SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

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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

SIXTH REPORT OF 2011

The Committee presents its Sixth 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:

Aged Care Amendment Bill 2011

Introduced into the House of Representatives on 26 May 2011
Portfolio: Health and Ageing

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 received on 21 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2011 - extract

Background

This bill amends the *Aged Care Act 1997* to:

- limit the permitted uses for accommodation bonds;
- introduce new criminal offences where misuse of accommodation bonds has been identified and the approved provider has failed financially, owing accommodation bond refunds;
- introduce new information gathering powers to enable the Secretary of the Department of Health and Ageing to better monitor approved providers; and
- remove restrictions on the use of income derived from accommodation bonds, retention amounts and accommodation charges.

The bill amends the *Health Insurance Act 1973* and *National Health Act 1953* to remove redundant provisions.

Also, the bill repeals the *Aged or Disabled Persons Care Act 1954* and the *Nursing Home Charge (Imposition) Act 1994.*

Trespass on personal rights and liberties
Schedule 1, item 1

This bill amends the *Aged Care Act 1997* to make a number of changes in relation to the use and misuse of accommodation bonds, and to introduce new information gathering powers to enable the Secretary to better monitor approved providers that may be experiencing financial difficulties and using accommodation bonds for non-permitted uses.

Item 1 of Schedule 1 inserts a new section 9-3B which enables the Secretary to require information about the ability to refund accommodation bond balances where he or she holds a belief on reasonable grounds in relation to specified matters. Paragraph 9-3B(4)(a) provides that requests for such information must be complied with within 28 days or such 'shorter period as is specified in the request'. It is an offence (30 penalty units) not to comply with a request for information and failure to comply can also result in other sanctions being imposed under the legislation.

The explanatory memorandum does not indicate why a shorter period may be required. **The Committee therefore seeks the Minister's advice as to why a shorter period could be required and whether the minimum period for the production of information should be 14 days as recommended in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.**

> *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

Trespass on personal rights and liberties; Schedule 1, item 1

The Committee is seeking advice in relation to proposed new section 9-3B which enables the Secretary to request information about the ability of an approved provider to refund bonds where the Secretary holds a belief on reasonable grounds in relation to certain matters. Specifically, the Committee seeks advice as to why the Secretary should be able to request information within 28 days or 'such shorter period as specified in the request' particularly noting that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* recommends a minimum of 14 days.

There are two main reasons that proposed section 9-3B enables the Secretary to specify a shorter period for the purposes of provision of information.

Firstly, proposed section 9-3B is consistent with other similar provisions in the Act which also require approved providers to give information within 28 days or such shorter period as specified in the request. See for example, subsection 9-2(2) and subsection 9-3A(2) of the Act, which have been in place for a number of years and with which industry are familiar and compliant.

Secondly, there are strong policy reasons for a period of less than 14 days being specified in exceptional circumstances. While it is intended that 28 days remain the default period in

which an approved provider needs to respond to a request or notice for information, there are exceptional circumstances where there may be imminent risk to the health and wellbeing of care recipients and a shorter response period is appropriate.

For example, the Secretary may seek information from an approved provider in a timeframe shorter than 28 days where:

- there are concerns that financial difficulty may imminently lead to a sharp deterioration in the quality of care being delivered or the possible closure of an aged care service. In the past, the Secretary has sought information in less than 28 days (under other similar provisions) where it has been advised that an approved provider may be about to go into administration or where there is information indicating staff or suppliers are not being paid. In these cases, there have been immediate risks such as the continuity of care for aged care residents and the availability of staff and supplies to deliver the appropriate level of care. This situation can quickly arise and the Secretary needs to be able to respond quickly. For example, non-payment of staff wages for only a week can mean the loss of critical care staff within similar timeframes.
- an approved provider may be at risk of not being able to refund accommodation bonds to a number of care recipients within the required timeframes. In circumstances where an approved provider holds the life savings of care recipients (as a bond) and is unable to quickly repay the money when the care recipients leave the service, there can be significant adverse impacts on the care recipients within short periods of time. In these circumstances the Secretary needs to be able to quickly intervene to achieve an outcome for the care recipients involved.

The ability of the Secretary to specify a shorter time is therefore required to safeguard residents and their funds in the event that ml approved provider may be at significant risk of non-compliance or no longer able to provide aged care.

Committee Response

The Committee thanks the Minister for this response, and requests that the key aspects of this information be included in the explanatory memorandum.

Alert Digest No. 5 of 2011 - extract

Trespass on personal rights and liberties
Schedule 1, item 5

Item 5 of Schedule 1 inserts a new section 57-17B which relates to offences for non-permitted use of accommodation bonds. Subsection 57-17B(1) provides for an offence for a corporation who is an approved provider. Subsection 57-17B(2) provides for an offence for individuals who are 'key personnel'. Section 8-3A defines the phrase 'key personnel'. Paragraph 57-17B(2)(d) conditions liability for the offence on whether or not the individual 'knew that, or was reckless or negligent as to whether' the bond would be used and that its use was not permitted. Where a bill includes provision for a fault element of negligence, the Committee has taken the view that an explanation of the reasons for the use of negligence requirement should be justified. Unfortunately, the explanatory memorandum at pages 24-26 merely repeats the terms of the provision. **The Committee therefore seeks the Minister's further advice as to examples of the circumstances of possible offences and an explanation as to why negligence is an appropriate standard of fault in this context.**

> *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

Trespass on personal rights and liberties; Schedule 1, item 5

The Bill inserts a new section 57-l7B which relates to offences for non-permitted use of accommodation bonds. The Committee is seeking advice as to examples of the circumstances of possible offences and an explanation as to why negligence is an appropriate standard of fault in this context.

Proposed section 57-l7B establishes an offence for key personnel who know or are reckless or negligent as to whether an approved provider is using bonds for non-permitted uses and fails to take reasonable steps to address this (in circumstances where the approved provider becomes insolvent and triggers the Guarantee Scheme).

In this circumstance it is important that both recklessness and negligence are included in the offence because recklessness describes the circumstance where the person knowingly

exposes another to risk (where the fault lies in being willing to run the risk) whereas negligence captures the circumstance where the fault lies in the failure to foresee and so allow otherwise avoidable risks to result.

Both circumstances can occur in the case of approved providers.

The total value of accommodation bonds held by approved providers has more than doubled in the last five years. Currently, the aged care industry holds over $10.6 billion in accommodation bonds on behalf of aged care residents. Given the significant amount of funds, it is appropriate providers and their key personnel understand and comply with the legislative requirements set out in the *Aged Care Act 1997.*

In the course of its prudential regulation activities, the Department has identified a number of cases where:

- approved providers, and their key personnel, have not exercised appropriate diligence in managing accommodation bonds paid by their residents and which has given rise to risks of default on refunds (reckless behaviour). For example, there is evidence to suggest that approved providers have used bonds for investment in non aged care purposes (e.g. sporting club or other business activities) and run the risk that they would have sufficient other funds to repay bonds. This has not transpired and the approved provider has become insolvent, leaving no bonds available for recovery by care recipients

- in other cases where approved providers have failed to make bond refunds and triggered the Accommodation Bond Guarantee Scheme, there has been evidence that they had failed to maintain adequate financial records and monitor their financial position (i.e. they have been negligent in discharging their responsibilities under the Act). For example, approved providers have failed to keep proper accounting systems for bonds, meaning that bonds are not refunded on time or are expended for purposes not relating to aged care. In other cases, approved providers have been experiencing financial difficulties and have continued to charge accommodation bonds when there were clear grounds for concern about their ability to make refunds. It also appears that some accommodation bond funds have been lent to related entities (e.g. other companies) without appropriate safeguards in place to manage risks to the repayment of loans, and these funds were subsequently unrecoverable when those entities failed.

Without effective governance processes there are significant risks for the approved provider, residents and staff. For instance, without regular and informed scrutiny of financial performance and financial position, and without senior personnel taking responsibility for their actions, an approved provider could be at increased risk of poor financial performance leading to insolvency and default on accommodation bond refunds. In this context, knowledge, recklessness or negligence are considered appropriate standards of fault.

I trust this clarifies the reasoning to these amendments and satisfies the Committee's request.

Committee Response

The Committee thanks the Minister for this response, and requests that the key aspects of this information be included in the explanatory memorandum.

Australian National Registry of Emissions Units Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Climate Change and Energy Efficiency

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 is part of a package of three bills to establish the Carbon Farming Initiative. The bill provides for the establishment and maintenance of the National Registry of Emissions Units which will support the implementation of the Carbon Farming Initiative and includes:

- rules for opening and closing accounts in the registry;
- different types of registry accounts;
- procedures and requirements relating to Kyoto and non-Kyoto international units in the registry;
- publication of information;
- voluntary cancellation of emissions units; prevention or rectifying non-compliance with registry requirements; and
- merits review of decisions.

Delegation of legislative power
Various

In this bill there is a general power to make regulations, but it is also often stated that the regulations 'may make provision' for particular matters, for example in relation to the opening of accounts, identification procedures, transactions limits etc. In fact, there are a large number or particular issues which are clearly flagged as requiring legislation to

enable the registry to function as intended. One particular example is clause 12: 'The regulations may empower the Administrator to designate a Commonwealth Registry account as an account with a name specified in the regulations.' This provision is dealt with at pages 7-8 of the explanatory memorandum , where it is said that this clause outlines Australia's obligations under the Kyoto rules.

The Committee acknowledges that there may be reasons why it is desirable that areas relating to the bill are to be provided for in future delegated legislation, but is concerned to ensure that as much information as possible is included in the primary legislation or a justification for the use of delegated legislation is provided. The Committee therefore **seeks the Minister's further advice as to the rationale for the significant reliance on the use of delegated legislation.**

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

Minister's response - extract

Delegation of legislative power - various clauses (other than clauses 27 and 57)
The Committee comments that a number of clauses provide that the regulations 'may make provision 'for particular mailers, for example, in relation to the opening of accounts, identification procedures, transaction limits etc. It also notes that many issues are clearly flagged as requiring delegated legislation to enable the Australian National Registry of Emissions Units (the Registry) to function as intended; clause 12, for instance. The Committee seeks the Minister's advice as to the rationale for the significant reliance on the use of delegated legislation.

The Registry was established under the Commonwealth's executive power to meet one of Australia's commitments under the Kyoto Protocol. Part 2 of the bill will provide a legislative basis for the continued existence of the Registry (clause 9), the making of entries in Registry accounts (clause 17) and the correction and rectification of the Registry (clauses 19, 20, 21, 22). The regulation-making powers in Part 2 (clauses 10(1), 11(1), (2), (3), (5),12,13,14(1),15(1),16(1), (3), (4), (5), (6) and 18) deal with matters that go to the day-to-day operation of the Registry, such as opening, closing and naming accounts; matters which are currently dealt with non-legislatively. Dealing with these matters in regulations will help ensure that the Registry can respond quickly and effectively to operational challenges and will promote operational integrity.

The regulation-making powers in Part 2 are not 'at large'. Rather, the circumstances in which the regulations can deal with the particular subject-matter of each power are expressly limited. For instance, while clause 15(1) provides that the regulations may make

provision for and in relation to empowering the Administrator to close a Registry account, clause 15(2) provides that the Administrator can only be empowered to close an account in the circumstances described in that subclause. An appropriate balance is thereby achieved between the primary and delegated legislation, and between Parliamentary oversight and operational flexibility.

The regulation-making powers in Part 3 of the bill (Kyoto units), in particular, clauses 38(1), (2), 39(1), 40(1), (2), 41(1), 42(2), 43(1), (2) and 44 (also clause 60 in Part 5), are largely geared towards ensuring that Australia has the flexibility to implement its obligations under the Kyoto Protocol and other related international instruments. For example, regulations will be required to set rules for the management of Kyoto units at the end of the first commitment period (2008-2012) under the Kyoto Protocol, which are subject to carry-over restrictions as outlined in the explanatory memorandum. The carryover process is expected to be completed in late 2014 or early 2015. Regulations might include details on how the carry-over restrictions will be implemented in an orderly way, whether this is achieved by setting carry-over restrictions for each account holder or by some other means.

Of the other regulation-making powers in Part 3:

- clauses 34(2)(c), 35(2)(b) and 47 deal with the type of information that must accompany certain Registry transactions. and are intended to ensure that the Registry can respond quickly and effectively to operational challenges;

- clause 36(1)(c) enables the regulations to specify units that cannot be transferred to a Registry account. and is intended to exclude any type of Kyoto units that do not meet environmental integrity standards because they do not fairly represent emission reductions in the country of origin or because they are associated with unacceptable environmental impacts. which could undermine CFI participants' confidence in the Registry;

- clause 45(2) (also clause 54(2), in relation to non-Kyoto international emissions units) enables the regulations to prescribe a purpose for which Kyoto units are personal property, and is geared towards 'future proofing' the operation of the section. The regulations would enable the scheme to protect the interests of Kyoto unit holders in circumstances that were not foreseen during the drafting of the bill.

The regulation-making powers in Part 4 of the bill (Non-Kyoto international emissions units) provide for regulations which prescribe the conditions that must be met in relation to certain transfers of non-Kyoto international emissions units, and are geared towards enabling the Registry to interact appropriately with foreign registries, should such interaction be permitted.

All of the regulation-making powers in the bill were drafted having regard to the guidance provided in the *Legislation Handbook* about matters that should be included in primary legislation and matters that may be included in subordinate legislation.

Committee Response

The Committee thanks the Minister for this comprehensive response.

Alert Digest No. 4 of 2011 - extract

Delegation of legislative power
Part 2, Division 7, Clause 27

Clause 27 allows for the creation of civil penalty provisions that carry significant penalties (see paragraph 69(4)(b) and paragraph 69(5)(b)) by regulation. The explanatory memorandum states at paragraph 5.20 that:

> Additional provisions in relation to the Registry may be made in the regulations. For example, it is expected that regulations will be required to set out detailed rules for the use of accounts and the registry. Failure to comply with the regulations may lead to the imposition of a civil penalty.

The explanatory memorandum also notes at paragraph 5.21 that the provisions are civil penalties rather than criminal offences because 'contravention of these provisions does not involve conduct of such serious moral culpability'. The Committee acknowledges the rationale provided, but retains concern about the ability for provisions attracting significant penalties to be created by delegated legislation rather than in the primary legislation. In the circumstances the Committee **leaves consideration of this matter to the consideration of the Senate as a whole**.

> *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

Delegation of legislative power - clause 27
Clause 27 allows for regulations to 'make further provision in relation to the Registry'. The Committee notes that regulations made under clause 27 can attract significant penalties, and indicates its concern about such provisions being created under delegated legislation

rather than primary legislation. While noting this concern, the Committee leaves consideration o/this matter to the consideration of the Senate as a whole.

Clauses 27(1) and (2) provide for regulations to 'make further provision' in relation to the Registry, including provisions requiring the holder of a Registry account to notify a matter to the Administrator. Clause 27(4) provides that if a holder of a Registry account is subject to a requirement under such regulations. the holder must comply with the requirement.

Clause 27(5) provides for ancillary contraventions of this requirement. Subclauses (4) and (5) are civil penalty provisions, meaning that a Court can order a person to pay a penalty if the Court is satisfied (on the balance of probabilities) that a person has contravened those provisions. The imposition of a civil penalty does not constitute a criminal conviction. The regulation-making power in clause 27 goes to the day-to-day operation of the Registry and supplements the other regulation-making powers in Part 2. Providing this supplementary regulation-making power will help ensure that the Registry can respond quickly and effectively to any operational challenges not otherwise addressed in Part 2 of the bill. For example, regulations made under clause 27(1) could prohibit account holders from accessing particular parts of the Registry in specified circumstances, where that access in those circumstances is undermining confidence in the integrity of the Registry. Imposing civil penalties in relation to such requirements helps ensure compliance. The civil penalties are not insignificant, but they are only imposed if a Court is satisfied that a contravention has occurred, are subject to maximum limits and are otherwise consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.*

Committee Response

The Committee thanks the Minister for this further information about the provision.

Alert Digest No. 4 of 2011 - extract

Possible severe penalties
Part 2, Division 7, Clauses 23 and 24

Part 2, Division 7, clauses 23 and 24 introduce offences for a person to knowingly make a false entry in the Registry or to tender in evidence a document which falsely purports to be a copy or extract from an entry in the Registry. The explanatory memorandum notes that the penalty for the first offence is not in line with the standard penalty/imprisonment ratio set out in section 4B of the *Crimes Act 1914*, whereas 7 years imprisonment equates to 420 penalty units, the penalty in the bill is 2000 units. The explanatory memorandum accepts

that cogent reasons are required to depart from the accepted ratio. The reason given for departure in this instance is (see page 31 of the explanatory memorandum) that 'the financial gain which could be made from tampering with the Registry would amount to several lifetimes' worth of imprisonment on the standard ratio' and that a large financial penalty is necessary given the potential gains which may be made from an offence under this provision. In the circumstances **the Committee leaves the question of whether the penalty imposed 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

Possible severe penalties - Division 7, clauses 23 and 24

The Committee notes that clauses 23 and 24 of the bill introduce possible severe penalties for making a false entry in the Registry or producing or tendering falsified documents purporting to be a copy or extract from the Registry. The penalty for the first offence is not in line with the standard penalty/imprisonment ratio set out in section 4B of the Crimes Act 1914. Whereas under the standard ratio, 7 years imprisonment equates to 420 penalty units, the penalty in the bill is 2000 units. The Committee leaves the question of whether the penalty imposed is appropriate to the consideration of the Senate as a whole.

The integrity of the Registry and reputation of the carbon farming initiative could be severely affected if sufficient measures are not taken to prevent false entries in the Registry. Reputation is essential in establishing and maintaining market confidence. For this reason the Registry will comply with IT requirements approved by the Defence Signals Directorate and the United Nations Framework on Climate Change Convention. Information will also be shared with key enforcement agencies to monitor any irregular activity. False entries may involve the attempted creation of counterfeit Australian carbon credit units or attempts to steal units from one account and place them in another. False entries could be made by persons with access to log-ons but without authority to make relevant entries. It is essential that there is a clear and strong deterrence for anyone contemplating these kinds of activities.

As mentioned in the explanatory memorandum, the profit that could be made out of this conduct could amount to several lifetimes' worth of imprisonment on the standard penalty/imprisonment ratio. It is for this reason that the standard ratio is varied. This is consistent with the instructions at page 38 of *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers* that the penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

Committee Response

The Committee thanks the Minister for this further information about these clauses.

Alert Digest No. 4 of 2011 - extract

Reversal of onus
Part 2, Division 7, Clause 26

Clause 26 of the bill is a civil penalty provision which relates to the use and disclosure of information obtained from the Registry. Subclause (3) states that the obligations imposed do not apply if the use or disclosure of the information is relevant to a number of matters. A defendant bears an evidential burden of proof in relation to these matters and at page 34 of the explanatory memorandum this approach is said to be 'justified' as the matters are 'peculiarly within the defendant's knowledge and not available to the prosecution'. In the circumstances **the Committee leaves the question of whether this approach is appropriate to 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

Reversal of onus - Division 7, clause 26
Clause 26 of the bill is a civil penalty provision which relates to the use and disclosure of information obtained from the Registry. Clause 26(3) provides that the obligations do not apply if the use or disclosure of the information is relevant to the holding o/units recorded in the Registry, or the exercise of the rights attaching to those units. A person wishing to rely on subclause (3) bears an evidential burden in relation to that matter, and thus bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. The Committee notes that in the explanatory memorandum, this approach is said to be justified because the matters are 'peculiarly within the defendant's knowledge and not available to the prosecution '. The Committee leaves the question of whether this approach is appropriate to the Senate as a whole.

Where matters are peculiarly within the defendant's knowledge and not available to the prosecution, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at page 29) indicates that it is legitimate to place the evidential burden in relation to that matter on the defendant. The approach taken in clause 26 is consistent with this.

Committee Response

The Committee thanks the Minister for this further information.

Alert Digest No. 4 of 2011 - extract

Delegation of legislative power
Part 4, Clause 57

Clause 57 is a broad regulation power which provides that 'the regulation may make further provision in relation to non-Kyoto international emissions units.' The explanatory memorandum states at paragraph 2.64 that:

> The bill provides a framework with the detailed arrangements for transfers of non-Kyoto international emissions units to be specified in regulations. This allows the transfer arrangements of such units to be in accordance with, for example, any associated treaty or agreement.

Further, at paragraph 2.71:

> Regulations may make further provisions in relation to non-Kyoto international emissions units. For example, they might detail any conditions that may apply to outgoing international transfers of non-Kyoto international emissions units. The administrative arrangements for giving effect to the transfer could also be specified in regulations.

These examples assist to understand some possible uses of the provision, but the Committee remains concerned about the breadth of this delegation of legislative power. However, in the circumstances the Committee leaves **the question of whether this delegation of legislative power 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Minister's response - extract

Delegation of legislative power – Part 4, clause 57
Clause 57 of the bill is a broad regulation power that applies in relation to non-Kyoto international emissions units. The Committee has noted that the explanatory memorandum outlines possible applications of the clause, but expresses concern as to the breadth of the delegation of the legislative power. The Committee leaves the question a/whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole.

The bill provides for certain prescribed non-Kyoto international emissions units to be held and traded in the Registry. This will mean that units issued under other schemes, for example New Zealand Units, may be prescribed and traded within the Registry. The bill sets out detailed rules for entries in the Registry, transmission and transfer of, and rights and interests in, non-Kyoto international emissions units.

As explained in the explanatory memorandum, clause 57 allows the regulations to specify further conditions in relation to non-Kyoto international emissions units. For example, the regulations may specify conditions on outgoing international transfers of non-Kyoto international emissions units, or specify rules that ensure coherence with the international agreement or law of the foreign country under which the units were originally issued. Clause 57 'future-proofs' Part 4 of the bill and ensures that the Registry will be able to interact appropriately with foreign registries in the event that this is permitted.

Committee Response

The Committee thanks the Minister for this further information.

Alert Digest No. 4 of 2011 - extract

Strict liability
Part 7, Clause 79

Clause 79 in effect provides that civil penalty provisions are strict liability offences: subclause 79(2) provides that in civil penalty proceedings it is not necessary to prove a person’s intention, knowledge, recklessness, negligence or any other state of mind. The

explanatory memorandum states at page 35 that the 'reason for this provision is that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention'.

The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (at page 25) indicates that strict liability is appropriate only if (i) the penalty imposed is no more than 60 penalty units for an individual and 300 for a body corporate, (ii) the punishment of offences not involving fault is likely to significantly enhance enforcement, and (iii) there are legitimate grounds for penalising persons lacking 'fault'. The reason cited in the explanatory memorandum for the imposition of strict liability is relevant to consideration (iii). The penalties which may be imposed (see subclause 69(4) and subclause 69(5)) do exceed the general limits for strict liability criminal offences indicated in the *Guide*, however the *Guide* also indicates that maximum penalty of a civil penalty provision will often be higher than that in relation to a criminal offence (see page 66) and that the use of strict liability is easier to justify 'where it is reasonable to expect those subject to the civil penalty to take steps to guard against any inadvertent contravention' (see page 65).

Although the justification in the explanatory memorandum of this approach might have been more detailed and informative, in the circumstances the Committee considers that **the question of whether the approach is appropriate should be left 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

Strict liability - Part 7, clause 79

Clause 79 provides that for certain civil penalty provisions (clauses 26(1),26(2) and 27(4)) it is unnecessary to prove a person's intention, knowledge, recklessness, negligence or other state a/mind. The Committee notes that the explanatory memorandum provides that the reason/or this provision is that it is reasonable to expect those subject to the provision to take steps to guard against any inadvertent contravention. The Committee leaves the question of whether this approach is appropriate to the consideration of the Senate as a whole.

Clauses 26(1) and (2) relate to the use and disclosure of material obtained from the Registry. Clause 27(4) provides that a person must comply with regulations made in relation to the Registry.

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of this provision. Consideration was given to the fact that the use of strict liability is more easily justified for a higher civil penalty provision than a higher penalty criminal offence. The conclusion was reached that the two criteria outlined at page 65 were fulfilled:

- The civil penalty provision applies only to corporate or whitecollar wrongdoing; and
- It is reasonable to expect those subject to the civil penalty to take steps to guard against any inadvertent contravention.

Chapter 7 of the Senate Standing Committee for the Scrutiny of Bills Report *The Work of the Committee during the 40th Parliament February 2002 -August 2004*, June 2008 is also noted. That report states that 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles'.

Committee Response

The Committee thanks the Minister for this further information.

Alert Digest No. 4 of 2011 - extract

Merits review
Part 3, subclause 36(2) and Part 8, clause 82

Clause 82 provides for merits review in relation to a number of decisions. Subclauses 36(2) and 53(2) both give the Administrator the discretion not to transfer units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent (in relation to Kyoto and non-Kyoto units respectively). Although decisions made under subclause 53(2) are reviewable, decisions made under subclause 36(2) are not and the explanatory memorandum does not address this issue. The Committee therefore **seeks the Minister's advice as to why a decision made under subclause 36(2) is not reviewable**.

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

Minister's response - extract

Merits review - Part 3, subclause 36(2) and Part 8, clause 82
Clauses 36(2) and 53(2) give the Administrator the discretion not to transfer units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent. The Committee notes that while a decision under clause 53(2) is subject to merits review, a decision under clause 36(2) is not. The Committee seeks the Minister's advice as to why a decision under clause 36(2) is not reviewable.

It is the Government's intention that a decision under clause 36(2) should be reviewable and amendments have been tabled in the House to achieve this. The omission of clause 36(2) from the table in clause 82 is an oversight.

Committee Response

The Committee thanks the Minister for this response and the action taken to ensure that this decision is reviewable.

Alert Digest No. 4 of 2011 - extract

Incorporating material by reference
Part 9, clause 95

Clause 95 enables the making of regulations which apply, adopt or incorporate, with or without amendment, a matter contained in other instruments as they exist from time to time. An instrument so incorporated must be published on the Administrator's website (unless it would infringe copyright). The explanatory memorandum at page 41 cites a standard published by the International Organization for standardisation as in force from time to time as an example. Beyond this, no justification for this approach is given. The concern is that legislative power may, by this arrangement, be delegated inappropriately and that the law may change without Parliament having the opportunity to scrutinise the changes. Although the requirement for the publication of instruments is welcomed as it increases the capacity for regulations to be scrutinised, it is unfortunate that the explanatory memorandum does not directly address this issue. The Committee therefore **seeks the Minister's advice as to why it is considered appropriate to include material by reference rather than including it directly in the primary legislation**.

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

Minister's response - extract

Incorporating material by reference - Part 9, clause 95

The Committee notes that clause 95 permits regulations to make provision in relation to a matter by applying, adopting or incorporating, with or without modification, a matter contained in an instrument or writing as in force or existing at a particular time or as in force or existing from time to time. An instrument so applied etc must be published on the Administrator's website (unless it would infringe copyright). The Committee is concerned that legislative power may, by this arrangement, be delegated inappropriately and that the law may change without Parliament having the opportunity to scrutinise the changes. The Committee seeks the Minister's advice as to why it is considered appropriate to include material by reference rather than including it directly in the primary legislation.

Clause 95 is geared towards the situation where Australia is required to implement obligations as they exist in international instruments from time to time, including, for example, under the Kyoto accounting rules. This will enable, for instance, regulations made in relation to carry-over restrictions (clause 40) to implement the carry-over restrictions that apply under those rules as they exist from time to time. Providing for those rules to be implemented in this way is an appropriate way for Australia to meet its binding international obligations.

The provision has been drafted in accordance with the Legislative Instruments Handbook, which states that:

> "2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect."

and

> "11.21 As noted in Chapter 2, the LIA *[Legislative Instruments Act 2003]* provides that legislative instruments may incorporate documents by reference in accordance with section 14. The benefit of incorporation by reference is that the incorporated document, which could be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled. However, an agency will be asked to provide

information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by reference, so this will draw the attention of Parliament to use of this mechanism."

The Kyoto rules are set out in the Kyoto Protocol itself and a range of decisions and standards that can be highly technical, complex and lengthy documents. For example, the Data Exchange Standards for Registry Systems under the Kyoto Protocol is a 451 page document which sets out technical specifications for data exchange between registries and the Independent Transaction Log, which was established to keep track of international transfers of Kyoto units and to ensure compliance with Kyoto rules (see http://unfccc.int/files/kvoto_protoco/registry_systems/application/pdf/des_full_ver_1.1.2 fullversion.pdf). The Registry must be operated in compliance with these standards.

Incorporation of such complex documents directly into the primary legislation or regulations would significantly increase the volume of the ANREU legislation and Commonwealth statute book, and would be inconsistent with the Government's Clearer Commonwealth Laws initiative which aims to reduce the complexity of legislation. By incorporating such documents by reference and requiring their publication on an easily accessible webpage, the legislation provides guidance to the Administrator and users of the scheme while avoiding unnecessary length and complexity.

Committee Response

The Committee thanks the Minister for this comprehensive response, and requests that the key aspects of this information be included in the explanatory memorandum.

Carbon Credits (Carbon Farming Initiative) Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Climate Change and Energy Efficiency

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 is one of a package of three related bills which creates a framework for investment in carbon abatement for the agricultural industry. In particular the bill provides for:

- types of abatement projects eligible for Australian carbon credit units (ACCUs);
- requirements for recognition as an offsets entity;
- eligibility for offsets projects;
- participation by holders of Aboriginal and Torres Strait Islander land;
- characteristics of methodology determinations;
- permanence arrangements for sequestration projects;
- reporting requirements for offsets projects;
- framework for auditing offset reports;
- the issue and exchange of ACCUs;
- monitoring and enforcement powers; merits review of decisions;
- establishment and functions of the Domestic Offsets Integrity Committee and the Carbon Credits Administrator; and
- publication of information and the treatment of confidential information.

'Henry VIII' clause
Clause 5

A number of the definitions in clause 5 of the bill allow the meaning of the defined terms to be modified or elaborated in regulations (see 'land rights land', 'native forest', 'prescribed native forest protection project', 'prescribed non-CFI offsets scheme'). The explanatory memorandum explains at page 87 the need for this in relation to 'prescribed native forest protection project', but not the other terms. The Committee **seeks the Minister's advice as to why this approach is considered appropriate for the other definitions**.

> *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

Henry VIII clause - clause 5
The Committee notes that a number of definitions in clause 5 of the bill allow the meaning of a defined term to be modified or elaborated in regulations. The Committee seeks the Minister's advice as to why this approach is considered appropriate for the definitions of 'land rights land', 'native forest' and 'prescribed non-CFI offsets scheme '.

Definition of 'land rights land'
The Government is committed to facilitating Aboriginal and Torres Strait Islander participation in carbon markets and the bill contains a number of provisions to give effect to this objective. In addition, extensive consultation is being conducted with stakeholders to ensure the bill effectively accommodates indigenous participation in the carbon farming initiative.

The definition of 'land rights land' is an adaptation of section 47A of the *Native Title Act 1993*, which covers land granted or vested under Aboriginal and Torres Strait Islander specific legislation or held or reserved expressly for Aboriginal and Torres Strait Islander people. There is a range of Aboriginal and Torres Strait Islander specific legislation across jurisdictions. Making provision for the definition of 'land rights land' to be supplemented by regulations ensures that any arrangement provided for in such legislation that is not otherwise captured by the definition can be accommodated.

Definition of 'native forest'
'Native forest' is defined by reference to the crown cover, height and natural range of trees. For the purposes of this definition, 'trees' and 'crown cover' may be defined in the regulations. It is envisaged that the regulations will specify that only trees with woody

vegetation will be eligible under the scheme and that some known tree species, such as species that are included on the Australian Government's weed alert list, will be excluded. The bill provides for the regulations to prescribe the meaning of 'tree' in order to enable the list of exclusions to be added to over time, as the need arises. In addition, providing for 'crown cover' and 'trees' to be defined in the regulations reflects the rules of the Kyoto Protocol which provide that the Government may amend its definition of trees and crown cover as appropriate, when international accounting rules for carbon sinks change.

Definition of 'non-CFI offsets scheme'

Transitional arrangements are made for projects that have received carbon credits under a 'prescribed non-CFI offsets scheme' (part 7, Division 4). This enables permanence obligations (for example, a requirement to maintain a forest for a period of 70 or 100 years) that were created under existing schemes to be enforced through the bill, thereby removing a barrier to winding up these schemes.

Clause 5 provides that 'prescribed non-CFI offsets scheme' has the meaning given by the regulations. It is intended that the regulations will provide that a prescribed non-CFI offsets scheme is an on-going scheme that issued or facilitated the issue of carbon credits for reforestation activities and was administered by an Australian or state/territory government such as the Australian Government's Greenhouse Friendly initiative and the NSW and ACT Governments' Greenhouse Gas Reduction Scheme. It is intended that the regulations will create a list which can be added to in order to ensure all eligible schemes are covered.

Committee Response

The Committee thanks the Minister for this response, and requests that the key aspects of this information be included in the explanatory memorandum.

Alert Digest No. 4 of 2011 - extract

Delegation of legislative power
Clause 41

Clause 41 of the bill sets out the ‘additionality test’, which is imposed to ensure that projects do not accrue credits for abatement that would have occurred in any event. The clause states that a project passes the test if ‘the project is of a kind specified in the regulations’ and is not required to be undertaken by or under a Commonwealth, State, or Territory law. Regulations will therefore list the activities or types of projects that are additional.

The Minister, prior to making the regulations, must consider advice from the expert committee established under the bill (the DOIC) and also whether the practice under consideration is a 'common practice'. The additionality test is thus envisaged as being based on expert advice (from a body to be established by the bill) and common practice which may obviously change over time.

The Committee acknowledges that the bill includes some legislative guidance as to requirements for the regulations, but is concerned that in practice it may be difficult to establish what is a 'common practice'. To better evaluate whether the proposed delegation of legislative power is appropriate the Committee **seeks the Minister's further advice about the justification for the approach and whether more precise legislative guidance can be provided in the primary legislation**.

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

Minister's response - extract

Delegation of legislative power – clause 41

The Committee notes that clause 41 provides that a project passes the additionality test if 'the project is of a kind specified in the regulations' and is not required to be undertaken by or under a Commonwealth, State or Territory law. Prior 10 making regulations, the Minister must consider advice from the expert committee established under the bill and also whether carrying out the project is a 'common practice'. The Committee notes that 'common practice' may change over time. The Committee acknowledges that the bill includes some legislative guidance as to requirements/or the regulations, but is concerned that in practice it may be difficult to establish what is 'common practice'. The Committee seeks the Minister's advice about the justification/or the approach and whether more precise legislative guidance can be provided in the primary legislation.

The purpose of the additionality test is to ensure that credits are only issued for abatement that would not normally have occurred and, therefore, provides a genuine environmental benefit.

It is envisaged that the regulations will provide a 'positive list' of activities or types of projects which are considered 'additional'. This approach allows the carbon farming initiative to adapt and cover different activities as the uptake of the scheme expands. Projects can only be added to the list if the Minister first obtains the advice of the Domestic Offsets Integrity Committee (DOIC), an expert body which provides independent advice to government. The Minister must also consider whether carrying out

the project is beyond 'common practice' in the relevant industry or environment where the project is to be carried out.

It is acknowledged that 'common practice' is variable between industries and over time. For this reason, it is envisaged that guidelines about what is and is not common practice will be established in consultation with expert stakeholders, and that the Minister will have regard to these guidelines when considering whether carrying out a project is common practice.

In the past, offset schemes have been criticised for using project-specific assessments of additionality which are expensive and time-consuming. The carbon fanning initiative will be one of the first carbon offset schemes in the world to use a more efficient and transparent 'positive list' approach to additionality.

Unlike the carbon fanning initiative, other carbon offset schemes rely heavily on financial additionality tests to determine whether activities are additional. Under financial additionality tests, activities that have productivity benefits, such as composting for soil carbon or improved herd management, are not considered additional and are excluded from participating in offset schemes. Further, financial additionality tests require sound judgment around rates of return and cash flow analyses which are difficult to administer. The financial additionality approach was rejected following consultation with stakeholders. The carbon fanning initiative's 'common practice' test recognises that there are many reasons why land sector abatement activities are not common practice.

Committee Response

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

Alert Digest No. 4 of 2011 - extract

Incorporating material by reference
Clauses 106 and 302

Clause 106 of the bill provides for the making of methodology determinations by legislative instrument. The methodology determinations establish procedures for estimating the extent of abatement attributable to particular projects and for project specific rules for monitoring and reporting on abatement. Subsection 106(8) enables a methodology determination to incorporate other instruments as in force or existing ‘from time to time’. The Committee has consistently questioned whether such provisions appropriately delegate

legislative power because the approach allows a change in obligations to be 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.

In this instance subclause 106(10) requires that any instrument which is incorporated must be published on the relevant website. This provision is welcomed as it enables members of the public to readily access the content of the laws that may not have been completely specified in the published regulations. Nevertheless, the explanatory memorandum merely repeats the effect of these provisions rather than explaining why they are necessary.

The same issue arises in relation to clause 302 which enables the general regulation making power to incorporate other instruments as in force or existing from time to time. Again, the explanatory memorandum does no more than repeat the effect of these provisions (see pages 138 to 139).

Due to the Committee's concern about possible inappropriate delegations of legislative power the Committee **seeks the Minister's further advice about the reasons for allowing the incorporation of material by reference in these clauses**.

> *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.*

Minister's response - extract

Incorporating material by reference - clauses 106 and 304

The Committee notes that clause 106 of the bill provides for the making of methodology determinations by legislative instrument. Clause 106(8) enables a determination incorporate other instruments as in force or existing 'from time to time '. Such instruments must be published on the relevant website. Clause 304 is to similar effect (the Digest incorrectly refers to clause 302, which deals with the operation of the Racial Discrimination Act 1975). The Committee is concerned that legislative power may, by this arrangement, be delegated inappropriately and that obligations may change without Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation. The Committee seeks the Minister's advice about the reasons for allowing the incorporation of material by reference in these clauses.

Project methodologies establish procedures for estimating abatement and project specific rules for monitoring, record keeping and reporting on abatement. Clause 106(8) is directed towards the situation where a project proponent is required to comply with obligations as they exist in domestic instruments from time to time, including, for example, standards

contained in the *National Greenhouse and Energy Reporting Determination 2008*, made under the *National Greenhouse and Energy Reporting Act 2007*. Providing for those standards to be implemented in this way is an appropriate way to ensure that methodologies are robust and reflect relevant industry-specific standards.

A methodology determination about the destruction of methane generated from manure in piggeries, for example, might make reference to the standards contained in the *National Environmental Guidelines for Piggeries 2010*. Other project specific methodologies may reference similar standards or guidelines. These standards and guidelines can be highly technical, complex and lengthy documents. The *National Environmental Guidelines for Piggeries 2010*, for instance, is a 200 page document which sets out standards and protocols for managing environmental issues associated with piggeries, such as construction, operation and maintenance of lagoons for storing manure.

Similar considerations apply in relation to clause 304. For example, in accordance with clause 304, regulations made under clause 55(1)(c), which specify a kind of offsets project as a Kyoto offsets project, may make reference to the Kyoto rules, as they exist from time to time. These roles are set out in the Kyoto Protocol itself and in a range of decisions and standards made under the Protocol. These decisions and standards can be highly technical, complex and lengthy, and are subject to change on a regular basis.

Clauses 106(8) and 304 have been drafted in accordance with the Legislative Instruments Handbook, which states that:

> "2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect."

and

> "11.21 As noted in Chapter 2, the LIA *[Legislative Instruments Act 2003]* provides that legislative instruments may incorporate documents by reference in accordance with section 14. The benefit of incorporation by reference is that the incorporated document, which *could* be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled. However, an agency will be asked to provide information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by reference, so this will draw the attention of Parliament to use of this mechanism."

Incorporating complex technical documents directly into the primary legislation or regulations would significantly increase the volume of the CFI legislation and Commonwealth statute book, and would be inconsistent with the Government's Clearer Commonwealth Laws initiative which aims to reduce the complexity of legislation. By incorporating such documents by reference and requiring their publication on an easily accessible webpage, the legislation provides guidance to the Administrator and users of the scheme while avoiding unnecessary length and complexity.

Committee Response

The Committee thanks the Minister for this comprehensive response, and requests that the key aspects of this information be included in the explanatory memorandum.

Alert Digest No. 4 of 2011 - extract

Abolition of the privilege against self-incrimination
Clauses 185 and 202

Clause 185 would empower the Administrator to obtain information or documents if he or she believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. Clause 189 states that a person is not excused from giving information or producing a document on the grounds that it might incriminate them or expose them to a penalty. However, in the case of an individual the provision provides for a use and derivative use immunity in relation to civil and criminal proceedings. There are limited exceptions, namely, proceedings for the recovery of a penalty under section 179 or 180 of the proposed Act and for offence against section 137.1 or 137.2 of the *Criminal Code* which relate to the giving of false or misleading information or documents to the Commonwealth. The exceptions to the provision for a use and derivative use immunity in relation to proceedings under the bill, relate to (i) proceedings to enforce a penalty imposed due to non-compliance with a requirement to relinquish carbon credit units (clause 179) and (ii) proceedings to enforce a late payment penalty for amounts payable under clause 179).

The Committee has consistently drawn attention to provisions that abrogate the privilege against self-incrimination, and accepts that this may be more easily justified where the loss of a person's right to silence is balanced by a prohibition on the direct and indirect use of the forced disclosure.

Although the need for the limited exceptions to the use and derivative use immunity are not explained, the explanatory memorandum at page 98 provides the following justification for the general effect of these provisions. It is argued that:

> [t]he effective administration of the scheme is an issue of public importance which could impact on the Australian community and business. Non-compliance could undermine the scheme's integrity. [The provisions] enhance the ability of the Administrator to monitor compliance with the scheme in a way that is consistent with the views of the Scrutiny of Bills Committee, as well as Commonwealth legal policy regarding the privilege against self-incrimination.

The same issue arises in relation to clause 202 which abrogates the privilege in relation to information gathering powers given to inspectors in the execution of monitoring warrants.

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

Abolition of the privilege against self-incrimination - clauses 185 and 202

Clause 185 empowers the Administrator to obtain information or documents if the Administrator believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. Clause 189 states that a person is not excused from giving information or producing a document on the grounds that it might tend to incriminate the person or expose the person to a penalty. The Committee notes that in the case of an individual, the provision provides for a use and derivative use immunity in relation to civil and criminal proceedings. There are limited exceptions, namely, proceedings for the recovery of a penalty under clauses 179 or 180 and for an offence against section 137.1 or 137.2 of the Criminal Code which relate to the giving of false or misleading information or documents to the Commonwealth. The Committee notes that the same issue arises in relation to clause 202 which abrogates the privilege in relation to information gathering powers given to inspectors in the execution of monitoring warrants. The Committee notes the justification of the provisions in the explanatory memorandum, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The exceptions to the use and derivative use immunity are limited and relate to:

- proceedings to enforce a penalty imposed due to non-compliance with a requirement to relinquish carbon credit units (clause 179);

- proceedings to enforce a late payment penalty for amounts payable under clause 179 (clause 180); and

- proceedings relating to the giving of false or misleading information or documents under Part 16 of the Act, brought under section 137.1 or 137.2 of the *Criminal Code.*

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of these exceptions. Consideration was given to the need for government to have enough information to properly carry out its duties to the community as balanced against any harm that may flow from the abrogation of the privilege against self incrimination. The conclusion was reached that in relation to proceedings for false and misleading conduct, the criteria at page 104 of the *Guide* were fulfilled. In relation to proceedings to enforce pecuniary penalties pursuant to clauses 179 and 180, the limited exceptions to the use and derivative use immunity were considered justified as the full and effective enforcement of the relinquishment regime is considered central to the integrity of the carbon fanning initiative.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 4 of 2011 - extract

Possible trespass on personal rights and liberties
Part 20, clause 217

Part 20, clause 217 imposes liability on 'executive officers of body corporates' where the body corporate has contravened a civil penalty provision, but only in circumstances where the officer's conduct has been reckless or negligent. The explanatory memorandum at page 103 argues that liability is appropriate given the aim to ensure compliance with obligations under the proposed law is taken seriously at a high level within liable entities, and that liability 'is not being imposed simply because the person is an officeholder…but requires a degree of blame before a civil penalty can be imposed'.

In order to better evaluate if the proposed approach trespasses unduly on personal rights and liberties, the Committee is interested to understand if the liability is commensurate with that imposed on executive officers in any other circumstances (possibly under the

Corporations Law, for example) and the justification for imposing the liability on the basis of 'negligence'. The Committee therefore **seeks the Minister's advice about these issues**.

> *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

Possible trespass on personal rights and liberties - Part 20, clause 217
Part 20, clause 217 imposes liability on executive officers o/bodies corporate where the body corporate has contravened a civil penalty provision, but only in circumstances where the officer had knowledge or their conduct has been reckless or negligent. The Committee has asked if the liability is commensurate with that imposed on executive officers in any other circumstances and the justification/or imposing the liability on the basis of 'negligence'.

Clause 217 is commensurate with the liability imposed on executive officers in a number of other Commonwealth laws, including under section 154N of the *Renewable Energy (Electricity Act) 2000*, section 40B of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and section 494 of the *Environmental Protection and Biodiversity Conservation Act 1999.*

Clause 217 ensures compliance with obligations under the carbon farming initiative is taken seriously at a high level within liable entities. The clause imposes civil penalties on executive officers where an offence is committed by a body corporate and the executive officer knew or was reckless or negligent as to whether the contravention would occur. Under Part 2J of the bill, pecuniary penalties are payable for a contravention of a civil penalty.

By imposing liability on the basis of knowledge, negligence or recklessness, the bill ensures that liability is not imposed simply because the person is an office holder within a body corporate, but is only imposed if there is a degree of blame that can be attributed to the office holder. This approach ensures fairness and offers some protection to the individuals involved. It is also consistent with the recommendations of the Australian Law Reform Commission in *Report* 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia.*

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 4 of 2011 - extract

Possible severe penalties
Part 21, clause 221

Part 21, clause 221, empowers a court to impose penalties of up to 2000 and 10000 penalty units for each contravention for a person and a body corporate respectively. The severity of these penalties is justified by reference to the importance of the scheme and the magnitude of financial gains that may be made from contravening civil penalty provisions (see the explanatory memorandum at page 106). The Committee **leaves the question of whether these provisions inappropriately trespass on personal rights 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

Possible severe penalties - Part 21, clause 221
The Committee notes that clause 221 of the bill empowers a court to impose penalties of up to 2000 and 10000 penalty units for each contravention/or a person and a body corporate respectively. The Committee notes that the severity of these penalties is justified by reference to the importance of the scheme and the magnitude of financial gains that may be made from contravening civil penalty provisions. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

As mentioned in the explanatory memorandum, substantial penalties are required to provide an adequate deterrent against inaccurate record-keeping or reporting. The clauses are consistent with the instructions at page 38 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers,* which provides that a penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 4 of 2011 - extract

Strict liability
Part 21, subclause 231(2)

Subclause 231(2) of Part 21 of the bill removes any requirement to prove the state of mind of a person (namely, their intention, knowledge, recklessness or negligence) in relation to civil penalty proceedings. In effect, this means that such provisions are to be tried on the basis of strict liability. The reason for this, given in the explanatory memorandum at page 108, is 'that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention'. Although the maximum penalties that may be awarded are significant—and exceed the level of penalties that are generally considered appropriately in relation to strict liability offences (ie a maximum of 300 penalty units for a body corporate), the justification offered is relevant to determining the appropriateness of the measure. Further, clause 221 of the bill does require a court to have regard to all relevant matters, including the nature and extent of the contravention and the nature and extent of any loss or damage suffered as a result of the contravention in determining a pecuniary penalty. In the circumstances the Committee **leaves the question of whether these provisions inappropriately trespass on personal rights 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

Strict liability - Part 21, subclause 231(2)
Clause 231(2) provides that for certain civil penalty provisions it is unnecessary to prove a person's intention, knowledge, recklessness, negligence or other state of mind. The Committee notes that the explanatory memorandum sets out a justification for this approach and that under clause 221 the court must have regard to all relevant matters,

including the nature and extent of the contravention and any loss or damaged suffered as a result, in determining a pecuniary penalty. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of this provision. Chapter 7 of the Senate Standing Committee for the Scrutiny of Bills Report *The Work of the Committee during the 40th Parliament February 2002 - August 2004,* June 2008 (the Senate Report) is also noted. That report states that 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles'.

Clause 231 (2) relates to proceedings for a civil penalty order against a person for a contravention of specified civil penalty provisions, including those relating to the provision of offset reports, certain notification requirements, contraventions of Carbon Maintenance Obligations, compliance with requests for information or documents, and record-keeping, monitoring and audit requirements. It is considered that strict liability is appropriate in these circumstances as compliance with the specified provisions is necessary to ensure the proper administration and integrity of the carbon fanning initiative.

The Senate Report states that 'strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent. As with other criteria, however, all the circumstances of each case should be taken into account'. State of mind for a contravention of the relevant provisions would be difficult to establish in most cases, making it difficult to effectively enforce the provisions if included as an element in the offence.

The Report also states that 'strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision. In such cases the defence of mistake of fact should apply'. Clause 230 provides for a defence of reasonable mistake of fact.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 4 of 2011 - extract

Reversal of onus
Subclause 270(2)

Subclause 270(2) of the bill places an evidential burden on a person seeking to rely on the exceptions specified an offence relating to the disclosure or use of protected information. The exceptions relate to instances where the bill authorises the use of disclosure of the information or is undertaken in compliance with a law of the Commonwealth or a prescribed law of a State or Territory. The justification for placing an evidential burden on a defendant is that 'in many cases it is peculiarly within the defendant's knowledge as to which of the exceptions, if any, apply' (see the explanatory memorandum at page 131). In the circumstances the Committee **leaves the question of whether these provisions inappropriately trespass on personal rights 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

Reversal of onus - Part 21, subclause 270(2)
Clause 270(1) of the bill is a criminal penalty provision which relates to the use and disclosure of information obtained by a person in their capacity as an entrusted public official. Clause 270(2) provides that the obligations do not apply if the use or disclosure of the information is authorised by a provision within Part 27 of the bill, or is in compliance with a requirement under a law of the Commonwealth or a prescribed law of a State or Territory. A person wishing to rely on clause 270(2) bears an evidential burden in relation to that matter, and thus bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. The Committee notes that in the explanatory memorandum, this approach is said to be justified because the matters are 'peculiarly within the defendant's knowledge and not available to the prosecution '. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

Where matters are peculiarly within the defendant's knowledge and not available to the prosecution, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at page 29) indicates that it is legitimate to place the evidential burden in relation to that matter on the defendant. The approach taken in clause 270(2) is consistent with this.

Committee Response

The Committee thanks the Minister for this response.

Competition and Consumer Amendment Bill (No.1) 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Treasury

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 17 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Competition and Consumer Act 2010* to:

- prohibit the private disclosure of pricing information to a competitor;
- prohibit disclosure of that or other information if the disclosure is made to substantially lessen competition;
- provide that prohibitions only apply to goods and services prescribed by regulations;
- provide exceptions to the prohibitions; and
- extend existing authorisation and notification regimes to enable businesses to obtain immunity from the Australian Competition and Consumer Commission from the prohibitions where a public net benefit results.

Delegation of legislative power
Schedule 1, item 2, section 44ZZT

This bill prohibits businesses from disclosing pricing information to competitors in various circumstances. The prohibitions in the bill will only apply to classes of goods and services prescribed by the regulations (see Schedule 1, item 2, proposed section 44ZZT). The explanatory memorandum states at page 11 that this 'allows an assessment to be undertaken [by the Minister] as to the potential impacts of the new prohibitions on specific goods or services before they are applied to those goods or services'. Although the making of regulations reflecting such assessments will continue to be subject to Parliamentary scrutiny through the disallowance procedure under the *Legislative Instruments Act*, it is of

concern that this scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. Regrettably, the explanatory memorandum merely states the effect of the provisions rather than justifying the need to leave the scope of operation of these new provisions to be determined by the regulations. The Committee therefore **seeks the Treasurer's advice about this approach and in particular whether consideration has been given to the possibility of defining the scope of operation of the laws (such as the intended areas of operation, guidance as to the types of industries to which it will apply or relevant considerations that will be examined before a decision is made) in the primary legislation**.

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

Treasurer's response - extract

The Bill amends the *Competition and Consumer Act 2010* to ban anti-competitive price signalling, targeting in particular the banking sector where the Australian Competition and Consumer Commission (ACCC) has already advised the Government that there is strong evidence of anticompetitive price signalling occurring.

The ACCC wrote to the Government on 28 January 2010 advising that there was a significant gap in Australia's competition laws which allowed banks to price signal. The ACCC said it was particularly concerned about the behaviour of 'some of the banks in signalling in advance what their response will be to a change in interest rates by the Reserve Bank'.

The ACCC also recently testified in the Senate Economics References Committee's inquiry into banking competition that banks were publicly price signalling their intended interest rate moves to each other and that:

> *'The problem with that sort of comment - the evil in it, if you like - is that it says to competitors, "if you increase your interest rates I will follow", which means you are signalling to the competitor that if they increase their interest rates they would need to worry about being stuck out there on their own and losing market share* '.

As outlined in the Explanatory Memorandum, the application of the anti-competitive price signalling prohibitions by way of regulation allows a comprehensive assessment to be undertaken by the Government as to the potential impacts of the new prohibitions on specific goods and serviced (sic) before they are applied to those goods and services.

The Government would only extend these laws to other sectors of the economy after further detailed review and consideration.

As indicated by the Committee, any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing the Parliament with the opportunity to scrutinise the application of these new prohibitions to specific sectors.

I trust this additional information is of assistance to the Committee.

Committee Response

The Committee thanks the Minister for this response, but remains concerned that the scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. However, the Committee is aware that any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003* and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Customs Amendment (Serious Drugs Detection) Bill 2010

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*and the *Third Report of 2011*. The Minister responded to the Committee's comments in the *Alert Digest* in a letter dated on 11 March 2011. Subsequently, the Minister responded when the Committee sought further advice in a letter dated 9 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Customs Act 1901* to enable officers of Customs, using prescribed equipment, to undertake an internal non-medical scan of a person who is suspected to be internally concealing a suspicious substance.

Possible trespass on personal rights and liberties
Various

This bill will allow Customs and Border Protection, using prescribed equipment, to undertake an internal non-medical scan of a person who is reasonably suspected to be internally concealing a suspicious substance. Clearly, this procedure can be considered as an encroachment on personal rights and liberties and in particular the right to privacy. However, the bill replicates existing levels of protections in relation to internal scans, which currently can only be undertaken by a medical practitioner.

Furthermore, the bill would only allow for an internal non-medical scan if the detainee gives their consent. In this regard it is noteworthy that the proposed subsection 219ZAA(1) sets out requirements designed to ensure that consent is informed consent, proposed subsection 219ZAA(2) provides for the invitation to consent and any consent to be recorded (by audiotape, videotape or other means or in writing), and proposed subsection 219ZAA(3) provides that the equipment used to undertake the scan be operated by an authorised officer of the same sex as the detainee.

The purpose of allowing authorised officers in Customs and Border Protection to undertake an internal non-medical scan by consent is to reduce the number of persons referred to hospital to undergo an internal search, thereby reducing the impact on the resources of the AFP, hospital emergency units and Customs and Border Protection. (The provisions in relation to the prescription of equipment to be used and for the authorisation of officers to undertake the scans replicate existing provisions in the legislation, explanatory memorandum at pages 13-14.).

Lastly, it is worth noting that the Office of the Australian Information Commissioner provided input into the impact of the Bill on individual rights to privacy. The second reading speech reports that 'all comments have been incorporated' into the bill.

In the Committee's view the general question of whether this legislation is a proportionate encroachment on personal rights and liberties is one which should appropriately be **left to the Senate as a whole**.

Nevertheless, the Committee has specific questions in relation to two matters. First, the explanatory memorandum states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a 'locked calibration to limit the scan capability to internal cavities within a skeletal structure' (which cannot be changed by an officer at the airport) will be required. However, this important safeguard does not appear to be reflected in the legislation. The Committee **seeks the Minister's advice** about whether it is, or will be, included directly in the primary legislation.

> *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.*

Third Report of 2011 - extract

Legislative requirement for locked calibration of the body scan technology

The explanatory memorandum for the Bill states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a locked calibration to limit the scan capability to internal cavities within a skeletal structure (which cannot be changed by an officer at the airport) will be required. The Committee seeks my advice about whether it is, or will be, included in the primary legislation.

The procurement process for the body scanning technology has not yet commenced. It is therefore not presently known whether the technology to be procured will have a capability limited to internal body scanning or have a broader spectrum of scanning capability. However, if the technology procured does have a broader scanning capability I undertake

that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier.

I advised Parliament in the Second Reading speech that both the Privacy and FOI Policy Branch of the Department of Prime Minister and Cabinet and the Office of the Australian Information Commissioner will be consulted prior to the prescription of body scan technology in the regulations.

I trust that including this restriction in the regulations, as opposed to the primary legislation, is acceptable to your Committee. I also undertake to provide a copy of the relevant regulations to your Committee once they are made.

Committee First Response

The Committee thanks the Minister for this response and notes the Minister's undertaking that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier and that a copy of the relevant regulations will be provided to the Committee once they are made. The Committee notes that these regulations will be disallowable and instruments and therefore subject to Parliamentary scrutiny.

However, given the significant potential to trespass on personal rights and liberties the Committee remains of the view that the principle that the capacity of any technology should be limited to the level necessary to undertake the action allowed by the legislation should be included in the primary legislation. It would be possible for the details relating to any particular machine to be prescribed by regulation. The Committee therefore **seeks the Minister's further advice about this matter**.

Minister's response - extract

In response to the Committee's view that the principle of appropriately limiting equipment capacity should be included in the primary legislation, a Government amendment to the Customs Amendment (Serious Drugs Detection) Bill 2011 has been drafted.

The proposed amendment will create a requirement, in the primary legislation, that equipment used for an internal non-medical scan must be configured so that its use is limited to that necessary to produce an indication that a person may be internally concealing a suspicious substance.

Committee Response

The Committee thanks the Minister for this response and for his commitment to introduce an amendment to the legislation to provide that equipment used for an internal non-medical scan must be configured so that its use is limited to that necessary to produce an indication that a person may be internally concealing a suspicious substance. This would address the Committee's concerns.

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Attorney-General

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 14 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Family Law Act 1975* to:

- prioritise the safety of children in parenting matters;
- change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour;
- amend advisers obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;
- change court access to evidence of abuse and family violence by amending reporting requirements; and
- facilitate state and territory child protection authorities participation in family law proceedings where appropriate.

The purpose of this bill is to prioritise the safety of children in family law proceedings. This general purpose is sought to be achieved through a number of amendments, including: changes to the definitions of 'abuse' and 'family violence', the strengthening of obligations of certain advisers (eg family counsellors and legal practitioners), giving the courts better access to relevant evidence by improving reporting requirements and making it easier for child protection authorities to participate in family law proceedings where appropriate.

'Henry VIII' clause
Schedule 1, Part 2, item 48

Item 48 enables regulations to be made about the transitional, application or saving provisions set out in Part 2 of Schedule 1. If regulations are made under this item, they prevail over the provisions in Part 2, to the extent of any inconsistency. As such, this item is a so-called Henry VIII clause, which is a provision which enables a regulation to amend primary legislation. The explanatory memorandum at page 17 states that the purpose of this amendment is to allow the transitional, application and savings provisions to be adjusted to deal with any 'unexpected' issues which arise or 'to take other action such as to carve out proceedings that are part heard or where judgment is reserved if that is considered appropriate'. In order to better evaluate the need for this delegation of legislative power the Committee **seeks the Minister's further advice as to the general nature of any such unexpected issues and possible reasons why it might be considered appropriate to modify the statutory provisions**.

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

Attorney-General's response - extract

In relation to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the Family Violence Bill) the Committee seeks further advice about item 48 in Part 2, Schedule 1. The Family Violence Bill amends the *Family Law Act 1975* (Cth) to introduce new measures to safeguard children and their families within the family law system. Various research reports provide a strong evidence base for the reforms, and a number discuss the complexity of the existing family law framework. This concern is also evident in a number of submissions to the inquiry into the Family Violence Bill being conducted by the Senate Standing Committee on Legal and Constitutional Affairs (the LACA Committee).

The Family Violence Bill prioritises the best interests of children and the safety of those who are suffering or at risk of family violence and abuse. To ensure the best result for children, the Family Violence Bill was cast to apply to as many family law cases as possible. I note that the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which introduced the 2006 family law reforms, contains a range of different application provisions. Some apply to 'orders' made on or after the commencement date, and similarly reach back to proceedings instituted before the commencement of that Act.

The regulation making power in item 48 was drafted to ensure that certain proceedings, such as part-heard, reserved judgment and appeal matters, could be carved out from application.

In her submission to the LACA Committee, the Chief Justice of the Family Court of Australia, the Hon Diana Bryant, highlighted the need to avoid double-reporting of family violence and child abuse. Her concerns arise in relation to transitional issues arising from the repeal of section 60K of the Family Law Act. While I am still considering the Chief Justice's concerns, this is the type of complex issue that the regulations might also be enlivened to address.

I emphasise that the nature of these transitional, application and savings issues do not affect the substantive operation of the important measures proposed by the Bill. As stated in the explanatory memorandum to the Family Violence Bill, the Bill is intended to provide better protection for children and families at risk of violence and abuse; it is intended to prioritise the safety of children over the cost and convenience to the courts, witnesses and parties to family law proceedings.

Committee Response

The Committee thanks the Attorney-General for this response.

Governance of Australian Government Superannuation Schemes Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Finance and Deregulation

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 14 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill is part of a package of three bills to establish governance arrangements for Commonwealth superannuation schemes. The bill seeks to merge the Australian Reward Investment Alliance, the Military Superannuation and Benefits Board and the Defence Force Retirement and Death Benefits Authority to form a single trustee body, the Commonwealth Superannuation Corporation.

This bill is identical to a bill introduced into the House of Representatives on 4 February 2010. The Committee previously commented on the bill in its *Fifth Report of 2010* and makes some additional comments below.

Delegation of legislative power
Clause 32

Subclause 32(1) provides for exemptions from certain Commonwealth and State and Territory taxes to apply to the CSC, ie the CSC is given an exemption from a number of taxes. Subclause 32(2) enables regulations to be made which reduce the scope of this exemption. The regulations do not enable new taxes to be levied, but may provide that exemptions which are specified from general taxes no longer apply. Thus the regulations may, in effect, increase the taxes payable by removing or reducing an exemption. Unfortunately, the explanatory memorandum does not explain why it is necessary to achieve this result (if it is thought desirable in the future) through regulations rather than by amending the legislation. The Committee **seeks the Minister's advice as to why this is considered an appropriate delegation of legislative power**.

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.

Delegation of legislative power
Clause 33

Subclause 33(1) provides that tax exemptions from certain taxes apply to CSC when it is performing functions and exercising powers in relation to the superannuation schemes and funds that it administers, and to the superannuation funds. Subclause 33(2) raises the same issue as subclause 32(2), as it enables regulations to be made which reduce the scope of the tax exemption provided for in subclause 33(1). (Subclause 33(3) enables the regulations made in relation to subclause 33(1) to specify different laws for different superannuation funds administered by the CSC.) Unfortunately, the explanatory memorandum does not explain why it is necessary to achieve this result (if it is thought desirable in the future) through regulations rather than by amending the legislation. The Committee **seeks the Minister's advice as to why this is considered an appropriate delegation of legislative power**.

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

Subclauses 32(1), 33(2), 33(3) and 33(4) taxation

Subclauses 32(1), 33(2), 33(3) and 33(4) relate to the application of taxation laws to CSC and the superannuation schemes it will be responsible for administering. These either replicate or are consequential on current provisions contained in other Superannuation Acts. These clauses are being moved from those Acts to the Bill to consolidate in a single Act the governance provisions relating to the Commonwealth Superannuation Corporation (CSC) and the schemes it will be responsible for administering.

Subclauses 32(1) and 33(2) replicate, for example, provisions currently contained in subsection 26(3) of the *Superannuation Act 1990* and subsection 22(2) of the *Superannuation Act 2005* that are being repealed.

Subclauses 32(1) and 33(2) allow CSC and the superannuation schemes to be subjected to taxes through the making of regulations. This flexibility is to enable any new taxation

legislation or changes in taxation legislation to be applied to CSC and the relevant superannuation schemes if a situation arose where it would not be possible to amend the primary legislation in the required timeframe. This would ensure that any new taxation legislation or changes to such legislation can be applied to CSC and the funds that it administers at the same time as it would apply to other superannuation trustees and superannuation funds.

The taxation provisions for each scheme are currently contained in the relevant Act establishing each particular scheme. This provides flexibility to apply different taxation treatment to each individual scheme should the need arise. Subclause 33(3) ensures that this flexibility continues after consolidation of the various taxation provisions into the Bill. The flexibility is needed because unlike the other superannuation schemes which CSC will be responsible for administering, the Public Sector Superannuation Accumulation Plan (PSSAP) is a fully funded accumulation fund. The other superannuation schemes that CSC will be responsible for administering are partially or fully unfunded defined benefit superannuation schemes.

Subclause 33(4) replicates provisions currently in subsections 22(3) and 22(4) of the *Superannuation Act 2005* that are being repealed. The subclause would enable regulations to be made to tax the PSSAP and the PSSAP Fund on the same basis as accumulation schemes in the broader superannuation industry. This may need to be considered if, for example, changes were made to PSSAP to align its features and services with such schemes in the broader superannuation industry. As the operational arrangements for the PSSAP are primarily contained in the PSSAP Trust Deed (a legislative instrument made under the *Superannuation Act 2005),* any such changes would be likely to be made through amendment of the Deed. Subclause 33(4) enables any required changes to the taxation of the PSSAP and the PSSAP Fund to be aligned with the timing of any such changes.

Committee Response

The Committee thanks the Minister for this response, which explains that the proposed provisions replicate or are consequential to current provisions in other Superannuation Acts and provides reasons for the approach taken in these provisions, which are related to the nature of the Public Sector Superannuation Accumulation Plan.

Alert Digest No. 4 of 2011 - extract

'Henry VIII' clause
Subclauses 33(4) and 34(3)

Subclause 33(4) provides that the regulations may modify the proposed new section 33 in relation to the PSSAP and the PSSAP Fund and that the section ceases to have effect at a specified time. The explanatory memorandum states at page 20 that 'this regulation-making power gives flexibility to allow the PSSAP to in future operate on the same basis as other superannuation schemes in relation to taxation'. The same issue arises in relation to subclause 34(3).

Given that the regulations made under these subclauses can amend the primary legislation, the Committee **seeks the Minister's further advice as to why this flexibility is required and why it is appropriate to enable the regulations to modify the primary legislation**.

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

Minister's response - extract

Subclause 34(3) - source of funds for paying remuneration and allowances

Subclause 34(3) enables regulations to be made to allow changes to be made to the source of funding for paying remuneration and allowances to the Chair and directors of CSC for functions performed in relation to the PSSAP and the PSSAP Fund.

Currently, provisions in relation to the source of funds for paying the remuneration and allowances of the Australian Reward Investment Alliance, which will become CSC on I July 2011, are set out in the PSS Trust Deed (a legislative instrument that is made under the *Superannuation ACI/990).* Therefore, any changes to the source of monies for paying remuneration and allowances can be made through delegated legislation. As a result of consolidating the governance arrangements for CSC into one single Act these provisions are effectively being moved from the PSS Trust Deed to the Bill.

Subclause 34(3) preserves the current flexibility (available under the PSS Trust Deed) but only in relation to changing the source of monies for payment of remuneration and allowances when functions are being performed in relation to the PSSAP and the PSSAP

Fund. This flexibility is required, as unlike the other superannuation schemes which CSC will administer, the PSSAP is a fully funded accumulation superannuation scheme and as such situations may arise in the future where it is necessary to differentiate the source of funding between the types of schemes that CSC administer.

In the event of regulations being made under subclauses 32(1), 33(2), 33(3), 33(4) or 34(3). the primary legislation would be subsequently amended at the next available opportunity to reflect the changes made through the regulations.

I trust that this information will assist the Committee with its consideration of the Bill.

Committee Response

The Committee thanks the Minister for this comprehensive response, which explains that the proposed approach reflects the current position under the PSS Trust Deed and states that if any regulations are made under subclauses 32(1), 33(2), 33(3), 33(4) or 34(3) the primary legislation would be subsequently amended at the next available opportunity to reflect the changes made through the regulations. **In view of the importance of this information, the Committee requests that these points be reflected in the explanatory memorandum.**

Intelligence Services Legislation Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011
Portfolio: Attorney-General

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 15 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001*(IS Act) and the *Criminal Code Act 1995.*

The bill will make amendments to:

- align the definition of 'foreign intelligence' and the collection of foreign intelligence un the ASIO Act with the IS act and *Telecommunications (Interception and Access) Act 1979*;

- clarify that a computer access warrant authorises access to data held in the target computer at any time while the warrant is in force;

- exclude the communication of information concerning the engagement or proposed engagement of staff within the Australian Intelligence Community from the security assessment provisions in the ASIO Act;

- provide the Defence Imagery and Geospatial Organisation (DIGO) with a function to specifically allow DIGO to provide assistance to the Australian Defence Force (ADF) in support of military operations and to cooperate with the ADF on intelligence matters;

- provide a new ground for obtaining a Ministerial Authorisation for the purpose of producing intelligence on an Australian person;

- clarify that the immunity provision in section 14 of the IS Act is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it;

- place existing exemptions from the *Legislative Instruments Act 2004* in the IS Act rather than in the Legislative Instruments Regulations 2004; and

- clarify that the provision in Part 10.7 of the Criminal Code is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it.

Trespass on personal rights and liberties
Schedule 1, item 18

Item 18 of Schedule 1 proposes to insert a new subsection 36(c) into the *Australian Security Intelligence Organisation Act 1979*. The effect of the amendment would be to exclude the communication of information concerning the engagement or proposed engagement of staff within the Australian Intelligence Community (AIC) from the security assessment provisions in the ASIO Act, including notification and review rights. The provision would enable ASIO to share information about employment decisions with other members of the AIC and would place 'ASIO on the same footing as other AIC agencies when it comes to sharing information relating to employment within the AIC'. The explanatory memorandum at page 7 states that the information to be exempted by the proposed amendment from the operation of Part IV of the ASIO Act 'will only impact on a small group of persons' and that employment decisions within the AIC 'need to be made carefully, and necessarily the processes takes quite some time compared to other Government employment processes in order to ensure suitability of applicants and minimise risk of compromising national security'. The Committee notes the advice that the proposed provision is consistent with arrangements for other organisations, but in order to better evaluate the provision against Standing Order 24 seeks the Attorney-General's advice **as to what, if any, detriment the provision will cause to individuals (e.g. existing or potential AIC staff members) and particularly whether or not these provisions unduly diminish the rights of persons to be notified of, and seek review of, security assessments.**

> *Pending the Attorney-General'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.*

Attorney-General's response - extract

Trespass on personal rights and liberties, Schedule 1, item 18

The Alert Digest notes that item 18 of Schedule 1 of the Bill proposes to insert a new subsection 36(c) into the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). The Committee has noted the advice in the Explanatory Memorandum that the proposed provision is consistent with arrangements for other Australian Intelligence

Community (AIC) organisations. In order to better evaluate the provision the Committee has sought my advice as to what. if any, detriment the provision will cause to individuals (e.g. existing or potential AIC staff members) and particularly whether or not these provisions unduly diminish the rights of persons to be notified of, and seek review of, security assessments.

I can advise the Committee that the provision would have a negligible impact on individuals (e.g. existing or potential AIC staff members). Furthermore, the provision would not unduly diminish the rights of persons to be notified of, and seek review of, security assessments. The amendment applies to a limited category of information and will only impact on a small group of persons. These are persons who have actively applied for employment with the intelligence community and voluntarily agreed to undergo a rigorous security vetting process. In terms of taking away the rights of persons to be notified of, and seek review of, security assessments, the impact of the amendment is very minor.

It is important to recognise that there is no merits review or independent appeals process for the overall employment decision within the AIC. Currently, a person could seek merits review over one small piece of information (regarding the ASIO information) but is not able to seek similar review of the employment decision itself, so the merits review would be of little practical benefit. Individual agencies will have their own internal policies regarding feedback to unsuccessful applicants (in some cases the policy is not to provide any feedback), and separating out one small aspect of that decision for separate review can lead to inconsistent outcomes.

The amendment is appropriate given that employment decisions within the AIC need to be made carefully in order to ensure suitability of applicants and minimise the risk of compromising national security. The way that the current provisions operate can, in some instances, act as a barrier to information sharing.

The amendment will only exclude from the security assessment provisions in Part IV of the ASIO Act the communication by ASIO of information relating to the engagement, or proposed engagement, of a person by another intelligence or security agency within the AIC. This exclusion would not apply to the communication by ASIO to other AIC agencies of other kinds of information not relating to employment. It would also not apply to the communication by ASIO to non-AIC agencies of information relating to employment. For example, if ASIO were to communicate information relating to employment to another Australian Public Service Department or agency, which is not an AIC agency, this would not be excluded from the operation of Part IV of the ASIO Act.

Background to the provision

Part IV of the ASIO Act governs the provision of "security assessments" which arc a defined subset of advice provided by ASIO under section 17 of the ASIO Act. Part IV contains a number of requirements that apply to the provision of adverse or qualified security assessments by ASIO. These requirements include a right to seek merits review of a security assessment in the Security Appeals Division of the Administrative Appeals

Tribunal. ASIO's role has always included providing security assessments related to certain administrative decisions ("prescribed administrative action"), such as visa decisions and security clearances for Commonwealth public servants to access classified information. The security assessment provisions under Part IV of the ASIO Act provide accountability and appropriate notification and review mechanisms for the security assessment part of those decisions.

Section 39 of the ASIO Act provides that a Commonwealth agency must not take or refuse to take 'prescribed administrative action' on the basis of any communication by ASIO relating to the person that does not amount to a security assessment. This means that, when providing another Commonwealth agency with any recommendation, opinion or advice relevant to prescribed administrative action. ASIO must ensure that this recommendation. opinion or advice is in the form of a security assessment for which ASIO is accountable.

Within the intelligence community, only ASIO is required to communicate information relevant to prescribed administrative action such as employment within an AIC agency in the form of a "security assessment" (which involves notification and review rights). Other AIC agencies may provide the same type of advice about employment to another AIC agency, however only ASIO's advice is a "security assessment" with notification and review mechanisms. Other AIC agencies are able to share information about employment decisions with each other as they are not bound by the same administrative requirements and do not have to provide the information as a "security assessment".

The difference is perhaps best illustrated by the following scenarios.

1. Person X, an ex-ASIO employee, has applied for a job in another AIC agency. The other AIC agency asks ASIO for information about X's employment in ASIO. If the ASIO response contains information that is prejudicial to X's job application with the other AIC agency. ASIO's advice to the AIC agency will be reviewable in the Administrative Appeals Tribunal. However, the decision by the other AIC agency to not employ X will not be reviewable.

2. Person X, an ex-employee of another AIC agency, has applied for a job in ASIO. ASIO asks the other AIC agency for information about X's employment in that agency. The advice from the other AIC agency will not be reviewable in the Administrative Appeals Tribunal. Further, ASIO's decision to not employ X will not be reviewable.

In sharing information, other AIC agencies are not subject to the requirement to notify the person or provide a statement of reasons for doing so, and potential employees do not have access to merits review. This facilitates the movement of staff between agencies, and helps to ensure that security clearances arc transferrable between AIC agencies. This amendment will put ASIO on the same footing as those other agencies.

Committee Response

The Committee thanks the Attorney-General for this comprehensive response, and notes that in practical terms there is unlikely to be any real detriment to any person as a result of this approach. The Committee notes that it would have been helpful for the key parts of this information to have been included in the explanatory memorandum.

Alert Digest No. 4 of 2011 - extract

Retrospective effect
Schedule 1, item 27

Item 27 of Schedule 1 proposes to insert a new subsection 15(7) into the *Intelligence Services Act 2001*. The new subsection would expressly state that rules made under subsection 15(1) (rules which relate to the protection of privacy) are not legislative instruments. These rules are currently exempt from the *Legislative Instruments Act* (LIA), by virtue of a provision in the *Legislative Instruments Regulations 2004*. The purpose of the amendment is to expressly provide for such exemptions in line with the recommendations of the 2008 review into the LIA. The amendment does not therefore change the law. However, item 32 (an application provision) states that the amendment applies with retrospective effect. The reason for this is that rules made under subsection 15(1) of the *Intelligence Services Act 2001* have only been expressly exempted from the LIA since 2010, when an amendment to this effect was made to the *Legislative Instruments Regulations 2004*. The explanatory memorandum explains at page 11 that 'retrospective operation is necessary to ensure the validity of actions done in reliance on the existing rules made under subsection 15(1).' It is unlikely that a provision designed to ensure the validity of rules which must be made having regard to ensuring that the privacy of persons is preserved as far as is consistent with the proper performance by the agencies of their functions (subsection 15(2) *Intelligence Services Act 2001*) would have a detrimental effect on any person. Nevertheless, as the explanatory memorandum does not confirm that this is indeed the case, and the Committee therefore **seeks the Attorney-General's advice as to whether giving subsection 15(7) retrospective application could have any possible detrimental effect on a person**.

> *Pending the Attorney-General'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.*

Attorney-General's response - extract

Retrospective effect, Schedule 1, item 27

The Committee has sought my advice as to whether giving subsection 15(7) retrospective application could have any possible detrimental effect on a person. Given that Privacy Rules provide important privacy safeguards, I can confirm that giving subsection 15(7) retrospective application would not have any possible detrimental effect on a person. This application provision is necessary to ensure the validity of acts done in reliance on the existing Privacy Rules. This ensures that acts that were done so as to apply privacy principles are preserved.

Agencies have always acted on the basis that Privacy Rules are binding, and have therefore acted in a manner that upholds privacy principles. As Privacy Rules provide important privacy safeguards, it is important to preserve acts done in reliance on these Rules, which uphold and apply privacy principles. The Inspector-General of Intelligence and Security (IGIS) is responsible for oversight of the activities of the agencies. This oversight includes their compliance with relevant laws, Ministerial guidelines and directions. Importantly, this oversight would include the power to consider Privacy Rules made under section 15 and the application of these rules by agencies.

The Government considers that it is important for the Privacy Rules of intelligence agencies to be publicly available, in order to provide transparency and enable the public to understand how the privacy principles apply to these agencies. Therefore, the Government remains committed to ensuring that the Privacy Rules continue to be made public on the websites of the relevant agencies. This is the current practice and will continue regardless of their status under the *Legislative Instruments Act 2004* (which requires publication of a legislative instrument).

Committee Response

The Committee thanks the Minister for this comprehensive response and notes his advice that the retrospective application of this item would not have any possible detrimental effect on a person.

National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Treasury

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 17 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009.*

Provisions within Part 3-2A of the bill introduces a requirement for lenders to provide a Key Facts Sheet for standard home loans. Provisions within Part 3-2B of the bill will:

- restrict approval of the use of credit cards above the credit limit;
- specify an allocation hierarchy for payments made under credit card contracts;
- restrict credit providers from making unsolicited invitations to borrowers to increase the credit limit of their credit card; and
- introduce a requirement for lenders to provide a Key Facts Sheet for credit card contracts.

Treasurer's comments concerning the bill - extract

The Government welcomes the opportunity to clarify the approach that has been developed and put forward as part of the National Credit Reforms including reforms to the regulation of credit cards announced as part of the *Competitive and Sustainable Banking System* Package.

The Committee has raised issues with several provisions in the Bill, including with the scope of regulation making powers and a number of the penalty arrangements. Specific responses to each of the concerns raised by the Committee are provided in the Attachment to this letter.

The Government is committed to ensuring adequate flexibility in the new arrangements to provide strong protections for consumers whilst providing a commercially workable outcome for industry which reduces implementation costs. I believe the Bill achieves the appropriate regulatory balance.

In addition, any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing Parliament with the opportunity to scrutinise the application of the new regulations.

I trust this information will be of assistance to you.

Alert Digest No. 4 of 2011 - extract

Poor explanatory memorandum

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this Committee) as an explanatory memorandum greatly assists those whose rights may be affected by a bill to understand the legislative proposal and it 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 particular care should be taken to ensure that an explanatory memorandum which adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) includes an index that is accurate and cross-references every provision in the bill. Unfortunately, the explanatory memorandum to this bill did not include an index. The Committee therefore **seeks the Treasurer's advice as to whether an amended explanatory memorandum that includes an index can be issued**.

Treasurer's response - extract

Explanatory memorandum

The Committee sought advice as to whether an amended explanatory memorandum that includes an index can be issued. The explanatory memorandum can be amended to include an index that cross-references every provision in the Bill. A revised explanatory

memorandum will be provided to the Senate incorporating the Government's Parliamentary Amendments and the index, and addressing other matters raised in the letter from the Committee.

Committee Response

The Committee thanks the Minister for this response and for the commitment to provide a revised explanatory memorandum.

Alert Digest No. 4 of 2011 - extract

Strict liability
Various

There are a number of strict liability offences which have been included in the bill. The general justification offered in relation to the various offences is to emphasise the importance of the objectives sought to be achieved by the proposed legislation. In light of the level of the penalties (which are within the acceptable limits for strict liability offences set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*) the justifications offered appear to be satisfactory. The Committee therefore **leaves the question of whether the approach in each provision is appropriate to the consideration of the Senate as a whole**.

Provision	**Penalty Units**	**Justification**	**EM Reference**
subclause 133AC(5)	10	The importance of the objective of ensuring consumers can compare different products through information in the Key Facts Sheets.	2.16
subclause 133BD(4)	10	The importance of the objective of ensuring consumers have access to key information relevant to their decision whether or not to obtain a particular credit card, and the straightforward nature of the requirements.	3.19
subclause 133BE(4)	10	To encourage strict compliance with the prohibition on sending out credit limit increase invitations, given the potentially	3.29

		adverse consequences for consumers.	
subclause 133BH(4)	10	The regulations will deal with situations where compliance is impractical, eg where electronic communications between the supplier and the credit provider are not operating and it is not possible for the credit provider to ascertain whether a customer has reached their credit limit: EM 3.44. Strict liability reflects the importance of credit providers ensuring that they have systems in place to avoid approving transactions in excess of the default buffer.	3.46
subclause 133BO(4)	10	The importance of credit providers ensuring that they have systems in place to attribute payments in the required order and to give effect to agreements with the consumer.	3.73

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.

Treasurer's response - extract

Strict liability - various clauses

The Bill contains amendments to the National Consumer Credit Protection Act 2009 (Credit Act), and adopts the same approach to penalties as the Credit Act and to Commonwealth legislation generally. The Bill imposes strict liability offences for breaches that are obvious and unambiguous. These penalties are relatively low.

Offences in the Bill that carry strict liability do not require a 'fault' element to be proved and are procedural in their application. The application of strict liability to these provisions will significantly enhance the ability of the Australian Securities and Investments Commission (ASIC) to enforce the legislation. This is because infringement notices can be issued for contraventions of strict liability offences. ASIC may issue an infringement notice to address one-off or irregular instances of non-compliance. The availability of civil and criminal penalties enables ASIC to seek more significant penalties, usually in response to serious or repeated non-compliance.

The Government has introduced Parliamentary Amendments to omit two strict liability offences, first, where a licensee does not have a website that allows a consumer to generate

a Home Loan Key Facts Sheet, and second, where a licensee enters into a contract without an up-to-date Credit Card Key Facts Sheet having been provided to the borrower. As a result of discussions with stakeholders since the introduction of the Bill it has been considered that strict liability may not be appropriate for these offences due to circumstances beyond the reasonable control of the licensee making contravention less unambiguous.

Committee Response

The Committee thanks the Minister for this response and for his willingness to reconsider the circumstances in which the application of strict liability is appropriate.

Alert Digest No. 4 of 2011 - extract

Reversal of onus
Various

The bill also includes a number of civil penalty and offence provisions. In some instances, for the purposes of applying these provisions, defences are specified and an evidential burden is placed on a defendant in relation to the relevant matters. The general justification offered for these provisions is that the credit provider will be in a better position to address the issue through the adoption of appropriate compliance systems or that the matters are within their knowledge or control. As these are grounds recognised in the *Guide to Framing Commonwealth Offences* in relation to all but one of these provisions the Committee therefore **leaves the question of whether the approach in each provision is appropriate to the consideration of the Senate as a whole**. However, subclause 133BL(2) provides that the matters for which the defendant bears an evidential burden are to be prescribed in the regulations. No explanation for this approach is provided in the explanatory memorandum. The Committee therefore **seeks the Treasurer's advice about the justification for delegating these matters rather than including them in the primary legislation.**

Treasurer's response - extract

Reversal of onus

The Bill includes a number of offence provisions where defences are specified and an evidential burden is placed on a defendant. This approach has been adopted where the defendant will be in a better position to address the issue through the adoption of appropriate compliance systems or that the matters are within their knowledge or control.

For example, subclause 133BF(2) and (3) allows a defence to the prohibition on making credit limit increase invitations where a consumer has provided their express consent. In this case the credit provider is best placed to record that the consent has been given so that consent can be relied upon when using the defence. It is therefore appropriate that the evidential onus be with the defendant to demonstrate this fact.

In relation to subclause 133BL(2), based on the recommendations on the House of Representatives Standing Committee on Economics inquiry into the Bill the Government has made Parliamentary Amendments to remove the restriction on approving the use of a credit card in excess of a credit limit. As a consequence, subsection 133BL has also been removed.

Committee Response

The Committee thanks the Minister for this response and notes that Parliamentary amendments have been introduced that will remove subsection 133BL.

Alert Digest No. 4 of 2011 - extract

Delegation of legislative power
Clause 30B

Clause 30B is a power to make regulations in relation to specified matters relating to interest charges under credit card contracts. Subclause 30B(2) states that the regulations made for this purpose may provide for offences and for civil penalties. In relation to penalties for offences, subclause 30B(3) states that the penalties must not be more than 50 penalty units for individuals and 250 penalty units for a body corporate. In relation to civil

penalties, the limits are 500 penalty units for an individual and 2500 units for a body corporate (these limits are well over the appropriate limits for penalties to be imposed by offences created by regulations set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at 43)).

The explanatory memorandum states at page 28 that 'specific provision is made for the imposition of penalties through the regulations as these reforms are intended to provide greater consistency between different credit card products' allowing consumers to make efficient choices. It is also stated that it is 'important that these objectives can be enforced through appropriate sanctions'.

The penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament. The explanatory memorandum notes, at 3.81, that the intention is to introduce reforms that will provide greater consistency in relation to annual percentage rates and will allow better comparisons between products to be made. What is not explained, however, is why these reforms must be achieved through regulations made by the executive.

In order to better evaluate whether these provisions breach Standing Order 24 the Committee **seeks the Treasurer's further advice as to why it is necessary to provide for offences and civil penalties in relation to the matters referred to in subclause 30B of the bill through regulations rather than primary legislation and also seeks the Treasurer's advice about examples of the conduct for which individuals may be subject to the penalties**.

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

'Henry VIII' clause
Subclause 30B(5)

Subclause 30B(5) states 'This Division has effect subject to regulations made for the purpose of subsection (1)'. A reference to this subclause could not be located in the explanatory memorandum. As this appears to allow for regulations to take effect despite the words of the bill under which they are authorised the Committee **seeks the Treasurer's advice as to why this provision is an appropriate delegation of legislative power**.

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

Treasurer's response - extract

Henry VIII clause - Delegation of legislative power

Proposed section 30B would allow Division 3 of the National Credit Code to be subject to any regulations made under the power set out in subsection 30B(1).

Subsection 30B(1) is a provision enabling regulations to be made in relation to, first, interest charges under credit card contracts, and, second, how matters relating to interest charges may be described in credit card contracts and other documents.

In respect of the first head of regulation-making power, the Credit Act currently specifies the maximum amount of interest that can be charged under any credit contract (section 28 of the National Credit Code, Schedule 1 to the Credit Act). The proposed regulation-making power is therefore not open-ended, but would be subject to limitations in that, first, it only applies to credit card contracts, and, second, it would allow regulations to be made that address the operation of 'interest free' periods, to regulate interest where it is less than the maximum permitted under the Code may be imposed by the credit provider. This power, if used, would allow for consistency in the way in which 'interest free' periods operate, and would avoid consumers being confused by differences that are not transparent or easily understood.

The second head of regulation-making power is limited to regulating the way in which matters relating to interest charges may be described, and is therefore relatively confined in scope. It is intended to use this power to enable consumers to more readily distinguish between different types of 'interest free' periods, so that different methods of imposing interest will need to be described in different ways.

Given that the regulations will need to describe these methods in detail, and that new methods of imposing interest may be developed by credit providers, it is considered this is a topic where a delegation of powers is appropriate.

In addition, any regulation made under these provisions would be a legislative instrument and subject to disallowance by Parliament.

Committee Response

The Committee thanks the Minister for this response, notes the explanation provided for the proposed approach and also notes that any regulation would be a legislative instrument subject to disallowance.

Tax Laws Amendment (2011 Measures No.2) Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Treasury

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 7 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends various taxation laws. These amendments include:

- Schedule 1 amending the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) to make two entities DGRs, and change the name of another entity.

- Schedule 2 amending the *Superannuation Industry (Supervision) Act 1993* to permit the regulations to impose rules on self managed superannuation fund trustees that make, hold or realise investments involving collectables or personal use assets.

- Schedule 3 amending the *Superannuation Industry (Supervision) Act 1993* and the *Retirement Savings Accounts Act 1997* to allow superannuation fund trustees and retirement savings account providers to use tax file numbers (TFNs):
  - as a method of locating member accounts; and
  - to facilitate the consolidation of multiple member accounts.

- Schedule 4 amending:
  - the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to replace the current mechanism for ensuring Australian taxes, and certain Australian fees and charges are not subject to the goods and services tax with specific legislative exemptions;
  - the GST Act to allow for the making of regulations to treat an Australian tax, or an Australian fee or charge in a particular way; and
  - the *A New Tax System (Luxury Car Tax) Act 1999* to account for changes being made to the GST Act.

- Schedule 5 makes technical corrections and other minor and miscellaneous amendments to the taxation laws.

Delegation of legislative power
Schedule 3

Schedule 3 of the bill makes amendments which allow superannuation funds providers to use tax file numbers to locate member accounts and to facilitate the consolidation of multiple member accounts. Overall, the explanatory memorandum at pages 20 and 21 provides a detailed and satisfactory account of the privacy issues raised by the amendments and why they are consistent with the National Privacy Principles. In particular, it is noted that:

- superannuation funds will not be able to use TFNs to replace member account numbers;

- use of TFNs for the purposes outlined in the legislation is a limited extension of the current TFN use rather than a new application;

- the increased use of TFNs has been authorised by amending the superannuation law as referenced under the TFN Guidelines (which were issued under the *Privacy Act*);

- the increased use of TFNs will be safeguarded by regulations see p 21-22 of the explanatory memorandum) that ensure member identity is protected and member consent is obtained where appropriate;

- the law does not alter an individual's right to choose not to quote a TFN; and

- superannuation funds are not obliged to increase their TFN use.

However, it is also proposed that it will be left to the regulations to 'contain necessary safeguards and processes' (see the explanatory memorandum at page 22). The Committee is concerned that as much important information as possible is contained in primary legislation so the Committee **seeks the Treasurer's advice as to why these safeguards and processes cannot be included in the primary legislation**.

> *Pending the Treasurer'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's letter requested an explanation as to why safeguards and processes, in the amendment in Schedule 3, cannot be included in the primary legislation.

Current laws allow the use of tax file numbers (TFNs) by the superannuation industry. These laws apply to trustees of superannuation funds, approved deposit funds, exempt public sector superannuation schemes, retirement savings account (RSA) providers, and employers.

These new amendments apply to superannuation fund trustees and RSA providers and permit them to locate multiple accounts held by the same person within a single fund and across multiple funds, and also to facilitate account consolidation.

Significant safeguards to protect individuals' TFNs are already in place, as current laws allow the use of TFNs by the superannuation industry. First, there are the rules set out in the *Superannuation Industry (Supervision) Act 1993*, which provide clear limitations on the quotation, use, and transfer of TFNs and also details the procedure to be followed for recording and destroying records of TFNs.

Further safeguards are contained in the *Tax Administration Act* 1953 (TAA), which provides for penalties where there is unauthorised use and recording of TFNs. Specifically, section 8WA and 8WB of the TAA provide that the penalty is 100 penalty units ($11,000) or imprisonment for two years, or both. All these safeguards will continue to apply in relation to the new amendments.

The regulation making power in question provides additional scope for further restrictions to be placed on the use of TFNs in the account consolidation process, over and above the key safeguards already mentioned. Consolidation requires a rollover or transfer of a superannuation benefit and there are already detailed rules in place governing rollovers and transfers in Divisions 6.4 and 6.5 of the *Superannuation Industry (Supervision) Regulations 1994.* Given the existing rules around rollovers and transfers are already set out in detail in regulations it is considered appropriate that any new rules that will be developed to further encourage account consolidation in superannuation, included any additional safeguards and processes that must be followed in the consolidation process, are also prescribed in complimentary regulations.

Committee Response

The Committee thanks the Minister for this detailed response. The Committee notes the advice about existing safeguards, but retains some concern that these provisions will not be included in primary legislation. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 4 of 2011 - extract

Retrospective effect
Schedule 4, section 81-25

Schedule 4 of the bill replaces the current mechanism for ensuring Australian taxes and certain fees are not subject to the GST with specific legislative exemptions. The taxes, fees or charges are excluded from the GST by the proposed new Division 81 or by regulations. Regulations may also prescribe that the GST does apply to certain taxes, fees and charges. The proposed section 81-25 states that regulations made for the these purposes 'may be expressed to take effect from a date before the regulations are registered under' the *Legislative Instruments Act 2003*. (This subsection thus departs from the normal rule stated in subsection 12(2) of the *Legislative Instruments Act*, concerning the date at which instruments take effect.)

The explanatory memorandum at page 33 notes that the operation of section 81-25 will allow:

> …for the desired GST treatment for a payment, or discharging of the liability to make such a payment, to be achieved where a new Australian tax of Australian fee or charge is imposed under an Australian law before regulations can be made to provide for the desired treatment.

Given the importance of people knowing in advance their legal rights and liabilities to facilitate planning their affairs, the Committee **seeks the Treasurer's advice as to why it is necessary to adopt this approach and the extent of any detriment that may be suffered by overriding the operation of subsection 12(2) of the *Legislative Instruments Act 2003***.

> *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.*

Minister's response - extract

The Committee's letter also requested an explanation as to why, in the amendment in Schedule 4, it is necessary for overriding the operation of subsection 12(2) of the *Legislative Instruments Act 2003* to allow for a regulation specifying the goods and

services tax (OST) treatment of an Australian tax, fee or charge to be made with retrospective effect.

When the GST was introduced, the Commonwealth, States and Territories agreed that the GST would apply to the commercial activities of government at all levels and that the non-commercial activities of government would be outside of the scope of the GST.

Accordingly, under the *Intergovernmental Agreement on Federal Financial Relations* (IGA) the Parties agreed that Division 81 of the GST Act will exempt Australian taxes, fees and charges from GST in accordance with the following principles:

- taxes that are in the nature of a compulsory impost for general purposes and compulsory charges by the way of fines or penalties will be exempt from GST;

- regulatory charges that do not relate to particular goods or services will be exempt from GST, including:

    - fees and charges levied on specific industries and used to finance particular regulatory or other activities in the government sector; and

    - licences, permits and certifications that are required by government prior to undertaking a general activity.

Division 81 of the GST Act previously allowed the Commonwealth Treasurer to specify by legislative instrument (a Determination), that the payment or discharging of the liability to pay any Australian tax, fee or charge is not the provision of consideration. The effect of the instrument is that taxes, fees and charges included in the Determination are exempt from GST.

Schedule 4 of the Bill amends Division 81 and is intended to replicate the OST treatment of taxes, fees and charges as currently provided by the Determination. The Bill also transitionally grandfathers the last Determination to maintain the same OST outcomes for taxes, fees and charges prior to this amendment.

The regulation making power in Schedule 4 of the Bill is intended to provide a failsafe to ensure that the GST treatment of taxes, fees and charges does not change under the new mechanism. This power allows for retrospective application to ensure that the GST treatment of a tax, fee or charge that may prove to not be covered by the new law can be rectified retrospectively to ensure a seamless transition and to ensure that taxpayers do not incur unnecessary GST.

For instance, a fee that had always been treated as GST exempt and is intended to not attract GST may be found to not be covered by the new law and therefore becomes taxable. If a retrospective regulation is not allowed to be made then the government agency which charges the fee would be required to remit GST. Allowing for a retrospective application

of a regulation will permit the government to correct the tax treatment to ensure taxpayers are not unintentionally liable for GST.

Conversely, a retrospective regulation *could* also he made where a fee that was previously taxable no longer attracts GST. If the regulation was not retrospective and taxpayers had incorrectly claimed an input tax credit on the belief the supply was taxable, the taxpayer would have to repay the credit and be liable for penalties for incorrectly assessing their GST liability.

Any regulation made under Schedule 4 of the Bill would be made in accordance with the principles agreed to in the IGA and through procedures agreed to by the Commonwealth and the States and Territories, in accordance with the *A New Tax System (Managing the GST Rate and Base) Act 1999.* The agreed procedures involve consultation and agreement between the Commonwealth and the States and Territories on all changes made to the GST base. Following consultation, any proposed regulation would require the unanimous agreement of the members of the Ministerial Council for Federal Financial Relations.

Committee Response

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

Senator the Hon Helen Coonan
Chair

THE HON MARK BUTLER MP
MINISTER FOR MENTAL HEALTH AND AGEING

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

Dear Senator Coonan

Re. Senate Standing Committee for the Scrutiny of Bills – Alert Digest No.5 of 2011 – Aged Care Amendment Bill 2011

I write to provide advice to the Senate Standing Committee for the Scrutiny of Bills as sought through Alert Digest No. 5 of 2011 in relation to the Aged Care Amendment Bill 2011.

The Aged Care Amendment Bill 2011 amends the *Aged Care Act 1997* (the Act) to make a number of changes in relation to the use and misuse of accommodation bonds, and to introduce new information gathering powers to enable the Secretary to better monitor approved providers that may be experiencing financial difficulties and using accommodation bonds for non-permitted uses.

Trespass on personal rights and liberties; Schedule 1, item 1
The Committee is seeking advice in relation to proposed new section 9-3B which enables the Secretary to request information about the ability of an approved provider to refund bonds where the Secretary holds a belief on reasonable grounds in relation to certain matters. Specifically, the Committee seeks advice as to why the Secretary should be able to request information within 28 days or 'such shorter period as specified in the request' particularly noting that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* recommends a minimum of 14 days.

There are two main reasons that proposed section 9-3B enables the Secretary to specify a shorter period for the purposes of provision of information.

Firstly, proposed section 9-3B is consistent with other similar provisions in the Act which also require approved providers to give information within 28 days or such shorter period as specified in the request. See for example, subsection 9-2(2) and subsection 9-3A(2) of the Act, which have been in place for a number of years and with which industry are familiar and compliant.

Secondly, there are strong policy reasons for a period of less than 14 days being specified in exceptional circumstances. While it is intended that 28 days remain the default period in which an approved provider needs to respond to a request or notice for information, there are exceptional circumstances where there may be imminent risk to the health and wellbeing of care recipients and a shorter response period is appropriate.

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For example, the Secretary may seek information from an approved provider in a timeframe shorter than 28 days where:

- there are concerns that financial difficulty may imminently lead to a sharp deterioration in the quality of care being delivered or the possible closure of an aged care service. In the past, the Secretary has sought information in less than 28 days (under other similar provisions) where it has been advised that an approved provider may be about to go into administration or where there is information indicating staff or suppliers are not being paid. In these cases, there have been immediate risks such as the continuity of care for aged care residents and the availability of staff and supplies to deliver the appropriate level of care. This situation can quickly arise and the Secretary needs to be able to respond quickly. For example, non-payment of staff wages for only a week can mean the loss of critical care staff within similar timeframes.

- an approved provider may be at risk of not being able to refund accommodation bonds to a number of care recipients within the required timeframes. In circumstances where an approved provider holds the life savings of care recipients (as a bond) and is unable to quickly repay the money when the care recipients leave the service, there can be significant adverse impacts on the care recipients within short periods of time. In these circumstances the Secretary needs to be able to quickly intervene to achieve an outcome for the care recipients involved.

The ability of the Secretary to specify a shorter time is therefore required to safeguard residents and their funds in the event that an approved provider may be at significant risk of non-compliance or no longer able to provide aged care.

Trespass on personal rights and liberties; Schedule 1, item 5

The Bill inserts a new section 57-17B which relates to offences for non-permitted use of accommodation bonds. The Committee is seeking advice as to examples of the circumstances of possible offences and an explanation as to why negligence is an appropriate standard of fault in this context.

Proposed section 57-17B establishes an offence for key personnel who know or are reckless or negligent as to whether an approved provider is using bonds for non-permitted uses and fails to take reasonable steps to address this (in circumstances where the approved provider becomes insolvent and triggers the Guarantee Scheme).

In this circumstance it is important that both recklessness and negligence are included in the offence because recklessness describes the circumstance where the person knowingly exposes another to risk (where the fault lies in being willing to run the risk) whereas negligence captures the circumstance where the fault lies in the failure to foresee and so allow otherwise avoidable risks to result.

Both circumstances can occur in the case of approved providers.

The total value of accommodation bonds held by approved providers has more than doubled in the last five years. Currently, the aged care industry holds over $10.6 billion in accommodation bonds on behalf of aged care residents. Given the significant amount of funds, it is appropriate providers and their key personnel understand and comply with the legislative requirements set out in the *Aged Care Act 1997.*

In the course of its prudential regulation activities, the Department has identified a number of cases where:

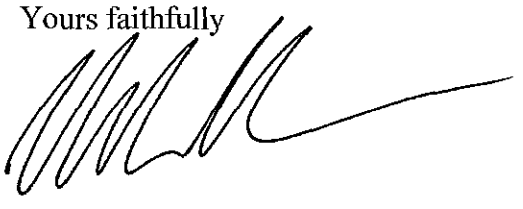
- approved providers, and their key personnel, have not exercised appropriate diligence in managing accommodation bonds paid by their residents and which has given rise to risks of default on refunds (reckless behaviour). For example, there is evidence to suggest that approved providers have used bonds for investment in non aged care purposes (e.g. sporting club or other business activities) and run the risk that they would have sufficient other funds to repay bonds. This has not transpired and the approved provider has become insolvent, leaving no bonds available for recovery by care recipients

- in other cases where approved providers have failed to make bond refunds and triggered the Accommodation Bond Guarantee Scheme, there has been evidence that they had failed to maintain adequate financial records and monitor their financial position (i.e. they have been negligent in discharging their responsibilities under the Act). For example, approved providers have failed to keep proper accounting systems for bonds, meaning that bonds are not refunded on time or are expended for purposes not relating to aged care. In other cases, approved providers have been experiencing financial difficulties and have continued to charge accommodation bonds when there were clear grounds for concern about their ability to make refunds. It also appears that some accommodation bond funds have been lent to related entities (e.g. other companies) without appropriate safeguards in place to manage risks to the repayment of loans, and these funds were subsequently unrecoverable when those entities failed.

Without effective governance processes there are significant risks for the approved provider, residents and staff. For instance, without regular and informed scrutiny of financial performance and financial position, and without senior personnel taking responsibility for their actions, an approved provider could be at increased risk of poor financial performance leading to insolvency and default on accommodation bond refunds. In this context, knowledge, recklessness or negligence are considered appropriate standards of fault.

I trust this clarifies the reasoning to these amendments and satisfies the Committee's request.

Yours faithfully



MARK BUTLER

Minister for Climate Change and Energy Efficiency

C11/3955

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

Dear Senator Coonan

I refer to the Senate Standing Committee's comments of 11 May 2011 concerning a number of measures in the *Australian National Registry of Emissions Units Bill 2011* and the *Carbon Credits (Carbon Farming Initiative) Bill 2011.*

I have considered the Committee's comments and respond to each of the issues raised.

Australian National Registry of Emissions Units Bill 2011

Delegation of legislative power – various clauses (other than clauses 27 and 57)

The Committee comments that a number of clauses provide that the regulations 'may make provision' for particular matters, for example, in relation to the opening of accounts, identification procedures, transaction limits etc. It also notes that many issues are clearly flagged as requiring delegated legislation to enable the Australian National Registry of Emissions Units (the Registry) to function as intended; clause 12, for instance. The Committee seeks the Minister's advice as to the rationale for the significant reliance on the use of delegated legislation.

The Registry was established under the Commonwealth's executive power to meet one of Australia's commitments under the Kyoto Protocol. Part 2 of the bill will provide a legislative basis for the continued existence of the Registry (clause 9), the making of entries in Registry accounts (clause 17) and the correction and rectification of the Registry (clauses 19, 20, 21, 22). The regulation-making powers in Part 2 (clauses 10(1), 11(1), (2), (3), (5), 12, 13, 14(1), 15(1), 16(1), (3), (4), (5), (6) and 18) deal with matters that go to the day-to-day operation of the Registry, such as opening, closing and naming accounts; matters which are currently dealt with non-legislatively. Dealing with these matters in regulations will help ensure that the Registry can respond quickly and effectively to operational challenges and will promote operational integrity.

The regulation-making powers in Part 2 are not 'at large'. Rather, the circumstances in which the regulations can deal with the particular subject-matter of each power are expressly limited. For instance, while clause 15(1) provides that the regulations may make provision for and in relation to empowering the Administrator to close a Registry account, clause 15(2) provides that the Administrator can only be empowered to close an account in the circumstances described in that subclause. An appropriate balance is thereby achieved between the primary and delegated legislation, and between Parliamentary oversight and operational flexibility.

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The regulation-making powers in Part 3 of the bill (Kyoto units), in particular, clauses 38(1), (2), 39(1), 40(1), (2), 41(1), 42(2), 43(1), (2) and 44 (also clause 60 in Part 5), are largely geared towards ensuring that Australia has the flexibility to implement its obligations under the Kyoto Protocol and other related international instruments. For example, regulations will be required to set rules for the management of Kyoto units at the end of the first commitment period (2008-2012) under the Kyoto Protocol, which are subject to carry-over restrictions as outlined in the explanatory memorandum. The carry-over process is expected to be completed in late 2014 or early 2015. Regulations might include details on how the carry-over restrictions will be implemented in an orderly way, whether this is achieved by setting carry-over restrictions for each account holder or by some other means.

Of the other regulation-making powers in Part 3:

- clauses 34(2)(c), 35(2)(b) and 47 deal with the type of information that must accompany certain Registry transactions, and are intended to ensure that the Registry can respond quickly and effectively to operational challenges;
- clause 36(1)(c) enables the regulations to specify units that cannot be transferred to a Registry account, and is intended to exclude any type of Kyoto units that do not meet environmental integrity standards because they do not fairly represent emission reductions in the country of origin or because they are associated with unacceptable environmental impacts, which could undermine CFI participants' confidence in the Registry;
- clause 45(2) (also clause 54(2), in relation to non-Kyoto international emissions units) enables the regulations to prescribe a purpose for which Kyoto units are personal property, and is geared towards 'future proofing' the operation of the section. The regulations would enable the scheme to protect the interests of Kyoto unit holders in circumstances that were not foreseen during the drafting of the bill.

The regulation-making powers in Part 4 of the bill (Non-Kyoto international emissions units) provide for regulations which prescribe the conditions that must be met in relation to certain transfers of non-Kyoto international emissions units, and are geared towards enabling the Registry to interact appropriately with foreign registries, should such interaction be permitted.

All of the regulation-making powers in the bill were drafted having regard to the guidance provided in the *Legislation Handbook* about matters that should be included in primary legislation and matters that may be included in subordinate legislation.

Delegation of legislative power – clause 27

Clause 27 allows for regulations to 'make further provision in relation to the Registry'. The Committee notes that regulations made under clause 27 can attract significant penalties, and indicates its concern about such provisions being created under delegated legislation rather than primary legislation. While noting this concern, the Committee leaves consideration of this matter to the consideration of the Senate as a whole.

Clauses 27(1) and (2) provide for regulations to 'make further provision' in relation to the Registry, including provisions requiring the holder of a Registry account to notify a matter to the Administrator. Clause 27(4) provides that if a holder of a Registry account is subject to a requirement under such regulations, the holder must comply with the requirement.

Clause 27(5) provides for ancillary contraventions of this requirement. Subclauses (4) and (5) are civil penalty provisions, meaning that a Court can order a person to pay a penalty if

the Court is satisfied (on the balance of probabilities) that a person has contravened those provisions. The imposition of a civil penalty does not constitute a criminal conviction. The regulation-making power in clause 27 goes to the day-to-day operation of the Registry and supplements the other regulation-making powers in Part 2. Providing this supplementary regulation-making power will help ensure that the Registry can respond quickly and effectively to any operational challenges not otherwise addressed in Part 2 of the bill. For example, regulations made under clause 27(1) could prohibit account holders from accessing particular parts of the Registry in specified circumstances, where that access in those circumstances is undermining confidence in the integrity of the Registry. Imposing civil penalties in relation to such requirements helps ensure compliance. The civil penalties are not insignificant, but they are only imposed if a Court is satisfied that a contravention has occurred, are subject to maximum limits and are otherwise consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.*

Possible severe penalties – Division 7, clauses 23 and 24

The Committee notes that clauses 23 and 24 of the bill introduce possible severe penalties for making a false entry in the Registry or producing or tendering falsified documents purporting to be a copy or extract from the Registry. The penalty for the first offence is not in line with the standard penalty/imprisonment ratio set out in section 4B of the Crimes Act 1914. Whereas under the standard ratio, 7 years imprisonment equates to 420 penalty units, the penalty in the bill is 2000 units. The Committee leaves the question of whether the penalty imposed is appropriate to the consideration of the Senate as a whole.

The integrity of the Registry and reputation of the carbon farming initiative could be severely affected if sufficient measures are not taken to prevent false entries in the Registry. Reputation is essential in establishing and maintaining market confidence. For this reason the Registry will comply with IT requirements approved by the Defence Signals Directorate and the United Nations Framework on Climate Change Convention. Information will also be shared with key enforcement agencies to monitor any irregular activity. False entries may involve the attempted creation of counterfeit Australian carbon credit units or attempts to steal units from one account and place them in another. False entries could be made by persons with access to log-ons but without authority to make relevant entries. It is essential that there is a clear and strong deterrence for anyone contemplating these kinds of activities.

As mentioned in the explanatory memorandum, the profit that could be made out of this conduct could amount to several lifetimes' worth of imprisonment on the standard penalty/imprisonment ratio. It is for this reason that the standard ratio is varied. This is consistent with the instructions at page 38 of *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers* that the penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

Reversal of onus – Division 7, clause 26

Clause 26 of the bill is a civil penalty provision which relates to the use and disclosure of information obtained from the Registry. Clause 26(3) provides that the obligations do not apply if the use or disclosure of the information is relevant to the holding of units recorded in the Registry, or the exercise of the rights attaching to those units. A person wishing to rely on subclause (3) bears an evidential burden in relation to that matter, and thus bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. The Committee notes that in the explanatory memorandum, this approach is said to be justified because the matters are 'peculiarly within the defendant's

knowledge and not available to the prosecution'. The Committee leaves the question of whether this approach is appropriate to the Senate as a whole.

Where matters are peculiarly within the defendant's knowledge and not available to the prosecution, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at page 29) indicates that it is legitimate to place the evidential burden in relation to that matter on the defendant. The approach taken in clause 26 is consistent with this.

Delegation of legislative power – Part 4, clause 57

Clause 57 of the bill is a broad regulation power that applies in relation to non-Kyoto international emissions units. The Committee has noted that the explanatory memorandum outlines possible applications of the clause, but expresses concern as to the breadth of the delegation of the legislative power. The Committee leaves the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole.

The bill provides for certain prescribed non-Kyoto international emissions units to be held and traded in the Registry. This will mean that units issued under other schemes, for example New Zealand Units, may be prescribed and traded within the Registry. The bill sets out detailed rules for entries in the Registry, transmission and transfer of, and rights and interests in, non-Kyoto international emissions units.

As explained in the explanatory memorandum, clause 57 allows the regulations to specify further conditions in relation to non-Kyoto international emissions units. For example, the regulations may specify conditions on outgoing international transfers of non-Kyoto international emissions units, or specify rules that ensure coherence with the international agreement or law of the foreign country under which the units were originally issued. Clause 57 'future-proofs' Part 4 of the bill and ensures that the Registry will be able to interact appropriately with foreign registries in the event that this is permitted.

Strict liability – Part 7, clause 79

Clause 79 provides that for certain civil penalty provisions (clauses 26(1), 26(2) and 27(4)) it is unnecessary to prove a person's intention, knowledge, recklessness, negligence or other state of mind. The Committee notes that the explanatory memorandum provides that the reason for this provision is that it is reasonable to expect those subject to the provision to take steps to guard against any inadvertent contravention. The Committee leaves the question of whether this approach is appropriate to the consideration of the Senate as a whole.

Clauses 26(1) and (2) relate to the use and disclosure of material obtained from the Registry. Clause 27(4) provides that a person must comply with regulations made in relation to the Registry.

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of this provision. Consideration was given to the fact that the use of strict liability is more easily justified for a higher civil penalty provision than a higher penalty criminal offence. The conclusion was reached that the two criteria outlined at page 65 were fulfilled:

- The civil penalty provision applies only to corporate or whitecollar wrongdoing; and

- It is reasonable to expect those subject to the civil penalty to take steps to guard against any inadvertent contravention.

Chapter 7 of the Senate Standing Committee for the Scrutiny of Bills Report *The Work of the Committee during the 40th Parliament February 2002 – August 2004,* June 2008 is also noted. That report states that 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles'.

Merits review - Part 3, subclause 36(2) and Part 8, clause 82

Clauses 36(2) and 53(2) give the Administrator the discretion not to transfer units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent. The Committee notes that while a decision under clause 53(2) is subject to merits review, a decision under clause 36(2) is not. The Committee seeks the Minister's advice as to why a decision under clause 36(2) is not reviewable.

It is the Government's intention that a decision under clause 36(2) should be reviewable and amendments have been tabled in the House to achieve this. The omission of clause 36(2) from the table in clause 82 is an oversight.

Incorporating material by reference – Part 9, clause 95

The Committee notes that clause 95 permits regulations to make provision in relation to a matter by applying, adopting or incorporating, with or without modification, a matter contained in an instrument or writing as in force or existing at a particular time or as in force or existing from time to time. An instrument so applied etc must be published on the Administrator's website (unless it would infringe copyright). The Committee is concerned that legislative power may, by this arrangement, be delegated inappropriately and that the law may change without Parliament having the opportunity to scrutinise the changes. The Committee seeks the Minister's advice as to why it is considered appropriate to include material by reference rather than including it directly in the primary legislation.

Clause 95 is geared towards the situation where Australia is required to implement obligations as they exist in international instruments from time to time, including, for example, under the Kyoto accounting rules. This will enable, for instance, regulations made in relation to carry-over restrictions (clause 40) to implement the carry-over restrictions that apply under those rules as they exist from time to time. Providing for those rules to be implemented in this way is an appropriate way for Australia to meet its binding international obligations.

The provision has been drafted in accordance with the Legislative Instruments Handbook, which states that:

> "2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect."

and

> "11.21 As noted in Chapter 2, the LIA [*Legislative Instruments Act 2003*] provides that legislative instruments may incorporate documents by reference in accordance

with section 14. The benefit of incorporation by reference is that the incorporated document, which could be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled.
However, an agency will be asked to provide information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by reference, so this will draw the attention of Parliament to use of this mechanism."

The Kyoto rules are set out in the Kyoto Protocol itself and a range of decisions and standards that can be highly technical, complex and lengthy documents. For example, the Data Exchange Standards for Registry Systems under the Kyoto Protocol is a 451 page document which sets out technical specifications for data exchange between registries and the Independent Transaction Log, which was established to keep track of international transfers of Kyoto units and to ensure compliance with Kyoto rules (see http://unfccc.int/files/kyoto_protocol/registry_systems/application/pdf/des_full_ver_1.1.2_fullversion.pdf). The Registry must be operated in compliance with these standards.

Incorporation of such complex documents directly into the primary legislation or regulations would significantly increase the volume of the ANREU legislation and Commonwealth statute book, and would be inconsistent with the Government's Clearer Commonwealth Laws initiative which aims to reduce the complexity of legislation. By incorporating such documents by reference and requiring their publication on an easily accessible webpage, the legislation provides guidance to the Administrator and users of the scheme while avoiding unnecessary length and complexity.

Carbon Credits (Carbon Farming Initiative) Bill 2011

Henry VIII clause – clause 5

The Committee notes that a number of definitions in clause 5 of the bill allow the meaning of a defined term to be modified or elaborated in regulations. The Committee seeks the Minister's advice as to why this approach is considered appropriate for the definitions of 'land rights land', 'native forest' and 'prescribed non-CFI offsets scheme'.

Definition of 'land rights land'

The Government is committed to facilitating Aboriginal and Torres Strait Islander participation in carbon markets and the bill contains a number of provisions to give effect to this objective. In addition, extensive consultation is being conducted with stakeholders to ensure the bill effectively accommodates indigenous participation in the carbon farming initiative.

The definition of 'land rights land' is an adaptation of section 47A of the *Native Title Act 1993*, which covers land granted or vested under Aboriginal and Torres Strait Islander specific legislation or held or reserved expressly for Aboriginal and Torres Strait Islander people. There is a range of Aboriginal and Torres Strait Islander specific legislation across jurisdictions. Making provision for the definition of 'land rights land' to be supplemented by regulations ensures that any arrangement provided for in such legislation that is not otherwise captured by the definition can be accommodated.

Definition of 'native forest'

'Native forest' is defined by reference to the crown cover, height and natural range of trees. For the purposes of this definition, 'trees' and 'crown cover' may be defined in the

regulations. It is envisaged that the regulations will specify that only trees with woody vegetation will be eligible under the scheme and that some known tree species, such as species that are included on the Australian Government's weed alert list, will be excluded. The bill provides for the regulations to prescribe the meaning of 'tree' in order to enable the list of exclusions to be added to over time, as the need arises. In addition, providing for 'crown cover' and 'trees' to be defined in the regulations reflects the rules of the Kyoto Protocol which provide that the Government may amend its definition of trees and crown cover as appropriate, when international accounting rules for carbon sinks change.

Definition of 'non-CFI offsets scheme'

Transitional arrangements are made for projects that have received carbon credits under a 'prescribed non-CFI offsets scheme' (Part 7, Division 4). This enables permanence obligations (for example, a requirement to maintain a forest for a period of 70 or 100 years) that were created under existing schemes to be enforced through the bill, thereby removing a barrier to winding up these schemes.

Clause 5 provides that 'prescribed non-CFI offsets scheme' has the meaning given by the regulations. It is intended that the regulations will provide that a prescribed non-CFI offsets scheme is an on-going scheme that issued or facilitated the issue of carbon credits for reforestation activities and was administered by an Australian or state/ territory government such as the Australian Government's Greenhouse Friendly initiative and the NSW and ACT Governments' Greenhouse Gas Reduction Scheme. It is intended that the regulations will create a list which can be added to in order to ensure all eligible schemes are covered.

Delegation of legislative power – clause 41

The Committee notes that clause 41 provides that a project passes the additionality test if 'the project is of a kind specified in the regulations' and is not required to be undertaken by or under a Commonwealth, State or Territory law. Prior to making regulations, the Minister must consider advice from the expert committee established under the bill and also whether carrying out the project is a 'common practice'. The Committee notes that 'common practice' may change over time. The Committee acknowledges that the bill includes some legislative guidance as to requirements for the regulations, but is concerned that in practice it may be difficult to establish what is 'common practice'. The Committee seeks the Minister's advice about the justification for the approach and whether more precise legislative guidance can be provided in the primary legislation.

The purpose of the additionality test is to ensure that credits are only issued for abatement that would not normally have occurred and, therefore, provides a genuine environmental benefit.

It is envisaged that the regulations will provide a 'positive list' of activities or types of projects which are considered 'additional'. This approach allows the carbon farming initiative to adapt and cover different activities as the uptake of the scheme expands. Projects can only be added to the list if the Minister first obtains the advice of the Domestic Offsets Integrity Committee (DOIC), an expert body which provides independent advice to government. The Minister must also consider whether carrying out the project is beyond 'common practice' in the relevant industry or environment where the project is to be carried out.

It is acknowledged that 'common practice' is variable between industries and over time. For this reason, it is envisaged that guidelines about what is and is not common practice will be established in consultation with expert stakeholders, and that the Minister will have

regard to these guidelines when considering whether carrying out a project is common practice.

In the past, offset schemes have been criticised for using project-specific assessments of additionality which are expensive and time-consuming. The carbon farming initiative will be one of the first carbon offset schemes in the world to use a more efficient and transparent 'positive list' approach to additionality.

Unlike the carbon farming initiative, other carbon offset schemes rely heavily on financial additionality tests to determine whether activities are additional. Under financial additionality tests, activities that have productivity benefits, such as composting for soil carbon or improved herd management, are not considered additional and are excluded from participating in offset schemes. Further, financial additionality tests require sound judgment around rates of return and cash flow analyses which are difficult to administer. The financial additionality approach was rejected following consultation with stakeholders. The carbon farming initiative's 'common practice' test recognises that there are many reasons why land sector abatement activities are not common practice.

Incorporating material by reference – clauses 106 and 304

The Committee notes that clause 106 of the bill provides for the making of methodology determinations by legislative instrument. Clause 106(8) enables a determination to incorporate other instruments as in force or existing 'from time to time'. Such instruments must be published on the relevant website. Clause 304 is to similar effect (the Digest incorrectly refers to clause 302, which deals with the operation of the Racial Discrimination Act 1975). The Committee is concerned that legislative power may, by this arrangement, be delegated inappropriately and that obligations may change without Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation. The Committee seeks the Minister's advice about the reasons for allowing the incorporation of material by reference in these clauses.

Project methodologies establish procedures for estimating abatement and project specific rules for monitoring, record keeping and reporting on abatement. Clause 106(8) is directed towards the situation where a project proponent is required to comply with obligations as they exist in domestic instruments from time to time, including, for example, standards contained in the *National Greenhouse and Energy Reporting Determination 2008*, made under the *National Greenhouse and Energy Reporting Act 2007*. Providing for those standards to be implemented in this way is an appropriate way to ensure that methodologies are robust and reflect relevant industry-specific standards.

A methodology determination about the destruction of methane generated from manure in piggeries, for example, might make reference to the standards contained in the *National Environmental Guidelines for Piggeries 2010*. Other project specific methodologies may reference similar standards or guidelines. These standards and guidelines can be highly technical, complex and lengthy documents. The *National Environmental Guidelines for Piggeries 2010*, for instance, is a 200 page document which sets out standards and protocols for managing environmental issues associated with piggeries, such as construction, operation and maintenance of lagoons for storing manure.

Similar considerations apply in relation to clause 304. For example, in accordance with clause 304, regulations made under clause 55(1)(c), which specify a kind of offsets project as a Kyoto offsets project, may make reference to the Kyoto rules, as they exist from time to time. These rules are set out in the Kyoto Protocol itself and in a range of decisions and

standards made under the Protocol. These decisions and standards can be highly technical, complex and lengthy, and are subject to change on a regular basis.

Clauses 106(8) and 304 have been drafted in accordance with the Legislative Instruments Handbook, which states that:

> "2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect."

and

> "11.21 As noted in Chapter 2, the LIA [*Legislative Instruments Act 2003*] provides that legislative instruments may incorporate documents by reference in accordance with section 14. The benefit of incorporation by reference is that the incorporated document, which could be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled. However, an agency will be asked to provide information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by reference, so this will draw the attention of Parliament to use of this mechanism."

Incorporating complex technical documents directly into the primary legislation or regulations would significantly increase the volume of the CFI legislation and Commonwealth statute book, and would be inconsistent with the Government's Clearer Commonwealth Laws initiative which aims to reduce the complexity of legislation. By incorporating such documents by reference and requiring their publication on an easily accessible webpage, the legislation provides guidance to the Administrator and users of the scheme while avoiding unnecessary length and complexity.

Abolition of the privilege against self-incrimination – clauses 185 and 202

Clause 185 empowers the Administrator to obtain information or documents if the Administrator believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. Clause 189 states that a person is not excused from giving information or producing a document on the grounds that it might tend to incriminate the person or expose the person to a penalty. The Committee notes that in the case of an individual, the provision provides for a use and derivative use immunity in relation to civil and criminal proceedings. There are limited exceptions, namely, proceedings for the recovery of a penalty under clauses 179 or 180 and for an offence against section 137.1 or 137.2 of the Criminal Code which relate to the giving of false or misleading information or documents to the Commonwealth. The Committee notes that the same issue arises in relation to clause 202 which abrogates the privilege in relation to information gathering powers given to inspectors in the execution of monitoring warrants. The Committee notes the justification of the provisions in the explanatory memorandum, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The exceptions to the use and derivative use immunity are limited and relate to:

- proceedings to enforce a penalty imposed due to non-compliance with a requirement to relinquish carbon credit units (clause 179);

- proceedings to enforce a late payment penalty for amounts payable under clause 179 (clause 180); and

- proceedings relating to the giving of false or misleading information or documents under Part 16 of the Act, brought under section 137.1 or 137.2 of the *Criminal Code*.

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of these exceptions. Consideration was given to the need for government to have enough information to properly carry out its duties to the community as balanced against any harm that may flow from the abrogation of the privilege against self incrimination. The conclusion was reached that in relation to proceedings for false and misleading conduct, the criteria at page 104 of the *Guide* were fulfilled. In relation to proceedings to enforce pecuniary penalties pursuant to clauses 179 and 180, the limited exceptions to the use and derivative use immunity were considered justified as the full and effective enforcement of the relinquishment regime is considered central to the integrity of the carbon farming initiative.

Possible trespass on personal rights and liberties – Part 20, clause 217

Part 20, clause 217 imposes liability on executive officers of bodies corporate where the body corporate has contravened a civil penalty provision, but only in circumstances where the officer had knowledge or their conduct has been reckless or negligent. The Committee has asked if the liability is commensurate with that imposed on executive officers in any other circumstances and the justification for imposing the liability on the basis of 'negligence'.

Clause 217 is commensurate with the liability imposed on executive officers in a number of other Commonwealth laws, including under section 154N of the *Renewable Energy (Electricity Act) 2000*, section 40B of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and section 494 of the *Environmental Protection and Biodiversity Conservation Act 1999*.

Clause 217 ensures compliance with obligations under the carbon farming initiative is taken seriously at a high level within liable entities. The clause imposes civil penalties on executive officers where an offence is committed by a body corporate and the executive officer knew or was reckless or negligent as to whether the contravention would occur. Under Part 21 of the bill, pecuniary penalties are payable for a contravention of a civil penalty.

By imposing liability on the basis of knowledge, negligence or recklessness, the bill ensures that liability is not imposed simply because the person is an office holder within a body corporate, but is only imposed if there is a degree of blame that can be attributed to the office holder. This approach ensures fairness and offers some protection to the individuals involved. It is also consistent with the recommendations of the Australian Law Reform Commission in *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia.*

Possible severe penalties – Part 21, clause 221

The Committee notes that clause 221 of the bill empowers a court to impose penalties of up to 2000 and 10000 penalty units for each contravention for a person and a body corporate respectively. The Committee notes that the severity of these penalties is justified by reference to the importance of the scheme and the magnitude of financial gains that may be made from contravening civil penalty provisions. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

As mentioned in the explanatory memorandum, substantial penalties are required to provide an adequate deterrent against inaccurate record-keeping or reporting. The clauses are consistent with the instructions at page 38 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, which provides that a penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

Strict liability – Part 21, subclause 231(2)

Clause 231(2) provides that for certain civil penalty provisions it is unnecessary to prove a person's intention, knowledge, recklessness, negligence or other state of mind. The Committee notes that the explanatory memorandum sets out a justification for this approach and that under clause 221 the court must have regard to all relevant matters, including the nature and extent of the contravention and any loss or damaged suffered as a result, in determining a pecuniary penalty. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

The recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of this provision. Chapter 7 of the Senate Standing Committee for the Scrutiny of Bills Report *The Work of the Committee during the 40th Parliament February 2002 – August 2004,* June 2008 (the Senate Report) is also noted. That report states that 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles'.

Clause 231(2) relates to proceedings for a civil penalty order against a person for a contravention of specified civil penalty provisions, including those relating to the provision of offset reports, certain notification requirements, contraventions of Carbon Maintenance Obligations, compliance with requests for information or documents, and record-keeping, monitoring and audit requirements. It is considered that strict liability is appropriate in these circumstances as compliance with the specified provisions is necessary to ensure the proper administration and integrity of the carbon farming initiative.

The Senate Report states that 'strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent. As with other criteria, however, all the circumstances of each case should be taken into account'. State of mind for a contravention of the relevant provisions would be difficult to establish in most cases, making it difficult to effectively enforce the provisions if included as an element in the offence.

The Report also states that 'strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a

reference to a legislative provision. In such cases the defence of mistake of fact should apply'. Clause 230 provides for a defence of reasonable mistake of fact.

Reversal of onus – Part 21, subclause 270(2)

Clause 270(1) of the bill is a criminal penalty provision which relates to the use and disclosure of information obtained by a person in their capacity as an entrusted public official. Clause 270(2) provides that the obligations do not apply if the use or disclosure of the information is authorised by a provision within Part 27 of the bill, or is in compliance with a requirement under a law of the Commonwealth or a prescribed law of a State or Territory. A person wishing to rely on clause 270(2) bears an evidential burden in relation to that matter, and thus bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. The Committee notes that in the explanatory memorandum, this approach is said to be justified because the matters are 'peculiarly within the defendant's knowledge and not available to the prosecution'. The Committee leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.

Where matters are peculiarly within the defendant's knowledge and not available to the prosecution, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at page 29) indicates that it is legitimate to place the evidential burden in relation to that matter on the defendant. The approach taken in clause 270(2) is consistent with this.

Thank you for bringing these issues to my attention and I trust that the Committee's concerns have been fully addressed.

Yours sincerely

GREG COMBET

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Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
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17 JUN 2011

Dear Senator Coonan

I understand that the Senate Standing Committee for the Scrutiny of Bills has requested a response in relation to its comments regarding the Competition and Consumer Amendment Bill (No. 1) (the Bill) made in *Alert Digest No. 4 of 2011* (11 May 2011).

The Bill amends the *Competition and Consumer Act 2010* to ban anti-competitive price signalling, targeting in particular the banking sector where the Australian Competition and Consumer Commission (ACCC) has already advised the Government that there is strong evidence of anti-competitive price signalling occurring.

The ACCC wrote to the Government on 28 January 2010 advising that there was a significant gap in Australia's competition laws which allowed banks to price signal. The ACCC said it was particularly concerned about the behaviour of 'some of the banks in signalling in advance what their response will be to a change in interest rates by the Reserve Bank'.

The ACCC also recently testified in the Senate Economics References Committee's inquiry into banking competition that banks were publicly price signalling their intended interest rate moves to each other and that:

> *'The problem with that sort of comment – the evil in it, if you like – is that it says to competitors, "If you increase your interest rates I will follow", which means you are signalling to the competitor that if they increase their interest rates they would need to worry about being stuck out there on their own and losing market share'.*

As outlined in the Explanatory Memorandum, the application of the anti-competitive price signalling prohibitions by way of regulation allows a comprehensive assessment to be undertaken by the Government as to the potential impacts of the new prohibitions on specific goods and serviced before they are applied to those goods and services.

The Government would only extend these laws to other sectors of the economy after further detailed review and consideration.

As indicated by the Committee, any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing the Parliament with the opportunity to scrutinise the application of these new prohibitions to specific sectors.

I trust this additional information is of assistance to the Committee.

Regards

WAYNE SWAN

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

Ministerial No: 102825

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

9 JUN 2011

Dear Senator Helen,

Thank you for your letter of 24 March 2011 in which you raised issues identified in the Scrutiny of Bills Committee's (the Committee) *Alert Digest No. 3 of 2011 (23 March 2011)* relating to the Customs Amendment (Serious Drugs Detection) Bill 2011.

In response to the Committee's view that the principle of appropriately limiting equipment capacity should be included in the primary legislation, a Government amendment to the Customs Amendment (Serious Drugs Detection) Bill 2011 has been drafted.

The proposed amendment will create a requirement, in the primary legislation, that equipment used for an internal non-medical scan must be configured so that its use is limited to that necessary to produce an indication that a person may be internally concealing a suspicious substance.

I understand that the proposed amendment will be considered at the Committee's meeting of 15 June 2011 and trust that it will be acceptable to your Committee.

The contact officer for this matter in the Australian Customs and Border Protection Service is Sally Macourt, Acting Director Executive Office Passengers whose contact details are sally.macourt@customs.gov.au or phone (02) 6275 8056.

I look forward to your response.

Yours sincerely

Brendan O'Connor

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ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

14 JUN 2011

AG-MC11/06133

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

Dear Senator Coonan

Thank you for your letter of 12 May 2011 seeking my response to issues identified by the Scrutiny of Bills Committee in its *Alert Digest No.4 of 2011* (11 May 2011) concerning the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 and the Intelligence Services Legislation Amendment Bill 2011.

In relation to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the Family Violence Bill) the Committee seeks further advice about item 48 in Part 2, Schedule 1. The Family Violence Bill amends the *Family Law Act 1975* (Cth) to introduce new measures to safeguard children and their families within the family law system. Various research reports provide a strong evidence base for the reforms, and a number discuss the complexity of the existing family law framework. This concern is also evident in a number of submissions to the inquiry into the Family Violence Bill being conducted by the Senate Standing Committee on Legal and Constitutional Affairs (the LACA Committee).

The Family Violence Bill prioritises the best interests of children and the safety of those who are suffering or at risk of family violence and abuse. To ensure the best result for children, the Family Violence Bill was cast to apply to as many family law cases as possible. I note that the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which introduced the 2006 family law reforms, contains a range of different application provisions. Some apply to 'orders' made on or after the commencement date, and similarly reach back to proceedings instituted before the commencement of that Act.

The regulation making power in item 48 was drafted to ensure that certain proceedings, such as part-heard, reserved judgment and appeal matters, could be carved out from application.

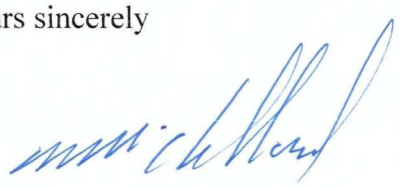
In her submission to the LACA Committee, the Chief Justice of the Family Court of Australia, the Hon Diana Bryant, highlighted the need to avoid double-reporting of family violence and child abuse. Her concerns arise in relation to transitional issues arising from the repeal of section 60K of the Family Law Act. While I am still considering the Chief Justice's

concerns, this is the type of complex issue that the regulations might also be enlivened to address.

I emphasise that the nature of these transitional, application and savings issues do not affect the substantive operation of the important measures proposed by the Bill. As stated in the explanatory memorandum to the Family Violence Bill, the Bill is intended to provide better protection for children and families at risk of violence and abuse; it is intended to prioritise the safety of children over the cost and convenience to the courts, witnesses and parties to family law proceedings.

I propose to write separately to you about the Intelligence Services Legislation Amendment Bill 2011, and will endeavour to provide this response to you as soon as possible.

Yours sincerely



Robert McClelland

SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation

REF:C11/1518

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

14 JUN 2011

Dear Senator Coonan Helen

I am writing in response to comments concerning the Governance of Australian Government Superannuation Schemes Bill 2011 (the Bill) contained in the Scrutiny of Bills Committee's Alert Digest No.4 of 2011 (11 May 2011). As you are aware, the Bill was introduced into Parliament as part of a broader package of legislation on 24 March 2011. The Committee has sought my advice regarding several provisions in the Bill. This advice is set out below.

Subclauses 32(1), 33(2), 33(3) and 33(4) – taxation

Subclauses 32(1), 33(2), 33(3) and 33(4) relate to the application of taxation laws to CSC and the superannuation schemes it will be responsible for administering. These either replicate or are consequential on current provisions contained in other Superannuation Acts. These clauses are being moved from those Acts to the Bill to consolidate in a single Act the governance provisions relating to the Commonwealth Superannuation Corporation (CSC) and the schemes it will be responsible for administering.

Subclauses 32(1) and 33(2) replicate, for example, provisions currently contained in subsection 26(3) of the *Superannuation Act 1990* and subsection 22(2) of the *Superannuation Act 2005* that are being repealed.

Subclauses 32(1) and 33(2) allow CSC and the superannuation schemes to be subjected to taxes through the making of regulations. This flexibility is to enable any new taxation legislation or changes in taxation legislation to be applied to CSC and the relevant superannuation schemes if a situation arose where it would not be possible to amend the primary legislation in the required timeframe. This would ensure that any new taxation legislation or changes to such legislation can be applied to CSC and the funds that it administers at the same time as it would apply to other superannuation trustees and superannuation funds.

The taxation provisions for each scheme are currently contained in the relevant Act establishing each particular scheme. This provides flexibility to apply different taxation treatment to each individual scheme should the need arise. Subclause 33(3) ensures that this flexibility continues after consolidation of the various taxation provisions into the Bill.

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The flexibility is needed because unlike the other superannuation schemes which CSC will be responsible for administering, the Public Sector Superannuation Accumulation Plan (PSSAP) is a fully funded accumulation fund. The other superannuation schemes that CSC will be responsible for administering are partially or fully unfunded defined benefit superannuation schemes.

Subclause 33(4) replicates provisions currently in subsections 22(3) and 22(4) of the *Superannuation Act 2005* that are being repealed. The subclause would enable regulations to be made to tax the PSSAP and the PSSAP Fund on the same basis as accumulation schemes in the broader superannuation industry. This may need to be considered if, for example, changes were made to PSSAP to align its features and services with such schemes in the broader superannuation industry. As the operational arrangements for the PSSAP are primarily contained in the PSSAP Trust Deed (a legislative instrument made under the *Superannuation Act 2005*), any such changes would be likely to be made through amendment of the Deed. Subclause 33(4) enables any required changes to the taxation of the PSSAP and the PSSAP Fund to be aligned with the timing of any such changes.

Subclause 34(3) – source of funds for paying remuneration and allowances

Subclause 34(3) enables regulations to be made to allow changes to be made to the source of funding for paying remuneration and allowances to the Chair and directors of CSC for functions performed in relation to the PSSAP and the PSSAP Fund.

Currently, provisions in relation to the source of funds for paying the remuneration and allowances of the Australian Reward Investment Alliance, which will become CSC on 1 July 2011, are set out in the PSS Trust Deed (a legislative instrument that is made under the *Superannuation Act 1990*). Therefore, any changes to the source of monies for paying remuneration and allowances can be made through delegated legislation. As a result of consolidating the governance arrangements for CSC into one single Act these provisions are effectively being moved from the PSS Trust Deed to the Bill.

Subclause 34(3) preserves the current flexibility (available under the PSS Trust Deed) but only in relation to changing the source of monies for payment of remuneration and allowances when functions are being performed in relation to the PSSAP and the PSSAP Fund. This flexibility is required, as unlike the other superannuation schemes which CSC will administer, the PSSAP is a fully funded accumulation superannuation scheme and as such situations may arise in the future where it is necessary to differentiate the source of funding between the types of schemes that CSC administer.

In the event of regulations being made under subclauses 32(1), 33(2), 33(3), 33(4) or 34(3), the primary legislation would be subsequently amended at the next available opportunity to reflect the changes made through the regulations.

I trust that this information will assist the Committee with its consideration of the Bill.

Yours sincerely

Penny Wong

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

RECEIVED
16 JUN 2011
Senate Standing C'ttee
for the Scrutiny
of Bills

10/13702

15 JUN 2011

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

Dear Senator Coonan

Thank you for your letter of 12 May 2011 seeking my response to issues identified by the Scrutiny of Bills Committee in its Alert Digest No.4 of 2011 (11 May 2011) concerning the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* and the *Intelligence Services Legislation Amendment Bill 2011*. I recently wrote to you in relation to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*. I am now writing to you in regards to the *Intelligence Services Legislation Amendment Bill 2011* (the Bill).

Trespass on personal rights and liberties, Schedule 1, item 18

The Alert Digest notes that item 18 of Schedule 1 of the Bill proposes to insert a new subsection 36(c) into the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). The Committee has noted the advice in the Explanatory Memorandum that the proposed provision is consistent with arrangements for other Australian Intelligence Community (AIC) organisations. In order to better evaluate the provision the Committee has sought my advice as to what, if any, detriment the provision will cause to individuals (e.g. existing or potential AIC staff members) and particularly whether or not these provisions unduly diminish the rights of persons to be notified of, and seek review of, security assessments.

I can advise the Committee that the provision would have a negligible impact on individuals (e.g. existing or potential AIC staff members). Furthermore, the provision would not unduly diminish the rights of persons to be notified of, and seek review of, security assessments. The amendment applies to a limited category of information and will only impact on a small group of persons. These are persons who have actively applied for employment with the intelligence community and voluntarily agreed to undergo a rigorous security vetting process. In terms of taking away the rights of persons to be notified of, and seek review of, security assessments, the impact of the amendment is very minor.

It is important to recognise that there is no merits review or independent appeals process for the overall employment decision within the AIC. Currently, a person could seek merits review over one small piece of information (regarding the ASIO information) but is not able to seek similar review of the employment decision itself, so the merits review would be of little practical benefit. Individual agencies will have their own internal policies regarding feedback to unsuccessful applicants (in some cases the policy is not to provide any feedback), and separating out one small aspect of that decision for separate review can lead to inconsistent outcomes.

The amendment is appropriate given that employment decisions within the AIC need to be made carefully in order to ensure suitability of applicants and minimise the risk of compromising national security. The way that the current provisions operate can, in some instances, act as a barrier to information sharing.

The amendment will only exclude from the security assessment provisions in Part IV of the ASIO Act the communication by ASIO of information relating to the engagement, or proposed engagement, of a person by another intelligence or security agency within the AIC. This exclusion would not apply to the communication by ASIO to other AIC agencies of other kinds of information not relating to employment. It would also not apply to the communication by ASIO to non-AIC agencies of information relating to employment. For example, if ASIO were to communicate information relating to employment to another Australian Public Service Department or agency, which is not an AIC agency, this would not be excluded from the operation of Part IV of the ASIO Act.

Background to the provision

Part IV of the ASIO Act governs the provision of "security assessments" which are a defined subset of advice provided by ASIO under section 17 of the ASIO Act. Part IV contains a number of requirements that apply to the provision of adverse or qualified security assessments by ASIO. These requirements include a right to seek merits review of a security assessment in the Security Appeals Division of the Administrative Appeals Tribunal. ASIO's role has always included providing security assessments related to certain administrative decisions ("prescribed administrative action"), such as visa decisions and security clearances for Commonwealth public servants to access classified information. The security assessment provisions under Part IV of the ASIO Act provide accountability and appropriate notification and review mechanisms for the security assessment part of those decisions.

Section 39 of the ASIO Act provides that a Commonwealth agency must not take or refuse to take 'prescribed administrative action' on the basis of any communication by ASIO relating to the person that does not amount to a security assessment. This means that, when providing another Commonwealth agency with any recommendation, opinion or advice relevant to prescribed administrative action, ASIO must ensure that this recommendation, opinion or advice is in the form of a security assessment for which ASIO is accountable.

Within the intelligence community, only ASIO is required to communicate information relevant to prescribed administrative action such as employment within an AIC agency in the form of a "security assessment" (which involves notification and review rights). Other AIC agencies may provide the same type of advice about employment to another AIC agency, however only ASIO's advice is a "security assessment" with notification and review mechanisms. Other AIC agencies are able to share information about employment decisions with each other as they are not bound by the same administrative requirements and do not have to provide the information as a "security assessment".

The difference is perhaps best illustrated by the following scenarios.

1. Person X, an ex-ASIO employee, has applied for a job in another AIC agency. The other AIC agency asks ASIO for information about X's employment in ASIO. If the ASIO response contains information that is prejudicial to X's job application with the other AIC agency, ASIO's advice to the AIC agency will be reviewable in the Administrative Appeals Tribunal. However, the decision by the other AIC agency to not employ X will not be reviewable.

2. Person X, an ex-employee of another AIC agency, has applied for a job in ASIO. ASIO asks the other AIC agency for information about X's employment in that agency. The advice from the other AIC agency will not be reviewable in the Administrative Appeals Tribunal. Further, ASIO's decision to not employ X will not be reviewable.

In sharing information, other AIC agencies are not subject to the requirement to notify the person or provide a statement of reasons for doing so, and potential employees do not have access to merits review. This facilitates the movement of staff between agencies, and helps to ensure that security clearances are transferrable between AIC agencies. This amendment will put ASIO on the same footing as those other agencies.

Retrospective effect, Schedule 1, item 27

The Committee has sought my advice as to whether giving subsection 15(7) retrospective application could have any possible detrimental effect on a person. Given that Privacy Rules provide important privacy safeguards, I can confirm that giving subsection 15(7) retrospective application would not have any possible detrimental effect on a person. This application provision is necessary to ensure the validity of acts done in reliance on the existing Privacy Rules. This ensures that acts that were done so as to apply privacy principles are preserved.

Agencies have always acted on the basis that Privacy Rules are binding, and have therefore acted in a manner that upholds privacy principles. As Privacy Rules provide important privacy safeguards, it is important to preserve acts done in reliance on these Rules, which uphold and apply privacy principles. The Inspector-General of Intelligence and Security (IGIS) is responsible for oversight of the activities of the agencies. This oversight includes their compliance with relevant laws, Ministerial guidelines and directions. Importantly, this oversight would include the power to consider Privacy Rules made under section 15 and the application of these rules by agencies.

The Government considers that it is important for the Privacy Rules of intelligence agencies to be publicly available, in order to provide transparency and enable the public to understand how the privacy principles apply to these agencies. Therefore, the Government remains committed to ensuring that the Privacy Rules continue to be made public on the websites of the relevant agencies. This is the current practice and will continue regardless of their status under the *Legislative Instruments Act 2004* (which requires publication of a legislative instrument).

The action officer for this matter in my Department is Laura Munsie who can be contacted on 6141 2925.

Yours sincerely

Robert McClelland

DEPUTY PRIME MINISTER
TREASURER

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

17 JUN 2011

Dear Senator Coonan

I refer to the letter from the Secretary of the Senate Scrutiny of Bills Committee (the Committee) of 12 May 2011 regarding the Committee's comments on the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011.

The Government welcomes the opportunity to clarify the approach that has been developed and put forward as part of the National Credit Reforms including reforms to the regulation of credit cards announced as part of the *Competitive and Sustainable Banking System* Package.

The Committee has raised issues with several provisions in the Bill, including with the scope of regulation making powers and a number of the penalty arrangements. Specific responses to each of the concerns raised by the Committee are provided in the Attachment to this letter.

The Government is committed to ensuring adequate flexibility in the new arrangements to provide strong protections for consumers whilst providing a commercially workable outcome for industry which reduces implementation costs. I believe the Bill achieves the appropriate regulatory balance.

In addition, any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing Parliament with the opportunity to scrutinise the application of the new regulations.

I trust this information will be of assistance to you.

Yours sincerely

WAYNE SWAN

Attachment

NATIONAL CONSUMER CREDIT PROTECTION AMENDMENT (HOME LOANS AND CREDIT CARDS) BILL 2011

Explanatory memorandum

The Committee sought advice as to whether an amended explanatory memorandum that includes an index can be issued. The explanatory memorandum can be amended to include an index that cross-references every provision in the Bill. A revised explanatory memorandum will be provided to the Senate incorporating the Government's Parliamentary Amendments and the index, and addressing other matters raised in the letter from the Committee.

Strict liability – various clauses

The Bill contains amendments to the National Consumer Credit Protection Act 2009 (Credit Act), and adopts the same approach to penalties as the Credit Act and to Commonwealth legislation generally. The Bill imposes strict liability offences for breaches that are obvious and unambiguous. These penalties are relatively low.

Offences in the Bill that carry strict liability do not require a 'fault' element to be proved and are procedural in their application. The application of strict liability to these provisions will significantly enhance the ability of the Australian Securities and Investments Commission (ASIC) to enforce the legislation. This is because infringement notices can be issued for contraventions of strict liability offences. ASIC may issue an infringement notice to address one-off or irregular instances of non-compliance. The availability of civil and criminal penalties enables ASIC to seek more significant penalties, usually in response to serious or repeated non-compliance.

The Government has introduced Parliamentary Amendments to omit two strict liability offences, first, where a licensee does not have a website that allows a consumer to generate a Home Loan Key Facts Sheet, and second, where a licensee enters into a contract without an up-to-date Credit Card Key Facts Sheet having been provided to the borrower. As a result of discussions with stakeholders since the introduction of the Bill it has been considered that strict liability may not be appropriate for these offences due to circumstances beyond the reasonable control of the licensee making contravention less unambiguous.

Reversal of onus

The Bill includes a number of offence provisions where defences are specified and an evidential burden is placed on a defendant. This approach has been adopted where the defendant will be in a better position to address the issue

through the adoption of appropriate compliance systems or that the matters are within their knowledge or control.

For example, subclause 133BF(2) and (3) allows a defence to the prohibition on making credit limit increase invitations where a consumer has provided their express consent. In this case the credit provider is best placed to record that the consent has been given so that consent can be relied upon when using the defence. It is therefore appropriate that the evidential onus be with the defendant to demonstrate this fact.

In relation to subclause 133BL(2), based on the recommendations on the House of Representatives Standing Committee on Economics inquiry into the Bill the Government has made Parliamentary Amendments to remove the restriction on approving the use of a credit card in excess of a credit limit. As a consequence, subsection 133BL has also been removed.

Henry VIII clause - Delegation of legislative power

Proposed section 30B would allow Division 3 of the National Credit Code to be subject to any regulations made under the power set out in subsection 30B(1).

Subsection 30B(1) is a provision enabling regulations to be made in relation to, first, interest charges under credit card contracts, and, second, how matters relating to interest charges may be described in credit card contracts and other documents.

In respect of the first head of regulation-making power, the Credit Act currently specifies the maximum amount of interest that can be charged under any credit contract (section 28 of the National Credit Code, Schedule 1 to the Credit Act). The proposed regulation-making power is therefore not open-ended, but would be subject to limitations in that, first, it only applies to credit card contracts, and, second, it would allow regulations to be made that address the operation of 'interest free' periods, to regulate interest where it is less than the maximum permitted under the Code may be imposed by the credit provider. This power, if used, would allow for consistency in the way in which 'interest free' periods operate, and would avoid consumers being confused by differences that are not transparent or easily understood.

The second head of regulation-making power is limited to regulating the way in which matters relating to interest charges may be described, and is therefore relatively confined in scope. It is intended to use this power to enable consumers to more readily distinguish between different types of 'interest free' periods, so that different methods of imposing interest will need to be described in different ways.

Given that the regulations will need to describe these methods in detail, and that new methods of imposing interest may be developed by credit providers, it is considered this is a topic where a delegation of powers is appropriate.

In addition, any regulation made under these provisions would be a legislative instrument and subject to disallowance by Parliament.

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MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

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Senator the Hon. Helen Coonan
Chair
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Dear Senator ~~Coonan~~ Helen

Thank you for the Senate Standing Committee for the Scrutiny of Bills' letter of 12 May 2011 in relation to Committee's *Alert Digest No.4 of* 2011 (11 May 2011) concerning the *Tax Laws Amendment (2011 Measures No.2) Bill 2011* (the Bill). The Deputy Prime Minister has asked me to respond to you as I have portfolio responsibility for this matter.

The Committee's letter requested an explanation as to why safeguards and processes, in the amendment in Schedule 3, cannot be included in the primary legislation.

Current laws allow the use of tax file numbers (TFNs) by the superannuation industry. These laws apply to trustees of superannuation funds, approved deposit funds, exempt public sector superannuation schemes, retirement savings account (RSA) providers, and employers.

These new amendments apply to superannuation fund trustees and RSA providers and permit them to locate multiple accounts held by the same person within a single fund and across multiple funds, and also to facilitate account consolidation.

Significant safeguards to protect individuals' TFNs are already in place, as current laws allow the use of TFNs by the superannuation industry. First, there are the rules set out in the *Superannuation Industry (Supervision) Act 1993*, which provide clear limitations on the quotation, use, and transfer of TFNs and also details the procedure to be followed for recording and destroying records of TFNs.

Further safeguards are contained in the *Tax Administration Act 1953* (TAA), which provides for penalties where there is unauthorised use and recording of TFNs. Specifically, section 8WA and 8WB of the TAA provide that the penalty is 100 penalty units ($11,000) or imprisonment for two years, or both. All these safeguards will continue to apply in relation to the new amendments.

The regulation making power in question provides additional scope for further restrictions to be placed on the use of TFNs in the account consolidation process, over and above the key safeguards already mentioned. Consolidation requires a rollover or transfer of a superannuation benefit and

there are already detailed rules in place governing rollovers and transfers in Divisions 6.4 and 6.5 of the *Superannuation Industry (Supervision) Regulations 1994*. Given the existing rules around rollovers and transfers are already set out in detail in regulations it is considered appropriate that any new rules that will be developed to further encourage account consolidation in superannuation, included any additional safeguards and processes that must be followed in the consolidation process, are also prescribed in complimentary regulations.

The Committee's letter also requested an explanation as to why, in the amendment in Schedule 4, it is necessary for overriding the operation of subsection 12(2) of the *Legislative Instruments Act 2003* to allow for a regulation specifying the goods and services tax (GST) treatment of an Australian tax, fee or charge to be made with retrospective effect.

When the GST was introduced, the Commonwealth, States and Territories agreed that the GST would apply to the commercial activities of government at all levels and that the non-commercial activities of government would be outside of the scope of the GST.

Accordingly, under the *Intergovernmental Agreement on Federal Financial Relations* (IGA) the Parties agreed that Division 81 of the GST Act will exempt Australian taxes, fees and charges from GST in accordance with the following principles:

- taxes that are in the nature of a compulsory impost for general purposes and compulsory charges by the way of fines or penalties will be exempt from GST;
- regulatory charges that do not relate to particular goods or services will be exempt from GST, including:
  - fees and charges levied on specific industries and used to finance particular regulatory or other activities in the government sector; and
  - licences, permits and certifications that are required by government prior to undertaking a general activity.

Division 81 of the GST Act previously allowed the Commonwealth Treasurer to specify by legislative instrument (a Determination), that the payment or discharging of the liability to pay any Australian tax, fee or charge is not the provision of consideration. The effect of the instrument is that taxes, fees and charges included in the Determination are exempt from GST.

Schedule 4 of the Bill amends Division 81 and is intended to replicate the GST treatment of taxes, fees and charges as currently provided by the Determination. The Bill also transitionally grandfathers the last Determination to maintain the same GST outcomes for taxes, fees and charges prior to this amendment.

The regulation making power in Schedule 4 of the Bill is intended to provide a failsafe to ensure that the GST treatment of taxes, fees and charges does not change under the new mechanism. This power allows for retrospective application to ensure that the GST treatment of a tax, fee or charge that may prove to not be covered by the new law can be rectified retrospectively to ensure a seamless transition and to ensure that taxpayers do not incur unnecessary GST.

For instance, a fee that had always been treated as GST exempt and is intended to not attract GST may be found to not be covered by the new law and therefore becomes taxable. If a retrospective regulation is not allowed to be made then the government agency which charges the fee would be required to remit GST. Allowing for a retrospective application of a regulation will permit the government to correct the tax treatment to ensure taxpayers are not unintentionally liable for GST.

Conversely, a retrospective regulation could also be made where a fee that was previously taxable no longer attracts GST. If the regulation was not retrospective and taxpayers had incorrectly claimed an input tax credit on the belief the supply was taxable, the taxpayer would have to repay the credit and be liable for penalties for incorrectly assessing their GST liability.

Any regulation made under Schedule 4 of the Bill would be made in accordance with the principles agreed to in the IGA and through procedures agreed to by the Commonwealth and the States and Territories, in accordance with the *A New Tax System (Managing the GST Rate and Base) Act 1999*. The agreed procedures involve consultation and agreement between the Commonwealth and the States and Territories on all changes made to the GST base. Following consultation, any proposed regulation would require the unanimous agreement of the members of the Ministerial Council for Federal Financial Relations.

Please do not hesitate to contact me if you require any additional information.

Yours sincerely

BILL SHORTEN

07 JUN 2011