SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2011

15 June 2011

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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

FIFTH REPORT OF 2011

The Committee presents its Fifth Report of 2011 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:

Child Support (Registration and Collection) Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011
Portfolio: Human Services

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2011*. The Minister responded to the Committee's comments in a letter dated on 25 May 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Child Support (Registration and Collection) Act 1988* to:

- broaden the powers of the Child Support Registrar to delegate powers to perform his or her duties to persons outside the Department to enable more efficient service delivery; and

- amend a number of criminal penalty provisions to ensure that the offences contained therein can be successfully prosecuted, protecting the integrity of the Child Support Scheme.

Delegation of legislative power
Schedule 1, item 1

One purpose of the Bill is achieved through item 1 of Schedule 1 of the bill, which broadens the powers of the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act*. The proposed subsection 15(1B) enables delegation of all or any of the Registrar's powers or functions to a person engaged, 'whether as an employee or otherwise', by the Registrar, an Agency, another authority of the Commonwealth, or an organisation that performs services for the Commonwealth. The text of the provision is said to be based upon paragraph 234(7)(c) of the *Social Security (Administration) Act 1999* and subsection 303(1) of the *Paid Parental Leave Act 2010*.

The explanatory memorandum states at paragraph 6 that 'as the Department of Human Services moves towards an integrated service model, it is appropriate to align the scope of the delegation powers to ensure consistency of delivery in service'. However, the

Committee remains concerned about the breadth of the provision, which goes much further than enabling a response to the particular problem of allowing for the outsourcing of debt collection services. The provision enables the delegation of all or any of the Registrar's powers or functions to a person who may be outside of the APS. Given that the Committee generally prefers to see powers to delegate limited to the holders of particular officers or members of the senior executive service or to people with specified skills, or expects that legislative guidance will be provided in the primary legislation about the regulations, in this case such as guidance as to the particular areas (such as debt collection) in which the delegation will be exercised. The Committee therefore **seeks the Minister's further explanation as to why such a broad power of delegation is required and about the extent to which any delegations to persons outside the public service may limit the application of administrative law review and complaint mechanisms.**

> *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.*

Minister's response - extract

The Committee requested advice about the appropriateness of item 1 of Schedule 1 in the Bill which allows the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act 1988* to persons outside the Australian Public Service (APS). In particular, the Committee seeks advice about why such a broad power of delegation is required, and the extent to which delegation of powers outside of the APS may limit access to administrative review and complaint mechanisms.

As provided in the Explanatory Memorandum to the Bill, Item 1 is intended to amend the legislation to enable the Registrar to delegate powers, 'as necessary, to persons engaged by the Commonwealth...to enable outsourcing of powers and functions currently performed exclusively by the Registrar and the Department'. The Explanatory Memorandum provides debt collection services as an example of a function that may be outsourced and thus requires the expanded delegation power to enable that. It is not envisaged that debt collection be the only function that may be outsourced, however debt collection is currently the only function currently being considered by CSP for outsourcing. The changes to the legislation will also enable the CSP to engage staff on a contract basis where they have a particular specialist skill set e.g. a forensic accountant that may be required for a short period.

As provided in the Explanatory Memorandum to the Bill, as the Department of Human Services moves towards an integrated service delivery model, it is appropriate to align the scope of delegation powers to ensure consistency of service delivery options. In a practical sense, this means the Department will be able to exercise similar powers in a similar

manner across the Portfolio. Using the example of debt collection, it is appropriate that the Department is able to collect any debts owing to the Commonwealth in the most efficient and effective manner available. Currently, Centrelink has arrangements for outsourcing debt collection functions. The amended child support provisions will allow the CSP to have the same powers as Centrelink so that external service providers can concurrently pursue debts relating to mutual customers of the CSP and Centrelink.

With regard to administrative review, delegation of the powers does not change the nature of the powers exercised - in that they remain decisions under an enactment subject to administrative review. Those decisions currently capable of review under the internal review (Objections) or review by the Social Security Appeals Tribunal (Parts VI and VI of the Act) will remain subject to those review processes. Those powers not currently subject to the review mechanisms provided by the Act would remain subject to judicial review mechanisms. Further, the Registrar retains a power to review and alter decisions of a delegate.

With respect to complaints, the Registrar will remain responsible for the outcomes of the outsourced functions. Complaints about a service provider would be made to the Registrar, subject to any contractual complaint mechanism that may be in addition to the ability to complain to the Registrar. As with similar outsourcing arrangements, contractors would be contractually bound to perform their functions in a manner and to a standard similar to those that apply to the Registrar under the law.

Committee Response

The Committee thanks the Minister for this response. The Committee understands the position outlined in relation to internal and tribunal review, but retains significant concern about the general extent and scope of the delegation (both within the context of delegations to public servants and to persons outside it) and the extent to which decisions taken by service providers under outsourcing arrangements remain subject to judicial review. As a result, the Committee believes it would be consistent with Standing Order 24(i)(iv) for the legislation to contain more specific delegations of the Registrar's power indicating which of the powers or functions of the Registrar are able to be delegated and to whom, including those which can be delegated to legal persons outside the Executive Government. **The Committee therefore seeks the Minister's further advice as to whether consideration can be given to the provision of more specific delegation powers. The Committee would also welcome more information about the capacity for the Registrar to engage staff with specialist skills on a contract basis without the need for delegating the Registrar's power and the basis upon which, for example, Centrelink outsources debt collection.**

Customs Amendment (Export Controls and Other Measures) Bill 2011

Introduced into the House of Representatives on 23 March 2011
Portfolio: Home Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2011*. The Minister responded to the Committee's comments in a letter dated on 9 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Customs Act 1901* and the *Customs Depot Licensing Charges Act 1997* to amend Customs controls relating to export cargo and ensure consistent depot and warehouse licence conditions.

Wide delegation of power
Schedule 2, item 7

Item 7 of Schedule 2 would insert new subsection 77Q(1), which provides that the CEO may, at any time, impose additional conditions to which a depot licence is subject if the conditions are considered to be necessary and desirable: (a) for the protection of the revenue; or (b) for ensuring compliance with customs statutes or any other law of the Commonwealth or a State or Territory prescribed by regulations; or (c) for any other purpose. The explanatory memorandum (at page 17) does not indicate why paragraph (c) must be drafted in terms which confer such a wide discretionary power on the CEO and why it is not possible to draft the authorised legislative purposes with more precision.

An identical issue also arises in relation to item 41, which would insert a new subsection 83(2) into the *Customs Act* 1901 (see the explanatory memorandum at pages 29-30) and item 43, which would insert a new subsection 82A(1).

The Committee **seeks the Minister's further explanation of the appropriateness of these items.**

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

Minister's response - extract

Schedule 2, items 7, 41 and 43 - Wide delegation of power

The Committee noted items 7, 41 and 43 of Schedule 2, which insert new provisions allowing the Chief Executive Officer (CEO) at any time to impose additional conditions to which a depot or warehouse licence is subject if the CEO considers the conditions necessary or desirable for specific purposes and "for any other purpose". The Committee queried why these provisions confer such a wide discretionary power through the inclusion of the words "for any other purpose".

I consider it appropriate and prudent to include the words "for any other purpose" in items 7, 41 and 43.

In accordance with normal principles of statutory interpretation, the reference to "any purpose" in these provisions would be limited to purposes of the Customs Act 1901 (the Customs Act). It is not practical to list all the purposes of the Customs Act and those purposes may change from time to time. An example of a purpose not specifically identified in these provisions would be the effective operation of the Customs Act, which could be reflected in a licence condition that facilitates the exercise of powers by Customs Officers. For example, the CEO might consider it necessary to place a condition on a depot licence requiring the licence holder to make available an adequate power supply to run specialist equipment or to facilitate space and access arrangements for mobile x-ray units.

Committee Response

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

Alert Digest No. 4 of 2011 - extract

Reversal of onus
Schedule 2, item 19

Item 19 of Schedule 2 inserts a new offence in relation to suspended depot licences. Subsection 77VA(2) sets out a number of exceptions to the offence which relate to actions which a Collector may authorise. The defendant has an evidential burden in relation to these matters. Paragraph 105 of the explanatory memorandum refers to, but does not explain, the provision and does not indicate whether the *Guide to Framing Commonwealth Offences* has been considered. Given that actions which may be permitted or authorised by a Collector are not matters which are uniquely within the knowledge of a defendant, the Committee **seeks the Minister's advice about the need for this approach**.

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

Minister's response - extract

Schedule 2, item 19 - Reversal of onus

The Committee noted item 19 of Schedule 2 to the Bill, which inserts a new offence into the Customs Act relating to suspended depot licences. Subsection 77VA(2) sets out a number of exceptions to the offence which relate to actions that a Collector may authorise. The defendant bears an evidential burden of proof in relation to these matters. The Committee raised concerns about requiring the defendant to bear the evidential burden of proof for these matters.

I consider that it is appropriate and consistent with the Customs Act and other Commonwealth laws that the defendant bears the evidential burden of proof in relation to the identified exceptions to the new section 77VA offence.

If the defendant had permission or authority to undertake certain conduct despite the suspension of the depot licence, the defendant would be in the best position to produce evidence of the permission or authority to avert conviction. The offence also carries a relatively low maximum penalty of 50 penalty units.

In addition, construction of the offence and exceptions in section 77VA is consistent with the similar offence and exceptions that apply to warehouses, as set out in current section 86 of the Customs Act. There are a number of other offences in the Customs Act that provide an exception if the person has permission or is acting with authority to engage in certain conduct, and under these provisions, it would similarly fall to the defendant to demonstrate that they had permission or were operating with authority. Similar arrangements exist in other regulatory schemes such as the *Quarantine Act 1908* - see for example the offences and related exceptions at sections 20 and 29.

I note that the Bill includes a footnote to new section 77VA referring to subsection 13.3(3) of the *Criminal Code*. Subsection 13.3(3) sets out the rules relating to the evidential burden of proof on a defendant. However, under section 5AA of the Customs Act, Part 2.6 of the *Criminal Code*, which includes subsection 13.3(3), would not apply to new section 77VA because it is an offence subject to a Customs prosecution. This footnote, which has no operative effect, has therefore been included in the Bill in error. Although subsection 13.3(3) of the *Criminal Code* would not apply to new section 77VA, the defendant would still bear the evidential burden of proof in relation to the identified exceptions to the offence in a Customs prosecution.

A Customs prosecution is a proceeding for the recovery of penalties under the Customs Act and Part XIV of the Customs Act regulates such proceedings. This exemption from the application of Part 2.6, as well as Parts 2.4 and 2.5, of the Criminal Code dates back to 2001 and recognised the fact that some of the requirements of the Criminal Code were not easily translated to Customs prosecutions. Similar footnotes to that in new section 77VA were previously included in error in several other sections of the Customs Act. I will seek to rectify these minor drafting errors in a future legislative vehicle.

Committee Response

The Committee thanks the Minister for this comprehensive response.

Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011

Introduced into the House of Representatives on 23 March 2011
Portfolio: Home Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2011*. The Minister responded to the Committee's comments in a letter dated on 9 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Customs Tariff Act 1995* and implements changes resulting from the fourth review of the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System.

Delayed Commencement
Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

Paragraphs 2 and 4 of the HS2012 Bill, in accordance with the application provisions of the HS2012 Bill in item 307, provide that all items in the Schedule to the HS2012 Bill will take effect on 1 January 2012, with the exception of item 110.

Paragraph 3 of the commencement provisions provides that item 110, relating to the description of goods in subheading 2710.19.20 (diesel fuel), will also commence on 1 January 2012. However, this item will not commence at all if the *Customs Tariff Amendment (Taxation of Alternative Fuels) Act 2011* commences on or before 1 January 2012.

If the bill is passed during this sitting period then commencement of these sections of the bill will be delayed by longer than six months. The explanatory memorandum refers to, but does not explain, the reason for the proposed commencement date. The Committee can understand that there are reasons that the beginning of a new calendar year is an

appropriate date for commencement, but given the possibility of delayed commencement **seeks the Minister's advice about the justification for the proposed approach**.

> *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.*

Minister's response - extract

Clause 2 - Delayed commencement

The Committee raised concerns about the delay in commencement of the legislation, which if passed in the Winter 2011 Parliamentary could be longer than six months.

The Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011 amends the *Customs Tariff Act 1995* to implement domestically, changes resulting from the fourth review of the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System.

Australia is a signatory to the Harmonized System. The administering body, the World Customs Organization (the WCO), reviews the Harmonized System every five years to reflect changes in industry practice, technological developments and changes in international trade patterns. The WCO completed its fourth review of the Harmonized System in June 2010. As a signatory to the Harmonized System, Australia is required to implement the changes resulting from the fourth review on 1 January 2012.

The Bill will make some 800 amendments to existing classifications in the Customs Tariff Act. These amendments will affect most of Australia's industry sectors, particularly industries involved in the trade of fish, fish products and some agricultural products.

The passage of the Bill in the current Parliamentary Sittings will provide transparency and certainty and allow Australian industry sufficient time to update in-house systems to reflect the new tariff classifications. Australian industry requested a greater period between passage of the legislation and its commencement following implementation of changes resulting from the WCO's third review of the Harmonised System. Passage in these Sittings will also ensure that Australia meets its international obligations and that we are applying the Harmonized System consistently with our major trading partners. Failure to meet the 1 January 2012 deadline could result in administrative and financial burdens for Australian importers and exporters.

I thank the Committee for raising these matters and I trust that the material in this letter is of assistance.

Committee Response

The Committee thanks the Minister for this response.

Tertiary Education Quality and Standards Agency Bill 2011

Introduced into the Senate on 23 March 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2011*. The Minister responded to the Committee's comments in a letter dated on 6 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill establishes the Tertiary Education Quality and Standards Agency and a new national regulatory and quality assurance environment for Australian higher education.

Minister's general comments concerning the bill - extract

I note that the Committee has requested a response in relation to the reason for the proposed commencement dates under clause 2.

The Committee has also mentioned clauses 69 and 76, which the Committee states partially abrogate the privilege against self incrimination. While the Committee's report leaves the question of whether the proposed approach is appropriate to the Senate, I have also addressed the Committee's concerns in relation to these clauses.

Before specifically addressing the Committee's concerns, I make the following general comments about the Bill.

Development of the Tertiary Education Quality and Standards Agency (TEQSA) Legislation

The Tertiary Education Quality and Standards Agency Bill 2011 and the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional

Provisions) Bill 2011 set out the new quality assurance and regulatory framework for higher education, including the establishment of the TEQSA.

The Commonwealth has consulted extensively on the development of the TEQSA legislation. In November 2010 and December 2010 face-to-face consultation sessions were held to discuss drafts of the legislation with representatives from the states and territories, key higher education peak bodies, and in February 2011 the Australian Government released a draft of the legislation for public comment. Stakeholders were also given further opportunity to comment when the legislation was referred to the Senate Education, Employment and Workplace Relations Legislation Committee on 24 March 2011.

I note that the Legislation Committee's report, delivered on 10 May 2011, was largely supportive of the establishment of TEQSA as a national regulator for the higher education sector and commended the Government for the extensive consultation process it undertook in developing the legislation. In particular, the Committee stated that it was confident that most stakeholders were comfortable with the approach taken in the legislation in regards to TEQSA's investigative and enforcement powers.

Alert Digest No. 4 of 2011 - extract

Possible delayed commencement
Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

In this bill, clause 9 of Part 1; Parts 2, 3 and 4; Division 2 of Part 5; Parts 6 and 7; and Part 11 are to commence on the later of 1 January 2012 and the day after the end of the 7 month period that begins on the day this Bill receives Royal Assent. In this case no information about the rationale of the commencement provision is included in the explanatory memorandum. The Committee therefore **seeks the Minister's advice about the reason for the proposed commencement date**.

> *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.*

Minister's response - extract

Clause 2

The Committee raised concerns about the commencement date of parts of legislation which are scheduled to commence on the later of 1 January 2012 or 7 months after the Bill receives royal assent. The Committee note in "its report that no information about the rationale of the commencement provisions contained in clause 2 are included in the explanatory memorandum, and seek advice about the reasons for the possible delayed commencement of some parts of the Bill.

The commencement provisions in clause 2 have been drafted to allow for the staged establishment of TEQSA. They provide for the agency to be established and to commence its *quality assurance functions* from the later of 1 July 2011 or one month after the Bill receives royal assent, and for the agency to commence its *regulatory functions* from the later of 1 January 2012 or 7 months after the Bill receives royal assent.

The delayed commencement provisions referred to by the Committee are therefore intended to ensure that TEQSA has sufficient time to develop appropriate policies and procedures before its regulatory powers are 'switched on'. The delay will also give higher education providers time to become familiar with their obligations under the TEQSA legislation.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 4 of 2011 - extract

Privilege against self-incrimination
Clauses 69 and 76

Clause 69 of the bill abrogates the privilege against self-incrimination in relation to the giving of information or producing of a document which is required by section 63 (as part of the investigative powers set out in Part 6 of the bill). However, subclause 69(2) provides that the evidence thus obtained as a result of these powers cannot be used directly or indirectly in civil proceedings for the recovery of a penalty or in criminal proceedings.

There are standard exceptions which relate to an offence set out in clause 64 of the bill for failing to provide information or produce documents (as required by clause 63) to Criminal Code provisions concerning the provision of false or misleading information or documents to Commonwealth officials. The explanatory memorandum at page 39 gives detailed consideration to the appropriateness of this approach.

The same issue also arises in relation to clause 76 relating to answering questions or producing a document as required under clause 75(2). The explanatory memorandum at page 45 again gives detailed consideration to the appropriateness of this approach.

In considering the abrogation of the privilege against self-incrimination, the Committee looks to see whether the public benefit which is to be achieved will decisively outweigh the resultant harm to the maintenance of civil rights. In this instance, the explanatory memorandum states at page 39 that TEQESA will 'necessarily rely on information provided by persons who are, or were, connected with current or former registered higher education providers in undertaking its regulatory and quality assurance functions' and that these are ultimately aimed at protecting students of these bodies. The provisions abrogating self-incrimination are balanced somewhat by the provision of use and derivative use immunity and the explanatory memorandum does provide a justification for the approach adopted in each instance.

In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**.

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

Minister's response - extract

Clauses 69 and 76

The Committee also questioned the appropriateness of the approach taken in clauses 69 and 76, which it stated partially abrogate the privilege against self-incrimination by providing that a person is not excused from giving information or producing a document or thing on grounds that production of the information or document requested could incriminate them.

These provisions are appropriate given that TEQSA will necessarily rely on the information gathered by authorised officers to perform its regulatory and quality assurance functions, one of the aims of which is to protect students. The provisions are balanced by the inclusion of subclauses 69(2) and 76(2) which provide that the evidence obtained will be inadmissible against an individual in respect of some civil and criminal proceedings.

Committee Response

The Committee thanks the Minister for this response.

Senator the Hon Helen Coonan
Chair

The Hon Tanya Plibersek MP
Minister for Human Services
Minister for Social Inclusion

C11/2144

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 12 May 2011 from Ms Toni Dawes, drawing my attention to the Senate Scrutiny of Bills Committee's *Alert Digest No 4 of 2011* (11 May 2011) and seeking further advice about amendments in the *Child Support (Registration and Collection) Amendment Bill 2011* (the Bill).

The Committee requested advice about the appropriateness of item 1 of Schedule 1 in the Bill which allows the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act 1988* to persons outside the Australian Public Service (APS). In particular, the Committee seeks advice about why such a broad power of delegation is required, and the extent to which delegation of powers outside of the APS may limit access to administrative review and complaint mechanisms.

As provided in the Explanatory Memorandum to the Bill, Item 1 is intended to amend the legislation to enable the Registrar to delegate powers, 'as necessary, to persons engaged by the Commonwealth…to enable outsourcing of powers and functions currently performed exclusively by the Registrar and the Department'. The Explanatory Memorandum provides debt collection services as an example of a function that may be outsourced and thus requires the expanded delegation power to enable that. It is not envisaged that debt collection be the only function that may be outsourced, however debt collection is currently the only function currently being considered by CSP for outsourcing. The changes to the legislation will also enable the CSP to engage staff on a contract basis where they have a particular specialist skill set e.g. a forensic accountant that may be required for a short period.

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As provided in the Explanatory Memorandum to the Bill, as the Department of Human Services moves towards an integrated service delivery model, it is appropriate to align the scope of delegation powers to ensure consistency of service delivery options. In a practical sense, this means the Department will be able to exercise similar powers in a similar manner across the Portfolio. Using the example of debt collection, it is appropriate that the Department is able to collect any debts owing to the Commonwealth in the most efficient and effective manner available. Currently, Centrelink has arrangements for outsourcing debt collection functions. The amended child support provisions will allow the CSP to have the same powers as Centrelink so that external service providers can concurrently pursue debts relating to mutual customers of the CSP and Centrelink.

With regard to administrative review, delegation of the powers does not change the nature of the powers exercised – in that they remain decisions under an enactment subject to administrative review. Those decisions currently capable of review under the internal review (Objections) or review by the Social Security Appeals Tribunal (Parts VI and VI of the Act) will remain subject to those review processes. Those powers not currently subject to the review mechanisms provided by the Act would remain subject to judicial review mechanisms. Further, the Registrar retains a power to review and alter decisions of a delegate.

With respect to complaints, the Registrar will remain responsible for the outcomes of the outsourced functions. Complaints about a service provider would be made to the Registrar, subject to any contractual complaint mechanism that may be in addition to the ability to complain to the Registrar. As with similar outsourcing arrangements, contractors would be contractually bound to perform their functions in a manner and to a standard similar to those that apply to the Registrar under the law.

The contact officer in my Department for the Bill is Mr Dennis Mahony, National Manager, Program Policy and Procedures who can be contacted on (02) 6272 8780.

Yours sincerely

Tanya Plibersek

Tanya Plibersek

25.5.11

THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs
Minister for Justice

Ministerial No: 102841

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2601

9 JUN 2011

Dear Senator

Thank you for the opportunity to provide the Senate Standing Committee for the Scrutiny of Bills (the Committee) with additional information on matters raised in the Committee's *Alert Digest No 4. of 2011.*

The Committee raised two matters in respect of the Customs Amendment (Export Controls and Other Measures) Bill 2011 and one matter in respect of the Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011.

Customs Amendment (Export Controls and Other Measures) Bill 2011
Schedule 2, items 7, 41 and 43 - Wide delegation of power

The Committee noted items 7, 41 and 43 of Schedule 2, which insert new provisions allowing the Chief Executive Officer (CEO) at any time to impose additional conditions to which a depot or warehouse licence is subject if the CEO considers the conditions necessary or desirable for specific purposes and "for any other purpose". The Committee queried why these provisions confer such a wide discretionary power through the inclusion of the words "for any other purpose".

I consider it appropriate and prudent to include the words "for any other purpose" in items 7, 41 and 43.

In accordance with normal principles of statutory interpretation, the reference to "any purpose" in these provisions would be limited to purposes of the *Customs Act 1901* (the Customs Act). It is not practical to list all the purposes of the Customs Act and those purposes may change from time to time. An example of a purpose not specifically identified in these provisions would be the *effective operation* of the Customs Act, which could be reflected in a licence condition that facilitates the exercise of powers by Customs Officers. For example, the CEO might consider it necessary to place a condition on a depot licence requiring the licence holder to make available an adequate power supply to run specialist equipment or to facilitate space and access arrangements for mobile x-ray units.

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Customs Amendment (Export Controls and Other Measures) Bill 2011
Schedule 2, item 19 - Reversal of onus

The Committee noted item 19 of Schedule 2 to the Bill, which inserts a new offence into the Customs Act relating to suspended depot licences. Subsection 77VA(2) sets out a number of exceptions to the offence which relate to actions that a Collector may authorise. The defendant bears an evidential burden of proof in relation to these matters. The Committee raised concerns about requiring the defendant to bear the evidential burden of proof for these matters.

I consider that it is appropriate and consistent with the Customs Act and other Commonwealth laws that the defendant bears the evidential burden of proof in relation to the identified exceptions to the new section 77VA offence.

If the defendant had permission or authority to undertake certain conduct despite the suspension of the depot licence, the defendant would be in the best position to produce evidence of the permission or authority to avert conviction. The offence also carries a relatively low maximum penalty of 50 penalty units.

In addition, construction of the offence and exceptions in section 77VA is consistent with the similar offence and exceptions that apply to warehouses, as set out in current section 86 of the Customs Act. There are a number of other offences in the Customs Act that provide an exception if the person has permission or is acting with authority to engage in certain conduct, and under these provisions, it would similarly fall to the defendant to demonstrate that they had permission or were operating with authority. Similar arrangements exist in other regulatory schemes such as the *Quarantine Act 1908* – see for example the offences and related exceptions at sections 20 and 29.

I note that the Bill includes a footnote to new section 77VA referring to subsection 13.3(3) of the *Criminal Code*. Subsection 13.3(3) sets out the rules relating to the evidential burden of proof on a defendant. However, under section 5AA of the Customs Act, Part 2.6 of the *Criminal Code*, which includes subsection 13.3(3), would not apply to new section 77VA because it is an offence subject to a Customs prosecution. This footnote, which has no operative effect, has therefore been included in the Bill in error. Although subsection 13.3(3) of the *Criminal Code* would not apply to new section 77VA, the defendant would still bear the evidential burden of proof in relation to the identified exceptions to the offence in a Customs prosecution.

A Customs prosecution is a proceeding for the recovery of penalties under the Customs Act and Part XIV of the Customs Act regulates such proceedings. This exemption from the application of Part 2.6, as well as Parts 2.4 and 2.5, of the *Criminal Code* dates back to 2001 and recognised the fact that some of the requirements of the *Criminal Code* were not easily translated to Customs prosecutions. Similar footnotes to that in new section 77VA were previously included in error in several other sections of the Customs Act. I will seek to rectify these minor drafting errors in a future legislative vehicle.

Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011
Clause 2 - Delayed commencement

The Committee raised concerns about the delay in commencement of the legislation, which if passed in the Winter 2011 Parliamentary could be longer than six months.

The Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011 amends the *Customs Tariff Act 1995* to implement domestically, changes resulting from the fourth review of the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System.

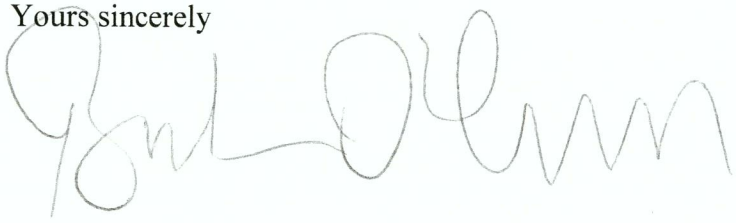
Australia is a signatory to the Harmonized System. The administering body, the World Customs Organization (the WCO), reviews the Harmonized System every five years to reflect changes in industry practice, technological developments and changes in international trade patterns. The WCO completed its fourth review of the Harmonized System in June 2010. As a signatory to the Harmonized System, Australia is required to implement the changes resulting from the fourth review on 1 January 2012.

The Bill will make some 800 amendments to existing classifications in the Customs Tariff Act. These amendments will affect most of Australia's industry sectors, particularly industries involved in the trade of fish, fish products and some agricultural products.

The passage of the Bill in the current Parliamentary Sittings will provide transparency and certainty and allow Australian industry sufficient time to update in-house systems to reflect the new tariff classifications. Australian industry requested a greater period between passage of the legislation and its commencement following implementation of changes resulting from the WCO's third review of the Harmonised System. Passage in these Sittings will also ensure that Australia meets its international obligations and that we are applying the Harmonized System consistently with our major trading partners. Failure to meet the 1 January 2012 deadline could result in administrative and financial burdens for Australian importers and exporters.

I thank the Committee for raising these matters and I trust that the material in this letter is of assistance.

Yours sincerely



Brendan O'Connor

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
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

Thank you for your letter of 12 May 2011 on behalf of the Standing Committee for the Scrutiny of Bills regarding the Committee's comments in *Alert Digest No. 4 of 2011* concerning the Tertiary Education Quality And Standards Agency Bill 2011.

I note that the Committee has requested a response in relation to the reason for the proposed commencement dates under clause 2.

The Committee has also mentioned clauses 69 and 76, which the Committee states partially abrogate the privilege against self incrimination. While the Committee's report leaves the question of whether the proposed approach is appropriate to the Senate, I have also addressed the Committee's concerns in relation to these clauses.

Before specifically addressing the Committee's concerns, I make the following general comments about the Bill.

Development of the Tertiary Education Quality and Standards Agency (TEQSA) Legislation

The Tertiary Education Quality and Standards Agency Bill 2011 and the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011 set out the new quality assurance and regulatory framework for higher education, including the establishment of the TEQSA.

The Commonwealth has consulted extensively on the development of the TEQSA legislation. In November 2010 and December 2010 face-to-face consultation sessions were held to discuss drafts of the legislation with representatives from the states and territories, key higher education peak bodies, and in February 2011 the Australian Government released a draft of the legislation for public comment. Stakeholders were also given further opportunity to comment when the legislation was referred to the Senate Education, Employment and Workplace Relations Legislation Committee on 24 March 2011.

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I note that the Legislation Committee's report, delivered on 10 May 2011, was largely supportive of the establishment of TEQSA as a national regulator for the higher education sector and commended the Government for the extensive consultation process it undertook in developing the legislation. In particular, the Committee stated that it was confident that most stakeholders were comfortable with the approach taken in the legislation in regards to TEQSA's investigative and enforcement powers.

Clause 2

The Committee raised concerns about the commencement date of parts of legislation which are scheduled to commence on the later of 1 January 2012 or 7 months after the Bill receives royal assent. The Committee note in its report that no information about the rationale of the commencement provisions contained in clause 2 are included in the explanatory memorandum, and seek advice about the reasons for the possible delayed commencement of some parts of the Bill.

The commencement provisions in clause 2 have been drafted to allow for the staged establishment of TEQSA. They provide for the agency to be established and to commence its *quality assurance functions* from the later of 1 July 2011 or one month after the Bill receives royal assent, and for the agency to commence its *regulatory functions* from the later of 1 January 2012 or 7 months after the Bill receives royal assent.

The delayed commencement provisions referred to by the Committee are therefore intended to ensure that TEQSA has sufficient time to develop appropriate policies and procedures before its regulatory powers are 'switched on'. The delay will also give higher education providers time to become familiar with their obligations under the TEQSA legislation.

Clauses 69 and 76

The Committee also questioned the appropriateness of the approach taken in clauses 69 and 76, which it stated partially abrogate the privilege against self-incrimination by providing that a person is not excused from giving information or producing a document or thing on grounds that production of the information or document requested could incriminate them.

These provisions are appropriate given that TEQSA will necessarily rely on the information gathered by authorised officers to perform its regulatory and quality assurance functions, one of the aims of which is to protect students. The provisions are balanced by the inclusion of subclauses 69(2) and 76(2) which provide that the evidence obtained will be inadmissible against an individual in respect of some civil and criminal proceedings.

I trust the information provided is helpful.

Yours sincerely

CHRIS EVANS

6/6/11.