SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2011

12 October 2011

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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

TWELFTH REPORT OF 2011

The Committee presents its *Twelfth 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:

Business Names Registration Bill 2011

Introduced into the House of Representatives on 17 August 2011
Portfolio: Innovation, Industry, Science and Research

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 9 of 2011*. The Minister responded to the Committee's comments in a letter dated 21 September 2011. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2011 - extract

Background

This bill is a package of three bills and is a regulatory reform of the Council of Australian Governments.

The bill provides for the establishment of a National Business Names Registration System.

'Henry VIII' clause
Schedule 1, clause 15

Clause 15 of the bill confers a power for regulations to modify the primary legislation in broader terms than the power discussed above. It provides that the operation of the legislation may be modified so that the legislation does not apply to a matter that is dealt with by a law of the referring/adopting State or an affected Territory, or so that no inconsistency arises between the business names legislation and laws of the referring/adopting States or affected Territories. It is acknowledged that the Bill will provide the basis for a national regulatory scheme and that this may justify this approach. Nevertheless, it is regrettable that the explanatory memorandum does not address the justification of this delegation of legislative power. The Committee therefore **seeks the Minister's advice as to the appropriateness of this approach**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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 15

The national business names registration scheme is a national scheme which replaces existing State/Territory schemes. In these existing schemes, some States/Territories regulate, for security and other reasons, the display of business names, where such names might indicate, for example, that mining explosives were on particular premises. There is a wide variety of existing regulatory practices among the States/Territories relating to the use of business names. The Commonwealth has no wish to interfere with such regulatory restrictions, and the purpose of clause 15 is to expeditiously allow such State/Territory restrictions to be lawful.

Committee Response

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

Alert Digest No. 9 of 2011 - extract

Reversal of onus
Determination of important matters by regulation
Part 2, clauses 18, 19, 20 and 21; Part 4

In contrast to the discussion above, unfortunately the explanatory memorandum does not address the appropriateness of the imposition of an evidential burden of proof in relation to subclauses within these provisions, which identify a number of exceptions in relation to each of the offences. In addition, each of the exceptions includes 'other circumstances prescribed by the regulations'. It is difficult to determine the appropriateness of imposing an evidential burden in relation to circumstances which remain to be specified. The Committee therefore **seeks the Minister's explanation of the appropriateness of this approach, particularly given that important matters can be included in regulations rather than the primary act.**

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; and 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

Reversal of onus; Determination of important matters by regulation
Part 2, clauses 18, 19, 20 and 21; Part 4

The clauses in question relate to the conduct of a business, and therefore deal with matters peculiarly within the defendant's knowledge that would be extremely difficult, *and/or* very expensive, for the Commonwealth to prove *(Alert Digest 1997/2*, p. 11). Therefore it is proposed that the onus of proof be reversed in such cases. An analogous example relates to the running of a business for profit in relation to the *Copyright Act 1968*, section 132APC, where the onus of proof is also reversed.

The determination of matters by regulation relates to the exempting of entities from the penalties referred to above. Under clause 18, for example, an entity is exempt from penalties for trading under an unregistered business name if it is registered on a 'notified State/Territory register'. It is possible that in the future, it may be desirable that entities registered on other sorts of registers should be exempted from the penalties. Giving the Minister the power make such exemptions by regulation will allow such exemptions to be made expeditiously.

Committee Response

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

Alert Digest No. 9 of 2011 - extract

Review of decisions
Clause 56

Clause 56 provides that decisions specified in the table are subject to administrative review (internal review and Administrative Appeals Tribunal review). The category of persons who may seek review for a decision to register a business name to an entity is limited to 'an entity in relation to whom there is a real risk of substantial detriment because of the registration of the business name'. Unfortunately the explanatory memorandum does not explain why the standing requirement for review is more restrictive than the default requirement under section 27 of the *Administrative Appeals Tribunal Act*. The Committee **therefore seeks the Minister's advice as to the justification for the proposed approach**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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

Review of decisions; clause 56

Clause 56 provides that certain specified decisions are subject to administrative review (internal review and Administrative Appeals Tribunal review), upon an application from 'an entity in relation to whom there is a real risk of substantial detriment because of the registration of the business name'. It is necessary to impose this limitation on those who might seek a review to avoid vexatious applications for review which could be conducted, for example, for the purpose of disrupting a competitor's business activities.

Committee Response

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

Alert Digest No. 9 of 2011 - extract

Reversal of onus
Schedule 1, clause 77

Clause 77 of the Bill imposes custodial penalties in relation to the misuse of confidential information. A number of exceptions to the offences apply, but the evidential burden is placed on the defendant in relation to them. It is regrettable that the explanatory memorandum does not address the appropriateness of imposing an evidential burden on a defendant in relation to establishing a number of exceptions in relation to the offences. The Committee therefore **seeks the Minister's explanation as to the justification of the approach**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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; clause 77

This clause relates to a person using confidential information in a way that is not appropriate in the circumstances. Whether the use of information might be appropriate in particular circumstances is something which is peculiarly within the defendant's knowledge, and which would be extremely difficult, *and/or* very expensive, for the Commonwealth to prove *(Alert Digest 1997/2,* p. 11). It is therefore proposed that the onus of proof be reversed in such cases.

Committee Response

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

Alert Digest No. 9 of 2011 - extract

National scheme – parliamentary scrutiny

While the Committee understands the arrangements by which cooperative schemes are often implemented and the arguments in favour of a uniform national approach, it is concerned to ensure that legislation is subject to appropriate legislative scrutiny. The Committee would welcome an opportunity for it to consider and comment on an exposure draft of any amendments proposed to this legislation prior to their adoption. **The Committee therefore requests the Minister's advice about the process by which any future amendments will be agreed to between the Commonwealth and the other jurisdictions for this and related Acts, and whether any proposed changes will be referred to this committee for comment prior to their adoption (whether in the form of an exposure draft or in another form).**

> *Pending the Minister's reply, the Committee draws Senators' attention to the issue, as the approach 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

National scheme - parliamentary scrutiny

The Intergovernmental Agreement for Business Names of 2009 provides that any amendments to the business names legislation will require the approval of the Ministerial Council for Corporations. Any legislative amendments would then be subject to the normal parliamentary processes of the Commonwealth.

Committee Response

The Committee thanks the Minister for this response. The Committee is disappointed that the Minister has declined the opportunity to obtain its technical expertise in scrutiny matters at an early stage in the development of future laws and remains willing to be consulted in future.

Business Names Registration (Transitional and Consequential Provisions) Bill 2011

Introduced into the House of Representatives on 17 August 2011
Portfolio: Innovation, Industry, Science and Research

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 9 of 2011*. The Minister responded to the Committee's comments in a letter dated 21 September 2011. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2011 - extract

Background

This bill is a package of three bills which aims to establish a national business names registration system, a regulatory reform of the Council of Australian Governments.

The bill proposes to:

- make transitions provisions covering a range of matters relating to business names registration*;* and
- make consequential amendments to a number of Acts.

'Henry VIII' clause
Schedule 1, subclause 10(3)

Subclause 10(3) provides that this Act and the Business Names Registration Act are to have effect subject to any modifications made by the regulations to deal with business names in relation to which outstanding matters under the law of a State or territory are to be resolved. It is regrettable that the explanatory memorandum does not address the justification of this delegation of legislative power (it amounts to a 'Henry VIII clause' in which subordinate legislation can override the effect of the primary legislation). The Committee **therefore seeks the Minister's advice as to the appropriateness of this approach**.

Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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; Schedule 1, subclause 10(3)

The legislation was drafted after lengthy discussions with the States/Territories. Currently no two State/Territory schemes are identical, including in the way they deal with outstanding matters, such as appeals against decisions to deregister business names. Since the timing and outcome of such appeals under State/Territory law are not possible to predict, it is proposed that regulations allow modifications to be made to the primary legislation so as to expeditiously deal with any eventuality stemming from whatever decision might be made under State/Territory law.

Committee Response

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

Clean Energy Bill 2011

Introduced into the House of Representatives on 13 September 2011
Portfolio: Climate Change and Energy Efficiency

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 11 of 2011*. The Minister responded to the Committee's comments in a letter dated 12 October 2011. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2011 - extract

Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill sets out the structure of the mechanism and process for its introduction. These include:

- entities and emissions that are covered by the mechanism;
- entities' obligations to surrender eligible emissions units;
- limits on the number of eligible emissions units that will be issued;
- the nature of carbon units;
- the allocation of carbon units, including by auction and the issue of free units;
- mechanisms to contain costs, including the fixed charge period and price floors and ceilings;
- linking to other emissions trading schemes;
- assistance for emissions-intensive, trade-exposed activities and coal-fired electricity generators;
- monitoring, investigation, enforcement and penalties;
- administrative review of decisions; and

- reviews of aspects of the mechanism over time.

Possible insufficient Parliamentary Scrutiny
Subclause 15(4)

Subclause 15(4) of the Bill provides that section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to regulations to declare a carbon pollution cap pursuant to clause 14 of the Bill. However, subclause 15(2) provides for the disallowance of such regulations by either House of Parliament. The disallowance provision in the *LIA* states that an instrument or provision of an instrument will be taken to have been disallowed in circumstances where a notice of a motion to disallow has not, after 15 days of the giving of that notice, been disposed of. Subclause 15(3) of the Bill provides that if neither House passes a resolution disallowing the regulations within 15 days of a notice having been given, that 'the regulations take effect on the day immediately after the last day upon which such a resolution could have been passed if it were assumed that the notice to disallow the regulations was given in each house on the last day' for issuing a notice after the regulations have been tabled in Parliament. Unfortunately the explanatory memorandum does not outline the reasons for the proposed approach to disallowance, and the Committee therefore **seeks the Minister's advice as to the justification for excluding the usual operation of the disallowance provision in section 42 of the *Legislative Instruments Act*.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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

Possible insufficient Parliamentary scrutiny
Clause 15

The intention of clause 15 is to ensure that the regulations do not take effect before the opportunity for disallowance had passed. The regulations would set the carbon pollution cap which limits the number of units that could be auctioned and issued for free under Parts 7 and 8 of the Bill. The carbon pricing mechanism would not work effectively if a carbon pollution cap commenced operation and units were issued under that cap, but the regulations setting the cap were disallowed some time later.

Clause 15 adopts the standard means of delaying the commencement of regulations or other legislative instruments until after the disallowance period (see, for instance, *Financial Management and Accountability Act 1997* (FMA Act), section 22; *Lands Acquisition Act 1989*, section 46; *Family Law Act* 1975, section 33C; *Interstate Road*

Transport Act 1985, section 43A; *Remuneration Tribunal Act 1973*, section 7). The Scrutiny of Bills Committee concluded that section 22 of the FMA Act 'achieve[d] an appropriate balance between the financial needs of the government and the need for Parliamentary scrutiny' (Alert Digest No.2 of 1999). It took no issue with the absence of provision for disallowance by default (as reflected in section 42(2) of the *Legislative Instruments Act 2003).*

In fact, clause 15 of the Clean Energy Bill provides greater opportunity for Parliamentary scrutiny than section 22 of the FMA Act. It does not reduce the standard disallowance period of 15 sitting days. Even with the reduction in the disallowance period to five sitting days, the Committee concluded that section 22 was appropriate.

Clause 15 maintains the opportunity for parliamentary scrutiny. The Australian Government considers that a transparent and deliberate resolution of either House of the Parliament is required to disallow such a significant element of the carbon pricing mechanism.

Committee Response

The Committee thanks the Minister for this detailed response. The Committee **requests that the key aspects of the reply are included in the explanatory memorandum.**

Alert Digest No. 11 of 2011 - extract

Retrospective application
Clause 29

Clause 29 of the Bill is an anti-avoidance provision. It enables the Regulator to determine that the sole or dominant purpose of a scheme was to obtain the benefit of one or more threshold provisions in relation to a relevant facility for an eligible financial year by bringing 'facilities or activities below thresholds without reducing emissions from those facilities' (see page 254 of the explanatory memorandum). The effect of this provision is that in these circumstances a person is not entitled to obtain the benefit of the relevant threshold provision.

The provision applies in relation to any scheme entered into after 15 December 2008. Although the explanatory memorandum, at page 254, states that this is the date when the Government first announced the details of the CPRS, it is regrettable that no further justification is offered for this approach. As the anti-avoidance provision can apply to

arrangements undertaken prior to it becoming law the Committee **seeks the Minister's further explanation of the justification for its retrospective application.**

Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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

Retrospective application
Clause 29

The anti-avoidance provision in clause 29 of the Clean Energy Bill 2011 would give the Regulator a power to make a determination which would preclude a person from taking the benefit of a relevant threshold provision. The determination could be made if a person entered into or carried out a certain kind of arrangement after 15 December 2008.

Clause 29 would not have retrospective effect. It would not operate on rights and obligations existing before the commencement of the Clean Energy Bill 2011. It would operate on rights and obligations arising from the time of commencement by reference to past events. There is a clear distinction between the two situations and the latter does not involve retrospectivity (see Pearce and Geddes, *Statutory Interpretation in Australia,* 7th ed., 2011, [10.3]-[10.5]).

The relevant threshold provisions are amongst the provisions in Division 2 of Part 3 of the Clean Energy Bill 2011 imposing liability for emissions from facilities. These provisions exempt from liability facilities where emissions are less than a threshold amount (generally 25,000 tonnes of carbon dioxide equivalence).

There is potential for operators of facilities to split facilities artificially so that thresholds are not met and liability is avoided. Clause 29 is directed at artificial schemes which achieve this result.

The Carbon Pollution Reduction Scheme contained provisions similar to the Clean Energy Bill for imposing liability for emissions from facilities, including similar threshold provisions. On 15 December 2008, details of the proposed provisions were published in the Government's White Paper *(Carbon Pollution Reduction Scheme: Australia's Low Pollution Future).* From that date, large emitters have been on notice that the Government's policy is that, if a carbon pricing scheme is enacted, liability thresholds along these lines will apply.

The Carbon Pollution Reduction Scheme Bill 2009 contained a similar provision which applied by reference to the same date of 15 December 2008.

It is possible that since 15 December 2008 some large emitters have made artificial arrangements which are directed at avoiding the proposed liability thresholds and that, before the Clean Energy Bill commences operation, some large emitters will make those sorts of arrangements.

In cases where avoidance of a statutory scheme is likely to take place once details of the scheme are announced, there can be justification for making laws that take account of actions that occur from the date of announcement. In this case, there is clear justification for applying an anti-avoidance provision to arrangements made in anticipation of the introduction of carbon pricing so as to operate on rights and obligations which arise after commencement.

Committee Response

The Committee thanks the Minister for this detailed response and **requests that the key aspects of the reply are included in the explanatory memorandum. In light of the explanation provided the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The Committee also takes the opportunity to note that a distinction may be drawn between provisions which commence retrospectively and those which operate on rights and obligations by reference to past events. However, given the Committee's scrutiny role it takes the view that it may also be appropriate for it to comment in circumstances in which a government proposal is treated as having legal consequences prior to that proposal being enacted in legislation.

Alert Digest No. 11 of 2011 - extract

Retrospective effect
Clause 208

Clause 208 of the Bill provides that a court may order a person convicted of a criminal offence relating to fraudulent conduct may be ordered to relinquish a specified number of carbon units where carbon units issued to that person were attributable to the commission of the offence. Subclause 208(6) provides that 'it is immaterial whether the conviction occurred before, at or after the commencement of this section'. Regrettably this provision is not mentioned in the explanatory memorandum and the Committee therefore **seeks the Minister's advice as to the appropriateness of clause 208 applying in relation to convictions that occurred prior to the commencement of the section**.

Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it 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

Retrospective effect
Clause 208

Clause 208 would empower a court to order relinquishment of carbon units where the issue of the units was directly or indirectly attributable to the commission of an offence, including where a person was convicted of an offence before the commencement of the Clean Energy Bill 2011. As for clause 29, the provision would not have retrospective effect. It would not operate on rights and obligations existing before the commencement of the Clean Energy Bill 2011. It would operate on rights and obligations arising from the time of commencement by reference to past events.

The object of clause 208 is to ensure that carbon units obtained as the result of fraudulent conduct (for instance a false or misleading statement made to the Commonwealth) are subject to the possibility of relinquishment. The issue of carbon units in such circumstances could mean that carbon units have been issued that should not have been issued. This could distort the operation of aspects of the carbon pricing mechanism by denying others the capacity to obtain those units to satisfy their liabilities.

Whether the fraud in question occurred before or after the commencement of the Clean Energy Bill 2011, or the conviction in question occurred before or after the commencement of the Clean Energy Bill 2011, would not affect whether, as a matter of policy, the carbon units should be relinquished so that the distortions that misallocation creates can be remedied.

In any case, there are unlikely to be many instances of carbon units being issued directly or indirectly arising out of a fraud for which a conviction has been obtained before commencement of the Clean Energy Bill 2011. If a conviction is obtained before commencement, it is likely that the Regulator will become aware of the conviction and that carbon units will not be issued in ignorance of the fraud.

Committee Response

The Committee thanks the Minister for this detailed response and **requests that the key aspects of the reply are included in the explanatory memorandum**. **In light of the explanation provided the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**.

Alert Digest No. 11 of 2011 - extract

Standing appropriation
Subclause 303A(2) and 303B(3)

Subclause 303A(2) provides that the Consolidated Revenue Fund is appropriated for the purposes of paying amounts payable by the Commonwealth under a contract or arrangement with a constitutional corporation, authorised by the Treasurer, made for the purpose of protecting energy security.

In its *Fourteenth Report of 2005*, the Committee stated at page 272 that:

> The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies. In this instance, the explanatory memorandum at paragraph 6.191 merely repeats the effect of the provision.

The same issue arises in relation to subclause 303B(3).

The Committee therefore **seeks the Minister's advice as to the reasons for including these standing appropriations in the bill, which has the effect of excluding the appropriations from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process**.

> *Pending the Minister's reply, 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

Standing appropriation
Subclauses 303A(2) and 303B(3)

Clause 303A will empower the Treasurer, the Hon Wayne Swan MP, to authorise the making of contracts and arrangements by the Commonwealth, where the contract or arrangement is made with a constitutional corporation for the purpose of protecting energy security in Australia. Consolidated Revenue is appropriated for the purpose. This provision is one of the Government's energy security measures and is designed to provide assurance in addition to the administrative allocations and the possibility of payments to close an electricity generation plant. The aim is to mitigate energy security risks arising from financial impairment, regardless of the cause.

At this time it is not possible to predict whether any assistance in reliance on this provision will be made, the nature of that assistance or to estimate the value of it. Paragraph 6.190 of the Explanatory Memorandum provides examples of the outcomes that may be relevant when considering entering into such a contract or arrangement. One example is the continued physical supply of electricity to consumers.

It is expected that this provision will only be used in rare circumstances following receipt of advice from the Energy Security Council. The Treasurer is also expected to consult the Minister for Resources and Energy, the Hon Martin Ferguson AM MP, before making a decision to provide financial assistance under this provision.

We note that there may be a need to act quickly to preserve energy security. This means it would be impractical to seek legislative approval for each response.

The Energy Security Council (the Council) will also provide advice to the Treasurer on loans for refinancing (see subclause 303B(2)). Again, it is not possible at this stage to anticipate whether any loans will be made under this provision and, if so, the amount of those loans. It is seen as a precautionary measure in case loans are not available for eligible generators on reasonable terms.

The Council, and the assistance it may recommend, are transitional mechanisms to provide additional assurance in the initial years of the carbon price. The need for the Council is expected to be subject to a review in 2014. The review is likely to have regard to a number of factors including progress towards transitioning to a low carbon electricity sector.

Clause 303B also refers to loans for the purchase of future carbon units at the initial auctions (subclause 303B(I)). By its own terms, it is limited to the first three years in which future carbon units are auctioned. As in the case of loans for refinancing, eligible generators would need to prove that loans were not available on reasonable terms.

Consideration of applications for loans to purchase future carbon units or to refinance existing loans will involve an assessment of the applicant's capacity to repay. Loan terms will be designed to encourage generators to seek private finance in the first instance.

Committee Response

The Committee thanks the Minister for this detailed response and **requests that the key aspects of the reply are included in the explanatory memorandum. In light of the explanation provided the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**.

Clean Energy (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 13 September 2011
Portfolio: Climate Change and Energy Efficiency

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 11 of 2011*. The Minister responded to the Committee's comments in a letter dated 12 October 2011. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2011 - extract

Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism. The bill makes consequential amendments to ensure:

- National Greenhouse and Energy Reporting System (NGERS) supports the mechanism;
- the Registry covers the mechanism and the Carbon Farming Initiative (CFI);
- the Regulator covers the mechanism, CFI, the Renewable Energy Target and NGERS;
- the Regulator and Authority are set up as statutory agencies and regulated by public accountability and financial management rules;
- that emissions units and their trading are covered by laws on financial services;
- that activities related to emissions trading are covered by laws on money laundering and fraud;
- synthetic greenhouse gases are subject to an equivalent carbon charge applied through existing regulation of those substances;
- the Regulator can work with other regulatory bodies, including the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Transaction Reporting and Analysis Centre (Austrac);

- the taxation treatment of emissions units for the purposes of GST and income tax is clear; and

- the Conservation Tillage Refundable Tax Offset is established.

Delegation of legislative power
Schedule 3, items 1 and 5

Items 1 and 5 of Schedule 3 provide that the Regulator may refuse or approve an application (proposed new subsection 11(2)) or may suspend a registration (proposed subsection 30A(2)) on grounds specified in the regulations. As the explanatory memorandum does not explain the need for the grounds for these decisions to be specified in the regulations the Committee **seeks the Minister's advice as to the need for these proposed delegations of power.**

> *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

Delegation of legislative power
Schedule 3, items 1 and 5

The amendments of sections 11 and 30A of the *Renewable Energy (Electricity) Act 2000* (the Act) would give the Regulator power to refuse or suspend registration of a person on a ground specified in the regulations. A person needs to be registered to create a renewable energy certificate under the Act.

As indicated in the Explanatory Memorandum at paragraph 7.24, it is anticipated that grounds for refusal or suspension of registration could include that the person was not, or was no longer, a fit and proper person. It is envisaged that such grounds could, for example, include lack of accreditation under a specified industry scheme or contravention of other legislation such as the *Corporations Act 2001* or the *Competition and Consumer Act 2010.*

In light of the Committee's concerns, the Government proposes to amend sections 11(2) and 30A(5) so that it is clear that the regulations setting out the grounds for refusal or suspension of registration must relate to whether the applicant is a fit and proper person. The capacity to amend these grounds through regulation will provide flexibility to adjust the criteria for a fit and proper person in light of experience and changing circumstances.

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

Committee Response

The Committee thanks the Minister for this detailed response and for his commitment to amend the relevant sections so that it is clear that grounds for refusal or suspension must relate to whether the applicant is a fit and proper person.

Clean Energy (Household Assistance Amendments) Bill 2011

Introduced into the House of Representatives on 13 September 2011
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 11 of 2011*. The Minister responded to the Committee's comments in a letter dated 12 October 2011. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2011 - extract

Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends relevant legislation to provide increased payments to pensioners, allowees and family payment recipients before the commencement of the carbon pricing scheme.

Merits review
Schedule 8, item 10 and generally

Proposed sections 65KO and 65KT, to be inserted into *A New Tax System (Family Assistance) Act 1999* by item 10 of Schedule 8 of the bill, require the Secretary to give notice of a determination and variation of a determination which states various matters, including that claimants may apply for review of the determination or variation. The proposed subsections 65KO(2) and 65KT(2) provide that a determination is not ineffective by reason only that a requirement that determinations state various matters has not been complied with. The explanatory memorandum merely repeats the effect of these proposed subsections. The Committee is interested to understand the effect of these provisions and, in particular, **seeks the Minister's advice as to whether they may have any adverse consequences for enabling claimants to exercise their right to seek review of the determination and variation decisions**. **The Committee also seeks the Minister's advice about the review arrangements in place for all other types of assistance provided for in the Bill.**

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

Minister's response - extract

The Senate Standing Committee for the Scrutiny of Bills commented on sections 65KO and 65KT in item 10 of Schedule 8 of the Bill. These provisions require that a notice be provided to a person when either there has been a determination that the person is, or is not, entitled to the payment of the single income family supplement or a variation of such determination. In particular, the Committee has asked whether not providing the relevant notices may have adverse consequences for enabling the person to seek review of the decisions.

If the Secretary does not provide a notice to a claimant under either section 65KO or 65KT, this does not limit the person's review rights. Section I09A of the *A New Tax System (Family Assistance) (Administration) Act* provides that a person affected by a decision under the family assistance law may apply to the Secretary for review of the decision, including decisions that should be notified under section 65KO or 65KT. This review can occur irrespective of whether a notice has been provided to the person or not. The inclusion of subsections 65KO(2) and 65KT(2) assist in preventing a person from being disadvantaged by a possible 'administrative fault', such that the required notice is not given.

I also note that in normal circumstances there are restrictions on when a person can seek review of certain decisions. Where decisions are reviewable, section 109D of the Act provides that a person must seek review of a decision within 52 weeks after the applicant is notified of the decision concerned. Therefore, if the notice is not provided under section 65KO or 65KT, the person's timeframes for seeking review of the decision are not limited by section 109D.

The notice provisions are similar to existing sections 22 and 32 of the Act and it is intended that the new provisions will apply in the same manner.

The Committee also sought my advice about the review arrangements for all other types of assistance provided for in the Bill. For clean energy payments made under the *Veterans'·Entitlements Act 1986*, review provisions at new Division 4 of Part IIIE of that Act will be inserted by the Bill. For all other new payments, the person affected by the decision will have administrative review rights under the relevant law. Similarly, the existing review rights for primary payments will apply to the new clean energy supplement because the supplements are a separate component of the primary payment.
Thank you again for giving me the opportunity to comment in response to the Committee's

concerns.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the inclusion of subsections 65KO(2) and 65KT(2) assist in preventing a person from being disadvantaged by a possible 'administrative fault', such that the required notice is not given. The Committee also notes the Minister's advice about review arrangements for all other types of assistance provided for in the Bill.

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Justice

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 15 September 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2011 - extract

Background

This bill amends the *Crimes Act 1914*, the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Schedule 1 contains general amendments which relate to both extradition and mutual assistance to:

- enable Federal Magistrates to perform functions under the *Extradition Act* and the *Mutual Assistance Act*; and
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes.

Schedule 2 contains amendments relating to extradition to:

- reduce delays in extradition processes by amending the early stages of the extradition process
- extend the availability of bail in extradition proceedings
- allow a person to waive the extradition process, subject to certain safeguards
- extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition

- allow a person to consent to being surrendered for a wider range of offences
- modify the definition of ‘political offence’ to clarify this ground of refusal does not extend to specified crimes such as terrorism, and
- require Australia to refuse to extradite a person if he or she may be prejudiced by reason of his or her sex or sexual orientation following surrender.

Schedule 3 contains amendments relating to mutual assistance which:

- increase the range of law enforcement tools available to assist other countries with their investigations and prosecutions, subject to particular safeguards
- amend existing processes for providing certain forms of assistance to other countries
- strengthen protections against providing assistance where there are death penalty or torture concerns in the requesting country
- amend other grounds on which Australia can refuse to provide mutual assistance to other countries, and
- amend the process for authorising proceeds of crime action, and allow registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

Schedule 4 contains technical contingent amendments.

Possible inappropriate delegation
Schedule 2, Part 3, item 33, section 5(c)

This item seeks to amend section 5 of the *Extradition Act* to expressly exclude an offence prescribed by regulations from being a political offence in relation to one or more countries (see paragraph 2.67 of the explanatory memorandum). This means that a person is not exempt from extradition for an offence listed in the regulations. The explanatory memorandum notes (at paragraph 2.68) that:

> These amendments will streamline the 'political offence' definition by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. The amendments are consistent with the United Nations Model Extradition Treaty, which states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person.

The fact that some offences are to be excluded from the definition is not an issue of specific concern to the Committee. However, the Committee does prefer that important matters are included in primary legislation rather than in regulations whenever possible.

At paragraph 2.69 the explanatory memorandum notes that Australia implements relevant treaty obligations to ensure that certain offences are extraditable offences by providing that such offences are excluded from the definition of political offence in the Extradition Act. However, it appears to the Committee that the extent to which the proposed power in Section 5(c) is to enable Australia to implement bilateral and multilateral treaties the regulation power is framed in terms which are broader than necessary.

The explanatory memorandum at paragraph 2.69 also describes a justification for the use of regulations as being that it will 'ensure the extradition regime can be dept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act'.

In light of the serious nature of this regulation-making power the Committee **seeks the Minister's further advice about the provision, and in particular, how often it has been necessary to amend the *Extradition Act* to ensure that the extradition regime meets Australia's international obligations, whether the scope of the subclause 5(c) can be narrowed, and whether the statement that the amendments are consistent with the United Nations Model Treaty applies specifically to subclause 5(c) or just more generally to section 5.**

> *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

Section 7 of the *Extradition Act* 1988 requires Australia to refuse an extradition request where it relates to the prosecution or punishment of a person for a political offence. A political offence is defined in section 5 of the Extradition Act as an offence against the law of the foreign country that is of a political character. The definition excludes a number of offences, such as terrorism offences, genocide, torture, and the taking of hostages, in order for Australia to be compliant with international conventions to which Australia is a party. Currently, section 5 of the Extradition Act excludes these offences from the definition of 'political offence' by reference to a list of specified multilateral treaties (for example, Article 2 of the *International Convention/or the Suppression o/the Financing a/Terrorism).*

(i) Further advice on amendments to the 'political offence' definition

The Bill proposes to streamline the definition of 'political offence' in section 5 of the Extradition Act by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. Providing for exceptions to the political offence definition to be set out in Regulations, rather than the Extradition Act, will ensure the

extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.

Previously, amendments to the 'political offence' definition in section 5 of the Extradition Act have been required to be made by four amending Acts (No. 139 of 1991, No. 182 of 1994, No. 58 of 2002 and No. 66 of 2002). The process for enacting legislation is often very lengthy and it is important to ensure that the 'political offence' definition in the Extradition Act can be kept up-to-date with Australia's international obligations under future conventions.

(ii) Scope of proposed paragraph (c) of the definition of 'political offence''

Proposed paragraphs (b) and (c) of the definition of 'political offence' would create an exception to the 'political offence' definition for offences prescribed by regulations to be an extradition offence or not to be a political offence for the purpose of the *Extradition Act 1988.* Regulations would prescribe those offences which Australia is required to ensure are extraditable offences or not considered to be political offences for the purposes of extradition under bilateral and multilateral treaties.

The Committee suggests narrowing the scope of proposed paragraphs (b) and (c) to ensure that only those offences which Australia is required to exclude from the definition of 'political offence' under international treaties are prescribed in regulations. I am advised that various options for drafting paragraphs (b) and (c) were explored by the Department, and the paragraphs in their current form are the most appropriate for achieving the objective of avoiding frequent amendments to the Extradition Act as Australia becomes a party to additional treaties. Regulations made under these paragraphs would still require the approval of the Executive Council.

Consistency with the United Nations Model Treaty on Extradition

The explanatory memorandum to the Bill states that the amendments are consistent with the United Nations Model Treaty on Extradition. This statement applies generally to section 5. Article 3(a) of the United Nations Model Treaty on Extradition states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person. This is consistent with proposed paragraph (a) of the definition of 'political offence' which will exclude from the definition of 'political offence' - offences that involve an act of violence against a person's life or liberty.

Article 3(a) of the United Nations Model Extradition Treaty also states that reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition. This is consistent with proposed paragraphs (b) and (c) of the definition of 'political offence', which will exclude

from the "political offence' definition, offences prescribed by regulations to be an extradition offence or not a political offence.

Committee Response

The Committee thanks the Minister for this detailed response. The Committee notes the information provided about the use of regulations, the need to amend the Act four times since 1988 and the relevance of the United Nations Model Treaty. The Committee remains unclear about the justification for retaining the proposed drafting of paragraphs (b) and (c). **In the circumstances the Committee is concerned that this provision has the capacity to trespass unduly on personal rights and liberties and leaves the question of whether it is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2011 - extract

Legislative instruments
Various, including Schedule 2, Part 3, item 46, subclause 44A(4); item 99; item 108

These items declare that these functions are not legislative instruments, but it is not clear whether this is merely describing the effect of the *Legislative Instruments Act 2003* or is being done to avoid the usual operation of that Act. For example, in relation to item 46, the explanatory memorandum states at page 29 that an 'undertaking is not a legislative instrument within the meaning of section 5 of the *Acts Interpretation Act 1901'*, but does not clearly address whether or not such instruments would usually fall within the definition of legislative instruments in section 5 of the *Legislative Instruments Act 2003* and are not otherwise exempt under that Act. Paragraph (b) of subsection 5(2) of the *LI Act*, states that an instrument will be taken to be of a legislative character if it has 'the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right'.

In addition, in relation to item 99, the explanatory memorandum at page 50 states that the provision 'is intended to clarify any existing uncertainty about whether a notice given under subsection 17(1) is a legislative instrument within the meaning of section 5' of the *LI Act*. However, this does not discuss whether the instrument is likely to be legislative in character and an exemption for the *LI Act* is intended, or whether the instruments are unlikely to be legislative, but the provision is for the avoidance of doubt.

The Committee is concerned to ensure that there is appropriate scrutiny of these legislative powers and therefore **seeks further advice from the Minister's as to whether it is appropriate to declare these instruments not to be legislative instruments**.

> *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

All the items in the Bill which declare that certain functions under the *Extradition Act 1988* are not legislative instruments are intended to describe the existing effect of the *Legislative Instruments Act 2003,* for the avoidance of doubt. These amendments are not intended to change the usual operation of the *Legislative Instruments Act 2003.*

Committee Response

The Committee thanks the Minister for this assurance.

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, item 11

This provision relates to providing mutual assistance in criminal matters in which the death penalty could apply. The explanatory memorandum explains this provision as follows (see from paragraph 3.40):

> 3.40 Subsection 8(1A) of the MA Act currently requires the Attorney-General to refuse a request for assistance if the request relates to the prosecution or punishment of a person *charged with*, or *convicted of*, an offence for which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

> 3. 41 This item will repeal existing subsection 8(1A) and replace it with a new provision. The new subsection 8(1A) will ensure the mandatory ground of refusal for death penalty offences also applies in circumstances in which a person has been *arrested or detained* on suspicion of committing an offence for which the death penalty may apply, regardless of whether formal charges have been laid.

The Committee supports the inclusion of the additional grounds for refusing assistance in death penalty cases.

In relation to the 'special circumstances' which could allow assistance to be provided, the Committee is aware that the proposed provision reflects the current approach. However, the Committee is concerned that while the specific examples outlined at paragraph 3.43 of the explanatory memorandum describe instances in which assistance would either be beneficial or provided in the knowledge that the death penalty will not be imposed, the provision itself would still allow assistance to be provided in circumstances in which the death penalty could apply. Given the importance of this matter, the Committee **seeks the Minister's advice about whether the provision can be drafted to ensure that assistance would not be provided in cases in which the death penalty will be carried out.**

> *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

The existing death penalty ground for refusing mutual assistance is consistent with Australia's strong opposition to the death penalty while still affording sufficient flexibility to ensure assistance can be provided to combat serious criminal activity. A request for assistance must be refused where the death penalty may be imposed unless special circumstances exist. As outlined in the explanatory memorandum to the Bill, special circumstances may exist where the foreign country provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. Another example of a special circumstance is that the assistance provided would assist a defendant to prove their innocence.

Precluding assistance where the death penalty may be carried out in all cases would prevent Australia from cooperating in a wide range of serious criminal matters, for example in international terrorism matters. Retaining the current drafting is both consistent with Australia's international obligations and necessary to ensure sufficient flexibility to enable the provision of assistance to combat serious criminal activity such as terrorism.

Committee Response

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

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, item 14, subsection 8(2)(c)

Currently, double jeopardy is a mandatory ground for refusal under paragraph 8(1)(f) of the MA Act. The explanatory memorandum explains at paragraph 3.61 that:

> This item will insert a new paragraph 8(2)(c) that will provide the Attorney-General with the discretion to refuse a request for assistance if he or she is of the opinion that it relates to the investigation, prosecution or punishment of a person for an offence where the person has been acquitted or pardoned or has undergone punishment for that offence, or another offence constituted by the same conduct. This amendment will make double jeopardy a discretionary ground for refusal to enable the provision of assistance in appropriate exceptional cases such as where there is fresh evidence that was not available at the original trial, or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle.

The Committee supports the extension of the principle of double jeopardy to apply to any country (not just the requesting country as is currently the position (see explanatory memorandum paragraph 3.62) and to the investigation stages of cases (paragraph 3.63). However, the Committee is concerned that the ground for refusal is being changed from mandatory to discretionary. The justification for this is given at paragraph 3.60 of the explanatory memorandum:

> However, there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns, for example, if fresh and compelling evidence such as new DNA evidence or evidence obtained through technological developments, has emerged.

In the circumstances the Committee **leaves the question of whether the proposed 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

The double jeopardy ground for refusal is proposed to be changed from a mandatory to discretionary ground for refusal as there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns. This includes where there is fresh evidence that was not available at the original trial (such as new DNA evidence or evidence obtained through technological developments), or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle. For example, it may also be appropriate to provide assistance if there are doubts about the legitimacy of the original trial and there is a fresh trial. This amendment will ensure that Australia is able to provide assistance in these exceptional cases.

Committee Response

The Committee thanks the Minister for this additional information and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, Part 3

This part of the Bill generally seeks to formalise and extend the provision to foreign countries of information obtained in Australia by telephone interception and surveillance devices, as long as the Attorney-General has agreed to provide mutual assistance in accordance with the Act and as long as offence thresholds are met. In the circumstances the Committee **leaves the question of whether the proposed 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

Telecommunications interception (TI) and covertly accessed stored communications material

Currently, lawfully obtained TI product and stored communications material can only be provided through 'take evidence' or 'production order' proceedings under section 13 of the *Mutual Assistance in Criminal Matters Act 1987*. The amendments in the Bill would allow lawfully obtained TI material and covertly accessed stored communications material to be provided to foreign countries using the streamlined procedure in section 13A of the Mutual Assistance Act. This proposal would not result in a greater range of material being able to be provided to foreign countries. It would simply streamline the process for making available material that Australia is already able to provide to foreign countries.

Following a request from a foreign country, I would be able to authorise the provision of lawfully obtained TI material and covertly accessed stored communications material to that foreign country. Lawfully obtained TI material would only be able to be provided if I am satisfied that the foreign country has commenced an investigation into, or proceedings relating to, an offence carrying a penalty of seven or more years imprisonment or a cartel offence punishable by a fine equivalent to at $10,000,000. Covertly accessed stored communications material would only be able to be provided if I am satisfied that the foreign country has commenced an investigation into, or proceedings relating to, an offence carrying a penalty of three or more years imprisonment or a fine equivalent to at least 900 penalty units (one penalty unit is A$110).

In addition to the penalty thresholds, the safeguards contained in the Mutual Assistance Act would continue to apply in assessing whether Australia should provide assistance to the requesting country. Each request for this type of assistance would be dealt with on a case-by-case basis, and I would retain the discretion to refuse to provide this type of assistance. I would also be able to place restrictions on the uses that can be made of information provided to the foreign country under section 13A to ensure the material is only used for the purposes for which it was provided. The amendments in the Bill would require me to report annually on the number of occasions on which lawfully intercepted information or interception warrant information and covertly accessed stored communications was provided to a foreign country in connection with an authorisation under subsection 13A(l) of the Mutual Assistance Act.

Surveillance devices

Currently, surveillance device warrants cannot be obtained by Australian agencies in response to mutual assistance requests. The amendments in the Bill would enable Australian law enforcement agencies to apply for warrants to use surveillance devices following a mutual assistance request from a foreign country. Following a request, I may.

in exercising my discretion, authorise the Australian Federal Police or police force of a State or Territory, in writing, to apply for a surveillance device warrant. Following my authorisation, an officer will be able to apply to an issuing officer for a warrant under the *Surveillance Devices Act 2004.* If a warrant is issued, a surveillance device may be used in accordance with the warrant.

There are a range of factors that would need to be taken into account by both myself and the issuing authority in determining whether to authorise a surveillance device warrant to ensure that assistance is only provided in appropriate cases. I would only be able to authorise an application for a surveillance device warrant if the relevant foreign offence carries a maximum penalty of at least three years' imprisonment. This will mirror the thresholds that apply for when a surveillance devices warrant can be sought for domestic purposes. The existing grounds for refusing assistance under the Mutual *Assistance in Criminal Matters Act 1987* would also apply to these requests.

Prior to issuing a surveillance device warrant, an issuing officer will be required to be satisfied of certain matters, such as that there are reasonable grounds to suspect that the use of a surveillance device is necessary for the purpose of enabling evidence to be obtained of the commission of the offence to which the authorisation relates. The issuing officer will also be required to have regard to factors, which are modelled on the considerations that must be taken into account when determining whether to issue a surveillance device warrant for domestic purposes. These include the nature and gravity of the alleged offence, and the likely evidentiary or intelligence value of any evidence or information sought to be obtained.

The amendments would ensure that information obtained through the use of a surveillance device would only be able to be used by the foreign country for the purposes for which it is provided. Further, the foreign country would be required to destroy the information when it is no longer required for the purpose for which the information was provided. I would also be able to place other conditions on the use of the material as appropriate at the time it is provided to the foreign country. Under the amendments, I would also be required to report to Parliament annually on the number of surveillance device warrant applications made following a mutual assistance request, the number of warrant applications refused, and a breakdown of the types of offences for which warrants were issued.

Committee Response

The Committee thanks the Minister for this additional information and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Part 4

In the context of this Bill, *forensic procedures* include obtaining fingerprints and DNA samples. At paragraph 3.282, the explanatory memorandum states that:

> Part 4 of Schedule 3 will amend the MA Act and the Crimes Act to enable the AFP, or a State or Territory police force, to carry out a forensic procedure on a suspect in relation to a foreign serious offence, either with informed consent or compulsorily, at the request of a foreign country. Part 4 would also clarify the procedures for obtaining forensic material from a volunteer on behalf of a foreign law enforcement agency.

Currently in Australia forensic procedures can be carried out: (i) with consent, (ii) as a compulsory 'non-intimate' procedure by order of a senior constable, and (iii) as a compulsory procedure by order of a magistrate. Through mutual assistance the provision of material obtained from a forensic procedure to another country is currently available only in circumstance (i) (with consent). The proposed provisions would also allow it to be provided for the purposes of international cooperation in circumstance (iii) (as a result of a compulsory procedure by order of a magistrate). In the circumstances the Committee **leaves the general question of whether the proposed 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

Forensic procedures are used by Australian law enforcement agencies as a key tool to investigate and prosecute domestic offences. The Bill would extend the availability of this law enforcement tool, subject to the strictest safeguards, to enable Australian law enforcement to provide assistance to their counterparts in foreign investigations.

The Bill proposes different regimes for forensic procedures depending on whether the person is a suspect, volunteer or child or incapable person. A forensic procedure would be able to be carried out on a suspect with the suspect's informed consent on a police-to-police basis, or without the suspect's consent by order of a magistrate following' a formal mutual

assistance request. The Bill would also enable a magistrate to authorise the carrying out of a forensic procedure on a child or incapable person, without the consent of that person's parent or guardian, in certain limited circumstances. Finally, the Bill would clarify the existing procedures for obtaining forensic material from volunteers with their consent following a police-to-police request from a foreign country.

The protections that apply to any grant of mutual assistance under the *Mutual Assistance in Criminal Matters Act 1987* would apply to requests by a foreign country for a forensic procedure to be carried out. Each request for this type of assistance would be dealt with on a case-by-case basis, and I would retain a general discretion to refuse to provide this type of assistance. The safeguards contained in the Mutual Assistance Act would also apply in assessing whether Australia should provide assistance to a foreign country.

The safeguards and procedures governing when and how forensic procedures can be carried out are modelled on requirements under the *Crimes Act 1914* for forensic procedures which are carried out for domestic purposes. For example, a magistrate must be satisfied of a number of matters before ordering a procedure, including that there are reasonable grounds to believe the procedure is likely to confirm or disprove that the suspect committed the offence and that the carrying out of the forensic procedure is justified in all the circumstances. The Crimes Act also lists a number of matters about which a person must be informed before they consent to providing a forensic sample. The proposal would ensure that these safeguards apply to persons undergoing a forensic procedure in response to a request from a foreign law enforcement agency. The person would also be informed of additional matters, such as the name of foreign law enforcement agency that made the request, and that the forensic evidence may be used in proceedings in the foreign country.

The amendments would enable a forensic procedure to be carried out on a child or incapable person, in the absence of the guardian's consent, in certain limited circumstances. I would be required to be satisfied that it is appropriate to authorise the request, having regard to the best interests of the child or incapable person. I would also need to be satisfied that either the parent or guardian's consent cannot reasonably be obtained or has been withdrawn, or the parent or guardian is a suspect in relation to the foreign serious offence.

If I am satisfied of these matters and believe that it is appropriate to authorise the request, the matter would then be referred to Australian police to apply for an order from a magistrate. The magistrate would need to be satisfied that the carrying out of a forensic procedure is justified in all the circumstances, having regard to a number of factors. These factors include the best interests of the child or incapable person and, if they can be obtained, the wishes of the child or the incapable person. Even if a magistrate ordered that a forensic procedure be conducted on a child, the procedure could not be carried out if the child resisted or objected to undergoing the procedure. This safeguard already exists in the Crimes Act and would apply to any procedure ordered by a magistrate in response to a request for a foreign country.

Committee Response

The Committee thanks the Minister for this additional information and **leaves the question of whether it is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, Part 4, item 78, subsection 23WI(2)

However, the Committee has a specific concern about the proposed approach in subsection 23WI(2). New paragraph 23WI(2)(a) applies to circumstances in which the forensic procedure has been requested by a foreign country and paragraph 23WI(2)(b) applies to all other cases. Paragraph 3.315 of the explanatory memorandum states that:

> New paragraph 23WI(2)(a) will require a constable to balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public interest in upholding the physical integrity of the suspect. Given the fundamental importance of reciprocity in international cooperation in criminal matters, it is important that this is taken into account by the magistrate in determining whether the carrying out of the forensic procedure is justified in all the circumstances.

Given the significance of obtaining forensic material without consent, and noting the importance accorded to reciprocity, the Committee **seeks the Minister's advice as to whether consideration could be given to limiting the provision of assistance to countries from whom Australia could receive similar assistance. The Committee would also welcome the Minister's advice about the reference to 'constable' in this provision and in paragraph 3.315 and the constable's role given that the procedure is to be carried out following an order by a magistrate (see paragraphs 3.283 and 3.284).**

> *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

Limiting the provision of assistance to countries from whom Australia could receive similar assistance

Australia's general position is to provide assistance in international crime cooperation matters to ensure that criminals cannot evade prosecution and confiscation action just because the evidence or proceeds of their crime are in different countries. While Australia undertakes a broad assessment of whether the requesting country is able to reciprocate and provide assistance to Australia, the inability of a foreign country to provide the specific form of assistance it has requested does not prevent Australia from determining that it is appropriate to provide the assistance sought. It is open to Australia to request assistance from a foreign country even where Australia would not be able to provide the specific assistance to the foreign country. Australia would be upfront about whether the assistance could be provided on a reciprocal basis when making the request. Imposing a requirement to undertake a specific and detailed assessment about whether the requesting country's laws allow for the provision of particular types of assistance would also pose a significant burden on Australia. It would also undermine Australia's general commitment to provide a high level of international crime cooperation to our foreign partners.

References to 'constable'

Item 78 of Schedule 3 of the Bill amends subsection 23WI(2) of the *Crimes Act 1914*. Section 23WI sets out matters to be considered by a constable before requesting a suspect's consent to a forensic procedure. New paragraph 23WI(2)(a) will require the constable to balance the public interest in Australia providing and receiving international assistance in criminal matters against the public interest in upholding the physical integrity of the suspect. Section 23WH of the Crimes Act allows a constable to seek a suspect's consent to a forensic procedure if satisfied of factors in section 23WI. Prior to seeking the suspect's consent, the constable would be required to be satisfied on the balance of probabilities that the person on whom the procedure is proposed to be carried out is a suspect, and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence.

To seek a suspect's consent, the constable would also be required to first inform the suspect of a range of matters. The matters that apply to the carrying out of a forensic procedure for domestic purposes will also apply to a forensic procedure for foreign law enforcement purposes. However, as provided by Item 79 of Schedule 3, the suspect must also be informed of additional matters, including that forensic evidence obtained from the procedure will be provided to a foreign law enforcement agency.

If the suspect provides consent, a request from a foreign country under the *Mutual Assistance in Criminal Matters Act 1987* would not be required and the relevant Australian

police agency would be able to carry out the procedure on behalf of a foreign law enforcement agency on a police-to-police basis. If a suspect does not consent, a formal request under the Mutual Assistance Act would be required. Under this Act, as amended by the Bill, following my authorisation, an order by a magistrate would be required in order to carry out a forensic procedure compulsorily on a suspect.

Committee Response

The Committee thanks the Minister for this detailed response and notes the point made about the significant burden that would be imposed if required to assess another country's requesting laws and the role of a constable in the process of consent to a forensic procedure.

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, Part 4, item 103, subsections 23YQC and 23YQD

These items will allow the provision of forensic material obtained by consent to be provided police-to-police in certain circumstances. The Committee seeks **the Minister's advice about whether, in the process of volunteering or providing informed consent, a person will be advised that it could be possible for the forensic material obtained to be shared with police from other countries.**

> *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

Items 79 and 93 of Schedule 3 of the Bill propose to insert new paragraphs 23WJ(I)(ib) and 23XWR(2)(da) into the *Crimes Act 1914*. These paragraphs would provide that in all cases where a suspect or volunteer undergoes a forensic procedure because of a request by a foreign law enforcement agency, the suspect or volunteer must be informed of:

- the name of the foreign law enforcement agency that has made the request

- that forensic evidence obtained from the procedure will be provided to that agency
- that the evidence may be used in proceedings in the foreign country
- that the retention of the evidence will be governed by the laws of the foreign country and undertakings given by the foreign law enforcement agency, and
- the content of undertakings given by-the foreign law enforcement agency relating to the retention of the evidence.

This will ensure that a person who provides forensic material is aware that he or she is consenting to the information obtained from the procedure being made available to foreign law enforcement authorities for a foreign offence.

Committee Response

The Committee thanks the Minister for this response and notes that if a forensic procedure *is carried out in response to* a request from a foreign country then a person will be informed as outlined above. However, the Committee was particularly interested to understand the effect of Schedule 3, Part 4, item 103, subsections 23YQC and 23YQD and specifically whether forensic material that has already been obtained for Australian domestic purposes could later be provided to a foreign country in response to a request from that foreign country. If so, the Committee is interested to know whether section 23WJ of the *Crimes Act 1914* should be amended to require a suspect to be informed that the information could subsequently be provided to a foreign country. The Committee therefore **seeks the Minister's further advice about this issue**.

Alert Digest No. 8 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 3, Part 4, item 112, subsection 28A(3) and 28B

The explanatory memorandum states at paragraphs 3.467 and 3.468 that:

> Subsection 28A(3) will clarify that Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out by using processes similar to those used in the foreign country.

This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

The Bill also seeks to provide that the material obtained is not inadmissible as evidence and is not precluded from being used for the purposes of the investigation simply on the ground that it was obtained otherwise than in accordance with Australia's request.

It appears to the Committee that the intention is that Australia could only request a forensic procedure that is already permitted under Australian law, but as this is inferred from the wording of the provision rather than clearly stated, the Committee **seeks the Minister's confirmation about whether this is intended, and if so, whether it can be clearly stated in the legislation**.

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 intention is *not* that Australia could only request a forensic procedure that is already permitted under Australian law. The wording of proposed subsection 28A(3) states that Australia may request that a forensic procedure be carried out in the foreign country even if that forensic procedure is not permitted under Australian law.

This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements.

Committee Response

The Committee thanks the Minister for this response. It is not as clear to the Committee that the wording of subsection 28A(3) clearly states "that Australia may request that a forensic procedure be carried out in the foreign country even if that forensic procedure is not permitted under Australian law." However, in view of this interpretation the Committee is concerned that Australia can request forensic procedures which would not be lawful in Australia because some procedures may be considered to trespass unduly on personal rights and liberties. The Committee notes that paragraph 3.468 of the Revised Explanatory Memorandum refers to the wording of section 28A(3) and states that:

> [This approach] is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

The Committee can understand that it is a matter for a foreign country to carry out a forensic procedure in accordance with its applicable domestic procedures, but the Committee is concerned that the intention of the provision is that Australia can actually request a forensic procedure that could not be authorised in Australia (regardless of the type or range of processes that could be used to carry out the procedure). The Committee remains unclear about the difference between a *forensic procedure* and a *forensic process* and is concerned about the intention that Australia can request procedures that are not authorised domestically. The Committee therefore **requests the Minister's further advice on the scope of this provision and whether it could have the effect of trespassing unduly on personal rights and liberties.**

Senator Mitch Fifield
Chair

SENATOR THE HON NICK SHERRY

MINISTER FOR SMALL BUSINESS
MINISTER ASSISTING ON DEREGULATION AND
PUBLIC SECTOR SUPERANNUATION
MINISTER ASSISTING ON TOURISM

Senator Mitch Fifield
Chair
Standing Committee for the Scrutiny of Bills
S1.111
Parliament House
CANBERRA ACT 2600

21 SEP 2011

Dear Senator Fifield

SCRUTINY OF BILLS COMMITTEE'S *ALERT DIGEST 9/2011*
BUSINESS NAMES REGISTRATION BILL 2011.

I refer to the Scrutiny of Bills Committee's *Alert Digest No. 9 of 2011*. The Committee raised certain issues in the Alert Digest, concerning the Business Names Registration Bill 2011 and its associated Bills, and asked me to respond to them.

Business Names Registration Bill 2011

'Henry VIII' clause; clause 15

The national business names registration scheme is a national scheme which replaces existing State/Territory schemes. In these existing schemes, some States/Territories regulate, for security and other reasons, the display of business names, where such names might indicate, for example, that mining explosives were on particular premises. There is a wide variety of existing regulatory practices among the States/Territories relating to the use of business names. The Commonwealth has no wish to interfere with such regulatory restrictions, and the purpose of clause 15 is to expeditiously allow such State/Territory restrictions to be lawful.

Reversal of onus; Determination of important matters by regulation
Part 2, clauses 18, 19, 20 and 21; Part 4

The clauses in question relate to the conduct of a business, and therefore deal with matters peculiarly within the defendant's knowledge that would be extremely difficult, and/or very expensive, for the Commonwealth to prove (*Alert Digest 1997/2*, p. 11). Therefore it is proposed that the onus of proof be reversed in such cases. An analogous example relates to the running of a business for profit in relation to the *Copyright Act 1968*, section 132APC, where the onus of proof is also reversed.

The determination of matters by regulation relates to the exempting of entities from the penalties referred to above. Under clause 18, for example, an entity is exempt from penalties for trading under an unregistered business name if it is registered on a 'notified State/Territory register'. It is possible that in the future, it may be desirable that entities registered on other sorts of registers should be exempted from the penalties. Giving the Minister the power make such exemptions by regulation will allow such exemptions to be made expeditiously.

Review of decisions; clause 56
Clause 56 provides that certain specified decisions are subject to administrative review (internal review and Administrative Appeals Tribunal review), upon an application from 'an entity in relation to whom there is a real risk of substantial detriment because of the registration of the business name'. It is necessary to impose this limitation on those who might seek a review to avoid vexatious applications for review which could be conducted, for example, for the purpose of disrupting a competitor's business activities.

Reversal of onus; clause 77
This clause relates to a person using confidential information in a way that is not appropriate in the circumstances. Whether the use of information might be appropriate in particular circumstances is something which is peculiarly within the defendant's knowledge, and which would be extremely difficult, and/or very expensive, for the Commonwealth to prove (*Alert Digest 1997/2*, p. 11). It is therefore proposed that the onus of proof be reversed in such cases.

National scheme – parliamentary scrutiny
The Intergovernmental Agreement for Business Names of 2009 provides that any amendments to the business names legislation will require the approval of the Ministerial Council for Corporations. Any legislative amendments would then be subject to the normal parliamentary processes of the Commonwealth.

Business Names Registration (Transitional and Consequential Provisions) Bill 2011

'Henry VIII' clause; Schedule 1, subclause 10(3)
The legislation was drafted after lengthy discussions with the States/Territories. Currently no two State/Territory schemes are identical, including in the way they deal with outstanding matters, such as appeals against decisions to deregister business names. Since the timing and outcome of such appeals under State/Territory law are not possible to predict, it is proposed that regulations allow modifications to be made to the primary legislation so as to expeditiously deal with any eventuality stemming from whatever decision might be made under State/Territory law.

Yours sincerely

NICK SHERRY

Minister for Climate Change and Energy Efficiency

B11/717

Senator Mitch Fifield
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

12 OCT 2011

Dear Senator

I refer to the Senate Standing Committee for the Scrutiny of Bills' comments of 22 September 2011 concerning a number of measures in the Clean Energy Bill 2011; Clean Energy (Consequential Amendments) Bill 2011; Clean Energy Regulator Bill; Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011; Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011; and Steel Transformation Plan Bill 2011.

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

Clean Energy Bill 2011

Possible insufficient Parliamentary scrutiny

Clause 15

The intention of clause 15 is to ensure that the regulations do not take effect before the opportunity for disallowance had passed. The regulations would set the carbon pollution cap which limits the number of units that could be auctioned and issued for free under Parts 7 and 8 of the Bill. The carbon pricing mechanism would not work effectively if a carbon pollution cap commenced operation and units were issued under that cap, but the regulations setting the cap were disallowed some time later.

Clause 15 adopts the standard means of delaying the commencement of regulations or other legislative instruments until after the disallowance period (see, for instance, *Financial Management and Accountability Act 1997* (FMA Act), section 22; *Lands Acquisition Act 1989*, section 46; *Family Law Act 1975*, section 33C; *Interstate Road Transport Act 1985*, section 43A; *Remuneration Tribunal Act 1973*, section 7). The Scrutiny of Bills Committee concluded that section 22 of the FMA Act 'achieve[d] an appropriate balance between the financial needs of the government and the need for Parliamentary scrutiny' (Alert Digest No. 2 of 1999). It took no issue with the absence of provision for disallowance by default (as reflected in section 42(2) of the *Legislative Instruments Act 2003*).

In fact, clause 15 of the Clean Energy Bill provides greater opportunity for Parliamentary scrutiny than section 22 of the FMA Act. It does not reduce the standard disallowance period of 15 sitting days. Even with the reduction in the disallowance period to five sitting days, the Committee concluded that section 22 was appropriate.

Clause 15 maintains the opportunity for parliamentary scrutiny. The Australian Government considers that a transparent and deliberate resolution of either House of the Parliament is required to disallow such a significant element of the carbon pricing mechanism.

Retrospective application

Clause 29

The anti-avoidance provision in clause 29 of the Clean Energy Bill 2011 would give the Regulator a power to make a determination which would preclude a person from taking the benefit of a relevant threshold provision. The determination could be made if a person entered into or carried out a certain kind of arrangement after 15 December 2008.

Clause 29 would not have retrospective effect. It would not operate on rights and obligations existing before the commencement of the Clean Energy Bill 2011. It would operate on rights and obligations arising from the time of commencement by reference to past events. There is a clear distinction between the two situations and the latter does not involve retrospectivity (see Pearce and Geddes, *Statutory Interpretation in Australia*, 7th ed., 2011, [10.3]-[10.5]).

The relevant threshold provisions are amongst the provisions in Division 2 of Part 3 of the Clean Energy Bill 2011 imposing liability for emissions from facilities. These provisions exempt from liability facilities where emissions are less than a threshold amount (generally 25,000 tonnes of carbon dioxide equivalence).

There is potential for operators of facilities to split facilities artificially so that thresholds are not met and liability is avoided. Clause 29 is directed at artificial schemes which achieve this result.

The Carbon Pollution Reduction Scheme contained provisions similar to the Clean Energy Bill for imposing liability for emissions from facilities, including similar threshold provisions. On 15 December 2008, details of the proposed provisions were published in the Government's White Paper (*Carbon Pollution Reduction Scheme: Australia's Low Pollution Future*). From that date, large emitters have been on notice that the Government's policy is that, if a carbon pricing scheme is enacted, liability thresholds along these lines will apply.

The Carbon Pollution Reduction Scheme Bill 2009 contained a similar provision which applied by reference to the same date of 15 December 2008.

It is possible that since 15 December 2008 some large emitters have made artificial arrangements which are directed at avoiding the proposed liability thresholds and that, before the Clean Energy Bill commences operation, some large emitters will make those sorts of arrangements.

In cases where avoidance of a statutory scheme is likely to take place once details of the scheme are announced, there can be justification for making laws that take account of actions that occur from the date of announcement. In this case, there is clear justification for applying an anti-avoidance provision to arrangements made in anticipation of the introduction of carbon pricing so as to operate on rights and obligations which arise after commencement.

Retrospective effect

Clause 208

Clause 208 would empower a court to order relinquishment of carbon units where the issue of the units was directly or indirectly attributable to the commission of an offence, including where a person was convicted of an offence before the commencement of the Clean Energy Bill 2011. As for clause 29, the provision would not have retrospective effect. It would not operate on rights and obligations existing before the commencement of the Clean Energy Bill 2011. It would operate on rights and obligations arising from the time of commencement by reference to past events.

The object of clause 208 is to ensure that carbon units obtained as the result of fraudulent conduct (for instance a false or misleading statement made to the Commonwealth) are subject to the possibility of relinquishment. The issue of carbon units in such circumstances could mean that carbon units have been issued that should not have been issued. This could distort the operation of aspects of the carbon pricing mechanism by denying others the capacity to obtain those units to satisfy their liabilities.

Whether the fraud in question occurred before or after the commencement of the Clean Energy Bill 2011, or the conviction in question occurred before or after the commencement of the Clean Energy Bill 2011, would not affect whether, as a matter of policy, the carbon units should be relinquished so that the distortions that misallocation creates can be remedied.

In any case, there are unlikely to be many instances of carbon units being issued directly or indirectly arising out of a fraud for which a conviction has been obtained before commencement of the Clean Energy Bill 2011. If a conviction is obtained before commencement, it is likely that the Regulator will become aware of the conviction and that carbon units will not be issued in ignorance of the fraud.

Standing appropriation

Subclauses 303A(2) and 303B(3)

Clause 303A will empower the Treasurer, the Hon Wayne Swan MP, to authorise the making of contracts and arrangements by the Commonwealth, where the contract or arrangement is made with a constitutional corporation for the purpose of protecting energy security in Australia. Consolidated Revenue is appropriated for the purpose. This provision is one of the Government's energy security measures and is designed to provide assurance in addition to the administrative allocations and the possibility of payments to close an electricity generation plant. The aim is to mitigate energy security risks arising from financial impairment, regardless of the cause.

At this time it is not possible to predict whether any assistance in reliance on this provision will be made, the nature of that assistance or to estimate the value of it. Paragraph 6.190 of the Explanatory Memorandum provides examples of the outcomes that may be relevant when considering entering into such a contract or arrangement. One example is the continued physical supply of electricity to consumers.

It is expected that this provision will only be used in rare circumstances following receipt of advice from the Energy Security Council. The Treasurer is also expected to consult the Minister for Resources and Energy, the Hon Martin Ferguson AM MP, before making a decision to provide financial assistance under this provision.

We note that there may be a need to act quickly to preserve energy security. This means it would be impractical to seek legislative approval for each response.

The Energy Security Council (the Council) will also provide advice to the Treasurer on loans for refinancing (see subclause 303B(2)). Again, it is not possible at this stage to anticipate whether any loans will be made under this provision and, if so, the amount of those loans. It is seen as a precautionary measure in case loans are not available for eligible generators on reasonable terms.

The Council, and the assistance it may recommend, are transitional mechanisms to provide additional assurance in the initial years of the carbon price. The need for the Council is expected to be subject to a review in 2014. The review is likely to have regard to a number of factors including progress towards transitioning to a low carbon electricity sector.

Clause 303B also refers to loans for the purchase of future carbon units at the initial auctions (subclause 303B(1)). By its own terms, it is limited to the first three years in which future carbon units are auctioned. As in the case of loans for refinancing, eligible generators would need to prove that loans were not available on reasonable terms.

Consideration of applications for loans to purchase future carbon units or to refinance existing loans will involve an assessment of the applicant's capacity to repay. Loan terms will be designed to encourage generators to seek private finance in the first instance.

Clean Energy (Consequential Amendments) Bill 2011

Delegation of legislative power

Schedule 3, items 1 and 5

The amendments of sections 11 and 30A of the *Renewable Energy (Electricity) Act 2000* (the Act) would give the Regulator power to refuse or suspend registration of a person on a ground specified in the regulations. A person needs to be registered to create a renewable energy certificate under the Act.

As indicated in the Explanatory Memorandum at paragraph 7.24, it is anticipated that grounds for refusal or suspension of registration could include that the person was not, or was no longer, a fit and proper person. It is envisaged that such grounds could, for example, include lack of accreditation under a specified industry scheme or contravention of other legislation such as the *Corporations Act 2001* or the *Competition and Consumer Act 2010.*

In light of the Committee's concerns, the Government proposes to amend sections 11(2) and 30A(5) so that it is clear that the regulations setting out the grounds for refusal or suspension of registration must relate to whether the applicant is a fit and proper person. The capacity to amend these grounds through regulation will provide flexibility to adjust the criteria for a fit and proper person in light of experience and changing circumstances.

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

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

MN11-002562

12 OCT 2011

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

Dear Senator

Thank you for seeking my advice, as set out in *Alerts Digest 11 of 2011* about the Clean Energy (Household Assistance Amendments) Bill 2011.

The Senate Standing Committee for the Scrutiny of Bills commented on sections 65KO and 65KT in item 10 of Schedule 8 of the Bill. These provisions require that a notice be provided to a person when either there has been a determination that the person is, or is not, entitled to the payment of the single income family supplement or a variation of such determination. In particular, the Committee has asked whether not providing the relevant notices may have adverse consequences for enabling the person to seek review of the decisions.

If the Secretary does not provide a notice to a claimant under either section 65KO or 65KT, this does not limit the person's review rights. Section 109A of the *A New Tax System (Family Assistance) (Administration) Act* provides that a person affected by a decision under the family assistance law may apply to the Secretary for review of the decision, including decisions that should be notified under section 65KO or 65KT. This review can occur irrespective of whether a notice has been provided to the person or not. The inclusion of subsections 65KO(2) and 65KT(2) assist in preventing a person from being disadvantaged by a possible 'administrative fault', such that the required notice is not given.

I also note that in normal circumstances there are restrictions on when a person can seek review of certain decisions. Where decisions are reviewable, section 109D of the Act provides that a person must seek review of a decision within 52 weeks after the applicant is notified of the decision concerned. Therefore, if the notice is not provided under section 65KO or 65KT, the person's timeframes for seeking review of the decision are not limited by section 109D.

The notice provisions are similar to existing sections 22 and 32 of the Act and it is intended that the new provisions will apply in the same manner.

The Committee also sought my advice about the review arrangements for all other types of assistance provided for in the Bill. For clean energy payments made under the *Veterans' Entitlements Act 1986*, review provisions at new Division 4 of Part IIIE of that Act will be inserted by the Bill. For all other new payments, the person affected by the decision will have administrative review rights under the relevant law. Similarly, the existing review rights for primary payments will apply to the new clean energy supplement because the supplements are a separate component of the primary payment.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

JENNY MACKLIN MP

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

11/19031, AG-MC11/09717

15 SEP 2011

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Mitch,

I refer to your letter of 18 August 2011 on behalf of the Senate Standing Committee for the Scrutiny of Bills, requesting my response to issues identified in the *Alert Digest No. 8 of 2011* concerning the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

My response to the matters raised by the Committee is attached for your consideration. I thank you for providing me with an opportunity to address these issues and trust this additional information addresses the matters raised by the Committee.

I note that the House of Representatives Standing Committee on Social Policy and Legal Affairs has also closely considered the Bill, and tabled its report on 12 September 2011.

If you wish to discuss this matter further, please phone Kathryn McMullan in my office on (02) 6277 7290.

Yours sincerely

Brendan O'Connor

Telephone +61 2 6277 7290 Parliament House, Canberra ACT 2600 Facsimile +61 2 6273 7098
mha@ag.gov.au Australia

Response to the Senate Standing Committee for the Scrutiny of Bills

Alert Digest No. 8 of 2011, 17 August 2011

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

Possible inappropriate delegation – Schedule 2, Part 3, item 33, section 5(c)

Item 33 of Schedule 2 of the Bill seeks to amend the 'political offence' definition in section 5 of the *Extradition Act* to ensure that exceptions to the definition are generally contained in regulations, rather than in the Act. This is intended to ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.

The Committee seeks the Minister's further advice about *(i)* the provision, and in particular, how often it has been necessary to amend the Extradition Act to ensure that the extradition regime meets Australia's international obligations, *(ii)* whether the scope of the subclause 5(c) can be narrowed, and *(iii)* whether the statement that the amendments are consistent with the United Nations Model Treaty applies specifically to subclause 5(c) or just more generally to section 5.

Response

Section 7 of the *Extradition Act 1988* requires Australia to refuse an extradition request where it relates to the prosecution or punishment of a person for a political offence. A political offence is defined in section 5 of the Extradition Act as an offence against the law of the foreign country that is of a political character. The definition excludes a number of offences, such as terrorism offences, genocide, torture, and the taking of hostages, in order for Australia to be compliant with international conventions to which Australia is a party. Currently, section 5 of the Extradition Act excludes these offences from the definition of 'political offence' by reference to a list of specified multilateral treaties (for example, Article 2 of the *International Convention for the Suppression of the Financing of Terrorism*).

(i) Further advice on amendments to the 'political offence' definition

The Bill proposes to streamline the definition of 'political offence' in section 5 of the Extradition Act by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. Providing for exceptions to the political offence definition to be set out in Regulations, rather than the Extradition Act, will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.

Previously, amendments to the 'political offence' definition in section 5 of the Extradition Act have been required to be made by four amending Acts (No. 139 of 1991, No. 182 of 1994, No. 58 of 2002 and No. 66 of 2002). The process for enacting legislation is often very lengthy and it is important to ensure that the 'political offence' definition in the Extradition Act can be kept up-to-date with Australia's international obligations under future conventions.

(ii) Scope of proposed paragraph (c) of the definition of 'political offence'

Proposed paragraphs (b) and (c) of the definition of 'political offence' would create an exception to the 'political offence' definition for offences prescribed by regulations to be an extradition offence or not to be a political offence for the purpose of the *Extradition Act 1988*. Regulations would prescribe those offences which Australia is required to ensure are extraditable offences or not considered to be political offences for the purposes of extradition under bilateral and multilateral treaties.

The Committee suggests narrowing the scope of proposed paragraphs (b) and (c) to ensure that only those offences which Australia is required to exclude from the definition of 'political offence' under international treaties are prescribed in regulations. I am advised that various options for drafting paragraphs (b) and (c) were explored by the Department, and the paragraphs in their current form are the most appropriate for achieving the objective of avoiding frequent amendments to the Extradition Act as Australia becomes a party to additional treaties. Regulations made under these paragraphs would still require the approval of the Executive Council.

Consistency with the United Nations Model Treaty on Extradition

The explanatory memorandum to the Bill states that the amendments are consistent with the United Nations Model Treaty on Extradition. This statement applies generally to section 5. Article 3(a) of the United Nations Model Treaty on Extradition states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person. This is consistent with proposed paragraph (a) of the definition of 'political offence' which will exclude from the definition of 'political offence' – offences that involve an act of violence against a person's life or liberty.

Article 3(a) of the United Nations Model Extradition Treaty also states that reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition. This is consistent with proposed paragraphs (b) and (c) of the definition of 'political offence', which will exclude from the 'political offence' definition, offences prescribed by regulations to be an extradition offence or not a political offence.

Legislative instruments – Various, including Schedule 2, Part 3, item 46, subclause 44A(4); item 99; item 108

These items declare that certain functions are not legislative instruments, but it is not clear whether this is merely describing the effect of the *Legislative Instruments Act 2003* or is being done to avoid the usual operation of that Act. The Committee is concerned to ensure that there is appropriate scrutiny of these legislative powers and therefore seeks further advice from the Minister as to whether it is appropriate to declare these instruments not to be legislative instruments.

Response

All the items in the Bill which declare that certain functions under the *Extradition Act 1988* are not legislative instruments are intended to describe the existing effect of the *Legislative Instruments Act 2003*, for the avoidance of doubt. These amendments are not intended to change the usual operation of the *Legislative Instruments Act 2003*.

Possible trespass on personal rights and liberties – Schedule 3, item 11

Item 11 of Schedule 3 of the Bill seeks to extend the death penalty ground for refusal under the *Mutual Assistance in Criminal Matters Act 1987* to circumstances in which a person has been *arrested* or *detained* on suspicion of committing a death penalty offence. This would extend the current ground for refusal where a person has been *charged* with, or *convicted* of, an offence for which the death penalty may be imposed, unless the Attorney-General or the Minister for Justice is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

In relation to the 'special circumstances' which could allow assistance to be provided, the Committee is aware that the proposed provision reflects the current approach. However, the Committee is concerned that while the specific examples outlined at paragraph 3.43 of the explanatory memorandum describe instances in which assistance would either be beneficial or provided in the knowledge that the death penalty will not be imposed, the provision itself would still allow assistance to be provided in circumstances in which the death penalty could apply. Given the importance of this matter, the Committee seeks the Minister's advice about whether the provision can be drafted to ensure that assistance would not be provided in cases in which the death penalty will be carried out.

Response

The existing death penalty ground for refusing mutual assistance is consistent with Australia's strong opposition to the death penalty while still affording sufficient flexibility to ensure assistance can be provided to combat serious criminal activity. A request for assistance must be refused where the death penalty may be imposed unless special circumstances exist. As outlined in the explanatory memorandum to the Bill, special circumstances may exist where the foreign country provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. Another example of a special circumstance is that the assistance provided would assist a defendant to prove their innocence.

Precluding assistance where the death penalty may be carried out in all cases would prevent Australia from cooperating in a wide range of serious criminal matters, for example in

international terrorism matters. Retaining the current drafting is both consistent with Australia's international obligations and necessary to ensure sufficient flexibility to enable the provision of assistance to combat serious criminal activity such as terrorism.

Possible trespass on personal rights and liberties – Schedule 3, item 14, subsection 8(2)(c)

The Committee is concerned that the double jeopardy ground for refusal is being changed from mandatory to discretionary. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Response

The double jeopardy ground for refusal is proposed to be changed from a mandatory to discretionary ground for refusal as there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns. This includes where there is fresh evidence that was not available at the original trial (such as new DNA evidence or evidence obtained through technological developments), or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle. For example, it may also be appropriate to provide assistance if there are doubts about the legitimacy of the original trial and there is a fresh trial. This amendment will ensure that Australia is able to provide assistance in these exceptional cases.

Possible trespass on personal rights and liberties – Schedule 3, Part 3

Part 3 of Schedule 3 of the Bill generally seeks to formalise and extend the provision to foreign countries of information obtained in Australia by telephone interception and surveillance devices, as long as the Attorney-General has agreed to provide mutual assistance in accordance with the Act and as long as offence thresholds are met. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Response

Telecommunications interception (TI) and covertly accessed stored communications material

Currently, lawfully obtained TI product and stored communications material can only be provided through 'take evidence' or 'production order' proceedings under section 13 of the *Mutual Assistance in Criminal Matters Act 1987*. The amendments in the Bill would allow lawfully obtained TI material and covertly accessed stored communications material to be provided to foreign countries using the streamlined procedure in section 13A of the Mutual Assistance Act. This proposal would not result in a greater range of material being able to be provided to foreign countries. It would simply streamline the process for making available material that Australia is already able to provide to foreign countries.

Following a request from a foreign country, I would be able to authorise the provision of lawfully obtained TI material and covertly accessed stored communications material to that foreign country. Lawfully obtained TI material would only be able to be provided if I am satisfied that the foreign country has commenced an investigation into, or proceedings relating to, an offence carrying a penalty of seven or more years imprisonment or a cartel

offence punishable by a fine equivalent to at $10,000,000. Covertly accessed stored communications material would only be able to be provided if I am satisfied that the foreign country has commenced an investigation into, or proceedings relating to, an offence carrying a penalty of three or more years imprisonment or a fine equivalent to at least 900 penalty units (one penalty unit is A$110).

In addition to the penalty thresholds, the safeguards contained in the Mutual Assistance Act would continue to apply in assessing whether Australia should provide assistance to the requesting country. Each request for this type of assistance would be dealt with on a case-by-case basis, and I would retain the discretion to refuse to provide this type of assistance. I would also be able to place restrictions on the uses that can be made of information provided to the foreign country under section 13A to ensure the material is only used for the purposes for which it was provided. The amendments in the Bill would require me to report annually on the number of occasions on which lawfully intercepted information or interception warrant information and covertly accessed stored communications was provided to a foreign country in connection with an authorisation under subsection 13A(1) of the Mutual Assistance Act.

Surveillance devices

Currently, surveillance device warrants cannot be obtained by Australian agencies in response to mutual assistance requests. The amendments in the Bill would enable Australian law enforcement agencies to apply for warrants to use surveillance devices following a mutual assistance request from a foreign country. Following a request, I may, in exercising my discretion, authorise the Australian Federal Police or police force of a State or Territory, in writing, to apply for a surveillance device warrant. Following my authorisation, an officer will be able to apply to an issuing officer for a warrant under the *Surveillance Devices Act 2004*. If a warrant is issued, a surveillance device may be used in accordance with the warrant.

There are a range of factors that would need to be taken into account by both myself and the issuing authority in determining whether to authorise a surveillance device warrant to ensure that assistance is only provided in appropriate cases. I would only be able to authorise an application for a surveillance device warrant if the relevant foreign offence carries a maximum penalty of at least three years' imprisonment. This will mirror the thresholds that apply for when a surveillance devices warrant can be sought for domestic purposes. The existing grounds for refusing assistance under the Mutual *Assistance in Criminal Matters Act 1987* would also apply to these requests.

Prior to issuing a surveillance device warrant, an issuing officer will be required to be satisfied of certain matters, such as that there are reasonable grounds to suspect that the use of a surveillance device is necessary for the purpose of enabling evidence to be obtained of the commission of the offence to which the authorisation relates. The issuing officer will also be required to have regard to factors, which are modelled on the considerations that must be taken into account when determining whether to issue a surveillance device warrant for domestic purposes. These include the nature and gravity of the alleged offence, and the likely evidentiary or intelligence value of any evidence or information sought to be obtained.

The amendments would ensure that information obtained through the use of a surveillance device would only be able to be used by the foreign country for the purposes for which it is provided. Further, the foreign country would be required to destroy the information when it

is no longer required for the purpose for which the information was provided. I would also be able to place other conditions on the use of the material as appropriate at the time it is provided to the foreign country. Under the amendments, I would also be required to report to Parliament annually on the number of surveillance device warrant applications made following a mutual assistance request, the number of warrant applications refused, and a breakdown of the types of offences for which warrants were issued.

Possible trespass on personal rights and liberties – Part 4

Through mutual assistance, the provision of material obtained from a forensic procedure to another country is currently available only in circumstance (i) (with consent). The proposed provisions would also allow it to be provided for the purposes of international cooperation in circumstance (iii) (as a result of a compulsory procedure by order of a magistrate). In the circumstances the Committee leaves the general question of whether the proposed approach is appropriate to the Senate as a whole.

Response

Forensic procedures are used by Australian law enforcement agencies as a key tool to investigate and prosecute domestic offences. The Bill would extend the availability of this law enforcement tool, subject to the strictest safeguards, to enable Australian law enforcement to provide assistance to their counterparts in foreign investigations.

The Bill proposes different regimes for forensic procedures depending on whether the person is a suspect, volunteer or child or incapable person. A forensic procedure would be able to be carried out on a suspect with the suspect's informed consent on a police-to-police basis, or without the suspect's consent by order of a magistrate following a formal mutual assistance request. The Bill would also enable a magistrate to authorise the carrying out of a forensic procedure on a child or incapable person, without the consent of that person's parent or guardian, in certain limited circumstances. Finally, the Bill would clarify the existing procedures for obtaining forensic material from volunteers with their consent following a police-to-police request from a foreign country.

The protections that apply to any grant of mutual assistance under the *Mutual Assistance in Criminal Matters Act 1987* would apply to requests by a foreign country for a forensic procedure to be carried out. Each request for this type of assistance would be dealt with on a case-by-case basis, and I would retain a general discretion to refuse to provide this type of assistance. The safeguards contained in the Mutual Assistance Act would also apply in assessing whether Australia should provide assistance to a foreign country.

The safeguards and procedures governing when and how forensic procedures can be carried out are modelled on requirements under the *Crimes Act 1914* for forensic procedures which are carried out for domestic purposes. For example, a magistrate must be satisfied of a number of matters before ordering a procedure, including that there are reasonable grounds to believe the procedure is likely to confirm or disprove that the suspect committed the offence and that the carrying out of the forensic procedure is justified in all the circumstances. The Crimes Act also lists a number of matters about which a person must be informed before they consent to providing a forensic sample. The proposal would ensure that these safeguards apply to persons undergoing a forensic procedure in response to a request form a foreign law enforcement agency. The person would also be informed of additional matters, such as the

name of foreign law enforcement agency that made the request, and that the forensic evidence may be used in proceedings in the foreign country.

The amendments would enable a forensic procedure to be carried out on a child or incapable person, in the absence of the guardian's consent, in certain limited circumstances. I would be required to be satisfied that it is appropriate to authorise the request, having regard to the best interests of the child or incapable person. I would also need to be satisfied that either the parent or guardian's consent cannot reasonably be obtained or has been withdrawn, or the parent or guardian is a suspect in relation to the foreign serious offence.

If I am satisfied of these matters and believe that it is appropriate to authorise the request, the matter would then be referred to Australian police to apply for an order from a magistrate. The magistrate would need to be satisfied that the carrying out of a forensic procedure is justified in all the circumstances, having regard to a number of factors. These factors include the best interests of the child or incapable person and, if they can be obtained, the wishes of the child or the incapable person. Even if a magistrate ordered that a forensic procedure be conducted on a child, the procedure could not be carried out if the child resisted or objected to undergoing the procedure. This safeguard already exists in the Crimes Act and would apply to any procedure ordered by a magistrate in response to a request for a foreign country.

Possible trespass on personal rights and liberties – Schedule 3, Part 4, item 78, subsection 23WI(2)

Given the significance of obtaining forensic material without consent, and noting the importance accorded to reciprocity, the Committee seeks the Minister's advice as to whether consideration could be given to limiting the provision of assistance to countries from whom Australia could receive similar assistance. The Committee would also welcome the Minister's advice about the reference to 'constable' in this provision and in paragraph 3.315 and the constable's role given that the procedure is to be carried out following an order by a magistrate (see paragraphs 3.283 and 3.284).

Response

Limiting the provision of assistance to countries from whom Australia could receive similar assistance

Australia's general position is to provide assistance in international crime cooperation matters to ensure that criminals cannot evade prosecution and confiscation action just because the evidence or proceeds of their crime are in different countries. While Australia undertakes a broad assessment of whether the requesting country is able to reciprocate and provide assistance to Australia, the inability of a foreign country to provide the specific form of assistance it has requested does not prevent Australia from determining that it is appropriate to provide the assistance sought. It is open to Australia to request assistance from a foreign country even where Australia would not be able to provide the specific assistance to the foreign country. Australia would be upfront about whether the assistance could be provided on a reciprocal basis when making the request. Imposing a requirement to undertake a specific and detailed assessment about whether the requesting country's laws allow for the provision of particular types of assistance would also pose a significant burden on Australia. It would also undermine Australia's general commitment to provide a high level of international crime cooperation to our foreign partners.

References to 'constable'

Item 78 of Schedule 3 of the Bill amends subsection 23WI(2) of the *Crimes Act 1914*. Section 23WI sets out matters to be considered by a constable before requesting a suspect's consent to a forensic procedure. New paragraph 23WI(2)(a) will require the constable to balance the public interest in Australia providing and receiving international assistance in criminal matters against the public interest in upholding the physical integrity of the suspect. Section 23WH of the Crimes Act allows a constable to seek a suspect's consent to a forensic procedure if satisfied of factors in section 23WI. Prior to seeking the suspect's consent, the constable would be required to be satisfied on the balance of probabilities that the person on whom the procedure is proposed to be carried out is a suspect, and there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence.

To seek a suspect's consent, the constable would also be required to first inform the suspect of a range of matters. The matters that apply to the carrying out of a forensic procedure for domestic purposes will also apply to a forensic procedure for foreign law enforcement purposes. However, as provided by Item 79 of Schedule 3, the suspect must also be informed of additional matters, including that forensic evidence obtained from the procedure will be provided to a foreign law enforcement agency.

If the suspect provides consent, a request from a foreign country under the *Mutual Assistance in Criminal Matters Act 1987* would not be required and the relevant Australian police agency would be able to carry out the procedure on behalf of a foreign law enforcement agency on a police-to-police basis. If a suspect does not consent, a formal request under the Mutual Assistance Act would be required. Under this Act, as amended by the Bill, following my authorisation, an order by a magistrate would be required in order to carry out a forensic procedure compulsorily on a suspect.

Possible trespass on personal rights and liberties – Schedule 3, Part 4, item 103, subsections 23YQC and 23YQD

These items will allow the provision of forensic material obtained by consent to be provided police-to-police in certain circumstances. The Committee seeks the Minister's advice about whether, in the process of volunteering or providing informed consent, a person will be advised that it could be possible for the forensic material obtained to be shared with police from other countries.

Response

Items 79 and 93 of Schedule 3 of the Bill propose to insert new paragraphs 23WJ(1)(ib) and 23XWR(2)(da) into the *Crimes Act 1914*. These paragraphs would provide that in all cases where a suspect or volunteer undergoes a forensic procedure because of a request by a foreign law enforcement agency, the suspect or volunteer must be informed of:

- the name of the foreign law enforcement agency that has made the request
- that forensic evidence obtained from the procedure will be provided to that agency
- that the evidence may be used in proceedings in the foreign country

- that the retention of the evidence will be governed by the laws of the foreign country and undertakings given by the foreign law enforcement agency, and

- the content of undertakings given by the foreign law enforcement agency relating to the retention of the evidence.

This will ensure that a person who provides forensic material is aware that he or she is consenting to the information obtained from the procedure being made available to foreign law enforcement authorities for a foreign offence.

Possible trespass on personal rights and liberties – Schedule 3, Part 4, item 112, subsection 28A(3) and 28B

It appears to the Committee that the intention is that Australia could only request a forensic procedure that is already permitted under Australian law, but as this is inferred from the wording of the provision rather than clearly stated, the Committee seeks the Minister's confirmation about whether this is intended, and if so, whether it can be clearly stated in the legislation.

Response

The intention is *not* that Australia could only request a forensic procedure that is already permitted under Australian law. The wording of proposed subsection 28A(3) states that Australia may request that a forensic procedure be carried out in the foreign country even if that forensic procedure is not permitted under Australian law.

This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements.