SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2013

27 February 2013

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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

SECOND REPORT OF 2013

The Committee presents its *Second 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:

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Introduced into the House of Representatives on 31 October 2012
Portfolio: Immigration and Citizenship

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 11 February 2013. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2012 - extract

Background

This bill amends the *Migration Act 1958* to:

- implement a recommendation of the Expert Panel on Asylum Seekers to provide that asylum seekers who unlawfully arrive anywhere in Australia are subject to the same regional processing arrangements as asylum seekers who arrive at an excised offshore place;

- ensure that a person does not cease to be a transitory person if they have been assessed to be a refugee; and

- provide for discretionary immigration detention of Papua New Guinea citizens who are unlawful non-citizens and are in a protected area.

Undue trespass on personal rights and liberties—natural justice
Schedule 1, item 33, subsection 198AE(3)

Item 31 of Schedule 1 proposes to insert a new subsection 198AE(1A) which would provide that the Minister may, in writing, vary or revoke a determination made under subsection 198AE(1) that section 198AD does not apply to an offshore entry person. Section 198AD provides for the taking of an offshore entry persons to a regional processing country. The proposed amendment, which expressly gives the Minister authority to revoke a determination made under subsection 198AE(1), is (like the power to make an initial determination under that subsection) available only if the Minister 'thinks that it is in the public interest to do so'.

Determinations made under subsection 198AE(1) are, by subsection 198AE(3), expressly said not to be subject to the rules of natural justice. Item 33 of Schedule 1 proposes to add 'or (1A)' at the end of subsection 198AE(3) so that the rules of natural justice would also not apply to a determination under subsection 198AE(1A) to vary or revoke a determination made under subsection 198AE(1). Although such a declaration is conditioned on the Minister's consideration of the public interest, the revocation of a determination under subsection 198AE(1), that the provisions for taking an offshore entry person to a regional processing country not apply, will operate to frustrate expectations such a person may reasonably hold based on the initial determination. In such circumstances it may be thought that fairness should require that persons affected be entitled to rely on the common law rules of natural justice that would entitle them to a fair, unbiased hearing.

The explanatory memorandum simply states that the rules of natural justice will be excluded, but offers no justification for the approach. **The Committee therefore seeks the Minster's advice as to the rationale for the proposed approach so that it is able to form a view as to the appropriateness of the exclusion of natural justice in relation to the exercise of the power under subsection 198AE(1A).**

> *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

I would like to provide the following information to the Committee as a result of the comments made in the Alert Digest.

Under the heading "undue trespass on personal rights and liberties - natural justice Schedule 1, item 33, subsection 198AE(3)" on page 14 of the Alert Digest the Committee sought "the Minister's advice as to the rationale for the proposed approach so that it is able to form a view as to the appropriateness of the exclusion of natural justice in relation to the exercise of the power under subsection 198AE(1A)."

New subsection 198AE(1A) clarifies that the Minister may, in writing, vary or revoke a determination made under subsection 198AE(l) if the Minister thinks it is in the public interest to do so.

While this power arguably already exists, new subsection 198AE(1A) has been added to put the matter beyond doubt. The consequential amendments to section 198AE, following the insertion of new subsection 198AE(1A), are made to provide consistency with the current operation of section 198AE.

Further, in implementing the recommendations of the Report of the Expert Panel on Asylum Seekers, the Government is focussed on creating an effective regional processing framework, which allows for the transfer of persons to designated regional processing countries for the processing of their protection claims. To discourage persons from undertaking hazardous sea voyages to Australia, the transfer process needs to be as efficient and streamlined as possible.

Under current section 198AE, the Minister may exempt a person from transfer, for example, where they have a particular vulnerability that cannot be accommodated in the regional processing country at that particular time. Where circumstances change and it becomes possible to transfer the person, it is consistent with the objectives of the regional processing framework that this occurs quickly and efficiently, in the same way that transfers take place where a person is not exempted under section 198AE.

Subsection 198AE(3) currently provides that the rules of natural justice do not apply to an exercise of the power under subsection 198AE(1). If natural justice was not excluded as a requirement for exercising the new express variation/revocation power, it would mean that the way in which a variation or revocation could be made by the Minister would be different than what is required for making a determination under subsection 198AE(1).

Committee Response

The committee thanks the Minister for this response. Although the committee notes the Minister's argument at the provision facilitates quick and efficient transfers in line with its regional processing framework, the committee retains concerns about the abrogation of natural justice. If a decision to revoke a determination under subsection 198AE(1) is based on individual considerations (for example, a changed assessment as to whether an individual is subject to a 'particular vulnerability'), fairness may require that the affected person be given the opportunity to be heard prior to the decision being made. **The committee therefore draws this matter to the attention of Senators and leaves the question of whether the proposed is appropriate to the Senate as a whole.**

Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Resources and Energy

Introduction

The Committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the Committee's comments in a letter dated 27 February 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) in relation to:

- the compliance, monitoring, investigation and enforcement powers of the national offshore petroleum regulator; and
- enforcement measures for contraventions of the Act in the context of a high-hazard industry.

Evidential burden
Schedule 1, Division 2, clauses 14 to 18

The explanatory memorandum does not appear to contain material that explains the effect of clauses 14 to 18 of Part 2, Division 2 of Schedule 1. These clauses deal with important matters concerning the circumstances in which offences are taken to be established, including a provision which places an evidential burden of proof on defendants (clause 18). **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach in these clauses and whether they are consistent with the *Guide to Framing Commonwealth Offences.***

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

Minister's response - extract

Part 2 of Schedule 1 to the Compliance Measures Bill will introduce a new Schedule 2A to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) to confer monitoring powers on NOPSEMA inspectors for the purpose of monitoring compliance with petroleum environmental management laws. Clauses 14 to 18 of the new Schedule 2A will provide for a number of general matters in relation to proceedings for offences against petroleum environmental laws. These clauses are consistent with existing clauses in Schedule 3 to the OPGGS Act in relation to proceedings for offences against listed OHS laws. The Committee has sought further information about the rationale for the approach in these clauses, in particular clause 18 which places an evidential burden of proof on defendants.

Clause 14 defines the phrase "offence against a petroleum environmental law" to specifically include an offence against section 6 of the *Crimes Act 1914* (the Crimes Act) that relates to an offence against a petroleum environmental law. Section 6 of the Crimes Act is about being an accessory after the fact. This clause will ensure that proceedings can be instituted against persons who receive or assist other persons who they know to be guilty of an offence against a petroleum environmental law to enable them to escape punishment or dispose of any proceeds obtained from committing the offence, and thereby aims to deter persons from such conduct.

Clause 15 provides for proceedings for an offence against a petroleum environmental law to be instituted by: (a) the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), as the national offshore petroleum regulator with regulatory functions in relation to (among other things) offshore petroleum environmental management matters under the OPGGS Act; or (b) a NOPSEMA inspector, who has the power to conduct inspections to monitor and investigate compliance by persons with their obligations under the OPGGS Act, including in relation to offshore petroleum environmental management.

Clause 16 provides for the establishment of the state of mind and conduct of a body corporate (subclauses (2) and (3)) or an individual (subclauses (4) and (5)) where conduct is undertaken by specified persons, such as employees or agents, acting within the scope of actual or apparent authority given to those persons by the body corporate or individual (e.g. in the course of undertaking commercial or business operations). This will ensure that the conduct and state of mind of those persons can be imputed to the relevant body corporate or individual during the course of proceedings for an offence against a petroleum environmental law. This is of particular importance in relation to bodies corporate, given that the actions and mental state of bodies corporate can only be exhibited through the actions and state of mind of individuals acting for or on behalf of the body corporate.

The *Guide to Framing Commonwealth Offences* states that vicarious liability (i.e. when an individual is made liable for the wrongful act of another person on the basis of the legal relationship between them) should only be used in limited circumstances. In this case, given the potentially serious consequences of a breach of a petroleum environmental law, a person acting under the authority of another individual should not be held personally liable, especially when that other individual stands to gain financially from the conduct which results in a breach. In the context of offshore petroleum operations, where compliance requires a major financial investment or expenditure, non-compliance can add considerably to the profits to be made from the activity. Importantly, as a punitive safeguard, subclause 16(6) will limit the penalty that may apply where an individual is convicted of an offence in circumstances where he or she would not have been convicted were it not for the subclauses which impute the state of mind or conduct of an employee or agent to the individual, so that the individual is not liable to be punished by imprisonment. This will ensure that an individual cannot be subjected to a penalty of imprisonment on the basis of deemed conduct or state of mind.

Subclause 16(8) disapplies Part 2.5 of the *Criminal Code*, which relates to corporate criminal responsibility, in relation to an offence against a petroleum environmental law, as corporate criminal responsibility is to be established in accordance with subclauses (2) and (3) as discussed above.

Clause 17 makes clear that new Schedule 2A does not give rise to any right for a person to take action in any civil proceedings in respect of any alleged contravention of a petroleum environmental law. This clause also provides that Schedule 2A does not confer a defence, or otherwise affect any right, in any civil proceedings. However, this provision is specified not to apply in relation to the enforcement of a petroleum environmental law that is a civil penalty provision, to ensure that any such civil penalty provision can be enforced in accordance with the terms of the OPGGS Act.

Clause 18 establishes that it is a defence to a prosecution for failing or refusing to do something that is required by a petroleum environmental law if the defendant proves that it was not practicable to do those things because of a prevailing emergency. As noted in the Alert Digest, this clause places a legal burden of proof on defendants. The burden of proof is reversed in this provision because the circumstances are likely to be exclusively within the knowledge of the defendant, particularly given the remote nature of offshore petroleum operations. This is in accordance with the *Guide to Framing Commonwealth Offences,* which states that where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence with the reversed burden of proof.

Committee Response

The Committee thanks the Minister for this detailed response **and requests that the key information is included in the explanatory memorandum.**

Alert Digest No. 1 of 2013 - extract

Possible retrospective effect
Schedule 1, Part 5

Part 5 of schedule 1 relates to transitional, application and savings provisions. There does not appear to be an explanation for these provisions in the explanatory memorandum and they raise issues of potential concern under the committee's scrutiny principles outlined in Senate Standing Order 24(1)(a). **The committee therefore seeks the Minister's advice as to the rationale for these provisions, and in particular, an explanation for item 155 given that it is possible this provision will have retrospective effect. Item 155 states that the amendments made by Schedule 1 apply on and after the commencement in relation to 'acts or omissions of persons, whether occurring before, on or after that commencement'.**

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

Minister's response - extract

Part 5 of Schedule 1 to the Compliance Measures Bill provides for transitional, application and savings provisions in relation to the amendments to the OPGGS Act made by Schedule 1. The Committee has sought advice as to the rationale for the provisions in Part 5, and in particular item 155 given that it is possible that this provision will have retrospective effect.

The purpose of item 155 is to ensure that the amended OPGGS Act will apply during inspections to monitor and investigate compliance by persons with the OPGGS Act after commencement of the amendments in Schedule 1, including inspections in relation to acts or omissions of those persons, whether those acts or omissions occurred before, on or after the commencement of the amendments. Therefore if, for example, prior to the commencement of Schedule 1, a person performed a certain act or omission, a NOPSEMA inspector will have the ability to inspect in relation to that act or omission after the commencement of Schedule 1 in accordance with the provisions of the OPGGS Act as amended.

This should not unduly trespass on personal rights and liberties given that, if the OPGGS Act were not amended, one of the existing categories of inspector, i.e. a petroleum project

inspector or an OHS inspector, would in any case have the power to inspect in relation to that act or omission. Effectively, in an inspection carried out under the amended OPGGS Act, the main differences would be a change in name of the type of inspector who carries out the inspection in relation to that act or omission, and that the inspector will now exercise powers under either the *Regulatory Powers (Standard Provisions) Act 2012* (Regulatory Powers Act), new Schedule 2A, or existing Schedule 3 (noting that investigations will now only be able to be carried out using the powers in the Regulatory Powers Act). These powers are substantially similar to the existing inspection powers in the OPGGS Act. In fact, under the OPGGS Act as amended by Schedule 1, inspectors will only have the ability to monitor without warrant in relation to listed OHS laws and petroleum environmental laws, and not for the purposes of the OPGGS Act generally (which a petroleum project inspector may currently do).

Although new offences will also be established by the amendments in Schedule 1, these offences can by their nature only apply in relation to acts or omissions occurring on or after commencement, and therefore will not result in investigation and prosecution of acts or omissions retrospectively. For example, the new provision in section 602K requiring a titleholder to nominate a representative to be present for an inspection on written request by NOPSEMA, and making it an offence to fail to do so, can only apply after commencement because no such requirement will exist until the amendments commence. Similarly, the new offences in new Schedule 2A apply in relation to a "petroleum environmental inspection". Such an inspection will not exist until the amendments in Schedule I commence.

Although the penalties for certain existing offences, i.e. for failures to comply with a do-not-disturb direction, prohibition notice or improvement notice, are increased by the amendments to Schedule 3 made by Schedule 1, and a new civil penalty is also applied for a failure to comply with an improvement notice, the increased or new penalties will only apply in relation to a notice or direction issued during an inspection that starts after commencement (and therefore does not apply to retrospective conduct). As discussed below, item 158 continues the operation of the OPGGS Act as it applies *prior* to commencement in relation to notices and directions issued during inspections that start prior to the commencement of the amendments in Schedule 1, and therefore also to a failure to comply with those notices or directions.

Item 156 will provide for persons who hold an existing appointment as a petroleum project inspector, OHS inspector or Greater Sunrise visiting inspector to be taken to hold an appointment as a NOPSEMA inspector, or a NOPSEMA inspector in the capacity of a Greater Sunrise visiting inspector, on commencement of the amendments contained in Schedule 1 to the Compliance Measures Bill. Those amendments will abolish petroleum project inspectors and OHS inspectors as separate categories and replace them with a new single category of inspector, called a NOPSEMA inspector.

Item 157 continues in effect identity cards issued to petroleum project inspectors or OHS inspectors as though they had been issued to a NOPSEMA inspector, for a period of 28 days. After this time, new identity cards will need to be issued to inspectors.

Item 158 enables inspections in relation to particular conduct, or a particular event or circumstances, which had started prior to the commencement of the amendments in Schedule 1, to continue on and after commencement as if those amendments had not been made until that inspection ends. It also clarifies that the OPGGS Act as in force before the amendments commence continues to apply in relation to a warrant, notice, direction, or other instrument issued in the course of the inspection, whether that notice, etc, is issued before, on or after commencement of the amendments. As discussed above, this means that existing criminal penalties will apply to a failure by a person to comply with such a notice or direction, rather than the higher criminal penalties and new civil penalty that will be introduced by Schedule 1.

Item 159 ensures that if a person was taken under section 780F (conferral of inspection powers for the purposes of inquiries into significant offshore incidents) to be a petroleum project inspector, Greater Sunrise visiting inspector or OHS inspector, the person is taken to be a NOPSEMA inspector, or a NOPSEMA inspector in the capacity of a Greater Sunrise visiting inspector, after the commencement of the amendments in Schedule 1 to the Compliance Measures Bill. In addition, this item provides for an inspection involving the exercise of powers or the performance of functions given to a person under section 780F, and that started prior to the commencement of the amendments in Schedule 1, to continue as if those amendments had not been made, until that inspection ends.

Item 160 gives the Governor-General the power to make regulations relating to transitional matters arising out of the amendments to the OPGGS Act made by Schedule 1.

I trust that this additional information will be sufficient to address the Committee's comments in the Alert Digest. If it is not, I am happy to provide further detail in relation to any specific identified gaps in the above explanatory information provided.

Committee Response

The Committee thanks the Minister for this response **and requests that the key information is included in the explanatory memorandum.**

Protection of Cultural Objects on Loan Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Regional Australia, Local Government, Arts and Sport

Introduction

The Committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the Committee's comments in a letter dated 19 February 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill provides for the establishment of a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.

Delegation of legislative power—important matters to be dealt with in regulations
Paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b)

Clause 9 establishes a protection from legal action while an object is on temporary loan. Paragraph 9(4)(b) provides that the protection from suit provided by subclauses 9(1) and (2), will not apply to proceedings prescribed by regulation for the purposes of subclause 9(4). Paragraph 9(4)(a) provides that proceedings under the *Proceeds of Crime Act 2002* are specifically exempted from the operation of subclause 9(1) and (2).

The explanatory memorandum indicates, at page 16, that it is necessary that further exceptions also be able to be prescribed by regulation, as this 'provides a mechanism to enable proceedings to be excluded following the commencement of the Bill' and 'recognised the possibility of the enactment of future laws to which the Commonwealth may not want subclause 9(1) and (2) to apply'.

Given that the possible need for further exceptions relates to proceedings under future legislation, it is not clear why it would not be appropriate for the issue to be dealt with at the time such legislation is enacted in primary legislation. What exceptions are appropriate to the application of this bill clearly raises important questions of policy and do not appear to be matters of detail or matters which require the greater flexibility provided by the process of delegated legislation.

The same issue arises in relation to paragraphs 10(4)(b), 11(2)(b) and 12(2)(b).

The committee is concerned that the explanatory memorandum has not adequately explained why it is appropriate for such questions to be determined by regulation on the basis of policy decisions made by the government rather than on the basis of legislative decisions made by the Parliament. The committee therefore seeks the Minister's further advice as to why it is appropriate to determine exceptions through regulation.

> *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

The Committee has requested further consideration of paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b) of the PCOL Bill, which provide that further exceptions relating to proceedings under future legislation will be able to be prescribed by regulations. The Committee has sought further advice on why it is appropriate to determine those exceptions through regulation.

The inclusion of the regulation making powers set out in paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b) in the PCOL Bill to provide for those exclusions to be prescribed through regulation was undertaken to provide greater flexibility than that provided by an amendment to the primary legislation when new or amending legislation that may affect this Act is made. As noted in the Explanatory Memorandum, the inclusion of provisions to enable further exceptions relating to proceedings under future legislation to be made through regulation provides an efficient mechanism to enable proceedings to be excluded following the commencement of the Act. The PCOL Bill does not preclude such exclusions being made through future amendments to the Act if new or amending legislation that affects this Act is introduced into the Parliament, but provides a safeguard to enable exemptions if consequential amendments are not made to the Act at the time that future legislation is introduced. This approach is considered appropriate and necessary for maintaining the intent of the legislation.

The making of regulations under this Bill is also not without Parliamentary oversight. Regulations made under the provisions in the PCOL Bill will be made by the Governor-General on advice of the Federal Executive Council and since the enactment of the *Legislative Instruments Act* 2003, regulations of the type contemplated by paragraphs 9(4)(b), 10(4)(b), 11 (2)(b) and 12(2)(b), and clause 21 of the PCOL Bill will be subject to disallowance by the Parliament. Further, the sunsetting provisions of the *Legislative Instruments Act 2003* mean that there will be a compulsory review and consideration of the utility and effectiveness of any regulations made under this Bill 10 years after they are registered. No provision has been included in this PCOL Bill that would exempt any regulations made from the sunsetting or disallowance regimes.

Committee Response

The Committee thanks the Minister for this timely response and **notes that it would be helpful for the key information to be included in the explanatory memorandum. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

Alert Digest No. 1 of 2013 - extract

Delegation of legislative power—important matters to be dealt with in regulations
Clause 21

This clause enables the Governor-General to make regulations prescribing matters required or permitted by the Bill and, in particular, provides that regulations dealing (among other things) with consultation requirements, publications requirements, and reporting requirements, may be made. The committee prefers that matters of importance are included in primary legislation whenever possible. Given that the intended existence of such requirements is part of the justification for the conclusion that the interest of individual's access to the courts has been adequately balanced against the public interest in the cultural outcomes facilitated by the bill, it is unclear why these matters should not be dealt with in the primary legislation. **The committee therefore seeks the Minister's advice as to whether these matters can be included in the primary legislation.**

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

Minister's response - extract

The Committee has also requested further consideration of clause 21 of the PCOL Bill, which enables the Governor-General to make regulations prescribing matters required or permitted by the Bill and, in particular, provides that regulations dealing with consultation requirements, publication requirements and reporting requirements may be made. The Committee has sought advice on whether those matters could be included in the primary legislation.

The use of a regulation making power, as set out in clause 21, was considered appropriate as the matters that can be prescribed in regulation under clause 21 require greater flexibility than can be achieved by embedding such requirements in primary legislation. The use of regulations to prescribe the matters set out in clause 21 will ensure provisions will remain current and provides flexibility to address changing circumstances as regulations can be made and repealed more expeditiously when compared with amending primary legislation. Matters to be prescribed in regulation include matters that are administrative in nature, such as the publication of information about objects proposed for loan (see sub-paragraph 21(3)(c)) and may be subject to future amendment to address changes to best practice within the collections sector. Prescribing those requirements in primary legislation would limit flexibility and provide less efficiency.

Thank you for the Committee's interest in this matter. I trust that this information will address the Committee's concerns.

Committee Response

The Committee thanks the Minister for this timely response. The committee accepts that in some instances the use of regulations may be justified as a response to an expectation that circumstances will change and flexibility is required. However, while it may be accepted that some of the requirements (which are proposed to be prescribed in regulations) relate to matters that are administrative in nature, in this instance the existence of the accountability requirements to be contained in the regulations is part of the justification given in the explanatory memorandum for provisions in the bill that limit access to the courts. **The Minister's response does not address this issue to enable the committee to assess the likely adequacy of the envisaged accountability requirements. The committee therefore retains concerns about the proposed delegation of legislative powers in relation to the proposed accountability requirements and seeks the Minister's further advice in relation to this issue.**

Senator the Hon Ian Macdonald
Chair

The Hon Brendan O'Connor MP
Minister for Immigration and Citizenship

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13 FEB 2013
Senate Standing C'ttee
for the Scrutiny
of Bills

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

Dear Senator Macdonald, Ian,

Thank you for your letter dated 22 November 2012 to the former Minister for Immigration & Citizenship, the Hon Chris Bowen MP, in relation to the comments made in the Committee's *Alert Digest No. 14 of 2012* (21 November 2012) concerning the Migration Amendment (Unauthorised Maritime Arrivals) Bill 2012. Your letter has been forwarded to me for response.

I would like to provide the following information to the Committee as a result of the comments made in the Alert Digest.

Under the heading "undue trespass on personal rights and liberties – natural justice Schedule 1, item 33, subsection 198AE(3)" on page 14 of the Alert Digest the Committee sought "the Minister's advice as to the rationale for the proposed approach so that it is able to form a view as to the appropriateness of the exclusion of natural justice in relation to the exercise of the power under subsection 198AE(1A)."

New subsection 198AE(1A) clarifies that the Minister may, in writing, vary or revoke a determination made under subsection 198AE(1) if the Minister thinks it is in the public interest to do so.

While this power arguably already exists, new subsection 198AE(1A) has been added to put the matter beyond doubt. The consequential amendments to section 198AE, following the insertion of new subsection 198AE(1A), are made to provide consistency with the current operation of section 198AE.

Further, in implementing the recommendations of the Report of the Expert Panel on Asylum Seekers, the Government is focussed on creating an effective regional processing framework, which allows for the transfer of persons to designated regional processing countries for the processing of their protection claims. To discourage persons from undertaking hazardous sea voyages to Australia, the transfer process needs to be as efficient and streamlined as possible.

Under current section 198AE, the Minister may exempt a person from transfer, for example, where they have a particular vulnerability that cannot be accommodated in the regional processing country at that particular time. Where circumstances change and it becomes possible to transfer the person, it is consistent with the objectives of the regional processing framework that this occurs quickly and efficiently, in the same way that transfers take place where a person is not exempted under section 198AE.

Subsection 198AE(3) currently provides that the rules of natural justice do not apply to an exercise of the power under subsection 198AE(1). If natural justice was not excluded as a requirement for exercising the new express variation/revocation power, it would mean that the way in which a variation or revocation could be made by the Minister would be different than what is required for making a determination under subsection 198AE(1).

Yours sincerely

BRENDAN O'CONNOR

11 FEB 2013

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

C13/396

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
PO Box 6022
Parliament House
CANBERRA ACT 2600

27 FEB 2013

Dear Senator Macdonald

I am writing in response to comments contained in the Senate Scrutiny of Bills Committee's *Alert Digest No. 1 of 2013* (Alert Digest) concerning the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012* (the Compliance Measures Bill). Please see below responses to the request for further advice in the Alert Digest in relation to certain provisions in this Bill.

Part 2 of Schedule 1 to the Compliance Measures Bill will introduce a new Schedule 2A to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) to confer monitoring powers on NOPSEMA inspectors for the purpose of monitoring compliance with petroleum environmental management laws. Clauses 14 to 18 of the new Schedule 2A will provide for a number of general matters in relation to proceedings for offences against petroleum environmental laws. These clauses are consistent with existing clauses in Schedule 3 to the OPGGS Act in relation to proceedings for offences against listed OHS laws. The Committee has sought further information about the rationale for the approach in these clauses, in particular clause 18 which places an evidential burden of proof on defendants.

Clause 14 defines the phrase "offence against a petroleum environmental law" to specifically include an offence against section 6 of the *Crimes Act 1914* (the Crimes Act) that relates to an offence against a petroleum environmental law. Section 6 of the Crimes Act is about being an accessory after the fact. This clause will ensure that proceedings can be instituted against persons who receive or assist other persons who they know to be guilty of an offence against a petroleum environmental law to enable them to escape punishment or dispose of any proceeds obtained from committing the offence, and thereby aims to deter persons from such conduct.

Telephone: (02) 6277 7930 Facsimile: (02) 6273 0434

Clause 15 provides for proceedings for an offence against a petroleum environmental law to be instituted by: (a) the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), as the national offshore petroleum regulator with regulatory functions in relation to (among other things) offshore petroleum environmental management matters under the OPGGS Act; or (b) a NOPSEMA inspector, who has the power to conduct inspections to monitor and investigate compliance by persons with their obligations under the OPGGS Act, including in relation to offshore petroleum environmental management.

Clause 16 provides for the establishment of the state of mind and conduct of a body corporate (subclauses (2) and (3)) or an individual (subclauses (4) and (5)) where conduct is undertaken by specified persons, such as employees or agents, acting within the scope of actual or apparent authority given to those persons by the body corporate or individual (e.g. in the course of undertaking commercial or business operations). This will ensure that the conduct and state of mind of those persons can be imputed to the relevant body corporate or individual during the course of proceedings for an offence against a petroleum environmental law. This is of particular importance in relation to bodies corporate, given that the actions and mental state of bodies corporate can only be exhibited through the actions and state of mind of individuals acting for or on behalf of the body corporate.

The *Guide to Framing Commonwealth Offences* states that vicarious liability (i.e. when an individual is made liable for the wrongful act of another person on the basis of the legal relationship between them) should only be used in limited circumstances. In this case, given the potentially serious consequences of a breach of a petroleum environmental law, a person acting under the authority of another individual should not be held personally liable, especially when that other individual stands to gain financially from the conduct which results in a breach. In the context of offshore petroleum operations, where compliance requires a major financial investment or expenditure, non-compliance can add considerably to the profits to be made from the activity. Importantly, as a punitive safeguard, subclause 16(6) will limit the penalty that may apply where an individual is convicted of an offence in circumstances where he or she would not have been convicted were it not for the subclauses which impute the state of mind or conduct of an employee or agent to the individual, so that the individual is not liable to be punished by imprisonment. This will ensure that an individual cannot be subjected to a penalty of imprisonment on the basis of deemed conduct or state of mind.

Subclause 16(8) disapplies Part 2.5 of the *Criminal Code*, which relates to corporate criminal responsibility, in relation to an offence against a petroleum environmental law, as corporate criminal responsibility is to be established in accordance with subclauses (2) and (3) as discussed above.

Clause 17 makes clear that new Schedule 2A does not give rise to any right for a person to take action in any civil proceedings in respect of any alleged contravention of a petroleum environmental law. This clause also provides that Schedule 2A does not confer a defence, or otherwise affect any right, in any civil proceedings. However, this provision is specified not to apply in relation to the enforcement of a petroleum environmental law that is a civil penalty provision, to ensure that any such civil penalty provision can be enforced in accordance with the terms of the OPGGS Act.

Clause 18 establishes that it is a defence to a prosecution for failing or refusing to do something that is required by a petroleum environmental law if the defendant proves that it was not practicable to do those things because of a prevailing emergency. As noted in the Alert Digest, this clause places a legal burden of proof on defendants. The burden of proof is reversed in this provision because the circumstances are likely to be exclusively within the knowledge of the defendant, particularly given the remote nature of offshore petroleum operations. This is in accordance with the *Guide to Framing Commonwealth Offences*, which states that where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence with the reversed burden of proof.
Part 5 of Schedule 1 to the Compliance Measures Bill provides for transitional, application and savings provisions in relation to the amendments to the OPGGS Act made by Schedule 1. The Committee has sought advice as to the rationale for the provisions in Part 5, and in particular item 155 given that it is possible that this provision will have retrospective effect.

The purpose of item 155 is to ensure that the amended OPGGS Act will apply during inspections to monitor and investigate compliance by persons with the OPGGS Act after commencement of the amendments in Schedule 1, including inspections in relation to acts or omissions of those persons, whether those acts or omissions occurred before, on or after the commencement of the amendments. Therefore if, for example, prior to the commencement of Schedule 1, a person performed a certain act or omission, a NOPSEMA inspector will have the ability to inspect in relation to that act or omission after the commencement of Schedule 1 in accordance with the provisions of the OPGGS Act as amended.

This should not unduly trespass on personal rights and liberties given that, if the OPGGS Act were not amended, one of the existing categories of inspector, i.e. a petroleum project inspector or an OHS inspector, would in any case have the power to inspect in relation to that act or omission. Effectively, in an inspection carried out under the amended OPGGS Act, the main differences would be a change in name of the type of inspector who carries out the inspection in relation to that act or omission, and that the inspector will now exercise powers under either the *Regulatory Powers (Standard Provisions) Act 2012* (Regulatory Powers Act), new Schedule 2A, or existing Schedule 3 (noting that investigations will now only be able to be carried out using the powers in the Regulatory Powers Act). These powers are substantially similar to the existing inspection powers in the OPGGS Act. In fact, under the OPGGS Act as amended by Schedule 1, inspectors will only have the ability to monitor without warrant in relation to listed OHS laws and petroleum environmental laws, and not for the purposes of the OPGGS Act generally (which a petroleum project inspector may currently do).

Although new offences will also be established by the amendments in Schedule 1, these offences can by their nature only apply in relation to acts or omissions occurring on or after commencement, and therefore will not result in investigation and prosecution of acts or omissions retrospectively. For example, the new provision in section 602K requiring a titleholder to nominate a representative to be present for an inspection on written request by NOPSEMA, and making it an offence to fail to do so, can only apply after commencement because no such requirement will exist until the amendments commence. Similarly, the new offences in new Schedule 2A apply in relation to a "petroleum environmental inspection". Such an inspection will not exist until the amendments in Schedule 1 commence.

Although the penalties for certain existing offences, i.e. for failures to comply with a do-not-disturb direction, prohibition notice or improvement notice, are increased by the amendments to Schedule 3 made by Schedule 1, and a new civil penalty is also applied for a failure to comply with an improvement notice, the increased or new penalties will only apply in relation to a notice or direction issued during an inspection that starts after commencement (and therefore does not apply to retrospective conduct). As discussed below, item 158 continues the operation of the OPGGS Act as it applies *prior* to commencement in relation to notices and directions issued during inspections that start prior to the commencement of the amendments in Schedule 1, and therefore also to a failure to comply with those notices or directions.

Item 156 will provide for persons who hold an existing appointment as a petroleum project inspector, OHS inspector or Greater Sunrise visiting inspector to be taken to hold an appointment as a NOPSEMA inspector, or a NOPSEMA inspector in the capacity of a Greater Sunrise visiting inspector, on commencement of the amendments contained in Schedule 1 to the Compliance Measures Bill. Those amendments will abolish petroleum project inspectors and OHS inspectors as separate categories and replace them with a new single category of inspector, called a NOPSEMA inspector.

Item 157 continues in effect identity cards issued to petroleum project inspectors or OHS inspectors as though they had been issued to a NOPSEMA inspector, for a period of 28 days. After this time, new identity cards will need to be issued to inspectors.

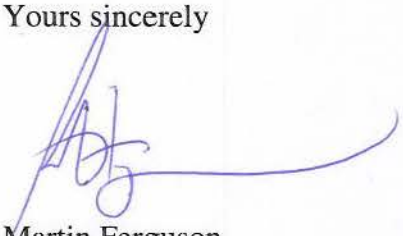
Item 158 enables inspections in relation to particular conduct, or a particular event or circumstances, which had started prior to the commencement of the amendments in Schedule 1, to continue on and after commencement as if those amendments had not been made until that inspection ends. It also clarifies that the OPGGS Act as in force before the amendments commence continues to apply in relation to a warrant, notice, direction, or other instrument issued in the course of the inspection, whether that notice, etc, is issued before, on or after commencement of the amendments. As discussed above, this means that existing criminal penalties will apply to a failure by a person to comply with such a notice or direction, rather than the higher criminal penalties and new civil penalty that will be introduced by Schedule 1.

Item 159 ensures that if a person was taken under section 780F (conferral of inspection powers for the purposes of inquiries into significant offshore incidents) to be a petroleum project inspector, Greater Sunrise visiting inspector or OHS inspector, the person is taken to be a NOPSEMA inspector, or a NOPSEMA inspector in the capacity of a Greater Sunrise visiting inspector, after the commencement of the amendments in Schedule 1 to the Compliance Measures Bill. In addition, this item provides for an inspection involving the exercise of powers or the performance of functions given to a person under section 780F, and that started prior to the commencement of the amendments in Schedule 1, to continue as if those amendments had not been made, until that inspection ends.

Item 160 gives the Governor-General the power to make regulations relating to transitional matters arising out of the amendments to the OPGGS Act made by Schedule 1.

I trust that this additional information will be sufficient to address the Committee's comments in the Alert Digest. If it is not, I am happy to provide further detail in relation to any specific identified gaps in the above explanatory information provided.

Yours sincerely



Martin Ferguson

RECEIVED
25 FEB 2013
Senate Standing C'ttee
for the Scrutiny
of Bills

THE HON SIMON CREAN MP

Minister for Regional Australia, Regional Development and Local Government
Minister for the Arts

19 FEB 2013

Reference: B13/78

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

Dear Senator Ian Macdonald

Thank you for the letter of 7 February 2013, from the Scrutiny of Bills Committee Secretary drawing my attention to Alert Digest No. 1 of 2013 (6 February 2013) and concerning the Protection of Cultural Objects on Loan Bill 2012 (PCOL Bill).

The Committee has requested further consideration of paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b) of the PCOL Bill, which provide that further exceptions relating to proceedings under future legislation will be able to be prescribed by regulations. The Committee has sought further advice on why it is appropriate to determine those exceptions through regulation.

The Committee has also requested further consideration of clause 21 of the PCOL Bill, which enables the Governor-General to make regulations prescribing matters required or permitted by the Bill and, in particular, provides that regulations dealing with consultation requirements, publication requirements and reporting requirements may be made. The Committee has sought advice on whether those matters could be included in the primary legislation.

The inclusion of the regulation making powers set out in paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b) in the PCOL Bill to provide for those exclusions to be prescribed through regulation was undertaken to provide greater flexibility than that provided by an amendment to the primary legislation when new or amending legislation that may affect this Act is made. As noted in the Explanatory Memorandum, the inclusion of provisions to enable further exceptions relating to proceedings under future legislation to be made through regulation provides an efficient mechanism to enable proceedings to be excluded following the commencement of the Act. The PCOL Bill does not preclude such exclusions being made through future amendments to the Act if new or amending legislation that affects this Act is introduced into the Parliament, but provides a safeguard to enable exemptions if

Parliament House Canberra ACT 2600 Telephone: 02 6277 7380 Facsimile: 02 6273 4117

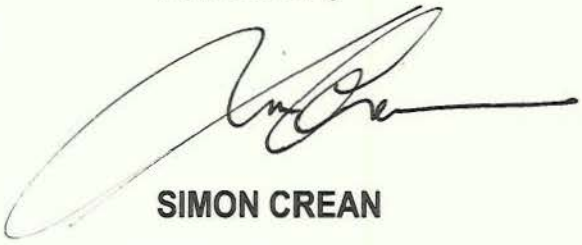
consequential amendments are not made to the Act at the time that future legislation is introduced. This approach is considered appropriate and necessary for maintaining the intent of the legislation.

The making of regulations under this Bill is also not without Parliamentary oversight. Regulations made under the provisions in the PCOL Bill will be made by the Governor-General on advice of the Federal Executive Council and since the enactment of the *Legislative Instruments Act 2003*, regulations of the type contemplated by paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b), and clause 21 of the PCOL Bill will be subject to disallowance by the Parliament. Further, the sunsetting provisions of the *Legislative Instruments Act 2003* mean that there will be a compulsory review and consideration of the utility and effectiveness of any regulations made under this Bill 10 years after they are registered. No provision has been included in this PCOL Bill that would exempt any regulations made from the sunsetting or disallowance regimes.

The use of a regulation making power, as set out in clause 21, was considered appropriate as the matters that can be prescribed in regulation under clause 21 require greater flexibility than can be achieved by embedding such requirements in primary legislation. The use of regulations to prescribe the matters set out in clause 21 will ensure provisions will remain current and provides flexibility to address changing circumstances as regulations can be made and repealed more expeditiously when compared with amending primary legislation. Matters to be prescribed in regulation include matters that are administrative in nature, such as the publication of information about objects proposed for loan (see sub-paragraph 21(3)(c)) and may be subject to future amendment to address changes to best practice within the collections sector. Prescribing those requirements in primary legislation would limit flexibility and provide less efficiency.

Thank you for the Committee's interest in this matter. I trust that this information will address the Committee's concerns.

Yours sincerely



SIMON CREAN