



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FIRST REPORT
OF
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon I Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

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

FIRST REPORT OF 2013

The Committee presents its *First Report of 2013* 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:

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Clean Energy Finance Corporation Bill 2012

Introduced into the House of Representatives on 23 May 2012

Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Assistant Treasurer responded to the Committee's comments in a letter dated 7 December 2012. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill establishes the following:

- Clean Energy Finance Corporation (the Corporation), a body corporate and Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997*;
- Clean Energy Finance Corporation Special Account for the purposes of the *Financial Management and Accountability Act 1997*;
- Board of the Corporation with statutory responsibility for decision making and managing investments; and
- Chief Executive Officer of the Corporation.

Incorporating material by reference

Clause 4, definition of 'GFS Australia'

In clause 4 of the bill, 'GFS Australia' is defined by reference to the 'publication of the Australian Bureau of Statistics known as *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, as updated from time to time'. The definition further provides that the updating takes the form of 'new versions' of the publication and when material in the current version is updated by other publications of the Australian Bureau of Statistics. Furthermore, 'GFS system' is defined as having 'the same meaning as in GFS Australia'.

The Committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can

create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. The Committee therefore **seeks the Minister's advice as to:**

- **why it is necessary to define this term by reference to a publication that may be updated from time to time as this approach may be thought to undermine the capacity of Parliament to scrutinise changes which may affect how the law is understood; and**
- **whether the *Australian System of Government Finance Statistics: Concepts, Sources and Methods* and updates are publicly available, especially updates which are included in other publications of the ABS, and if so, are they free or is a charge involved.**

Pending the Minister's advice, 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.

Assistant Treasurer's response - extract

Establishing the Clean Energy Finance Corporation

The Committee sought an explanation of why it is necessary to define a term ('GFS Australia') in clause 4 of the Clean Energy Finance Corporation Bill 2012 by reference to a publication that may be updated from time to time and whether the Australian System of Government Finance Statistics: Concepts, Sources and Methods, and its updates, are publicly available.

The CEFC Act established the Clean Energy Finance Corporation, which is to invest, by way of the acquisition of 'financial assets', in Australia's clean energy industries from 1 July 2013.

Section 4 of the CEFC Act defined 'financial assets' by reference to the Australian Bureau of Statistics' publication, *The Australian System of Government Finance Statistics: Concepts, Sources and Methods* (the GFS). The GFS is the accounting standard used throughout the Government's Budget process and is freely available to the public on the Bureau's website.

The purpose of the reference to the GFS is to limit the CEFC asset holdings to 'financial assets' as the term *is* used *in* the Budget context. This alignment ensures the CEFC acts consistently with the Government's broader fiscal policy. The wording of the relevant provisions is taken from sections 5 and 6 of the *Future Fund Act 2006*.

The Committee also raised similar concerns that the definition of Climate Change Convention in clause 4 of the Bill refers to external material. Section 4 of the CEFC Act also defined the Climate Change Convention as the "United Nations Framework Convention on Climate Change done at New York on 9 May 1992, as amended and in force for Australia from time to time". Section 10 of the CEFC Act outlines the constitutional limits to the CEFC's powers with reference to the Climate Change Convention, amongst other things. These reflect the relevant constitutional limits of the Parliament.

The purpose of this provision is to ensure that the CEFC Act does not purport to exceed the legislative powers of the Parliament or permit the CEFC to do so. The reference to the Climate Change Convention is necessary as it enlivens Parliament's power to make laws with respect to external affairs under section 51(xxix) of the Constitution. To the extent that Australia's international legal obligations under the Convention may change in the future, it is appropriate that the CEFC Act continue to reflect the legislative powers of the Parliament in this respect.

Committee Response

The committee thanks the Assistant Treasurer for this response and notes that the bill has already been passed by the Parliament. **In light of the scrutiny principle relating to incorporating material by reference to another document it would have been useful for key aspects of the explanation to have been included in the explanatory memorandum.**

Customs Amendment (Malaysia-Australia Free Trade Agreement Implementation and Other Measures) Bill 2012

Introduced into the House of Representatives on 1 November 2012

Portfolio: Home Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2012*. The Minister responded to the Committee's comments in a letter dated 14 December 2012. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2012 - extract

Background

This bill amends the *Customs Act 1901* and the *Customs Amendment (New Zealand Rules of Origin) Act 2012* to:

- provide for rules of origin for goods imported into Australia from Malaysia to give effect to chapter three of the Malaysia-Australia Free Trade Agreement; and
- make technical amendments.

Delegation of legislative power

Various

The bill requires a number of matters be dealt with in the regulations, though the explanatory memorandum does not detail the reasons why the terms of the MAFTA cannot be adequately reflected in the primary legislation. **The Committee therefore seeks a general explanation for the reliance on regulation making powers within the bill, and in particular (1) why it is necessary for the regulations to incorporate adopt or apply any matter contained in an instrument or other writing as in force or existing from time to time (see proposed subsection 153ZLB(6), introduced by item 1 of Schedule 1), and (2) why the record keeping obligations required by MAFTA are to be dealt with in regulations as opposed to the primary legislation (see proposed section 126ALB, item 2 of schedule 1).**

Pending the Minister's response, 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

I refer to the Committee's Alert Digest No. 14 of 2012, dated 21 November 2012, in particular the *Customs Amendment (Malaysia-Australia Free Trade Agreement Implementation and Other Measures) Act 2012* (the Act), in which you seek my advice on the use of regulation making powers contained in the Act.

The Act amends the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from Malaysia to give effect to the Malaysia-Australia Free Trade Agreement (MAFTA).

As referred to in the Committee's Alert Digest, the Act allows the Governor-General to make regulations including prescribing the calculation of the regional valuation content of goods, the value of goods, tariff change classifications and record keeping obligations.

The approach used in the Act to use regulation making powers instead of including all of the detail in the legislation is consistent with amendments made to the Customs Act to implement other free trade agreements such as the Thailand-Australia Free Trade Agreement and the Australia-United States Free Trade Agreement.

I consider the use of a regulation making power to prescribe certain matters to give effect to MAFTA is appropriate. The *Customs (Malaysian Rules of Origin) Regulation 2012* is in excess of 600 pages in length and including this level of detail in the Customs Act would create unnecessary complexity.

Further, any regulations made under the new provisions will be made by the Governor-General on advice of the Federal Executive Council and will be disallowable instruments for the purposes of the *Legislative Instruments Act 2003*. (Ultimately Parliament will have oversight of) and may disallow, regulations made under the new provisions.

Regarding the adoption of instruments or other writing as in force from time to time, this is consistent with provisions in the Customs Act which implement other free trade agreements. It will enable the regulations to refer to documents, such as general accounting principles of Malaysia (which may be updated from time to time), to give full effect to MAFTA. As any regulation made under these new provisions is a legislative

instrument, any provision which adopts another instrument or writing will be subject to scrutiny by Parliament.

Committee Response

The Committee thanks the Minister for this detailed response and notes that it would have been useful for information relating to the need for delegated legislation and incorporating material by reference to another document to have been included in the explanatory memorandum.

Fair Work Amendment Bill 2012

Introduced into the House of Representatives on 30 October 2012

Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2012*. The Minister responded to the Committee's comments in a letter dated 20 December 2012. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2012 - extract

Background

This bill makes amendments to the operation of the *Fair Work Act 2009* in accordance with a number of the Fair Work Act Review Panel recommendations contained in the *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* of June 2012.

The bill also makes amendments in response to recommendations of the Productivity Commission in its final report on *Default Superannuation Funds in Modern Awards* (released on 12 October 2012), additional amendments to the structure and operation of the FWC and a number of technical amendments.

Possible undue trespass on personal rights and liberties—fair hearing

Part 4, Schedule 6

Part 4 of Schedule 6 would introduce two new subsections (subsections 401(1) and 401(1A)) which are designed to provide a stronger deterrent for lawyers and paid agents 'from encouraging parties to bring or continue speculative unfair dismissal claims, particularly claims they know have no reasonable prospect of success' (see the explanatory memorandum at page 38) or in cases where the representative has acted in an unreasonable way connected with the conduct or continuation of the matter.

The Statement of Compatibility with Human Rights argues that these amendments 'strike a balance between the need to protect workers from unfair dismissal, and to provide a deterrent against unreasonable conduct during proceedings'. It is concluded, in the SOC, that the measures will not 'prevent genuine claims from being pursued' and as such are 'reasonable and proportionate to address the time and expense that unreasonable conduct' of a representative 'may cause another party to incur' (at page 7). The explanatory memorandum, at page 39, indicates that these amendments respond to recommendation 46

of The Fair Work Act Review Panel's report, *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* (June 2012).

Although these proposed subsections may have a 'chilling effect' on the willingness or vigour with which lawyers and representatives may represent a party in unfair dismissal matters, **the Committee notes the objective of minimising unreasonable claims and actions and leaves the question of whether the proposed limitation is appropriate to the consideration of the Senate as a whole.**

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

Minister's response - extract

Possible undue trespass on personal rights and liberties- fair hearing (costs against paid agents)

The Committee has expressed concern that the two new subsections on costs against paid agents could possibly trespass on personal rights and liberties. The Committee notes that the subsections that would extend the Fair Work Commission's (the Commission's) current powers to order costs against legal representatives may have a 'chilling effect' on the willingness or vigour with which lawyers and representatives may represent a party in an unfair dismissal matter.

The Commission's proposed power to order costs against lawyers and paid agents under the amendments is an extension of the tribunal's current powers to order costs. Currently, these powers are limited to allow for costs orders to be made only where the unreasonable act or omission of a lawyer or paid agent engaged by one party has caused the other party to incur costs and the lawyer or paid agent has been granted permission by the Commission to represent the party in unfair dismissal proceedings. The amendments prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order because they have not been formally granted permission to appear by the Commission on behalf of a party. Importantly, they do not prevent a lawyer or paid agent fully pursuing a genuine claim on behalf of their client.

Consequently, I do not believe that allowing orders for costs to be made against lawyers or paid agents unduly trespasses on personal rights and liberties.

Committee Response

The committee thanks the Minister for this response and notes the intention of the provision. The committee notes that the bill has already been passed by the Parliament.

Alert Digest No. 14 of 2012 - extract

Possible inappropriate delegation of power Schedule 8, item 62, proposed subsection 581A(3)

Part 7 of Schedule 8 of the bill provides for the creation of a framework for handling complaints about FWC Members. The provisions are said to be ‘broadly modelled on provisions contained in the Courts Legislation Amendment (Judicial Complaints) Bill 2012’ (explanatory memorandum, page 48).

Proposed subsection 581A(3) provides that the President may authorise a person or a body to undertake a number of functions in relation to handling a complaint against an FWC Member. The functions that may be undertaken by such a person or body are significant and in practical effect appear to enable the function of handling complaints to be delegated to such persons or bodies.

The explanatory memorandum, at page 49, indicates that the approach enables the President to have a discretion to appoint an independent person or body to investigate a complaint and is part of a flexible scheme which may involve the establishing of a Conduct Committee to investigate a complaint. Nevertheless, it is of concern that the bill does not provide any guidance as to the qualifications of persons or bodies that may be appropriate to exercise these functions nor does it provide for any institutional protections that may be considered to ensure or protect the independence of such decision-makers. **The Committee therefore seeks advice as to why the decision has been taken to confer a broad unstructured discretionary power on the President to authorise other persons or bodies to investigate complaints and whether consideration can be given to providing more legislative guidance on these matters, including in relation to the qualifications or experience required of a potential delegate; safeguards on the operation of the delegated power; and accountability.**

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

Inappropriate delegation of power to inquire into complaints made against FWC Members

The Committee has identified the ability for the President or the Minister to arrange for another person to investigate a complaint made against a Commission Member as a broad delegation of power and sought advice on whether consideration should be given to providing more legislative guidance on the matter.

The complaints handling framework created by the Bill is intended to be flexible. As the seriousness and nature of a complaint may vary, a flexible approach towards complaint management by the President of the Commission means responses to complaints can be prompt and tailored to the relevant circumstances.

The powers that may be delegated by the President under proposed subsection 581A(3) are powers of an investigatory nature. They do not include powers to take punitive measures against a Commission Member. The power of the President under subsection 581A(1)(b) to take measures necessary to maintain public confidence in the Commission cannot be delegated, and the appointment of a Member can only be terminated following the process outlined in section 641 of the Fair Work Act 2009.

These comments equally apply to the Minister's ability to arrange for another person to investigate a complaint on the Minister's behalf.

These amendments leave undisturbed Parliament's ultimate power to deal with alleged misbehaviour by a Commission Member, and consequently, it is not considered that further legislative guidance on the delegation of the power is required.

Committee Response

The committee thanks the Minister for this response and notes the requirement for flexibility. **Nonetheless, the committee remains concerned that the bill does not provide any guidance as to the qualifications of persons or bodies that may be appropriate to exercise these functions, which it believes could have been done without inhibiting the flexibility sought.** The committee notes that the bill has already been passed by the Parliament.

Alert Digest No. 14 of 2012 - extract

Inappropriate delegation of legislative power Schedule 8, item 62, proposed section 581B

Part 7 of Schedule 8 of the bill provides for the creation of a framework for handling complaints about FWC Members. The provisions are said to be ‘broadly modelled on provisions contained in the Courts Legislation Amendment (Judicial Complaints) Bill 2012’ (see the explanatory memorandum at page 48).

Proposed subsection 581B(1) provides for the President of the FWC to determine a Code of Conduct for FWC Members. Subsection 581(3) requires that the Code be published on the FWC’s website or any other means the President considers appropriate. Subsection 581B(4) states that a determination under subsection (1) is not a legislative instrument. The explanatory memorandum indicates that this subsection, which exempts the code from the operation of the *Legislative Instruments Act (LIA)*, is ‘intended to be declaratory of the law’.

The definition of a legislative instrument under the *LIA* is that the instrument be ‘of a legislative character’ and be made in the exercise of a power delegated by the Parliament. Further, it is provided by the *LIA*, that an instrument is to be taken to be a legislative instrument if it ‘determines the law or alters the content of the law, rather than applying the law in a particular case’ and 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’.

As it is likely that a complaint handler under the framework provided for in Part 7 of Schedule 8 of the bill would be required to at least consider any Code of Conduct made pursuant to subsection 581B(1) the reasons why subsection 581(4) is not a substantive exemption from the *LIA* are not obvious. The Committee notes that the statement in the SOC that the complaints process amendments ‘strengthen the right of FWC Members not to be unjustly deprived of work by enabling the formulation of standards of conduct for FWC Members and by ensuring that complaints can be dealt with in a structured way’ arguably indicates an intention that the complaints process should be administered taking into account the Code of Conduct (see the explanatory memorandum at pages 8 to 10). **The Committee therefore seeks the Minister’s advice as to why the express declaration that the Code is not a legislative instrument and should be considered to be declaratory of the law.**

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

Minister's response - extract

Status of Code of Conduct as a legislative instrument

The Committee has suggested that as it is likely that the complaint handler under the framework provided for in Part 7 of Schedule 8 of the Fair Work Amendment Bill 2012 would be required to at least consider any Code of Conduct made pursuant to subsection 581B(1), the Code of Conduct could be said to be a legislative instrument for the purpose of the Legislative Instruments Act 2003.

Proposed subsection 581 B enables the President to determine a Code of Conduct for Fair Work Commission Members.

While a complaint against a Member may be based on a breach of the Code of Conduct, the Code itself is expected to reflect well-established expectations for the conduct of tribunal members. The Member Conduct Guide approved by the President of Fair Work Australia earlier this year and published on the Fair Work Australia website does not include sanctions, and places the primary responsibility for deciding whether or not a particular activity or course of conduct is or is not appropriate on individual members.

For these reasons, it is considered that the Code is not a legislative instrument for the purpose of the Legislative Instruments Act.

Committee Response

The Committee thanks the Minister for this response. **It is not clear to the committee why the fact that the Code is expected to reflect well-established expectations or may not include sanctions is determinative of either whether the instrument 'determines the law or alters the content of the law' or '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'.** However, the committee notes that the bill has already been passed by the Parliament.

Alert Digest No. 14 of 2012 - extract

Possible undue trespass on personal rights and liberties—retrospective effect Schedule 11, item 1

Item 1 of Schedule 3 of the bill makes amendments to section 160 of the *Fair Work Act* that have the effect of broadening the standing requirements for bringing an application to have a modern award varied to remove an ambiguity, uncertainty or to correct an error.

Item 1 of Schedule 11 inserts a new Schedule 3 into the *Fair Work Act*, and item 3 of Part 4 to Schedule 3 ensures that applications and determinations to vary a modern award under section 160 before the commencement of this amendment are valid. Subitem 3(2) provides that a determination or application are ‘as valid, and are taken always to have been valid, as they would have been if paragraphs 160(2)(c) and (d) (as inserted by Part 1 Schedule 3 to the amending Act) had been in force at the time the determination or application was made’.

The Committee seeks the Minister’s advice as to whether the application of the amendments to section 160 to applications and determinations prior to commencement will have any detrimental effect on any person whose interests might be affected by such applications and determinations.

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

Minister’s response - extract

Retrospective effect of amendments to section 160 (variation of a modern award to remove ambiguity or uncertainty or correct error)

The Committee has asked for advice on whether the application of the amendments to section 160 to applications and determinations for variation of a modern award prior to commencement will have any detrimental effect on any person whose interests might be affected by such applications.

Section 160 enables the Commission to vary a modern award to remove ambiguity or uncertainty or correct an error. The effect of the amendment to section 160 is to remove the

inconsistency between it and section 158 by providing consistent rules about standing for organisations that are entitled to represent the interests of employers or employees.

Item 3 of Part 4 to Schedule 3 of the Bill ensures that applications or determinations under section 160, which would be defective because the party that brought the application lacks standing, are not disturbed. This provides certainty for employers and employees who can rely on the ongoing consistency of the modern award system by ensuring that prior relevant variation decisions are valid.

Committee Response

The Committee thanks the Minister for this response, but notes that it does not appear to provide the information sought in relation to possible detriment to any person. However, the committee notes that the bill has already been passed by the Parliament.

Fair Work Amendment (Transfer of Business) Bill 2012

Introduced into the House of Representatives on 11 October 2012

Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2012*. The Minister responded to the Committee's comments in a letter dated 28 November 2012. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2012 - extract

Background

This bill amends the *Fair Work Act 2009* to provide for the transfer of employees' terms and conditions of employment from an old public sector employer to a national system employer where there is a connection between the two, and to enable Fair Work Australia to make orders that modify the general effect of the transfer of business rules in these circumstances.

The bill also makes consequential amendments to the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Delegation of legislative power—Henry VIII clause Schedule 1, item 1, proposed subsection 768CA(2)

Proposed subsection 768CA(2) would enable the making of regulations that 'may modify provisions of this Act or the Transitional Act'.

The Committee routinely raises concerns about so-called Henry VIII provisions that enable the executive government to modify the operation of primary legislation passed by the Parliament. The concern is that such provisions may subvert the appropriate relationship between the Parliament and the Executive branch of government.

As the explanatory memorandum does not indicate why this provision is necessary, **the Committee seeks the Minister's advice in relation to the justification for the proposed approach.**

Pending the Minister's advice, 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

The Committee has sought my advice on the justification for the delegation of legislative power under proposed subsection 768CA(2) of the Bill. This proposed subsection would allow for regulations to be made that modify provisions of the *Fair Work Act 2009* (FW Act) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

The Bill inserts a new Part 6-3A into the FW Act to make provision for when there is a transfer of business between a non-national system employer that is a State public sector employer to a national workplace relations system employer. This necessarily involves a range of both complex and technical transitional issues. For example, the Bill provides for the recognition of terms and conditions of employment under State industrial instruments in the national workplace relations system via the creation of new federal instruments.

Similarly, it provides for the recognition of employees' accrued entitlements and service and translates those entitlements into the national workplace relations system. This involves both the preservation of entitlements and providing for the ongoing interaction of those entitlements with the FW Act, including the National Employment Standards.

Given this complexity, and consistent with the justification provided at Paragraph 93 of the Explanatory Memorandum to the Bill, I consider it both necessary and appropriate to include this regulation making power to allow the Government to deal with any unforeseen consequences relating to transitional arrangements and to ensure a smooth transition in particular for employees transferring into the national workplace relations system.

Proposed subsection 768CA(3) makes it clear that proposed section 768CA does not allow regulations to be made that would have the effect of creating offences.

I thank the Committee for its consideration of the Bill and I trust the information provided is helpful.

Committee Response

The committee thanks the Minister for this response notes that the bill has already been passed by the Parliament.

National Gambling Reform Bill 2012

Introduced into the House of Representatives on 1 November 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2012*. The Minister responded to the Committee's comments in a letter dated 30 January 2013. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2012 - extract

Background

This bill is part of a package of three bills in relation to a national scheme for gaming machines. The bill provides for:

- precommitment systems for gaming machines;
- registered users to set a loss limit;
- gaming machines to display certain warnings; limits daily withdrawals from automatic teller machines located in gaming premises (excluding casinos) to \$250;
- new machines manufactured or imported to be capable of supporting precommitment;
- a Regulator to be established to monitor and investigate compliance;
- enforcement measures;
- an Australian Gambling Research Centre to be established within the Australian Institute of Family Studies; and
- the Productivity Commission to undertake two inquiries.

Delegation of legislative power

Paragraph 51(1)(c) and Subclause 51(4)

These provisions relate to the Regulator's power to approve a precommitment system for a State or Territory and to vary the approved terms and conditions for such a system. In both instances the Regulator must be, among other things, satisfied that the terms and conditions are reasonable 'taking into account the matters prescribed by the regulations'. The

Committee prefers that important information is included in primary legislation unless there is an appropriate reason for using delegated legislation. Unfortunately the explanatory memorandum does not indicate why these relevant considerations cannot be specified in the primary legislation (see the discussion at page 25). **The Committee therefore seeks the Minister's advice as to the rationale for the proposed approach so that it is able to form a view as to its appropriateness.**

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 51 of the Act sets out the matters the Regulator must be satisfied about before approving pre-commitment systems for provision to venues. Among a range of matters, paragraph 51(1)(c) and subsection 51(4) together provide that the terms and conditions upon which pre-commitment systems are approved or varied must be reasonable having regard to the matters prescribed in the regulations. These provisions allow the Regulator to regulate the commercial relationship between pre-commitment providers and venues to ensure pre-commitment systems can be accessed by venues across Australia, and that access to a fairly priced pre-commitment system is not a barrier to compliance.

Specifying that matters referred set out in paragraph 51(1)(c) and subsection 51(4) in regulations will ensure the terms and conditions remain current and responsive to the commercial and jurisdictional context.

As you would be aware, ultimately Parliament will have oversight of, and may disallow, the regulations made under the Act.

Committee Response

The Committee thanks the Minister for this response and notes that the key information would have been helpful in the explanatory memorandum. The committee notes that the bill has already been passed by the Parliament.

Regulatory Powers (Standard Provisions) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated 27 November 2012. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2012 - extract

Background

This bill provides for a framework of standard regulatory powers exercised by agencies across the Commonwealth including:

- monitoring and investigative powers; and
- enforcement provisions such as civil penalties, infringement notices, enforceable undertakings and injunctions.

Delegation of legislative power

Multiple provisions

The provisions of the bill which provide that its powers may only be activated by a triggering Act also state that its provisions may be activated by regulation. The Committee in general expects to see important matters dealt with in primary legislation rather than regulations. Although the bill also provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act (see, for example, clause 18), it remains the case that the provisions of this Act can be triggered by regulations. **The Committee therefore seeks the Attorney-General's advice as to why it is considered appropriate to enable the application of the significant provisions in this bill through the enactment of regulations.**

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

Attorney-General's response - extract

In the Scrutiny of Bills Committee's *Alert Digest No. 13 of 2012* (31 October 2012) my advice is sought as to why the Bill subjects the exercise of legislative power to an inappropriate degree of Parliamentary scrutiny.

The purpose of the Bill is to simplify the law by creating a standard set of provisions to deal with monitoring, investigation (including entry, search and seizure), civil penalties, the use of infringement notices, enforceable undertakings and injunctions and general provisions relating to regulations.

The Bill is based on existing Commonwealth laws, including the *Crimes Act 1914*. It is consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* approved by the Minister for Home Affairs in September 2011.

The Bill is an initiative under the Government's *Clearer Laws* project, which aims to reduce the volume, and improve the coherence and consistency of Commonwealth laws. As a law of general application, the Bill could reduce the size of each new Commonwealth Act or regulation requiring regulatory provisions by up to 80 pages. Many of the measures in the Bill have been included in several Commonwealth laws over the past 18 months. The Bill is also the subject of a Drafting Direction, an instruction issued by First Parliamentary Counsel which requires all drafters to comply with the direction. This too will ensure a consistent approach is taken to the Bill's provisions.

I wish to address the Committee's concerns in relation to Clause 18 of the Bill. This provides that, only if the power to do so is given under another Act, can a legislative instrument provide that a provision is enforceable under this Part or that a person is an authorised person or a relevant chief executive under this Part.

I refer the Committee to the Office of Parliamentary Counsel's draft Drafting Direction 3.5A in respect of this Bill. The Drafting Directions are an authoritative series of pronouncements on a range of drafting issues issued by First Parliamentary Counsel after consultation with all drafters and the editorial staff.

To ensure that the implementation of the Bill in relation to a particular legislative scheme is subject to appropriate scrutiny, the Drafting Direction provides that a Part of the Bill will only operate if it is triggered by a provision in another Act or a regulation. If an instructing agency wishes to leave open the option of triggering a Part of the Bill in a regulation, the Act under which that regulation is made must include a provision allowing this to be done.

Attachment A to the Drafting Direction sets out examples of provisions triggering each Part of the Bill. It is anticipated that the triggering provisions would be grouped together within a Part or Division. However, this may not always be the case. Attachment A also

provides examples of a regulation-making power that could be included in an Act to allow the regulations themselves to trigger a Part of the Bill.

The Government agrees with the Committee that important matters should be dealt with in primary legislation rather than regulations. Clause 18 provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act. It therefore remains the case that the provisions of this Bill must be triggered by legislation.

Committee Response

The committee thanks the Attorney-General for this response. **The committee notes that it will look to the explanatory memorandum for each future bill that seeks to enable the application of the significant provisions in this bill through the enactment of regulations for a detailed justification for doing so.**

Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2012*. The Minister responded to the Committee's comments in a letter dated 11 October 2012 which was published in the Committee's *Thirteenth Report of 2012*. The Minister then provided a further response dated 28 November 2012 to comments made in the report by the Committee. A copy of the letter is attached to this report.

Minister's response - extract

Thank you for publishing, in the Committee's report dated 31 October 2012, my response to comments on the retrospective application of the amendments in Schedule 4 to the Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012.

I am glad that my response was helpful in explaining the possible detriment to child support payees and payers if the amendments were not to apply retrospectively.

The Committee has requested that the key information from my response be included in the explanatory memorandum for the Bill. However, since the Bill was passed by the Senate and the Parliament on 1 November 2012, it is no longer feasible to make that inclusion in the explanatory memorandum.

Nevertheless, I will ensure as far as possible that information to address the Committee's terms of reference, or comments made by the Committee, are included in future explanatory memoranda for my portfolio.

Committee Response

The committee thanks the Minister for this response and commitment to ensure that explanatory memoranda address matters relating to scrutiny principles.

Tax Laws Amendment (2012 Measures No.1) Bill 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2012*. The Assistant Treasurer responded to the Committee's comments in a letter dated 7 December 2012. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2012 - extract

Background

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* to implement the 2011-12 Budget measure to disallow deductions against government assistance payments from 1 July 2011.

Schedule 2 amends the *Income Tax Assessment Act 1997* to remove access to the trading stock exception to the capital gains tax primary code rule for certain assets (primarily shares, units in a trust and land) owned by a complying superannuation entity.

Schedule 3 amends the *Income Tax Assessment Act 1997* to exempt from income tax ex-gratia payments to New Zealand non-protected special category visa holders for the floods that occurred in New South Wales and Queensland in early 2012.

Schedule 4 amends the *Income Tax Assessment Act 1936* (ITAA 1936) to phase out, from 1 July 2012, the dependent spouse tax offset for taxpayers who maintain a dependent spouse born on or after 1 July 1952.

The Schedule also amends the ITAA 1936 so a taxpayer eligible for an amount of offset in respect of an invalid or carer spouse is not also entitled to the equivalent amount of dependent spouse tax offset as a component of their zone, overseas forces or overseas civilian tax offset.

Schedule 5 makes miscellaneous amendments to the taxation laws.

Legislation by press release
Retrospective application
Schedule 1

The amendments in this schedule will apply from 1 July 2011 (item 4), having been announced on 10 May 2011 in the 2011-12 Budget. The amendments are designed to disallow deductions against government assistance payments, in response to a High Court ruling which held that students receiving Youth Allowance were able to deduct study expenses from their assessable income.

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

The Committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a draft bill within six calendar months after the date of that announcement. It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the Committee seeks the Minister's advice as to the justification for the delay and the rationale for seeking to apply these provisions retrospectively.**

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.

Assistant Treasurer's response - extract

Disallowing deductions related to government assistance

The Committee sought an explanation of the justification for the delay in introducing Schedule 1 of Tax Laws Amendment (2012 Measures No. 1) Bill 2012 and the rationale for applying the provisions retrospectively.

The Treasurer announced on 10 May 2011 that the Government would disallow deductions related to government assistance payments from 1 July 2011. The amendments restore the original policy intent of the provisions.

The Australian Taxation Office wrote to affected taxpayers after the Treasurer's announcement and advised them to check its website for details of the Government's response.

The legislation to disallow these deductions was introduced into the Parliament on 21 March 2012. The introduction of the legislation to Parliament was delayed as Treasury worked to resolve issues identified in the drafting process to ensure that the legislation achieved its policy intent without unintended consequences. Prior to introduction, the draft legislation was released publicly on 20 January 2012 for a period of four weeks to provide members of the public with the opportunity to comment.

Committee Response

The committee thanks the Assistant Treasurer for this response and notes that the bill has already been passed by the Parliament. The committee notes that it routinely seeks information about the rationale for any provisions with retrospective effect and what potential detrimental effect they could have and expects that the explanatory memorandum will address these issues.

Alert Digest No. 5 of 2012 - extract

Legislation by press release

Retrospective application

Schedule 2, item 6

This Schedule makes amendments that remove access to an exception from certain rules associated with capital gains tax. The amendments appear to be to the detriment of certain superannuation entities and life insurance companies. The explanatory memorandum at page 16 indicates that the amendments have been a response to such entities departing from the 'general industry practice', and claiming the exception. This has, it is said, created 'potential uncertainty regarding the appropriate tax treatment of gains and losses made from the sale of shares owned by complying superannuation entities'.

The justification for retrospective application is that the amendments were announced on 10 May 2011 and, at page 18 of the explanatory memorandum, that there is a need to 'promote certainty regarding the appropriate tax treatment of certain assets owned by a complying superannuation entity'. Although some proposed amendments in Schedule 4 apply from 1 July 2011, the explanatory memorandum states at page 5 that 'no taxpayers are disadvantaged'. While noting this, the Committee observes that it is regrettable that it

has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the Committee seeks the Minister's further advice as to the justification for the delay and the rationale for seeking to apply these provisions retrospectively.**

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.

Assistant Treasurer's response - extract

Remove access to the trading stock exception to the capital gains tax primary code rule for certain assets owned by a complying superannuation entity

The Committee sought advice on the justification for the delay in introducing Schedule 2 of Tax Laws Amendment (20 12 Measures No. 1) Bill 2012 and the rationale for applying the provisions retrospectively.

The Government announced in the 2011-12 Budget that it would remove access to the trading stock exception to the capital gains tax primary code rule for certain assets (primarily shares, units in a trust and land) owned by a superannuation entity.

These amendments applied from the time of announcement (10 May 2011) to remove the ambiguity about the appropriate taxation treatment of certain assets owned by superannuation entities. Superannuation entities that held trading stock assets at the time of announcement were able to continue to treat those assets as trading stock.

Delaying the application date of these amendments would have placed pressure on the Australian Taxation Office to provide guidance as to whether superannuation entities were able to treat certain assets as trading stock. Providing this guidance would have disrupted the superannuation industry as it would have raised concerns amongst larger superannuation entities as to whether their assets, which are typically accounted for under the capital gains tax provisions, should be taxed under the trading stock provisions.

The legislation was delayed because there were a large number of un-enacted measures that were competing for limited drafting resources. Drafting resources were assigned to legislative projects according to Government priorities which meant that significant drafting resources were assigned to several large legislative projects. Notwithstanding this delay, the Government released exposure legislation on 13 January 2012 (approximately eight months after announcement).

Committee Response

The Committee thanks the Assistant Treasurer for this response and notes that the bill has already been passed by the Parliament. **The committee also notes the resource issues affecting the allocation of drafting resources, but in light of paragraph 19 of Drafting Direction No. 1.3, which requires that where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay, the committee expects that the explanatory memorandum will address this issue in detail.**

Tax Laws Amendment (2012 Measures No.2) Bill 2012

Introduced into the House of Representatives on 24 May 2012

Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Assistant Treasurer responded to the Committee's comments in a letter dated 7 December 2012. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill amends the following:

- *Taxation Administration Act 1953* and four other Acts to:
 - extend the director penalty regime so that directors are personally responsible for their company's unpaid superannuation guarantee amounts;
 - make directors and their associates liable to pay as you go (PAYG) withholding non-compliance tax in certain circumstances;
 - and ensure that directors cannot discharge their director penalties by placing their company into administration or liquidation when PAYG withholding or superannuation guarantee remains unpaid and unreported three months after the due date;
- *Income Tax Assessment Act 1997* and *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* in relation to the taxation of financial arrangements consolidation interaction;
- *Income Tax Assessment Act 1997* to modify the consolidation tax cost setting rules and rights to future income rules; and
- *Taxation Administration Act 1953* to make amendments consequential on the proposed *Income Tax (Managed Investment Trust Withholding Tax) Amendment Act 2012*.

Retrospective application Schedule 2

This Schedule makes amendments to the complex tax laws applicable in the context of the taxation of financial arrangements (TOFA). The amendments will commence immediately after the commencement of the laws being amended (i.e. 26 March 2009). The explanatory memorandum accepts that the amendments commence and apply retrospectively. In justification of this approach the explanatory memorandum states, at page 97, that ‘the amendments are largely technical amendments to correct parts of the law that did not give proper effect to the policy’ of the laws introduced in 2009. Further it is argued that (1) the TOFA regime is ‘a new and very complex part of the tax laws’ and that shortly after its introduction the ‘Government made it clear that technical amendments and further integrity measures may be necessary to ensure the law operates as intended’, and (2) the Government announced its intention to make retrospective clarification where it became aware that the law could be productive of unintended outcomes. (see the explanatory memorandum at pages 97 and 98). The result is that the amendments may benefit some taxpayers and adversely affect others, ‘depending on their circumstances’.

The Committee usually does not regard complexity of the law and an indication from the government that retrospective change may be required as justifying retrospective legislation. In general, affected persons are entitled to rely on legislation as currently applicable, regardless of its complexity. The Committee is also interested to understand more about the extent of any detriment and **therefore seeks the Treasurer’s advice on this issue, such as an indication as to the number of taxpayers affected and the extent of likely detriment.**

Pending the Treasurer’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.

Assistant Treasurer’s response - extract

Taxation of financial arrangements (TOFA) consolidation interaction

The Committee sought an explanation of the number of taxpayers affected by Schedule 2 of the Tax Laws Amendment (2012 measures No.2) Bill 2012 and the extent of any detriment imposed as a result of the retrospectivity of the amendments.

The amendments contained in Schedule 2 largely clarify the operation of the taxation of financial arrangements (TOFA) provisions with respect to complex commercial transactions. The amendments provide certainty to affected taxpayers involved in these complex transactions and affect those taxpayers in different ways - that is, they benefit or

adversely affect taxpayers depending on their specific circumstances. Consequently, without taxpayer specific information, it is difficult to assess the extent of likely detriment.

However, to limit the detriment to taxpayers, the retrospective application of the amendments excluded certain taxpayers who had received an Australian Taxation Office ruling confirming the application of the law prior to the amendments. Consequently, overall the number of taxpayers affected is expected to be very small, even if the potential impact on any one taxpayer may be significant. Furthermore, some of these affected taxpayers may have benefited from these retrospective changes.

Committee Response

The Committee thanks the Assistant Treasurer for this response and notes that the bill has already been passed by the Parliament. **The committee notes that it routinely seeks information about the rationale for any provisions with retrospective effect and what potential detrimental effect, if any, they could have. The committee expects that the explanatory memorandum will address these issues in detail.**

Alert Digest No. 6 of 2012 - extract

Retrospective application Schedule 3

The amendments in this schedule respond to an unanticipated outcome created by an amendment to the consolidation tax cost setting and rights to future income rules which was enacted in 2010. The amendments ‘respond to the need to protect a significant amount of revenue that would otherwise be at risk, and to make the tax outcomes for consolidated groups more consistent with those for entities outside consolidation’ (see the explanatory memorandum at page 103).

The 2010 amendments operated with retrospectivity back to 2002, and the proposed changes affecting a corporate acquisition will depend on the time that the acquisition took place. In particular ‘different changes apply to acquisitions that took place before 12 May 2010, after 30 March 2011 (when the Board of taxation was asked to review the rules) and the intervening period’ (see the explanatory memorandum at page 103). As the 2010 amendments operated with retrospective effect back to 2002, some of the amendments will operate with effect from that date to ‘prevent the retrospective operation of unintended effects’ and ‘perceived weaknesses’ in the earlier amendments. The changes for the intervening period will ‘protect taxpayers who acted on the basis of the current law before the Board of Taxation review was announced’ (see page 103). The final category of

changes 'implement recommendations made by the Board of Taxation' and 'apply broadly to the period after 30 March 2011(see page 104)'.

The amendments are complex and it is argued that the overall approach is justified by reference to a need to protect a significant amount of revenue and for consistency as between entities inside and those outside the consolidation regime.

It is unclear why the final category of changes (ie those which take effect from March 2011) should commence at that date given that the proposal was announced in November 2011 (see the explanatory memorandum at page 6). More broadly, the complexity of the changes makes consideration of the appropriateness of the retrospectivity involved in the application of the 'pre-rules' difficult. In particular the question of the extent and fairness of any detriment suffered by taxpayers is not as directly addressed in the explanatory memorandum as it might have been. It appears that the proposed amendments will remove retrospective benefits introduced by the 2010 amendments. **In the circumstances the committee seeks the Treasurer's further advice in relation to (1) the issue of the commencement of the final category of changes and (2) the extent and fairness of any detriment.**

Assistant Treasurer's response - extract

Consolidation tax cost setting rules and rights to future income rules

The Committee sought an explanation of why it is necessary for the final category of changes ('prospective rules') in Schedule 3 of Tax Laws Amendment (2012 Measures No.2) Bill 2012, which were announced in November 2011, to be applied broadly to the period after 30 March 2011, and the extent and fairness of any detriment from the package of amendments.

The final category of changes commenced from 30 March 2011, the date of announcement of the Board of Taxation Review of the rights to future income and residual cost setting rules. The Review was initiated after the Board raised concerns that the 2010 amendments could be applied in such a way that was not consistent with the Government's policy intention.

A later commencement date would have extended the 'interim rules' period, in which there were inconsistencies in the tax outcomes between consolidated groups and entities outside of consolidation. In particular, consolidated groups could have continued to reclassify traditional goodwill assets of joining entities as rights to future income, and thereby get access to immediate tax deductions. This would have significantly reduced the amount of revenue protected by the changes.

The 2012 amendments were designed to uphold the policy intention of the changes, while limiting the detriment to taxpayers that had received a refund for claims made under the 2010 amendments or who had received an Australian Taxation Office ruling in their favour. As a result, all taxpayers that had received a refund or positive Australian Taxation Office ruling were able to continue to rely on the law as it operated at that time. Taxpayers that had not received a refund or positive Australian Taxation Office ruling were required to comply with the 2012 amendments. This ensured that this latter group of taxpayers did not receive unintended windfall gains.

Thank you again for your letter and I hope this information will be of assistance to the Committee.

Committee Response

The Committee thanks the Assistant Treasurer for this detailed response and notes that the bill has already been passed by the Parliament. The committee also notes that it routinely seeks information about the rationale for any provisions with retrospective effect and what potential detrimental effect, if any, they could have. The committee expects that the explanatory memorandum will address these issues in detail.

Senator the Hon Ian Macdonald
Chair

**THE HON JASON CLARE MP**

Minister for Home Affairs

Minister for Justice

Ministerial number: 106645

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the Committee's Alert Digest No. 14 of 2012, dated 21 November 2012, in particular the *Customs Amendment (Malaysia-Australia Free Trade Agreement Implementation and Other Measures) Act 2012* (the Act), in which you seek my advice on the use of regulation making powers contained in the Act.

The Act amends the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from Malaysia to give effect to the Malaysia-Australia Free Trade Agreement (MAFTA).

As referred to in the Committee's Alert Digest, the Act allows the Governor-General to make regulations including prescribing the calculation of the regional valuation content of goods, the value of goods, tariff change classifications and record keeping obligations.

The approach used in the Act to use regulation making powers instead of including all of the detail in the legislation is consistent with amendments made to the Customs Act to implement other free trade agreements such as the Thailand-Australia Free Trade Agreement and the Australia-United States Free Trade Agreement.

I consider the use of a regulation making power to prescribe certain matters to give effect to MAFTA is appropriate. The *Customs (Malaysian Rules of Origin) Regulation 2012* is in excess of 600 pages in length and including this level of detail in the Customs Act would create unnecessary complexity.

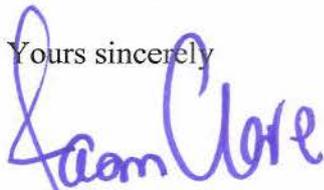
Further, any regulations made under the new provisions will be made by the Governor-General on advice of the Federal Executive Council and will be disallowable instruments for the purposes of the *Legislative Instruments Act 2003*. Ultimately, Parliament will have oversight of, and may disallow, regulations made under the new provisions.

Regarding the adoption of instruments or other writing as in force from time to time, this is consistent with provisions in the Customs Act which implement other free trade agreements. It will enable the regulations to refer to documents such as general accounting principles of Malaysia, which may be updated from time to time, to give full effect to MAFTA. As any regulation made under these new provisions is a legislative instrument, any provision which adopts another instrument or writing will be subject to scrutiny by Parliament.

The officer responsible for this matter in Customs and Border Protection is Ms Erin Dale, Acting National Manager Cargo Policy who can be contacted on (02) 6122 5530.

I trust this information is of assistance.

Yours sincerely



Jason Clare





**MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

20 DEC 2012

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

Dear Senator

I refer to the Committee's Alert Digest No 14 of 2012, and in particular comments on the Fair Work Amendment Bill 2012.

Attached is a response to issues raised by the Committee.

I thank the Committee for the opportunity to respond.

Regards

A handwritten signature in blue ink that reads 'Bill Shorten'.

BILL SHORTEN

Possible undue trespass on personal rights and liberties – fair hearing (costs against paid agents)

The Committee has expressed concern that the two new subsections on costs against paid agents could possibly trespass on personal rights and liberties. The Committee notes that the subsections that would extend the Fair Work Commission's (the Commission's) current powers to order costs against legal representatives may have a 'chilling effect' on the willingness or vigour with which lawyers and representatives may represent a party in an unfair dismissal matter.

The Commission's proposed power to order costs against lawyers and paid agents under the amendments is an extension of the tribunal's current powers to order costs. Currently, these powers are limited to allow for costs orders to be made only where the unreasonable act or omission of a lawyer or paid agent engaged by one party has caused the other party to incur costs and the lawyer or paid agent has been granted permission by the Commission to represent the party in unfair dismissal proceedings. The amendments prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order because they have not been formally granted permission to appear by the Commission on behalf of a party. Importantly, they do not prevent a lawyer or paid agent fully pursuing a genuine claim on behalf of their client.

Consequently, I do not believe that allowing orders for costs to be made against lawyers or paid agents unduly trespasses on personal rights and liberties.

Inappropriate delegation of power to inquire into complaints made against FWC Members

The Committee has identified the ability for the President or the Minister to arrange for another person to investigate a complaint made against a Commission Member as a broad delegation of power and sought advice on whether consideration should be given to providing more legislative guidance on the matter.

The complaints handling framework created by the Bill is intended to be flexible. As the seriousness and nature of a complaint may vary, a flexible approach towards complaint management by the President of the Commission means responses to complaints can be prompt and tailored to the relevant circumstances.

The powers that may be delegated by the President under proposed subsection 581A(3) are powers of an investigatory nature. They do not include powers to take punitive measures against a Commission Member. The power of the President under subsection 581A(1)(b) to take measures necessary to maintain public confidence in the Commission cannot be delegated, and the appointment of a Member can only be terminated following the process outlined in section 641 of the *Fair Work Act 2009*.

These comments equally apply to the Minister's ability to arrange for another person to investigate a complaint on the Minister's behalf.

These amendments leave undisturbed Parliament's ultimate power to deal with alleged misbehaviour by a Commission Member, and consequently, it is not considered that further legislative guidance on the delegation of the power is required

Status of Code of Conduct as a legislative instrument

The Committee has suggested that as it is likely that the complaint handler under the framework provided for in Part 7 of Schedule 8 of the Fair Work Amendment Bill 2012 would be required to at least consider any Code of Conduct made pursuant to subsection 581B(1), the Code of Conduct could be said to be a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

Proposed subsection 581B enables the President to determine a Code of Conduct for Fair Work Commission Members.

While a complaint against a Member may be based on a breach of the Code of Conduct, the Code itself is expected to reflect well-established expectations for the conduct of tribunal members. The Member Conduct Guide approved by the President of Fair Work Australia earlier this year and published on the Fair Work Australia website does not include sanctions, and places the primary responsibility for deciding whether or not a particular activity or course of conduct is or is not appropriate on individual members.

For these reasons, it is considered that the Code is not a legislative instrument for the purpose of the *Legislative Instruments Act*.

Retrospective effect of amendments to section 160 (variation of a modern award to remove ambiguity or uncertainty or correct error)

The Committee has asked for advice on whether the application of the amendments to section 160 to applications and determinations for variation of a modern award prior to commencement will have any detrimental effect on any person whose interests might be affected by such applications.

Section 160 enables the Commission to vary a modern award to remove ambiguity or uncertainty or correct an error. The effect of the amendment to section 160 is to remove the inconsistency between it and section 158 by providing consistent rules about standing for organisations that are entitled to represent the interests of employers or employees.

Item 3 of Part 4 to Schedule 3 of the Bill ensures that applications or determinations under section 160, which would be defective because the party that brought the application lacks standing, are not disturbed. This provides certainty for employers and employees who can rely on the ongoing consistency of the modern award system by ensuring that prior relevant variation decisions are valid.



**MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

28 NOV 2012

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

Dear Senator

I refer to the letter of 1 November 2012 from Toni Dawes, Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills, regarding the Committee's comments on the Fair Work Amendment (Transfer of Business) Bill 2012 (the Bill), contained in the Scrutiny of Bills *Alert Digest* No. 13 of 2012 (31 October 2012).

The Committee has sought my advice on the justification for the delegation of legislative power under proposed subsection 768CA(2) of the Bill. This proposed subsection would allow for regulations to be made that modify provisions of the *Fair Work Act 2009* (FW Act) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

The Bill inserts a new Part 6-3A into the FW Act to make provision for when there is a transfer of business between a non-national system employer that is a State public sector employer to a national workplace relations system employer. This necessarily involves a range of both complex and technical transitional issues. For example, the Bill provides for the recognition of terms and conditions of employment under State industrial instruments in the national workplace relations system via the creation of new federal instruments.

Similarly, it provides for the recognition of employees' accrued entitlements and service and translates those entitlements into the national workplace relations system. This involves both the preservation of entitlements and providing for the ongoing interaction of those entitlements with the FW Act, including the National Employment Standards.

Given this complexity, and consistent with the justification provided at Paragraph 93 of the Explanatory Memorandum to the Bill, I consider it both necessary and appropriate to include this regulation making power to allow the Government to deal with any unforeseen consequences relating to transitional arrangements and to ensure a smooth transition in particular for employees transferring into the national workplace relations system.

Proposed subsection 768CA(3) makes it clear that proposed section 768CA does not allow regulations to be made that would have the effect of creating offences.

I thank the Committee for its consideration of the Bill and I trust the information provided is helpful.

Regards


BILL SHORTEN



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

Parliament House
CANBERRA ACT 2600

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MC12-013047

30 JAN 2013

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

I refer to the letter of 22 November 2012 from the Committee Secretary of the Standing Committee for the Scrutiny of Bills, Ms Toni Dawes, about the National Gambling Reform Bill 2012, which was subsequently enacted on 12 December 2012 (the Act). I understand that the Committee seeks my advice in relation to why the details about the terms and conditions on which pre-commitment systems will be provided are set out in regulations rather than the primary legislation.

Section 51 of the Act sets out the matters the Regulator must be satisfied about before approving pre-commitment systems for provision to venues. Among a range of matters, paragraph 51(1)(c) and subsection 51(4) together provide that the terms and conditions upon which pre-commitment systems are approved or varied must be reasonable having regard to the matters prescribed in the regulations. These provisions allow the Regulator to regulate the commercial relationship between pre-commitment providers and venues to ensure pre-commitment systems can be accessed by venues across Australia, and that access to a fairly priced pre-commitment system is not a barrier to compliance.

Specifying that matters referred set out in paragraph 51(1)(c) and subsection 51(4) in regulations will ensure the terms and conditions remain current and responsive to the commercial and jurisdictional context.

As you would be aware, ultimately Parliament will have oversight of, and may disallow, the regulations made under the Act.

Thank you again for writing.

Yours sincerely

A handwritten signature in blue ink that reads 'Jenny Macklin'.

JENNY MACKLIN MP



**THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT**

MC12/16133; 12/6343

27 NOV 2012

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

Scrutiny.sen@aph.gov.au

Dear Senator

Thank you for the letter of 1 November 2012 signed by the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Ms Toni Dawes, drawing my attention to comments made in relation to the Regulatory Powers (Standard Provisions) Bill 2012 (the Bill). A copy of this reply will also be e-mailed to the Secretariat as requested.

In the Scrutiny of Bills Committee's *Alert Digest No. 13 of 2012* (31 October 2012) my advice is sought as to why the Bill subjects the exercise of legislative power to an inappropriate degree of Parliamentary scrutiny.

The purpose of the Bill is to simplify the law by creating a standard set of provisions to deal with monitoring, investigation (including entry, search and seizure), civil penalties, the use of infringement notices, enforceable undertakings and injunctions and general provisions relating to regulations.

The Bill is based on existing Commonwealth laws, including the *Crimes Act 1914*. It is consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* approved by the Minister for Home Affairs in September 2011.

The Bill is an initiative under the Government's *Clearer Laws* project, which aims to reduce the volume, and improve the coherence and consistency of Commonwealth laws. As a law of general application, the Bill could reduce the size of each new Commonwealth Act or regulation requiring regulatory provisions by up to 80 pages. Many of the measures in the Bill have been included in several Commonwealth laws over the past 18 months. The Bill is also the subject of a Drafting Direction, an instruction issued by First Parliamentary Counsel which requires all drafters to comply with the direction. This too will ensure a consistent approach is taken to the Bill's provisions.

I wish to address the Committee's concerns in relation to Clause 18 of the Bill. This provides that, only if the power to do so is given under another Act, can a legislative instrument provide that a provision is enforceable under this Part or that a person is an authorised person or a relevant chief executive under this Part.

I refer the Committee to the Office of Parliamentary Counsel's draft Drafting Direction 3.5A in respect of this Bill. The Drafting Directions are an authoritative series of pronouncements on a range of drafting issues issued by First Parliamentary Counsel after consultation with all drafters and the editorial staff.

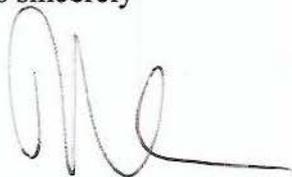
To ensure that the implementation of the Bill in relation to a particular legislative scheme is subject to appropriate scrutiny, the Drafting Direction provides that a Part of the Bill will only operate if it is triggered by a provision in another Act or a regulation. If an instructing agency wishes to leave open the option of triggering a Part of the Bill in a regulation, the Act under which that regulation is made must include a provision allowing this to be done.

Attachment A to the Drafting Direction sets out examples of provisions triggering each Part of the Bill. It is anticipated that the triggering provisions would be grouped together within a Part or Division. However, this may not always be the case. Attachment A also provides examples of a regulation-making power that could be included in an Act to allow the regulations themselves to trigger a Part of the Bill.

The Government agrees with the Committee that important matters should be dealt with in primary legislation rather than regulations. Clause 18 provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act. It therefore remains the case that the provisions of this Bill must be triggered by legislation.

The action officer in my Department responsible for this Bill is Quentin O'Keefe who can be contacted on 6141 3637.

Yours sincerely

A handwritten signature in black ink, appearing to read 'NR', with a long horizontal stroke extending to the right.

NICOLA ROXON



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

Parliament House
CANBERRA ACT 2600

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MN12-002695

28 NOV 2012

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

Dear Senator

Thank you for publishing, in the Committee's report dated 31 October 2012, my response to comments on the retrospective application of the amendments in Schedule 4 to the Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012.

I am glad that my response was helpful in explaining the possible detriment to child support payees and payers if the amendments were not to apply retrospectively.

The Committee has requested that the key information from my response be included in the explanatory memorandum for the Bill. However, since the Bill was passed by the Senate and the Parliament on 1 November 2012, it is no longer feasible to make that inclusion in the explanatory memorandum.

Nevertheless, I will ensure as far as possible that information to address the Committee's terms of reference, or comments made by the Committee, are included in future explanatory memoranda for my portfolio.

Yours sincerely

A handwritten signature in blue ink that reads 'Jenny Macklin'.

JENNY MACKLIN MP



The Hon David Bradbury MP
Assistant Treasurer
Minister Assisting for Deregulation

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

Dear Senator ^{Ian,} Macdonald

Thank you for the letter of 14 September 2012 from the Senate Standing Committee for the Scrutiny of Bills. The Committee has sought information concerning Tax Laws Amendment (2012 Measures No. 1) Bill 2012, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, Clean Energy Finance Corporation Bill 2012 and the Tax Laws Amendment (2012 Measures No. 2) Bill 2012, outlined in the Committee's *Alert Digest No. 5 of 2012* (10 May 2012) and *Alert Digest No. 6 of 2012* (21 June 2012). The Deputy Prime Minister has asked me to respond to you. I apologise for the delay in responding to the Committee. Minister Shorten will respond separately concerning the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011.

The Committee's letter requested an explanation in relation to a number of concerns it had, including the retrospectivity of certain amendments and the delay in introducing amendments. Accordingly, the Government's responses to the Committee's concerns are set out below.

Disallowing deductions related to government assistance

The Committee sought an explanation of the justification for the delay in introducing Schedule 1 of Tax Laws Amendment (2012 Measures No. 1) Bill 2012 and the rationale for applying the provisions retrospectively.

The Treasurer announced on 10 May 2011 that the Government would disallow deductions related to government assistance payments from 1 July 2011. The amendments restore the original policy intent of the provisions.

The Australian Taxation Office wrote to affected taxpayers after the Treasurer's announcement and advised them to check its website for details of the Government's response.

The legislation to disallow these deductions was introduced into the Parliament on 21 March 2012. The introduction of the legislation to Parliament was delayed as Treasury worked to resolve issues identified in the drafting process to ensure that the legislation achieved its policy intent without unintended consequences. Prior to introduction, the draft legislation was released publicly on 20 January 2012 for a period of four weeks to provide members of the public with the opportunity to comment.

Remove access to the trading stock exception to the capital gains tax primary code rule for certain assets owned by a complying superannuation entity

The Committee sought advice on the justification for the delay in introducing Schedule 2 of Tax Laws Amendment (2012 Measures No. 1) Bill 2012 and the rationale for applying the provisions retrospectively.

The Government announced in the 2011-12 Budget that it would remove access to the trading stock exception to the capital gains tax primary code rule for certain assets (primarily shares, units in a trust and land) owned by a superannuation entity.

These amendments applied from the time of announcement (10 May 2011) to remove the ambiguity about the appropriate taxation treatment of certain assets owned by superannuation entities. Superannuation entities that held trading stock assets at the time of announcement were able to continue to treat those assets as trading stock.

Delaying the application date of these amendments would have placed pressure on the Australian Taxation Office to provide guidance as to whether superannuation entities were able to treat certain assets as trading stock. Providing this guidance would have disrupted the superannuation industry as it would have raised concerns amongst larger superannuation entities as to whether their assets, which are typically accounted for under the capital gains tax provisions, should be taxed under the trading stock provisions.

The legislation was delayed because there were a large number of un-enacted measures that were competing for limited drafting resources. Drafting resources were assigned to legislative projects according to Government priorities which meant that significant drafting resources were assigned to several large legislative projects. Notwithstanding this delay, the Government released exposure legislation on 13 January 2012 (approximately eight months after announcement).

Establishing the Clean Energy Finance Corporation

The Committee sought an explanation of why it is necessary to define a term ('GFS Australia') in clause 4 of the Clean Energy Finance Corporation Bill 2012 by reference to a publication that may be updated from time to time and whether the *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, and its updates, are publicly available.

The CEFC Act established the Clean Energy Finance Corporation, which is to invest, by way of the acquisition of 'financial assets', in Australia's clean energy industries from 1 July 2013.

Section 4 of the CEFC Act defined 'financial assets' by reference to the Australian Bureau of Statistics' publication, *The Australian System of Government Finance Statistics: Concepts, Sources and Methods* (the GFS). The GFS is the accounting standard used throughout the Government's Budget process and is freely available to the public on the Bureau's website.

The purpose of the reference to the GFS is to limit the CEFC asset holdings to 'financial assets' as the term is used in the Budget context. This alignment ensures the CEFC acts consistently with the Government's broader fiscal policy. The wording of the relevant provisions is taken from sections 5 and 6 of the *Future Fund Act 2006*.

The Committee also raised similar concerns that the definition of Climate Change Convention in clause 4 of the Bill refers to external material. Section 4 of the CEFC Act also defined the Climate Change Convention as the "United Nations Framework Convention on Climate Change done at

New York on 9 May 1992, as amended and in force for Australia from time to time”. Section 10 of the CEFC Act outlines the constitutional limits to the CEFC’s powers with reference to the Climate Change Convention, amongst other things. These reflect the relevant constitutional limits of the Parliament.

The purpose of this provision is to ensure that the CEFC Act does not purport to exceed the legislative powers of the Parliament or permit the CEFC to do so. The reference to the Climate Change Convention is necessary as it enlivens Parliament’s power to make laws with respect to external affairs under section 51(xxix) of the Constitution. To the extent that Australia’s international legal obligations under the Convention may change in the future, it is appropriate that the CEFC Act continue to reflect the legislative powers of the Parliament in this respect.

Taxation of financial arrangements (TOFA) consolidation interaction

The Committee sought an explanation of the number of taxpayers affected by Schedule 2 of the Tax Laws Amendment (2012 measures No. 2) Bill 2012 and the extent of any detriment imposed as a result of the retrospectivity of the amendments.

The amendments contained in Schedule 2 largely clarify the operation of the taxation of financial arrangements (TOFA) provisions with respect to complex commercial transactions. The amendments provide certainty to affected taxpayers involved in these complex transactions and affect those taxpayers in different ways – that is, they benefit or adversely affect taxpayers depending on their specific circumstances. Consequently, without taxpayer specific information, it is difficult to assess the extent of likely detriment.

However, to limit the detriment to taxpayers, the retrospective application of the amendments excluded certain taxpayers who had received an Australian Taxation Office ruling confirming the application of the law prior to the amendments. Consequently, overall the number of taxpayers affected is expected to be very small, even if the potential impact on any one taxpayer may be significant. Furthermore, some of these affected taxpayers may have benefited from these retrospective changes.

Consolidation tax cost setting rules and rights to future income rules

The Committee sought an explanation of why it is necessary for the final category of changes (‘prospective rules’) in Schedule 3 of Tax Laws Amendment (2012 Measures No. 2) Bill 2012, which were announced in November 2011, to be applied broadly to the period after 30 March 2011, and the extent and fairness of any detriment from the package of amendments.

The final category of changes commenced from 30 March 2011, the date of announcement of the Board of Taxation Review of the rights to future income and residual cost setting rules. The Review was initiated after the Board raised concerns that the 2010 amendments could be applied in such a way that was not consistent with the Government’s policy intention.

A later commencement date would have extended the ‘interim rules’ period, in which there were inconsistencies in the tax outcomes between consolidated groups and entities outside of consolidation. In particular, consolidated groups could have continued to reclassify traditional goodwill assets of joining entities as rights to future income, and thereby get access to immediate tax deductions. This would have significantly reduced the amount of revenue protected by the changes.

The 2012 amendments were designed to uphold the policy intention of the changes, while limiting the detriment to taxpayers that had received a refund for claims made under the 2010 amendments or who had received an Australian Taxation Office ruling in their favour. As a result, all taxpayers

that had received a refund or positive Australian Taxation Office ruling were able to continue to rely on the law as it operated at that time. Taxpayers that had not received a refund or positive Australian Taxation Office ruling were required to comply with the 2012 amendments. This ensured that this latter group of taxpayers did not receive unintended windfall gains.

Thank you again for your letter and I hope this information will be of assistance to the Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D. Bradbury', with a long horizontal flourish extending to the right.

DAVID BRADBURY

07 DEC 2012