Corporations Amendment (No.1) Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 29 September 2010
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter received on 12 November 2010 and the Committee's consideration of the response was outlined in its *Ninth Report of 2010*.

The Committee had sought advice from the Minister in relation to two issues: the justification for new search warrant powers and action in relation to a defective explanatory memorandum. In his reply the Minister stated that a replacement explanatory memorandum would be tabled and that it would address both of these issues.

The Committee has now been able to consider the content of the replacement explanatory memorandum and provides the following further comments.

Committee Response

Search warrants
Items 1 to 3

The Committee was concerned about these items as they seek to amend the foundation on which ASIC can apply for the issue of a search warrant in relation to the production of books for the purposes of inspection and audit. The Committee sought to understand why new powers are needed, whether the proposed power is too broad, what safeguards are in place to ensure that their use would be for a proper purpose and proportionate to the circumstances, and whether they are consistent with other similar powers.

The replacement explanatory memorandum at paragraph 3.6 provides an explanation of the justification for the proposed approach and at paragraphs 3.17 to 3.26 provides a comprehensive explanation of the intended operation of the provisions and the fact that they are modelled on existing provisions in the *Trade Practices Act 1974*.

The Committee thanks the Minister for the inclusion of the additional information and **leaves it to the Senate as a whole** as to whether the provisions trespass unduly on personal rights and liberties.

Poor explanatory memorandum
Various

The Committee was concerned about the quality of the original explanatory memorandum accompanying the bill. The Committee thanks for the Minister for his comprehensive response and for the replacement explanatory memorandum.

Education Services for Overseas Students Legislation Amendment Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced into the Senate on 27 October 2010
Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2010*. The Minister responded to the Committee's comments in a letter dated on 23 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends the *Education Services for Overseas Students Act 2000* and the *Ombudsman Act 1976* to provide for recommendations from the review of the Education Services for Overseas Students legislative framework, dated February 2010, titled *Stronger, simpler, smarter ESOS: supporting international students* (the ESOS Review) conducted by the Hon Bruce Baird AM. The bill will introduce provisions to amend the registration process for approved providers and improve access to a statutory independent external complaints body.

Poor explanatory memorandum
Strict liability
Items 10, 12, 14, 15, 16, and 17

Items 10, 12, 14, 15, 16, and 17 include statements that the offences provided for are strict liability offences. The penalties imposed for the offences are consistent with the 'basic principles' which the Committee outlined in its sixth report of 2002 (*Application of Absolute and Strict Liability Offences in Commonwealth Legislation*). The Committee takes the view that fault liability is one of the most fundamental protections of the criminal law and that 'strict liability should be introduced only after careful consideration' (see page 283 of the above report).

The Committee notes the comment at page 25 of the explanatory memorandum that these amendments 'reorganise existing offence provisions…to reflect modern drafting practice by locating the operative offence provisions within their corresponding, substantive provisions.' However, it is regrettable that the explanatory memorandum merely repeats the strict liability nature of the offences without attempting to justify the appropriateness of this approach. In addition, it is noted that in the case of the offence outlined in item 15 the elements of the offence may be set out in regulations (see the explanatory memorandum for item 15).

The Committee therefore **seeks the Minister's advice** as to why strict liability is considered appropriate in relation to each of these offences, and the justification for the approach to the elements of item 15.

> *Pending the Minister's response, 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 for offences in items 12,14,15,16 and 17

The amendments covered by these items relate to the imposition of financial penalties and were developed in response to a key concern raised during ESOS Review consultations about the effectiveness of current ESOS enforcement provisions.

Currently, under Part 6 of the ESOS Act, there is a range of sanctions such as suspension or cancellation of registration which may be imposed for non-compliant action by providers of education to overseas students. The imposition of these sanctions may have significant implications for a provider's operations, and potentially adversely impact students should the provider cease to operate. Instead of such sanctions, financial penalties are a tangible and immediate action that can be taken against providers for compliance breaches. It is anticipated that this would reduce the need for lengthy enforcement processes and would also be less likely to compromise a provider's ability to continue operating (with the consequent effect this may have on students).

The penalties to be introduced by items 12,14,15,16 and 17 do not involve imprisonment and are quite low - 60 penalty units. The application of strict liability with respect to the penalties is considered likely to significantly enhance the effectiveness of the enforcement regime for the conduct in question. This conduct concerns obligations on providers to give

information about their accepted students, sending students notices of visa breaches, record keeping, maintaining lists of education agents used, written agreements with students concerning refund requirements and refunds in other cases. Regardless of the existence of intent, these obligations are central to the integrity of the student visa scheme and the protection of international students' interests. The ability to impose penalties on a strict liability basis without needing to establish fault is very important for the effectiveness of these matters. It will also place providers on notice that they need to take these matters seriously and give them the incentive to do so.

The specific non-compliant behaviour identified for financial penalties in these amendments has been selected on the basis that the regulator is able to readily assess that a breach has taken place. For example, item 16 amends section 28 of the ESOS Act to provide that a financial penalty may be applied if a provider fails to enter into a written agreement with a student or provide a refund to a student in accordance the provider's obligations under section 28. Given that under section 4A the first principal object of the Act is to provide financial and tuition assurance to overseas students for courses for which they have paid, in my view strict liability for failure to refund monies to a student is most appropriate.

Including elements of the offence in item 15 in the regulations

In relation to the Committee's concerns about item 15, it should be noted that subsection 21A of the Act was first introduced in March 2010 when the Australian Government was still considering proposed regulatory changes arising from the Baird Review to strengthen provider obligations for the education agents they use. Section 21A was intended to cover increased transparency in provider/agent relationships at the broad level, with more detailed obligations more appropriately prescribed in the regulations.

Section 21A requires registered providers to maintain lists of the education agents they use and to publish the lists on their websites and in any other manner prescribed by the regulations. At present, publishing the lists on websites is considered to be a very effective way of bringing this information to the attention of international students. The ability for the regulations to prescribe other ways of publishing the lists will provide flexibility to deal with emerging circumstances that may require other publishing methods to be used. It may be, for example, that new technologies are developed that would also prove to be an efficient way for the information to be made available to international students.

Committee Response

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

Extract from Alert Digest No. 8 of 2010

Retrospective application
Item 8

Schedule 2 of the bill establishes and confers functions, powers and duties on the Overseas Students Ombudsman. Item 8 provides that the amendments in Part 1 of Schedule 2 applies in relation to action taken by a private registered provider before or after the commencement of Schedule 2. The law therefore applies to actions which occur prior to its commencement.

The proposed arrangements would not substantively retrospectively affect legal rights or obligations because the Ombudsman's powers do not include powers to make determinative rulings, but are of an investigatory nature. Nonetheless, the approach would still allow the retrospective application of the investigative powers and the ability to table reports about such conduct. The Committee expects that justification will be provided in the explanatory memorandum for any retrospective commencement or application of legislative proposals. In this case the explanatory memorandum at page 39 merely restates the effect of the provision without outlining reasons for the proposed approach. The Committee therefore **seeks the Minister's advice** about the justification for the retrospective application of Part 1 of schedule 2.

> *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

Retrospective application of Part 1 of Schedule 2 about the Overseas Students Ombudsman

There are three main reasons why Part 1 of Schedule 2 should have retrospective application. In short, these reasons are:

- to minimise confusion and duplication of effort during the transition from current complaints arrangements
- to reduce complexity with respect to determining when a complaint arose and the commencement of the Overseas Students Ombudsman's role

- the approach is consistent with the commencement of the *Ombudsman Act 1976* providing the Ombudsman with power to investigate action taken by departments and prescribed authorities prior to that Act's commencement.

Minimising confusion and duplication of effort

In response to the Committee's concerns about the retrospective application of Part 1 of Schedule 2 to actions taken by private registered providers before or after the commencement of Schedule 2, this is intended to minimise confusion and duplication of effort during the transition from current arrangements.

There is an existing requirement that providers give students access to an independent external complaints mechanism. This is contained in Standard 8 of the *National Code of Practice* of *Registered Authorities and Providers* of *Education and Training to Overseas Students* 2007(the National Code) as follows:

> *8.2 The registered provider must have arrangements in place for a person or body independent of and external to the registered provider to hear complaints or appeals arising from the registered provider's internal complaints and appeals process or refer students to an existing body where that body is appropriate for the complaint or appeal.*

There is therefore no new right or obligation being imposed on providers by the creation of the Overseas Students Ombudsman's jurisdiction. Arguably it is more straight forward and less onerous for a provider to refer complainants to the Overseas Students Ombudsman as the external complaints body, rather than having to establish or rely upon another external complaints mechanism.

If complaints arising from circumstances prior to the commencement of the Overseas Students Ombudsman's role could not be considered by the Overseas Students Ombudsman, other avenues of external complaints and appeal would have to be available and accessible for students for so long as those circumstances might give rise to a complaint.

Reducing complexity – timing

There may also be confusion about determining an exact point in time at which a complaint arose so as to determine whether it arose before or after the Overseas Students Ombudsman's role commenced. For example, if a student believes their attendance has been improperly recorded in one semester, became aware of it in a second semester, and unsuccessfully appealed the record at a later date, which period/date does the complaint relate to? If the Overseas Students Ombudsman's role commences after the unsuccessful internal appeal:

a. is there no access to an external complaints body?

b. is there access to an external complaints mechanism established by the provider?

c. can the provider agree to the Overseas Students Ombudsman being that mechanism?

d. does the Overseas Students Ombudsman have the capacity to hear the complaint regardless of arrangements put in place by the provider?

e. do the providers' external complaints arrangements lapse with the commencement of the Education Students Ombudsman's jurisdiction?

Clause 9ZL of the Bill provides for the Overseas Students Ombudsman to decline to investigate where the action complained of came to the complainant's knowledge more than 12 months before the complaint was made. This tempers the possibility of an open ended interpretation of the transitional provisions by reference to coverage of actions taken by providers prior to commencement. It also reflects section 6 of the *Ombudsman Act 1976*, under which the Ombudsman currently has and uses discretion not to investigate complaints in circumstances where the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before making the complaint.

The Committee's comments do raise the issue of transitional provisions in those circumstances where an external complaint or appeal has commenced but is not completed when the Overseas Students Ombudsman's role takes effect. Arguably these complaints and appeals could continue to completion, as the Bill does not terminate the right to an external complaint body through other channels, but creates the Overseas Students Ombudsman as a new vehicle for complaint consideration.

Consistency with commencement of the *Ombudsman Act 1976*

The capacity to investigate action taken prior to the commencement of an Ombudsman role is not unique. It is also found in section 5 of the *Ombudsman Act* 1976 which gave the Ombudsman, at commencement of that Act, the power to investigate action taken by departments and prescribed authorities prior to the Act's commencement. I trust this information enables the Committee to finalise its consideration of the Bill.

Committee Response

The Committee thanks the Minister for this very comprehensive response and notes that it would have been helpful for some of this information to have been included in the explanatory memorandum.

Superannuation Legislation Amendment Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 29 September 2010
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter received on 18 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends various superannuation and taxation laws to implement a range of improvements to these laws.

Schedule 1 provides for amendments to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, and the Income Tax Assessment Act 1997 to:

- facilitate state and territory authorities and public sector superannuation schemes paying unclaimed superannuation moneys to the Commissioner of Taxation (Commissioner); and

- enable the Commissioner to accept, and subsequently pay out, amounts transferred by state and territory authorities and public sector superannuation schemes.

Schedule 2 and clause 4 provide for transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds by amending the *Income Tax (Transitional Provisions) Act 1997* and the *Income Tax Assessment Act 1997*.

Schedule 3 amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) to allow the trustee of a regulated superannuation fund to acquire an asset *in specie* from a

related party of the fund, following the relationship breakdown of a member of the fund, without contravening the prohibition against related party acquisitions.

This Schedule also amends Subdivision D of Division 1 of Part 8 of the SIS Act 1993 to ensure equitable application of the transitional arrangements in relation to in-house assets where an asset transfer occurs as the result of the relationship breakdown of a member of the fund.

Schedule 4 makes a number of minor amendments to improve the operation of the superannuation sections of the income tax legislation. These amendments include:

- allowing a deduction for eligible contributions to be claimed from successor superannuation funds after 1 July 2011;
- increasing the time-limit for deductible employer contributions made for former employees;
- clarifying the due date of the shortfall interest charge for the purposes of excess contributions tax;
- allowing the Commissioner of Taxation to exercise discretion for the purposes of excess contributions tax before an assessment is issued;
- providing a regulation making power to specify additional circumstances when a benefit from a public sector superannuation scheme will have an untaxed element; and
- streamlining references to the Immigration Secretary and Immigration Department.

Retrospective commencement
Schedule 1, item 21

Item 21 of Schedule 1 is an application provision which states that changes to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, to be inserted by this Schedule, apply to transfers occurring before, on or after the commencement of this item. Although this provision does not appear to have the potential to detrimentally affect any person, the explanatory memorandum does not deal with the question. The Committee therefore **seeks the Treasurer's advice** as to whether or not there is any potential detriment to any person.

Pending the Treasurer'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

Superannuation Legislation Amendment Bill 2010 - Schedule I, item 21

Changes to the Superannuation (Unclaimed Money and Lost Members) Act 1999 (S(UMLM)Act) commence retrospectively under item 21 of Schedule 1 to Superannuation Legislation Amendment Bill 2010.

Under item 21 of Schedule I, subparagraph 49A(1)(b) the S(UMLM) Act is applied to transfers of unclaimed superannuation moneys to State and Territory authorities occurring before, on or after the commencement of the item. Subparagraph 49A(1Xb) enables State and Territory authorities to transfer to the Commissioner of Taxation unclaimed superannuation previously transferred to them under State and Territory unclaimed money legislation.

Prior to 1 July 2007 private sector unclaimed superannuation moneys was paid to State and Territory authorities under State and Territory legislation. As a result, State and Territory authorities may have a stock of private sector unclaimed superannuation in addition to unclaimed superannuation paid to them by State and Territory superannuation schemes.

Retrospective application of subparagraph 49A(1)(b) is necessary to ensure that the legislation allows unclaimed superannuation moneys that were transferred to State and Territory authorities prior to the commencement of the Act to be subsequently transferred to the Commissioner of Taxation and claimed back by individuals.

The retrospective commencement under item 21 does not have any potential detriment to any person. Prior to these amendments, individuals could claim money from a State or Territory authority that was transferred to the authority under State or Territory legislation. Under the changes made by this Bill, individuals can now claim back their money from the Commissioner at any time.

These amendments will facilitate more uniform treatment of unclaimed money across the public and the private sectors and assist in the central administration of unclaimed monies.

Committee Response

The Committee thanks the Minister for this response and notes his advice that this proposal will facilitate more uniform treatment of unclaimed money and will not have a detrimental effect on any person.

Extract from Alert Digest No. 8 of 2010

Retrospective commencement
Schedule 2 and clause 4

Schedule 2 and clause 4 of this bill provide for transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds. The changes operate with retroactive effect, but provide funds with *greater* scope to deduct premiums paid for insurance and thus are clearly beneficial. The explanatory memorandum does not expressly address the question of retrospective effect but the changes do not appear to cause any detriment to a taxpayer and the provision of transitional relief is designed to enable industry practices to be brought in line with strict compliance with the proper interpretation of the rules allowing deductions in relation to total and permanent disability insurance premiums given the government's recognition of a number of concerns raised by industry (see explanatory memorandum pp 20-21). Amendments to section 170 of the ITAA are made to ensure that taxpayers who have claimed deductions for past years in accordance with the current law may seek an amendment of their assessments to take advantage of the broader deduction allowed under the transitional provisions (see explanatory memorandum p 28). The Committee usually expects that any retrospective commencement will be justified in the explanatory memorandum, but as the provision in this instance is beneficial, it has no further comment.

> *In the circumstances, the Committee makes no further comment on the commencement of these provisions.*

Relevant extract from the response from the Minister

Superannuation Legislation Amendment Bill 2010 – Schedule 2 and clause 4

Schedule 2 and clause 4 of the Bill amend the tax laws to provide transitional relief for income tax deductibility of total and permanent disability (TPD) insurance premiums paid by superannuation funds.

The transitional relief will provide complying superannuation funds, for the 2004-05 to 2010-11 income years, with a greater scope to deduct premiums paid for insurance cover commonly regarded as TPD insurance. This measure applies retrospectively from the 2004-05 income year.

As the transitional relief broadens tax deductions, retrospectivity is beneficial to affected taxpayers.

I hope this information will assist the Committee.

Committee Response

The Committee thanks the Minister for this response.

Tax Laws Amendment (2010 Measures No.4) Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 29 September 2010
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Assistant Treasurer responded to the Committee's comments in a letter received on 18 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends various taxation laws to implements a range of improvements to Australia's tax laws,

Schedule 1 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure the third party payment adjustment provisions operate appropriately involving third party payments.

Schedule 2 amends the *Income Tax Assessment Act 1997* to provide a capital gains tax (CGT) roll-over for taxpayers who replace an entitlement to water with one or more different water entitlements.

Part 1 of Schedule 3 amends Division 230 of the *Income Tax Assessment Act 1997* and the consequential and transitional provisions inserted by the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* to make minor policy refinements and technical amendments and corrections to the provisions.

Part 2 of Schedule 3 extends the transitional arrangements relating to the application of the debt/equity rules made by the *New Business Tax System (Debt and Equity) Act 2001* to 1 July 2010 for Upper Tier 2 instruments issued before 1 July 2001.

Part 3 of Schedule 3 amends Division 775 (foreign currency gains and losses provisions) of the *Income Tax Assessment Act 1997* to extend the scope of a number of compliance cost saving measures, and to make technical amendments to ensure that the provisions operate as intended.

Schedule 4 amends the *Income Tax Assessment Act 1997* to make it easier for takeovers and mergers regulated by the *Corporations Act 2001* to qualify for the capital gains tax scrip for scrip roll-over.

Schedule 5 amends the *Income Tax Assessment Act 1936* to increase the threshold above which a taxpayer may claim the medical expenses tax offset and commence annually indexing the threshold to the consumer price index.

Schedule 6 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients to make one entity a deductible gift recipient, extend the period of listing of one entity and change the name of another entity.

Schedule 7 to this Bill adds three new general deductible gift recipient categories into the *Income Tax Assessment Act 1997*.

Poor explanatory memorandum
Various

The Committee is concerned that many of the items in this bill are incorrectly indexed in the explanatory memorandum. The Committee considers that an effective explanatory memorandum is an essential aid to proper Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

In the Committee's view, especial care should be taken to ensure the accuracy of the index in an explanatory memorandum that adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order). Flaws in the index can significantly (or sometimes totally) undermine the usefulness of the whole explanatory memorandum. Some examples of the incorrect indexing the Committee identified are at pages 43 (paragraph 2.86), 45 (paragraphs 2.91 to 2.93, 2.95 to 2.97), 81 (paragraph 4.39 – the cross-reference is correct, but it was omitted from the index) and 114 of the explanatory memorandum.

In the Committee's view it remains essential that explanatory memoranda comprehensively explain the effect of each provision in a legislative proposal and where a narrative style is adopted that the index is comprehensive and accurate. The Committee therefore **seeks the**

Treasurer's advice about whether the explanatory memorandum can be revised to ensure that it is comprehensive information and accurately indexed.

> *Pending the advice of the Treasurer, 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 Assistant Treasurer

The Committee is concerned that some items in Tax Laws Amendment (2010 Measures No.4) Bill 2010 are incorrectly indexed in the explanatory memorandum. While the explanation of the amendments in the explanatory memorandum is comprehensive and accurate, it seems that errors in the index arose as a consequence of last minute changes to the numbering of amendments in the Bill. The Government proposes to table a correction to the explanatory memorandum to ensure the index is accurate.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 8 of 2010

Retrospective application
Schedule 3, item 132

At page 65 the explanatory memorandum states that the purpose of this provision is to 'ensure that the definition of 'accounting principles' applies from the commencement of the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009*' As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. Unfortunately the explanatory memorandum does not address the likely impact of this provision, especially whether it will have a detrimental effect on any person. The Committee therefore **seeks the Treasurer's advice** as to the justification for the retrospective effect of this provision and whether it may cause detriment to any person.

Pending the Treasurer'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 Assistant Treasurer

Tax Laws Amendment (2010 Measures No.4) Bill 2010 - Schedule 3, Item 132

While the amendments covered by the application provision at item 132 of the Bill will have retrospective application from the commencement of Part 1 of Schedule 1 to the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (that is, from 26 March 2009), they are beneficial to affected taxpayers. As explained in paragraph 3.69 of the explanatory memorandum, 'accounting standards' is narrowly defined in the tax law to mean those standards that the Australian Accounting Standards Board makes for the purposes of the Corporations Act only, and without the amendments, entities who use accounting standards made by the Australian Accounting Standards Board for purposes other than the Corporations Act purposes (for example, superannuation funds) would not be able to rely on their financial reports for the purposes of making the various tax-timing elections under Division 230.

Committee Response

The Committee thanks the Minister for this response and notes his advice that the amendments are beneficial to affected taxpayers.

Extract from Alert Digest No. 8 of 2010

Retrospective application
Schedule 3, item 149

This item is an application provision which states that 'The amendments made by this Part apply on and after 17 December 2003.' As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The explanatory memorandum at page 81 simply repeats the effect of the provision without explaining the reason for it. Page 6 of the explanatory memorandum provides some background to the provisions, including the timing of their commencement, and implies that they are beneficial. However, there is no direct explanation of the very significant retrospective commencement and whether there is likely to be a detrimental effect on any person. The Committee therefore **seeks the Treasurer's advice** as to the justification for the retrospective application and whether it may cause detriment to any person.

> *Pending the advice of the Minister, 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 Assistant Treasurer

Tax Laws Amendment (2010 Measures No.4) Bill 2010 - Schedule 3, item 149

While the amendments to the foreign currency gains and losses tax provisions will have retrospective application from 17 December 2003, they are part of a package of amendments that was initially announced by the previous government on 5 August 2004 to apply from 1 July 2003.

They are intended to extend the scope of a number of compliance cost saving measures in the law, and to make technical amendments (including fixing minor drafting errors) to ensure that the law operates as intended.

While the amendments are generally beneficial to affected taxpayers, some of the minor technical amendments that are intended to correct obvious drafting errors (for example, the amendment at item 142) may be detrimental to some taxpayers. However, the initial announcement in 2004 contained detailed information about the proposed amendments so that affected taxpayers could manage their tax affairs or carry on their activities with the knowledge of the amendments and their impacts (beneficial and otherwise). As such, affected taxpayers should not have been disadvantaged by the retrospective application of those amendments.

Committee Response

The Committee thanks the Minister for this response, but remains concerned about the significant delay in bringing the proposed amendments before the Parliament, particularly as some of the amendments may be detrimental to some taypayers.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

While the Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, this is usually limited to publication of a draft bill within 6 calendar months after the date of that announcement. Proposed legislation introduced outside this timeframe is at particular risk of the Senate amending the commencement date to the date of introduction of the bill (see Senate Resolution 40). In this case the legislation has been introduced more than 6 years after the Schedule 2 and Schedule 4 measures were announced. In the circumstances the Committee **leaves to the Senate as a whole** the question of whether this amounts to an undue trespass on individual rights and liberties and insufficiently subjects the provisions to appropriate Parliamentary scrutiny.

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010

Introduced into the House of Representatives on 15 September 2009 and reintroduced on 20 October 2010
Portfolio: Broadband, Communications and the Digital Economy

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on 19 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends the *Telecommunications Act 1997*, Parts XIB and XIC of the *Competition and Consumer Act 2010*, the *National Transmission Network Sale Act 1998*, the *Radiocommunications Act 1992* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The bill introduces a package of legislative reforms aimed at enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards.

The bill has three primary parts:

- addressing the current structure of the telecommunications sector;
- streamlining the access and anti-competitive conduct regimes in Parts XIB and XIC of the *Competition and Consumer Act 2010*; and
- strengthening consumer safeguard measures, such as the Universal Service Obligation, the Customer Service Guarantee and Priority Assistance.

Legislative Instruments Act – possible exemption
Item 30, subsections 577A and 577B

Item 30 introduces subsection 577A(7) which authorises the Minister to set out matters in writing that the ACCC is then required to consider in determining (under the proposed subsection 577A(6)) whether to accept undertakings given by Telstra concerning the structural separation of its operations. The proposed subsection 577A (23) states that these directions are not legislative instruments. The explanatory memorandum at page 92 indicates that this is 'for the avoidance of doubt' given that Ministerial directions to any person are exempt from disallowance (see section 44 of the *Legislative Instruments Act*) *and* that the proposed direction operates 'like a direction to the ACCC to consider the specified matters.'

Although it is true that section 44 of the *Legislative Instruments Act* does operate to remove certain legislative instruments from the disallowance provisions, this does not change the *legislative* character of the instruments. The establishment of the criteria for determining limitations on the exercise of statutory powers is normally considered to be a legislative task (see eg *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 33).

The relevance of section 44 of the LIA is not that instruments are 'not legislative in character', but that specific legislative instruments are deemed 'not subject to disallowance'. Alternatively, section 7 of the LIA deals with instruments that are declared 'not to be legislative instruments' for the purposes of the LIA. The proposed provisions and the information in the explanatory memorandum at page 92 seem confused about these points. The same issue also arises in relation to item 31, subsections 577B(4), (5) and (9) (see pages 98 and 99 of the explanatory memorandum).

Given that these instruments change the criteria relevant for the exercise of a statutory discretion by requiring the ACCC to consider particular matters, the Committee would like to fully understand the operation of the proposed provisions and whether appropriate parliamentary scrutiny of any such legislative instruments will occur. The Committee therefore **seeks the Minister's advice** as to whether the intention is to declare these instruments not to be legislative for the purposes of section 7 of the LIA, or whether the position is that the instruments are legislative in character, but that it is asserted that they fall within the section 44 exemption from disallowance.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Relevant extract from the response from the Minister

Legislative Instruments Act - exemption
Schedule 1, item 30, subsection 577A(7) and subsection 577B(5)

I confirm that proposed subsections 577A(7) and 577B(5), which authorise the Minister to set out matters in writing that the Australian Competition and Consumer Commission (ACCC) is to consider in determining whether to accept a structural separation undertaking (SSU) or a variation to an SSU respectively, are not legislative in character and should not be legislative instruments.

As set out in the Explanatory Memorandum to the Bill, proposed subsections 577A(7) and 577B(5) operate like a direction from the Minister to the ACCC to consider the specified matters in those instruments in deciding whether to accept an SSU or a variation to an SSU. These instruments are intended to provide guidance to the ACCC on the matters that the ACCC must have regard to in making its decision.

In setting out matters under proposed subsections 577A(7) and 577B(5), the Minister is not limiting the matters to which the ACCC may have regard. In each case the ACCC may also have regard to any other matters it considers relevant (see proposed paragraphs 577A(6)(b) and 577B(4)(b)).

Under Parts 4, 5 and 6 of the *Legislative Instruments Act 2003* legislative instruments are required to be:

1. registered on the Federal Register of Legislative Instruments;
2. subject to parliamentary disallowance and tabling; and
3. subject to sunsetting.

The requirement to register the instrument set out in proposed subsection 577A(7) on the Federal Register and to table the instrument in Parliament is not necessary as proposed subsection 577A(22) in the Bill requires the instrument to be published on the Department's website. The requirement for the instrument to be sunsetted is not applicable as once the ACCC has made its decision to accept an SSU, the instrument has no further effect regarding the provisions in the Bill relating to Telstra's structural separation.

To give Telstra a high degree of certainty to progress its decision to structurally separate, the instrument under proposed subsection 577A(7) should not be subject to parliamentary disallowance. Under proposed subsection 577A(9) Telstra is not entitled to give an SSU to the ACCC unless an instrument under proposed subsection 577A(7) is in force. If this instrument was subject to parliamentary disallowance, and as a consequence the instrument was disallowed by the Parliament, Telstra would not be permitted to lodge an SSU.

Disallowance would have the effect under the arrangements set out in the Bill that Telstra could be required to implement functional separation even though Telstra may wish to proceed with structural separation, which is clearly a preferable outcome.

For similar reasons, the instrument under proposed subsection 577B(5) should not be a legislative instrument.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's confirmation that any instruments made under these provisions would not be legislative in character.

Extract from Alert Digest No. 8 of 2010

Procedural fairness
Item 31, clause 76

Item 31, proposed clause 76, requires Telstra to give the Minister a draft functional separation undertaking within 90 days. Subclause 76(3) allows the minister to specify a longer period. Subclause 76(6A) is intended to make it clear that the Minister is not required to observe the requirements of procedural fairness in relation to the making of an instrument under subclause 76(3). The justification for the exclusion of procedural fairness obligations is that this will 'reduce the opportunity for the use of legal proceedings to disrupt' the procedural steps set out in this provision.

The possibility that legal proceedings may disrupt efficient administration is not normally a sufficient reason for the exclusion of procedural fairness obligations, and no further explanation is provided. Given the importance accorded by the Committee (and the Courts) to procedural fairness, the Committee **seeks the Minister's advice** as to the nature of any detriment which may be suffered and whether the exclusion of procedural fairness is justified in the circumstances.

> *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

Denial of procedural fairness
Schedule 1, item 31, subclause 76(6A)

Proposed subclause 76(6A) makes it clear that the Minister is not required to observe the requirements of procedural fairness in relation to the making of an instrument under proposed subclause 76(3). Proposed subclause 76(3) extends the 90-day period within which Telstra is required to give the Minister a draft functional separation undertaking once a functional separation requirements determination comes into force.

In line with Telstra's decision to proceed with voluntarily structurally separating, the Bill has been structured to give priority to a genuine structural separation process over functional separation. However, if Telstra is unable to progress its structural separation, for example if the ACCC does not accept Telstra's SSU or Telstra's shareholders vote against the structural separation proposal, then under the Bill, Telstra is required to implement functional separation.

In a situation where Telstra is required to implement functional separation, Telstra will have a strong commercial incentive to challenge each procedural step on the path to functional separation. In these circumstances, every delay is to the advantage to Telstra and to the detriment of Telstra's competitors. Not requiring the Minister to observe procedural fairness in relation to extending the period within which Telstra is required to submit a draft functional separation undertaking will give greater certainty to the telecommunications industry by removing an obvious means by which Telstra could use legal proceedings to defer the requirement for it to implement functional separation.

Even though it is the Government's preference for Telstra to voluntarily structurally separate, if this does not eventuate it will be important to implement functional separation quickly as it will enable Telstra's competitors to compete on more level terms than they currently do and will give competitors the confidence to invest. This will result in greater innovation, lower prices and more choices for telecommunications services for consumers.

I trust this information is of assistance.

Committee Response

The Committee thanks the Minister for this response and notes the justification provided for the proposed approach. The Committee **leaves it to the Senate as a whole** as to whether the proposed removal of the requirement for the Minister to observe procedural fairness is appropriate in the circumstances.

Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010* and published the Minister's response in the *Sixth Report*. In *Alert Digest No. 9 of 2010* the Committee sought further advice from the Minister concerning one of the amendments agreed to in the House of Representatives. The Parliamentary Secretary for Health and Ageing responded in a letter dated 18 November 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2010

On 27 October 2010 a supplementary explanatory memorandum was tabled and 15 amendments were agreed to and the bill was passed in the House of Representatives.

One of the amendments falls within the Committee's terms of reference. Amendment number (6) relates to schedule 2, item 3, subparagraph 26BB(8) and proposes that a determination made under section 26BB(1) (relating to permissible ingredients) 'may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.'

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

Although legitimate reasons for the use of such a provision can be guessed at, it is unfortunate that the explanatory memorandum does not address this issue. The Committee **seeks the Minister's advice** about the justification for the approach.

> *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 Parliamentary Secretary

You raised a concern that proposed subsection 26BB(8) in the Bill allows the Minister, in a determination about permissible ingredients that can be included in low risk medicines, to make provision for a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

This subsection, which replicates subsection 26BB(3) that was added to the *Therapeutic Goods Act 1989* (the Act) in 2009, was in the Bill when it was first introduced into the House of Representatives in March 2010. The Committee raised the same concerns at that time (Alert Digest 5 of 201 0). The response from the then Parliamentary Secretary, the Hon Mark Butler, on 3 June 2010 noted that subsection 26BB(7) (as it was in the original Bill) is in the same form as existing subsection 26BB(3) and that:

- to be suitable for inclusion in listed medicines, ingredients must either be low risk in nature or the requirements imposed in relation to their use have that effect;
- in some circumstances these requirements will be set out in pharmacopoeia or other documents and the provision will allow the Minister to refer to such documents which removes the need for unnecessary duplication in the determination;
- sponsors and manufacturers of these low risk medicines are familiar with reference documents such as pharmacopoeias as these are core mechanisms by which requirements for medicines are set, similar to the standards determined under s.10 of the Act, and against which medicines are manufactured;
- allowing the use of such references as they change from time to time ensures Australia's regulatory framework remains in step with the requirements of corresponding regulatory agencies internationally and reduces potential for variation or requirements for sponsors and manufacturers where they produce products for multiple markets; and
- the provision was not therefore expected to cause concern or confusion for sponsors or manufacturers of medicines but will clarify existing practice.

The Committee acknowledged the response in the Committee's Report No.6 of 2010 published on 16 June 2010.

By way of additional comment on the subsection, I note that the Minister considers the safety and quality of ingredients when making a determination under section 26BB and will be doing so by reference to industry-accepted international standards and requirements which are set out in documents such as international pharmacopoeias. For instance, a determination may contain a requirement that a specified ingredient can only be used in a listed medicine in a particular

form (such as root or leaf), cannot be used at a concentrate greater than specified or must be treated or processed in a specified way. The details of these requirements will in some cases be set out the British Pharmacopoeia or another international pharmacopoeia.

So while the provision is wide on its face, the number and extent of documents that will be included in a determination is likely to be limited. Allowing the incorporation of changes to these documents promotes the harmonisation of regulatory requirements for therapeutic goods and saves the industry from having to comply with different national requirements.

Subsection 26BB(7) of the Bill was renumbered to subsection 26BB(8) following the inclusion of a number of government amendments to the Bill as agreed to by the House of Representatives on 27 October 2010.

The Committee's concern that adequate explanations concerning the incorporation by reference of other documents as amended from time to time in legislative instruments should be included in an accompanying Explanatory Memorandum has been noted.

Committee Response

The Committee thanks the Minister for this comprehensive response.

Senator the Hon Helen Coonan
Chair

The Hon Anthony Albanese MP
Minister for Infrastructure and Transport
Leader of the House

Reference: 06371-2010

22 NOV 2010

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

Dear Senator Coonan Helen,

I refer to the letter dated 28 October 2010 from Ms Toni Dawes, Committee Secretary, about the issues identified in the *Alert Digest No 8 of 2010* concerning the Airports Amendment Bill 2010 (the Bill).

As noted in the *Alert Digest*, the Bill introduces a new section 89A into the *Airports Act 1996* (the Act) which will prohibit certain "incompatible" developments except in exceptional circumstances and establish an offence for proceeding without approval. Subsection 89A(3) provides that strict liability applies only to paragraph 2(a) of section 89A.

The *Alert Digest* commented that the explanatory memorandum does not explain the justification for the imposition of strict liability. Furthermore, it stated that the normal penalty for a body corporate in relation to strict liability offences is 300 penalty units whereas subsection 89A(2) sets the penalty for the offence at 400 penalty units.

The Department of Infrastructure and Transport has consulted the Attorney-General's Department and it has been advised that section 89A of the Bill is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide).

The Australian Government considers the application of strict liability in relation to paragraph 89A(2)(a) is appropriate. Developments on leased federal airports are carried out by the airport lessee company or in some circumstances a sub-lessee. All should be well aware of the regulatory requirements for developments at the airport, which are designed to ensure the interests of the travelling public, the Commonwealth as lessor and the broader community are balanced with the lessee's objectives. Enforcement action for non-compliant developments will clearly be difficult if proof is required of the developer's actual state of mind in relation to the requirements of the relevant provision of the Act. Accordingly, requiring proof of fault in relation to that element may undermine deterrence. The creation of a strict liability offence in proposed subsection 89A(3) is consistent with other provisions in the Act—please refer to existing subsections 90(3A) and 90(7).

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Furthermore, the Guide provides that a limit of 60 penalty units for an individual and 300 penalty units for a body corporate should be observed where strict liability is applied to ***all*** the physical elements of an offence. However, we have not adopted this aspect of the Guide and have limited strict liability offence to one element, paragraph 89A(2)(a). Elements of the offence relating to a person's conduct are not caught by the strict liability requirement and fault would still need to be proven with respect to the matters in paragraphs 89A(2)(b) and (c).

In relation to 'Note 2' under subsection 89A(2), you may be pleased to know that this drafting error will be rectified by the proposed government amendments.

Thank you for raising this matter and I trust the above information will be of assistance to the Committee.

Yours sincerely

ANTHONY ALBANESE

THE HON KEVIN RUDD MP

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

23 NOV 2010

RECEIVED
23 NOV 2010
Senate Standing Ctee for the Scrutiny of Bills

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

Dear Senator Coonan

I refer to the letter of 16 June 2010 from the Secretary of the Scrutiny of Bills Committee regarding comments in the Committee's *Alert Digest No 6 of 2010* concerning the Autonomous Sanctions Bill 2010 (the Bill). I welcome the opportunity to respond to the Committee's comments on the Bill. A detailed response to each of the Committee's comments is attached.

The legislative purpose of the Bill is to provide the Australian Government with the means to impose autonomous sanctions in the same way, with the same scope and effect, and subject to the same compliance measures, as United Nations Security Council (UNSC) sanctions implemented under Australian law.

The effectiveness of autonomous sanctions relies in part on collective action by like-minded states imposing the same or similar measures targeted at a State or regime whose actions give rise to serious international concern. Australia's like-minded partners in this regard implement measures which are identical in scope and effect to UNSC sanctions measures.

In relation to sanctions imposed by the UNSC, the Commonwealth Parliament, through the *Charter of the United Nations Act 1945*, has given the Executive the authority to implement any measure not involving the use of armed force that is the subject of a legally-binding UNSC decision. This allows Australia to give full scope and effect to any legally binding UNSC sanction measure.

There is at present no dedicated legislation for autonomous sanctions, meaning the Government must rely on existing legislation, meant for other purposes, to impose autonomous sanctions. This means that Australia can approximate, but not fully replicate, either the financial or trade-related measures imposed by like-minded states and is thus currently not able to match fully the measures of key like-minded partners when imposing autonomous sanctions within a broader coalition of states.

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The Bill is modelled on the *Charter of the United Nations Act 1945* in order to remove distinctions between the scope and extent of autonomous sanctions and UNSC sanctions enforcement laws, harmonising the enforcement of both autonomous sanctions and UNSC sanctions and simplifying administrative and compliance arrangements. The Bill will provide the Government with the necessary flexibility to calibrate autonomous sanctions measures to ensure they remain relevant and effective.

The contact officer within the Department of Foreign Affairs and Trade for any further questions is Peter Scott, Director, Sanctions and Transnational Crime Section. He can be contacted by telephone on (02) 6261 2922 or by email at peter.scott@dfat.gov.au .

I thank the Committee for bringing its concerns to my attention. I trust that this information is of assistance.

Yours sincerely

Kevin Rudd

Attachment

Response of the Minister for Foreign Affairs to comments of the Standing Committee on the Scrutiny of Bills contained in *Alert Digest No. 6 of 2010* (16 June 2010) concerning the Autonomous Sanctions Bill 2010

Incorporation by reference
Proposed clause 10

The Committee has raised concerns about the regulation making power in proposed clause 10 of the Bill which allows, in subclause 10(3), for material to be incorporated by reference to other instruments as they are in force or existence from time to time. The provision corresponds to subsection 6(3) of the *Charter of the United Nations Act 1945* which was introduced into the *Charter of the United Nations Act 1945* in 2007.

Autonomous sanctions, like UNSC sanctions, are highly targeted measures, aimed at specific goods, or specific individuals and entities, which are contributing to the situation of international concern that the sanctions aim to mitigate or change. Subclause 10(3) will enable the Government both to prepare its own lists of goods, or persons and entities, to be subject to sanctions. It will also enable the Government to apply sanctions to lists of goods prepared by international export control regimes, such as the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group or the Wassenaar Arrangement.

It is imperative to the goal of autonomous sanctions - the need to ensure harmonised measures across a number of like-minded implementing countries, as well as the ability to respond quickly to rapidly changing circumstances in the situation to which the sanctions relate - that the Government have the requisite flexibility in setting the scope of sanctions measures, in terms of the goods, or the persons and entities, to which the sanctions apply.

Henry VIII clause
Proposed clause 12

The Committee has raised concerns about proposed clause 12 of the Bill (known as a Henry VIII clause), which ensures that regulations made under the Bill (once enacted) will have effect despite a contrary provision in another Act. Proposed clause 12 substantially corresponds to section 9 of the *Charter of the United Nations Act 1945*, which was introduced by an amendment to that Act in 1993 and further amended in 2001.

The decision to impose sanctions is properly one for the Executive as a matter of foreign policy, with the Parliament setting the framework and parameters for how such measures will be reflected in Australian law. The measures applied are highly targeted, applied only to specific foreign governments, individuals and entities or to specific goods and services where there is a nexus to situations of international concern.

It is appropriate that measures applied with the intention of limiting the adverse consequences of a situation of international concern should not be prevented from taking effect as intended and should not be affected by pre-existing legislation or legislative instruments of the Commonwealth or a State or Territory.

Inappropriate delegation of legislative power
Proposed clause 13

The Committee has raised concerns about proposed clause 13 of the Bill, an interpretative provision, the effect of which is to require that a future Act of Parliament can only be taken as amending or repealing or otherwise altering a provision of Part 2 of the Bill (once enacted) or of the regulations made under it, if the Act provides for this outcome expressly. Proposed clause 13 substantially corresponds to section 10 of the *Charter of the United Nations Act 1945*, introduced by amendment in 1993.

Sub-clause 13(2) of the Bill would allow Parliament to amend this provision though express reference. Therefore, the provision does not derogate from any power of the Parliament. Given the significance of the Bill and the Regulations in the context of seeking to deal with situations of international concern, including prevention of nuclear proliferation, it is appropriate that substantive changes to the Act or Regulations made under it only occur through the express actions of the Parliament, rather than through inadvertent or implied inconsistencies that might have unintended consequences.

Trespass on personal rights and liberties
Proposed sub-clause 14(5)

The Committee has raised concerns about proposed sub-clause 14(5) of the Bill, which relieves the Attorney-General of the requirement to give an undertaking as to damages when an interim injunction is sought. This provision substantially corresponds to section 13(5) of the *Charter of the United Nations Act 1945*, which was introduced by amendment in 1993.

The purpose for which the Attorney-General might seek an injunction under the Bill is to seek to prevent the commission of a serious criminal offence, that is, the contravention of a sanction law. In this context, the Government considers that it is not appropriate to require an undertaking as to damages in an injunction which seeks to prevent the commission of a criminal offence.

It is an established principle of law that liability shall not accrue with respect to a lawfully made decision of a Minister. A provision excluding the requirement to give an undertaking as to damages in these circumstances is consistent with this principle.

Determination of important matters by delegated legislation
Proposed clause 16

The Committee has raised concerns about proposed clause 16 of the Bill, which seeks to introduce offences for contraventions of a 'sanction law' and defines part of the

offences by reference to what is, by legislative instrument, specified as a 'sanction law'. The proposed provision substantially corresponds to section 27 of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

The specification of a 'sanction law' by legislative instrument subjects the specification to parliamentary scrutiny as a disallowable instrument. Publishing such lists of 'sanction laws' provides transparency, as only laws so listed will be sanction laws.

The Government makes substantial efforts to ensure the public is advised of sanction laws. The Department of Foreign Affairs and Trade conducts extensive outreach activities to attempt to ensure potentially affected persons have relevant information on sanction laws. This includes targeted outreach activities throughout Australia with business and industry (at least annually); maintenance of a comprehensive sanctions website which provides links to relevant legislation and legislative instruments; and operation of a public email inquiry service.

Strict Liability for contraventions by bodies corporate
Proposed clause 16

The Committee has raised concerns about the strict liability provisions in proposed clause 16 of the Bill which apply to bodies corporate that contravene a sanction law. These provisions correspond to the strict liability offences for bodies corporate contained in section 27 of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007. As the object and purpose of the Bill is to ensure identical consequences for a breach of Australian laws implementing both autonomous and UNSC sanctions, the Bill necessarily replicates the offence provisions of the *Charter of the United Nations Act 1945*.

The strict liability offence provisions do not apply to individuals.

The origin of the strict liability offence for bodies corporate in the *Charter of the United Nations Act 1945* is Recommendation 2 of the report, dated 24 November 2006, of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme conducted by Commissioner the Honourable Terence RH Cole AO RFD QC (the Cole Inquiry). Commissioner Cole proposed that there be new strict liability criminal offences with severe penalties - three times the value of the offending transactions, by way of monetary fine for corporations - for acting contrary to Australian law implementing UNSC sanctions to ensure that the penalties have a sufficient deterrent effect for bodies corporate.

The strict liability offence provisions for bodies corporate are balanced by an absolute defence for bodies corporate that can prove they took reasonable precautions, and exercised due diligence, to avoid contravening the sanctions law or authorisation concerned. This in turn is intended to promote a culture of corporate compliance.

The Government considers it is appropriate that the same penalty regime apply to autonomous sanctions. Such measures supplement UNSC sanctions regimes, either by implementing the non-mandatory categories of UNSC sanctions or by applying new measures aimed at reinforcing the impact of UNSC sanctions. They also apply in

situations of grave international concern where the UNSC, through the limits of its mandate or its inability to agree on measures, has not imposed sanctions.

The situations to which autonomous sanctions apply will therefore be either the same as UNSC sanctions, or of the same gravity in terms of the extent to which they are of international concern. The Government's view is that it is appropriate that the consequences for contravening autonomous sanctions should therefore be the same as for contravening UNSC sanctions.

Privilege against self-incrimination
Proposed clause 22

The Committee has raised concerns about proposed clause 22 of the Bill, which abrogates the privilege against self-incrimination in relation to a requirement that an individual give information or a document under clause 19. Proposed clause 22 of the Bill corresponds to section 33 the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

Section 33 is one of a number of measures which implemented Recommendation 3 of the Cole Inquiry. Given the correspondence between autonomous and UNSC sanctions, it is appropriate that the same authority exists to enable sanctions enforcement agencies to monitor compliance with both UNSC and autonomous sanctions.

Proposed clause 22 provides that the individual is not excused from providing the document or information on the ground that the provision of the document or information may tend to incriminate the person. However, the information or document is not admissible in evidence against the person who made it available, other than in respect of an action with respect to giving false or misleading information in connection with a sanction law or failure to comply with the requirement to give information or a document.

Possible inappropriate delegation of legislative power
Proposed clause 24

The Committee has raised concerns about proposed clause 24 of the Bill, which sets out to whom the CEO of a designated Commonwealth entity may disclose information. These provisions correspond to paragraph 35(2)(f) and subsection 35(3) of the *Charter of the United Nations Act 1945*, introduced by amendment in 2007.

The inclusion of the category of a person or entity specified by the Minister provides a limited degree of additional flexibility in the categories of persons or entities with whom information or documents can be shared. This helps to ensure that enforcement of sanction laws is not stymied through the incapacity to exchange information with relevant persons or entities.

Specification by legislative instrument, a disallowable instrument, subjects the specification to Parliamentary scrutiny.

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

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

Dear Senator Helen

I refer to the letter dated 17 November 2010 from the Committee Secretary of the Standing Committee for the Scrutiny of Bills to my Office regarding the Committee's comments in *Alert Digest No. 9 of 2010* concerning the Education Services for Overseas Students Legislation Amendment Bill 2010.

I note the Committee has asked for advice about:

1. why strict liability is considered appropriate for the offences in items 10, 12,14,15,16 and 17 of Part 1 of Schedule 1
2. the justification for the elements of the offence in item 15 being able to be set out in regulations
3. the justification for the retrospective application of Part 1 of Schedule 2 about the Overseas Students Ombudsman.

The amendments to the *Education Services for Overseas Students Act 2000* (ESOS Act) contained in the Bill respond directly to specific recommendations arising from the recent review of the Education Services for Overseas Students (ESOS) legislation conducted by the Hon Bruce Baird AM (ESOS Review). The ESOS Review report *Stronger, simpler, smarter ESOS: supporting international students* was released in March 2010.

Strict liability for offences in items 12,14,15,16 and 17

The amendments covered by these items relate to the imposition of financial penalties and were developed in response to a key concern raised during ESOS Review consultations about the effectiveness of current ESOS enforcement provisions.

Currently, under Part 6 of the ESOS Act, there is a range of sanctions such as suspension or cancellation of registration which may be imposed for non-compliant action by providers of education to overseas students. The imposition of these sanctions may have significant implications for a provider's operations, and potentially adversely impact students should the provider cease to operate. Instead of such sanctions, financial penalties are a tangible and immediate action that can be taken against providers for compliance breaches. It is anticipated that this would reduce the need for lengthy enforcement processes and would also be less likely to compromise a provider's ability to continue operating (with the consequent effect this may have on students).

The penalties to be introduced by items 12,14,15,16 and 17 do not involve imprisonment and are quite low – 60 penalty units. The application of strict liability with respect to the penalties is considered likely to significantly enhance the effectiveness of the enforcement regime for the conduct in question. This conduct concerns obligations on providers to give information about their accepted students, sending students notices of visa breaches, record keeping, maintaining lists of education agents used, written agreements with students concerning refund requirements and refunds in other cases. Regardless of the existence of intent, these obligations are central to the integrity of the student visa scheme and the protection of international students' interests. The ability to impose penalties on a strict liability basis without needing to establish fault is very important for the effectiveness of these matters. It will also place providers on notice that they need to take these matters seriously and give them the incentive to do so.

The specific non-compliant behaviour identified for financial penalties in these amendments has been selected on the basis that the regulator is able to readily assess that a breach has taken place. For example, item 16 amends section 28 of the ESOS Act to provide that a financial penalty may be applied if a provider fails to enter into a written agreement with a student or provide a refund to a student in accordance the provider's obligations under section 28. Given that under section 4A the first principal object of the Act is to provide financial and tuition assurance to overseas students for courses for which they have paid, in my view strict liability for failure to refund monies to a student is most appropriate.

Including elements of the offence in item 15 in the regulations

In relation to the Committee's concerns about item 15, it should be noted that subsection 21A of the Act was first introduced in March 2010 when the Australian Government was still considering proposed regulatory changes arising from the Baird Review to strengthen provider obligations for the education agents they use. Section 21A was intended to cover increased transparency in provider/agent relationships at the broad level, with more detailed obligations more appropriately prescribed in the regulations.

Section 21A requires registered providers to maintain lists of the education agents they use and to publish the lists on their websites and in any other manner prescribed by the regulations. At present, publishing the lists on websites is considered to be a very effective way of bringing this information to the attention of international students. The ability for the regulations to prescribe other ways of publishing the lists will provide flexibility to deal with emerging circumstances that may require other publishing methods to be used. It may be, for example, that new technologies are developed that would also prove to be an efficient way for the information to be made available to international students.

Retrospective application of Part 1 of Schedule 2 about the Overseas Students Ombudsman

There are three main reasons why Part 1 of Schedule 2 should have retrospective application. In short, these reasons are:

- to minimise confusion and duplication of effort during the transition from current complaints arrangements
- to reduce complexity with respect to determining when a complaint arose and the commencement of the Overseas Students Ombudsman's role

- the approach is consistent with the commencement of the *Ombudsman Act 1976* providing the Ombudsman with power to investigate action taken by departments and prescribed authorities prior to that Act's commencement.

Minimising confusion and duplication of effort

In response to the Committee's concerns about the retrospective application of Part 1 of Schedule 2 to actions taken by private registered providers before or after the commencement of Schedule 2, this is intended to minimise confusion and duplication of effort during the transition from current arrangements.

There is an existing requirement that providers give students access to an independent external complaints mechanism. This is contained in Standard 8 of the *National Code of Practice of Registered Authorities and Providers of Education and Training to Overseas Students 2007*(the National Code) as follows:

> *8.2 The registered provider must have arrangements in place for a person or body independent of and external to the registered provider to hear complaints or appeals arising from the registered provider's internal complaints and appeals process or refer students to an existing body where that body is appropriate for the complaint or appeal.*

There is therefore no new right or obligation being imposed on providers by the creation of the Overseas Students Ombudsman's jurisdiction. Arguably it is more straight forward and less onerous for a provider to refer complainants to the Overseas Students Ombudsman as the external complaints body, rather than having to establish or rely upon another external complaints mechanism.

If complaints arising from circumstances prior to the commencement of the Overseas Students Ombudsman's role could not be considered by the Overseas Students Ombudsman, other avenues of external complaints and appeal would have to be available and accessible for students for so long as those circumstances might give rise to a complaint.

Reducing complexity – timing

There may also be confusion about determining an exact point in time at which a complaint arose so as to determine whether it arose before or after the Overseas Students Ombudsman's role commenced. For example, if a student believes their attendance has been improperly recorded in one semester, became aware of it in a second semester, and unsuccessfully appealed the record at a later date, which period/date does the complaint relate to? If the Overseas Students Ombudsman's role commences after the unsuccessful internal appeal:

a. is there no access to an external complaints body?
b. is there access to an external complaints mechanism established by the provider?
c. can the provider agree to the Overseas Students Ombudsman being that mechanism?
d. does the Overseas Students Ombudsman have the capacity to hear the complaint regardless of arrangements put in place by the provider?
e. do the providers' external complaints arrangements lapse with the commencement of the Education Students Ombudsman's jurisdiction?

Clause 9ZL of the Bill provides for the Overseas Students Ombudsman to decline to investigate where the action complained of came to the complainant's knowledge more than 12 months before the complaint was made. This tempers the possibility of an open-ended interpretation of the transitional provisions by reference to coverage of actions taken by providers prior to commencement. It also reflects section 6 of the *Ombudsman Act 1976*, under which the Ombudsman currently has and uses discretion not to investigate complaints in circumstances where the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before making the complaint.

The Committee's comments do raise the issue of transitional provisions in those circumstances where an external complaint or appeal has commenced but is not completed when the Overseas Students Ombudsman's role takes effect. Arguably these complaints and appeals could continue to completion, as the Bill does not terminate the right to an external complaint body through other channels, but creates the Overseas Students Ombudsman as a new vehicle for complaint consideration.

Consistency with commencement of the *Ombudsman Act 1976*

The capacity to investigate action taken prior to the commencement of an Ombudsman role is not unique. It is also found in section 5 of the *Ombudsman Act 1976* which gave the Ombudsman, at commencement of that Act, the power to investigate action taken by departments and prescribed authorities prior to the Act's commencement.

I trust this information enables the Committee to finalise its consideration of the Bill.

Yours sincerely

CHRIS EVANS

23.11.10

ASSISTANT TREASURER
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12 NOV 2010

Senator the Hon Helen Coonan
Chair, Senate Scrutiny of Bills Committee
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Helen
Dear Senator ~~Coonan~~

I refer to the issues identified in the Scrutiny of Bills Committee's *Alert Digest No. 8 of 2010* in relation to Tax Laws Amendment (2010 Measures No. 4) Bill 2010 and Superannuation Legislation Amendment Bill 2010.

The Committee is concerned that some items in Tax Laws Amendment (2010 Measures No. 4) Bill 2010 are incorrectly indexed in the explanatory memorandum. While the explanation of the amendments in the explanatory memorandum is comprehensive and accurate, it seems that errors in the index arose as a consequence of last minute changes to the numbering of amendments in the Bill. The Government proposes to table a correction to the explanatory memorandum to ensure the index is accurate.

The Committee also requests advice as to whether there is any potential detriment to any person arising from the retrospective application of measures contained in Tax Laws Amendment (2010 Measures No. 4) Bill 2010 and Superannuation Legislation Amendment Bill 2010.

Tax Laws Amendment (2010 Measures No. 4) Bill 2010 — Schedule 3, item 132

While the amendments covered by the application provision at item 132 of the Bill will have retrospective application from the commencement of Part 1 of Schedule 1 to the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (that is, from 26 March 2009), they are beneficial to affected taxpayers. As explained in paragraph 3.69 of the explanatory memorandum, 'accounting standards' is narrowly defined in the tax law to mean those standards that the Australian Accounting Standards Board makes for the purposes of the Corporations Act only, and without the amendments, entities who use accounting standards made by the Australian Accounting Standards Board for purposes other than the Corporations Act purposes (for example, superannuation funds) would not be able to rely on their financial reports for the purposes of making the various tax-timing elections under Division 230.

Tax Laws Amendment (2010 Measures No. 4) Bill 2010 — Schedule 3, item 149

While the amendments to the foreign currency gains and losses tax provisions will have retrospective application from 17 December 2003, they are part of a package of amendments that was initially announced by the previous government on 5 August 2004 to apply from 1 July 2003.

They are intended to extend the scope of a number of compliance cost saving measures in the law, and to make technical amendments (including fixing minor drafting errors) to ensure that the law operates as intended.

While the amendments are generally beneficial to affected taxpayers, some of the minor technical amendments that are intended to correct obvious drafting errors (for example, the amendment at item 142) may be detrimental to some taxpayers. However, the initial announcement in 2004 contained detailed information about the proposed amendments so that affected taxpayers could manage their tax affairs or carry on their activities with the knowledge of the amendments and their impacts (beneficial and otherwise). As such, affected taxpayers should not have been disadvantaged by the retrospective application of those amendments.

Superannuation Legislation Amendment Bill 2010 — Schedule 1, item 21

Changes to the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (S(UMLM)Act) commence retrospectively under item 21 of Schedule 1 to Superannuation Legislation Amendment Bill 2010.

Under item 21 of Schedule 1, subparagraph 49A(1)(b) the S(UMLM) Act is applied to transfers of unclaimed superannuation moneys to State and Territory authorities occurring before, on or after the commencement of the item. Subparagraph 49A(1)(b) enables State and Territory authorities to transfer to the Commissioner of Taxation unclaimed superannuation previously transferred to them under State and Territory unclaimed money legislation.

Prior to 1 July 2007 private sector unclaimed superannuation moneys was paid to State and Territory authorities under State and Territory legislation. As a result, State and Territory authorities may have a stock of private sector unclaimed superannuation in addition to unclaimed superannuation paid to them by State and Territory superannuation schemes.

Retrospective application of subparagraph 49A(1)(b) is necessary to ensure that the legislation allows unclaimed superannuation moneys that were transferred to State and Territory authorities prior to the commencement of the Act to be subsequently transferred to the Commissioner of Taxation and claimed back by individuals.

The retrospective commencement under item 21 does not have any potential detriment to any person. Prior to these amendments, individuals could claim money from a State or Territory authority that was transferred to the authority under State or Territory legislation. Under the changes made by this Bill, individuals can now claim back their money from the Commissioner at any time.

These amendments will facilitate more uniform treatment of unclaimed money across the public and the private sectors and assist in the central administration of unclaimed monies.

Superannuation Legislation Amendment Bill 2010 — Schedule 2 and clause 4

Schedule 2 and clause 4 of the Bill amend the tax laws to provide transitional relief for income tax deductibility of total and permanent disability (TPD) insurance premiums paid by superannuation funds.

The transitional relief will provide complying superannuation funds, for the 2004-05 to 2010-11 income years, with a greater scope to deduct premiums paid for insurance cover commonly regarded as TPD insurance. This measure applies retrospectively from the 2004-05 income year. As the transitional relief broadens tax deductions, retrospectivity is beneficial to affected taxpayers.

I hope this information will assist the Committee.

Yours sincerely

Bill Shorten

BILL SHORTEN

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

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA

19 NOV 2010

Dear Senator Coonan

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 28 October 2010, requesting a response to issues relating to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (the Bill) identified in the Committee's *Alert Digest* No. 8 of 2010. My response follows.

Please note that references to statutory provisions are to provisions of the *Telecommunications Act 1997,* unless otherwise indicated.

Legislative Instruments Act—exemption
Schedule 1, item 30, subsection 577A(7) and subsection 577B(5)

I confirm that proposed subsections 577A(7) and 577B(5), which authorise the Minister to set out matters in writing that the Australian Competition and Consumer Commission (ACCC) is to consider in determining whether to accept a structural separation undertaking (SSU) or a variation to an SSU respectively, are not legislative in character and should not be legislative instruments.

As set out in the Explanatory Memorandum to the Bill, proposed subsections 577A(7) and 577B(5) operate like a direction from the Minister to the ACCC to consider the specified matters in those instruments in deciding whether to accept an SSU or a variation to an SSU. These instruments are intended to provide guidance to the ACCC on the matters that the ACCC must have regard to in making its decision.

In setting out matters under proposed subsections 577A(7) and 577B(5), the Minister is not limiting the matters to which the ACCC may have regard. In each case the

ACCC may also have regard to any other matters it considers relevant (see proposed paragraphs 577A(6)(b) and 577B(4)(b)).

Under Parts 4, 5 and 6 of the *Legislative Instruments Act 2003* legislative instruments are required to be:

1. registered on the Federal Register of Legislative Instruments;
2. subject to parliamentary disallowance and tabling; and
3. subject to sunsetting.

The requirement to register the instrument set out in proposed subsection 577A(7) on the Federal Register and to table the instrument in Parliament is not necessary as proposed subsection 577A(22) in the Bill requires the instrument to be published on the Department's website. The requirement for the instrument to be sunsetted is not applicable as once the ACCC has made its decision to accept an SSU, the instrument has no further effect regarding the provisions in the Bill relating to Telstra's structural separation.

To give Telstra a high degree of certainty to progress its decision to structurally separate, the instrument under proposed subsection 577A(7) should not be subject to parliamentary disallowance. Under proposed subsection 577A(9) Telstra is not entitled to give an SSU to the ACCC unless an instrument under proposed subsection 577A(7) is in force. If this instrument was subject to parliamentary disallowance, and as a consequence the instrument was disallowed by the Parliament, Telstra would not be permitted to lodge an SSU. Disallowance would have the effect under the arrangements set out in the Bill that Telstra could be required to implement functional separation even though Telstra may wish to proceed with structural separation, which is clearly a preferable outcome.

For similar reasons, the instrument under proposed subsection 577B(5) should not be a legislative instrument.

Denial of procedural fairness
Schedule 1, item 31, subclause 76(6A)

Proposed subclause 76(6A) makes it clear that the Minister is not required to observe the requirements of procedural fairness in relation to the making of an instrument under proposed subclause 76(3). Proposed subclause 76(3) extends the 90-day period within which Telstra is required to give the Minister a draft functional separation undertaking once a functional separation requirements determination comes into force.

In line with Telstra's decision to proceed with voluntarily structurally separating, the Bill has been structured to give priority to a genuine structural separation process over functional separation. However, if Telstra is unable to progress its structural separation, for example if the ACCC does not accept Telstra's SSU or Telstra's shareholders vote against the structural separation proposal, then under the Bill, Telstra is required to implement functional separation.

In a situation where Telstra is required to implement functional separation, Telstra will have a strong commercial incentive to challenge each procedural step on the path

to functional separation. In these circumstances, every delay is to the advantage to Telstra and to the detriment of Telstra's competitors. Not requiring the Minister to observe procedural fairness in relation to extending the period within which Telstra is required to submit a draft functional separation undertaking will give greater certainty to the telecommunications industry by removing an obvious means by which Telstra could use legal proceedings to defer the requirement for it to implement functional separation.

Even though it is the Government's preference for Telstra to voluntarily structurally separate, if this does not eventuate it will be important to implement functional separation quickly as it will enable Telstra's competitors to compete on more level terms than they currently do and will give competitors the confidence to invest. This will result in greater innovation, lower prices and more choices for telecommunications services for consumers.

I trust this information is of assistance.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

The Hon Catherine King MP

Parliamentary Secretary for Health and Ageing

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

Dear Senator Coonan

Thank you for your letter of 17 November 2010 regarding the Therapeutic Goods Amendment (2010 Measures No. 1) Bill 2010 (the Bill). You raised a concern that proposed subsection 26BB(8) in the Bill allows the Minister, in a determination about permissible ingredients that can be included in low risk medicines, to make provision for a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

This subsection, which replicates subsection 26BB(3) that was added to the *Therapeutic Goods Act 1989* (the Act) in 2009, was in the Bill when it was first introduced into the House of Representatives in March 2010. The Committee raised the same concerns at that time (Alert Digest 5 of 2010). The response from the then Parliamentary Secretary, the Hon Mark Butler, on 3 June 2010 noted that subsection 26BB(7) (as it was in the original Bill) is in the same form as existing subsection 26BB(3) and that:

- to be suitable for inclusion in listed medicines, ingredients must either be low risk in nature or the requirements imposed in relation to their use have that effect;
- in some circumstances these requirements will be set out in pharmacopoeia or other documents and the provision will allow the Minister to refer to such documents which removes the need for unnecessary duplication in the determination;
- sponsors and manufacturers of these low risk medicines are familiar with reference documents such as pharmacopoeias as these are core mechanisms by which requirements for medicines are set, similar to the standards determined under s.10 of the Act, and against which medicines are manufactured;
- allowing the use of such references as they change from time to time ensures Australia's regulatory framework remains in step with the requirements of corresponding regulatory agencies internationally and reduces potential for variation or requirements for sponsors and manufacturers where they produce products for multiple markets; and
- the provision was not therefore expected to cause concern or confusion for sponsors or manufacturers of medicines but will clarify existing practice.

The Committee acknowledged the response in the Committee's Report No. 6 of 2010 published on 16 June 2010.

By way of additional comment on the subsection, I note that the Minister considers the safety and quality of ingredients when making a determination under section 26BB and will be

doing so by reference to industry-accepted international standards and requirements which are set out in documents such as international pharmacopoeias. For instance, a determination may contain a requirement that a specified ingredient can only be used in a listed medicine in a particular form (such as root or leaf), cannot be used at a concentrate greater than specified or must be treated or processed in a specified way. The details of these requirements will in some cases be set out the British Pharmacopoeia or another international pharmacopoeia.

So while the provision is wide on its face, the number and extent of documents that will be included in a determination is likely to be limited. Allowing the incorporation of changes to these documents promotes the harmonisation of regulatory requirements for therapeutic goods and saves the industry from having to comply with different national requirements.

Subsection 26BB(7) of the Bill was renumbered to subsection 26BB(8) following the inclusion of a number of government amendments to the Bill as agreed to by the House of Representatives on 27 October 2010.

The Committee's concern that adequate explanations concerning the incorporation by reference of other documents as amended from time to time in legislative instruments should be included in an accompanying Explanatory Memorandum has been noted.

Yours sincerely

Catherine King

18 NOV 2010