SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD 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

THIRD REPORT OF 2013

The committee presents its *Third 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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Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Agriculture, Fisheries and Forestry

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 1 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill amends the *Agricultural and Veterinary Chemicals Act 1994*, *Agricultural and Veterinary Chemicals (Administration) Act 1992*, the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* to:

- implement reforms to the approval, registration and reconsideration of agricultural and veterinary chemicals;
- simplify, reorganise and modernise legislation to reduce uncertainty and complexity in the legislation, and improve the operability and understanding of the legislation; and
- remove redundant provisions and amend out of date provisions in all Commonwealth agricultural and veterinary chemical legislation.

Minister's background - extract

As noted by the Joint Parliamentary Committee on Human Rights the Bill promotes the right to health and a healthy environment, by regulating agricultural and veterinary chemicals (agvet chemicals). Agvet chemicals are designed to destroy pests and weeds, and prevent or cure diseases. They may be dangerous and are typically poisonous substances that often have deleterious consequences for human health and the environment.

Given the necessity of protecting the community and the environment from the hazards of agvet chemical products, measures in the Bill may limit personal rights and liberties but only as is reasonable and necessary to manage the risks associated with these chemical products.

The Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 will make amendments to the *Agricultural and Veterinary Chemicals Act 1994* (Agvet Act), *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act), the *Agricultural and Veterinary Chemicals Code Act 1994* (Code Act), including the Schedule to that Act (Agvet Code) and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Collection Act) (collectively called agvet chemical legislation).

The Senate Standing Committee for the Scrutiny of Bills (the committee) sought further advice on the following matters.

Alert Digest No. 1 of 2013 - extract

Trespass on personal rights and liberties—strict liability and reversal of onus Schedule 1, items 54 and 58; Schedule 2, item 7

Items 54 and 58 of schedule 1 introduce new subsections 32(5) and 33(4) of the Code, which are set out in the Schedule of the *Agricultural and Veterinary Chemicals Code Act 1994*. These proposed subsections reinsert the previous strict liability offences for not complying with a notice to provide required information in the circumstances specified in these items. The penalty for each of these items remains unchanged from the previous level (120 penalty units). A defendant will bear an evidential burden in relation to these offences.

The committee notes that the explanatory memorandum emphasises the point that these provisions adopt the approach taken in relation to existing offences, however, it is concerned that no explanation is given for departing from the maximum penalty for strict liability offences recommended in the *Guide to Framing Commonwealth Offences* (60 penalty units). Although there is a general justification for the offence provisions in the bill which require defendants to carry an evidential or legal burden of proof included in the statement of compatibility, that justification does not specifically address these provisions.

The committee expects that the explanatory memorandum will demonstrate that the considerations relating to the use of strict liability outlined in the *Guide* have been taken into consideration in each instance in which it is sought to be applied. **The committee therefore seeks the minister's advice as to the justification for placing strict liability and an evidential burden of proof on defendants in relation to these specific**

provisions, particularly in light of the fact that the penalty for the strict liability offence is in excess of that recommended in the *Guide*.

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

Minister's response - extract

Schedule 1, items 54 and 58; Schedule 2, item 7

The committee advised:

> *The committee expects that the explanatory memorandum will demonstrate that the considerations relating to the use of strict liability outlined in the Guide have been taken into consideration in each instance in which it is sought to be applied. The committee therefore seeks the minister's advice as to the justification for placing strict liability and an evidential burden of proof on defendants in relation to these specific provisions, particularly in light of the fact that the penalty for the strict liability offence is in excess of that recommended in the Guide.*

The committee specifically referred to the level of the penalty for the strict liability offences in new subsections 32(5) and 33(4) and sought advice as to why these vary from *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the guide). Sections 32 and 33 of the Agvet Code deal with notices to require persons to provide information that is relevant to a reconsideration. Reconsiderations are conducted where currently approved active constituents may not meet the safety criteria or where currently registered chemical products may not meet the safety criteria, trade criteria or efficacy criteria. Hindering a reconsideration by not providing relevant information may therefore have serious consequences for human health and the environment. As noted by the committee, these offences align with the current offences in relation to both the strict liability nature of the offences, the level of the penalty (120 penalty units) and the evidential burden for the defences in subsections 32(4) and 33(3).

The committee sought advice as to the justification for strict liability to apply in relation to the offences in subsections 32(5) and 33(4). These offences were included in the Agvet Code on its commencement in 1995 and at that time the penalty was 120 penalty units. These offences were made strict liability offences in 2001 in the *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001*. No change to the strict liability, evidential burden or level of penalty for these offences was proposed in the Bill. As no changes were proposed and regulated persons would already be aware of

these offences, the explanatory memorandum did not specifically seek to justify these offences.

The current and longstanding penalty level of 120 penalty units in sections 32 and 33 is also considered to be commensurate with the need to protect human health and the environment, and sufficient to require persons to provide relevant information to support a reconsideration. The provision of this information will ensure that the APVMA has access to information to enable it to remain satisfied that currently approved active constituents or registered chemical products are acceptable for supply to the Australian marketplace.

While the amount of the penalty is more than that mentioned in the guide for a failure to lodge a report, not providing relevant information for a reconsideration is more related to obstructing or hindering the progress of a reconsideration that may have serious health or environmental consequences. Furthermore, this level of penalty is less than that for failing to provide new relevant information about a product (for example, where the use may be an undue hazard to the safety of people) (section 161, 300 penalty units). It is also significantly less than the 500 penalty unit strict liability offence in therapeutic goods legislation for the equivalent offence of failing to provide information about registered or previously registered therapeutic goods. Given the existing and other prevailing legislation and in the context of ensuring the ongoing protection of human health and the environment by requiring the provision of relevant information for a reconsideration, the current 120 penalty unit amount in the strict liability offences in subsections 32(5) and 33(4) is not considered to trespass unduly on personal rights and liberties.

The committee sought advice as to the justification for placing an evidential burden of proof on defendants for the defences in subsections 32(4) and 33(3), as these were not specifically addressed in the human rights statement of compatibility. The Criminal Code codifies principles of proof for Commonwealth offences. Where the law imposes a burden of proof on the defendant, it is an evidential burden and the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. As stated in the guide, an evidential burden of proof should generally apply to a defence and the default position in the Criminal Code should apply (section 4.3.2). In addition, the Bill does not alter the evidential burden for these defences. On this basis, the retention of the current evidential burden of proof on a defendant for the defences in subsections 32(4) and 33(3) would not trespass unduly on personal rights and liberties.

Committee Response

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

Alert Digest No.1 of 2013 - extract

Trespass on personal rights and liberties—reversal of onus
Item 120 of Schedule 3, proposed new subsection 45C(4)

This proposed subsection places a legal burden of proof in relation to a defence provided for the offence of possessing, having custody of or other dealing with a suspended active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices which have been published.

The committee has taken the view that the imposition of legal burdens on defendants should be kept to a minimum given it requires positive proof of the specified matter rather than the less onerous evidential burden, which requires a defendant to demonstrate a reasonable possibility that the matter exists. The use of the higher burden is more difficult to reconcile with the fundamental principle that the prosecution should prove all elements of an offence.

The defence specified in subsection 45C(4) covers circumstances in which the defendant, who has not been given a notice, did not know and could not reasonably be expected to have known of the *Gazette* notice or that the possession etc. was not in accordance with the instructions in the *Gazette* notice. The explanatory memorandum argues that this approach is justified given that the matters relate to what the defendant did not know and could not reasonably be expected to have known and is therefore information that 'would be peculiarly within the knowledge of the defendant' (see page 71). It is also stated that this information would not be likely to be uncovered the in the 'normal course of an investigation' (also at page 71). Further, the statement of compatibility emphasises that the approach mirrors the existing defence and onus of proof provisions and is 'considered reasonable, necessary and proportionate and is consistent with the legitimate objective of protecting human health and the environment' (at page 14).

Although it may be accepted that a case for reversing the burden of proof can be made in these circumstances, it is not clear why a legal burden, as opposed to an evidential burden is necessary. More particularly, given that what a defendant may reasonably be expected to have known is not capable of clear definition, the fairness of requiring defendants to provide positive proof by such a criterion is questionable. **The Committee therefore seeks a further justification of why an evidential burden is not sufficient to support the objectives of promoting human health and the environment in relation to this defence.**

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

Minister's response - extract

Schedule 3, item 120, new subsection 45C(4)

The committee advised that:

> *Although it may be accepted that a case for reversing the burden of proof can be made in these circumstances, it is not clear why a legal burden, as opposed to an evidential burden is necessary. More particularly, given that what a defendant may reasonably be expected to have known is not capable of clear definition, the fairness of requiring defendants to provide positive proof by such a criterion is questionable. The Committee therefore seeks a further justification of why an evidential burden is not sufficient to support the objectives of promoting human health and the environment in relation to this defence.*

The Joint Parliamentary Committee on Human Rights' consideration of the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 raised similar issues with new subsection 45C(4).

The amendments in the Bill ensure minimal changes to existing offences so as not to disturb the existing provisions dealing with the evidential burden and legal burden. The exceptions are new section 45C of the Agvet Code (Schedule 3 of the Bill) and to a lesser degree new section 47E (Schedule 2 of the Bill). Section 47E mirrors current section 54. New section 47E contains the same defence as in current section 54 with the same evidential burden for the defence.

The current sections 45A and 55 have been amalgamated into new sections 45A, 45B and 45C. Just as is provided for in existing sections 45A and 55, new section 45C provides for a strict liability offence for possessing, having custody of or other dealing with a suspended or cancelled active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices that have been published. The amount of the penalty (300 penalty units) is for the same amount as the current sections 45A and 55. The defences in the current subsections 55(5) and (6) have been retained as subsections 45C(3) and (4). The defence and the reversal of the onus of proof in subsection 45C(4) mirrors the current defence and onus of proof in current subsection 55(6).

Subsection 45C(4) provides a defence to the defendant, who has not been given a notice, that he or she either did not know and could not reasonably have been expected to have known of the existence of the *Gazette* notice or that the possession etc was not in accordance with the instructions in the *Gazette* notice. This is an additional defence to the defence of honest and reasonable mistake of fact and, although the defendant bears the legal burden, is broader in scope. This is because it is not concerned with the requisite state of mistaken belief but is judged against the standard of what could be reasonably expected.

The provision imposes the legal burden of proof on the defendant and this must be discharged on the balance of probabilities that the person did not know and could not reasonably be expected to have known of the existence of the notice.

The proposed defence, which remains unchanged, is that the defendant did not know *and* could not reasonably be expected to have known of the existence of the notice. As stated in the guide (section 4.3.2), a legal burden of proof on the defendant must be discharged *on the balance of probabilities* (section 13.5 of the Criminal Code). The issue therefore turns on whether the defendant should be expected to prove, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with suspended or cancelled chemical products or constituents.

It would not be likely that the defendant's knowledge of 'what they could reasonably be expected to have known' may be uncovered through the normal course of an investigation. In addition, the objectivity of this test will depend on the particular circumstances. More importantly, reducing the current legal burden to an evidential burden could be regarded as undermining the integrity of the agvet chemical regulatory system as it would reduce the need for suppliers to maintain the systems they currently have in place about the status of chemical products for supply.

While it is acknowledged that the placing of a legal burden on a defendant should be kept to a minimum, this specific circumstance of dealing with suspended or cancelled products is considered a situation where the defendant should continue to bear this burden. This is on the basis that dealing with some of these suspended or cancelled products is highly likely to be a concern for human health and the environment, and because the current and proposed burden on the defendant only extends to proving, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with these products.

In summary, while subsection 45C(4) is a new section, it does not represent a new obligation or an altered regulatory burden for regulated entities or an increased impact on any person's rights or liberties. On this basis and recognising the defence and the reversal of the onus of proof in new subsection 45C(4) mirrors the defence and onus of proof in current subsection 55(6), new subsection 45C(4) is considered reasonable and necessary. It is also consistent with the legitimate objective of protecting human health and the environment. It also results in the least impact on all parties to which the current and amended offence provisions relate.

Committee Response

The committee thanks the Minister for this response and notes the justification provided for the proposed approach. **The committee requests that the key information be included in the explanatory memorandum.**

Australian Sports Anti-Doping Authority Amendment Bill 2013

Introduced into the Senate on 6 February 2013
Portfolios: Sport

Introduction

The committee dealt with this bill in *Alert Digest No.2 of 2013*. The Minister responded to the committee's comments in a letter dated 12 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2013 - extract

Background

This bill amends the *Australian Sports Anti-Doping Authority Act 2006* (the Act) to amend the Australian Sports Anti-Doping Authority's investigation functions and to the information sharing arrangements with other government agencies. The bill also:

- clarifies certain definitions in the Act;
- clarifies conflict of interest provisions for members of anti-doping bodies established under the Act; and
- confirms the statutory period for commencing action against an athlete in relation to possible anti-doping rule violations.

Minister's background - extract

The harmful health effects of using prohibited substances and methods is well known, along with the potential for doping to undermine the important values that sport promotes within the community (such as the spirit of competition, honesty, fair play and dedication). In a sports-loving country like Australia, rigorous and effective anti-doping arrangements are essential to protect the value and integrity of sport, to discourage athletes and their support staff from doping, and to sanction those who do.

I would also preface my response by noting the structure of Australia's anti-doping legislative framework and that, subject to the passage of the Bill through the Parliament, the Regulations will be amended to give effect to the amendments contained in the Bill.

While the *Australian Sports Anti-Doping Authority Act* 2006 (ASADA Act) facilitates the operation of Australia's anti-doping arrangements, a significant amount of the detail in relation to the operation of these arrangements is specified in the *Australian Sports Anti-Doping Authority Regulations* 2006 (the Regulations).

The Act provides for the making of regulations and specifies that the Regulations must prescribe a scheme that gives effect to Australia's international anti-doping obligations. Accordingly, the National Anti-Doping (NAD) Scheme appears at Schedule 1 of the Regulations.

The ASADA Act specifies what must be in the NAD Scheme. The Scheme details the protocols and procedures for the exercise of ASADA's functions. The functions which the NAD Scheme must authorise ASADA to do include:

- request an athlete to keep the ASADA informed of where they can be found;
- request an athlete to provide a sample;
- test, or arrange the testing of, samples;
- investigate possible violations of the anti-doping rules;
- disclose information obtained during such investigations for the purposes of, and in connection with, such investigations;
- notify athletes, support persons and sporting administration bodies of findings made by the Anti-Doping Rule Violation Panel in relation to a possible violation; and
- present such findings at hearings of the Court of Arbitration for Sport or other sporting tribunals.

The role of the NAD Scheme in underpinning the operational aspects of our anti-doping arrangements is highlighted in the Bill. The addition of sub-section 13(A)(2) would allow the NAD Scheme to include provisions in relation to new elements of the Bill, namely:

- disclosure notices;
- the form and conduct of interviews; and
- the form in which information, documents, things and answers to questions must or may be given.

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—privacy
Delegation of legislative power
Schedule 1, item 7 and 9, proposed paragraph 13(1)(ea) and section 13A

Proposed paragraph 13(1)(ea) provides that the National Anti-Doping Scheme (which is provided for by regulation) must provide authority for the CEO to be able to request a specified person to attend an interview, give information and/or produce documents or things. A specified person can be any person, that is, the power extends beyond athletes and athlete support persons. The power is conditioned on the CEO holding a 'reasonable belief' that the requested things may be relevant to the administration of the NAD scheme.

Proposed section 13A provides authority for the NAD Scheme to establish a scheme which provides for the issuing of disclosure notices which require a person to disclose information and or documents if the CEO 'reasonably believes' that the person has information, documents or things that may be relevant to the administration of the NAD scheme.

These powers may require the disclosure of personal information and as such may limit the right to privacy. The statement of compatibility argues, however, that the powers are 'reasonable, necessary and proportionate to the legitimate aim of catching doping cheats'. The fact that the powers are not arbitrary (ie may only be exercised on the basis of a reasonable belief being formed that the disclosures requested may be relevant to the NAD scheme) and the existence of existing privacy safeguards in the *Australian Sports Anti-Doping Authority Act 2006*, are given emphasis. Section 71 of the Act 'already provides for the protection of NAD Scheme personal information while section 73 preserves the operation of the *Privacy Act 1988*' (statement of compatibility at page iii). Additionally, the statement of compatibility notes the objectives being pursued by the legislation are significant, including the protection of integrity of sport and the prevention of harm to an athlete's health. Finally, it is noted that amendments to the regulations will provide further protections around the issuing of a disclosure notice such as specifying what information must be included in a disclosure note.

In light of the justification provided for the general approach the committee leaves to the Senate as a whole the overall question of whether the powers are appropriate taking into account both the purposes of the legislation and privacy concerns.

Nevertheless, it is not clear to the committee why the 'further protections' relating to the privacy interests of persons who may be subject to the disclosure notice powers envisaged by the statement of compatibility (at page (iv)) cannot be included in the primary

legislation. The committee expects that important matters will be included in primary legislation unless a sound justification is provided for the use of delegated legislation.

In this instance it is not clear from the explanatory memorandum why the requirements dealing with what information must be included in a disclosure notice and the provision of a minimum time for compliance (14 days is the accepted norm) cannot be included in the bill itself, especially as the bill already includes a requirement for the NAD scheme to provide that a person who receives a disclosure notice has the right to be notified in writing of the possible consequences of a failure to comply with a disclosure notice (proposed subsection 13A(3)). **Given the importance of these additional safeguards the committee seeks an explanation as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill.**

> *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 seeks an explanation as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill.

The Bill proposes that the ASADA Act include the power for the NAD Scheme to authorise the ASADA Chief Executive Officer (CEO) to issue disclosure notices. The specific details around disclosure notices, including the information that must be included in a disclosure notice will be set out in the NAD Scheme. As outlined above, this approach is consistent with Australia's existing anti-doping legislative framework.

It is also important to note that there are a range of protections, both proposed in the Bill and entrenched in existing arrangements to ensure the appropriate use of this power by the CEO. For example:

- The Bill prescribes that the issuing of disclosure notices can only occur if the CEO has a reasonable belief that the individual concerned has information documents or things that may be relevant to the administration of the NAD Scheme.

- The CEO's reasonable belief will be informed by intelligence obtained by ASADA under the NAD Scheme. As a matter of administrative practice, the reasons which underpin the application of that discretion are to be properly recorded at the time of the decision.

- The Bill makes clear that the power to issue a disclosure notice cannot be delegated beyond the Senior Executive Service level within ASADA.

- The Bill includes provisions which require the ASADA CEO to report, in ASADA' s annual report, on the issuing of disclosure notices.

- If a person believes that a decision to issue a disclosure notice is unreasonable, they can seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

- Decisions made by the CEO can be scrutinised by the Commonwealth Ombudsman.

- Final decisions relating to an anti-doping rule violation are reviewable to the Administrative Appeals Tribunal.

Committee Response

The committee thanks the Minister for this response and notes her comments relating to the range of existing protections. However, despite the argument that including details relating to disclosure notices in the regulations is consistent with the existing anti-doping legislative framework, the committee remains concerned that this approach does not enable the Parliament to assess the adequacy of the 'further protections' relating to disclosure notices. In particular, the committee notes that unreasonableness would not, in itself, be a ground of review available under the ADJR Act. **However, in light of the existing anti-doping legislative framework, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—privacy and property rights
Schedule 1, item 9, proposed paragraph subsection 13B(2)

This proposed section empowers the CEO to take and retain ‘for as long as necessary’ documents or things produced in response to a disclosure notice. Where items are seized under search and seizure powers, the power to retain such items is usually subject to a maximum time limit, with the possibility of this limit being extended if necessary. It is also common for legislation to require that seized material be regularly reviewed to ensure its retention remains necessary. These powers provide additional accountability for decisions to retain documents and things disclosed under the NAD scheme.

Given that the power to retain a document for ‘as long as necessary’ may be subject to differing interpretations and may result in an individual’s property or information being retained for lengthy periods of time, **the committee seeks the Minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals.**

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

Minister's response - extract

The Committee seeks the Minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals. The NAD scheme underpins ASADA's implementation of co-ordinated anti-doping programs and activities that comply with the requirements of the World Anti-Doping Code (the Code). The International Standard for the Protection of Privacy and Personal Information is established under the Code to ensure that all organisations involved in anti-doping adhere to a set of minimum privacy protections when collecting and using personal information.

In relation to holding an athlete's personal information, the Standard prescribes that information can be retained indefinitely, except for phone numbers and addresses which can be held for up to eight years. The Standard, however, recognises that national laws take precedence in relation to the collection, handling and dissemination of personal information.

The Code specifies that an anti-doping stakeholder must commence action on a possible anti-doping rule violation within eight years of the alleged violation. Accordingly, ASADA needs to keep information collected through the NAD scheme for a sufficient period to ensure that this provision could be activated if it receives information of a possible violation at any time within that eight year threshold.

To make this clearer I will issue amendments to the Regulations to include appropriate time periods. I trust that these proposed amendments will address your concerns.

Committee Response

The committee thanks the Minister for this response and notes the 8 year timeframe for commencing action (which is consistent with the World Anti-Doping Code). **The committee thanks the Minister for her commitment to amend the regulations to make the relevant timeframes clearer and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—coercive powers
Schedule 1, item 9, proposed paragraph 13C(1)(c)

This paragraph provides that a person fails to comply with a disclosure notice if, inter alia, they do not comply with the notice within the period specified in the notice. *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states the notice to produce or attend powers should allow a person at least 14 days to comply. It may be that this protection is intended to be included in the regulations (see above), however as it is an important protection and the committee prefers that important matters be included in primary legislation whenever possible, **the committee seeks the Minister's advice as to whether this provision can be included in the bill.**

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

Minister's response - extract

In relation to proposed paragraph 13(1)(c), which provides that a person fails to comply with a disclosure notice if they do not comply with the notice within the period specified in the notice, the Committee seeks the Minister's advice as to whether the timeframe for a person to respond to a notice should be included in the Bill.

Consistent with the current specification of the NAD scheme, the specific details around the issuing of disclosure notices, including the form and content of the notice and how it is

to be issued would all be detailed in the Regulations. The timeframe for responding to a disclosure notice will be 14 days.

Committee Response

The committee thanks the Minister for this response and for her advice that the regulations will specify a period of 14 days for complying with a disclosure notice. **The committee requests that this information be included in the explanatory memorandum.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—self-incrimination
Schedule 1, item 9, proposed section 13D

Proposed subsection 13D(1) abrogates the privilege against self-incrimination, in relation to the obligation on persons to comply with disclosure notices. There is a detailed justification for the necessity of this approach in the explanatory memorandum (at page 8) and the SOC (at page iv). The explanatory memorandum states:

> This approach is necessary as anti-doping investigations are often significantly hampered or in some cases completely obstructed by a person's refusal to provide information if the person believes that they may implicate themselves in an anti-doping rule violation. Subsection 13D(1) will ensure that a person with information that may assist in an anti-doping investigation is required to provide that information.

Importantly the proposed new section includes use and derivative use immunities in relation to criminal proceedings (excepting those relating to the provision of false or misleading information and documents) and civil proceedings (excepting those arising under or out of the ASADA Act or regulations). The exception in relation to criminal proceedings is common in Commonwealth legislation that provides for use and derivative use immunity where the privilege against self-incrimination has been abrogated. It is less clear, however, why the exception to the use and derivative use immunities in relation to *civil proceedings* under or arising out of the ASADA Act or regulations is appropriate and the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to civil proceedings.**

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

Minister's response - extract

The Committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to civil proceedings.

As a condition of receiving Australian Government funding, Australia's national sporting organisations (NSOs) are required to have in place an anti-doping policy that complies with the Code as well as acknowledges ASADA's powers and functions under the ASADA Act and NAD Scheme.

All NSO anti-doping policies replicate the essential parts of the Code (for example, Article 2 of the Code, which sets out the anti-doping rule violations). The effect of this is that when ASADA is exercising its legislative functions in relation to violations, it is also enforcing the anti-doping policy of the relevant sport.

NSOs then enforce their agreements with athletes through membership agreements and contracts. Penalties (sanctions) for doping offences usually involve bans from sport but, importantly, are not criminal penalties. Information obtained in response to a disclosure notice may assist ASADA in establishing an anti-doping rule violation against an athlete or athlete support person. Accordingly, to ensure effective delivery of ASADA's functions, it is counter-intuitive and unworkable to include an immunity in relation to all civil proceedings as anti-doping matters arise under the ASADA Act or Regulations (i.e. matters in relation to violations of the anti-doping rules) and are civil in nature.

However, when the Bill was being drafted, there was a concern that, unless the derivative use immunity was applied to other civil proceedings, this provision could potentially leave an individual exposed to civil penalties (when the purpose of the disclosure note is to collect information on possible anti-doping rule violations).

Committee Response

The committee thanks the Minister for this detailed response **and requests that the key information outlined above be included in the explanatory memorandum. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—reversal of onus
Item 9, schedule 1, proposed subsection 13C(2)

This subsection provides for exceptions in relation to the civil penalty provision relating to a disclosure notice which requires a person to give specified information or produce documents or things. In relation to the exceptions, the person bears an evidential burden to establish relevant matters, namely, that the person does not possess the information, document or thing or that the person has taken all reasonable steps available to the person to obtain the information, document or thing and has been unable to obtain it.

The statement of compatibility (at page v) argues that it:

> …is appropriate for the burden of proof to be placed on a defendant in this case as it will be within the knowledge of the defendant as to whether they have what is being requested. Imposing the burden of proof on ASADA would be extremely difficult or expensive whereas it could readily and cheaply [be] provided by the recipient of the disclosure note. In practical terms, [the] evidential burden may be satisfied if the person signs a document of legal standing that they do not have the required material (e.g. [a] statutory declaration).

The committee notes that it is often not easy to establish what is not in one's knowledge or possession and it appears that this has been recognised in the explanatory memorandum by the statement that a statutory declaration would be sufficient for these purposes. **However, the committee is concerned to ensure that this option would be effective in practice and therefore seeks the Minister's advice as to whether the view expressed in the that a statutory declaration would be sufficient for these purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection 13C(2).**

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

Minister's response - extract

The Committee seeks the Minister's advice as to whether the view expressed in the Explanatory Memorandum that a statutory declaration would be sufficient for these

purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection 13C(2).

The only situation where the evidential burden is being shifted to the recipient of a disclosure notice relates to the provision of material or documents being requested. Nevertheless, this burden needs to be reasonable and proportionate. Signing a document of legal standing to confirm that someone does not possess the requested items is a proportionate mechanism for achieving this. This option has not been reviewed by the courts however, I undertake to provide greater clarity around this issue through the Regulations.

Committee Response

The committee thanks the Minister for this response and for her commitment to provide greater clarity in the regulations about the ability for the recipient of a disclosure notice to use a statutory declaration to discharge the evidential burden imposed. **The committee requests that the key information outlined above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—fair trial
Schedule 1, item 13, proposed section 73G and section 73K

The failure to comply with a disclosure notice gives rise to a civil penalty of up to 30 penalty units (see proposed section 13C). Proposed section 73G provides that the rules of evidence and procedure for civil matters apply during proceedings for a civil penalty. Section 73K provides that criminal proceedings may be commenced after civil proceedings.

The committee is aware that the distinction between civil and criminal proceedings does not depend merely on the legislative designation of a contravention of the law being a civil penalty provision (see, for example, the Parliamentary Joint Committee on Human Rights' *First Report of 2013*). Given that the relationship between civil penalty orders and criminal offences may not be clear cut, the committee is concerned that this provision may raise questions about punishment being twice imposed for the same offence. However, the committee notes the comments the PJCHR made about this bill in its *Second Report of 2013* and its continuing consideration of this issue. **In light of this the committee draws**

the Senate's attention to the PJCHR's *Second Report of 2013: Australian Sports Anti-Doping Authority Amendment Bill* and leaves the matter 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.*

Committee Comment

As outlined above, the committee did not seek the Minister's advice in relation to this matter as it had also been raised by the Parliamentary Joint Committee on Human Rights. The committee notes that the Minister has provided a response to the PJCHR, which is included in its *Third Report of 2013*. The PJCHR has stated that it will undertake a closer examination of the matter in light of the information provided by the Minister. The Scrutiny of Bills Committee will continue to monitor the issue and comment as appropriate.

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—infringement notice scheme Schedule 1, item 15, proposed section 80

This section authorises the regulations to provide for an infringement notice scheme to be made as an alternative to civil proceedings in relation to a failure to comply with a disclosure notice. In effect the civil penalties associated with the scheme are strict liability offences (proposed section 73P provides that it is not necessary to prove a person's state of mind and proposed section 73Q provides that a person is not liable to have a civil penalty order made against them if mistake of fact (as defined) has been made). However, failure to give information or produce documents as required (proposed subsection 13C(1)) is subject to exceptions, including whether the person has taken all reasonable steps available to obtaining the information or document.

In general, infringement notice schemes are considered most appropriate in relation to relatively minor offences where (i) a high volume of contraventions is expected and (ii) for which assessments of liability are straightforward. The applicable penalties for the proposed scheme are consistent with the approach recommended in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Nevertheless, it is not clear why such a scheme is needed or appropriate as the matter is not addressed in the explanatory memorandum. **In order to assist the committee to assess whether the**

proposed approach is appropriate, the committee seeks the Minister's advice as to why an infringement notice scheme is necessary and whether it is appropriate for the scheme to be provided for in regulations rather than being included in the primary legislation.

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

Minister's response - extract

The Committee seeks the Minister's advice as to why an infringement notice scheme is necessary and whether it is appropriate for the scheme to be provided for in regulations rather than being included in the primary legislation.

The Guide to Framing Commonwealth Offences recognises that an infringement notice scheme can be included in Regulations so long as the primary legislation includes a regulation-making power providing for this. The operation of an infringement notice scheme provides the CEO with some flexibility to promptly manage matters that involve non-compliance. It allows the CEO to seek redress for non-compliance on less serious matters without the need to take the matter to the relevant court.

Committee Response

The committee thanks the Minister for this response and notes her comments as to the justification for an infringement notice scheme. The committee's concern was that, given the exception available to a recipient of a disclosure notice (whether a person taken all reasonable steps), it is not clear that assessments of liability will be straightforward. This could give rise to a question as to whether an infringement notice scheme is appropriate. **However, in the circumstances the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Trespass on personal rights and liberties—privacy
Schedule 2, item 3, proposed subsection 68(5A)

As explained in the explanatory memorandum at page 14, the ASADA may share protected customs information with a number of sporting administration bodies for permitted anti-doping purposes. Subsections 68(2) and 68(5) require the CEO to give written notice to the person to whom the information relates if the information is shared with a sporting administration body. Proposed subsection 68(5A) provides that these notification requirements do not apply if the 'CEO is satisfied that complying with those requirements is likely to prejudice a current investigation into a possible violation of the anti-doping rules'.

Although this provision limits the operation of protections associated with the disclosure of information that may include personal information, the objective being pursued is a legitimate one. Nevertheless, the committee is concerned that power given to the CEO to avoid these protections in some circumstances is a broad power and the committee believes that additional safeguards could apply without undermining the effectiveness of the provision. **The committee therefore seeks the Minister's advice as to whether consideration has been given to appropriate limitations on this power (e.g. a requirement that the CEO be satisfied on reasonable grounds) or that the exercise of the power be subject to reporting requirements.**

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

Minister's response - extract

In relation to proposed subsection 68(5A) of the Bill, the Committee seeks the Minister's advice as to whether consideration has been given to appropriate limitations on this power (e.g. the requirement that the CEO be satisfied on reasonable grounds) or that the exercise of power be subject to reporting requirements.

The provisions requiring the CEO to advise the person of the proposed disclosure has been shown to have the potential to compromise an ongoing investigation thus affecting the outcomes from that investigation. Accordingly, the Bill proposes that, while retaining the

existing provisions, the ASADA Act be amended so that the ASADA CEO would not have to disclose this information to a person if they believe it is likely to impinge a current investigation into a possible violation of the anti-doping rules.

I am, however, prepared to consider further your suggestion that the exercise of this power should be subject to appropriate reporting requirements. Thank you for the opportunity to provide clarification on the matters you have raised.

Committee Response

The committee thanks the Minister for this response and notes the comments made in support of the proposed approach. **The committee also thanks the Minister for her commitment to consider whether the CEO's power should be subject to a reporting requirement. However, the committee remains concerned that the power is not subject to the CEO holding a reasonable belief that notifying the person could jeopardise a current investigation. In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Customs Amendment (Miscellaneous Measures) Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Home Affairs

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 6 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill amends the *Customs Act 1901* to introduce a new offence for bringing into Australia a new category of goods known as 'restricted goods', and makes a number of technical amendments.

The bill also amends the *A New Tax System (Wine Equalisation) Act 1999*, *Import Processing Charges Act 2001* and *Customs Act 1901* to remove provisions which established the accredited client program.

The elements of serious offence included in regulations
Schedule 1, item 6, proposed section 233BABAE

This item would insert a provision into the *Customs Act 1901* that creates an offence of strict liability if a person brings 'restricted goods' into Australia. The penalty is 1000 penalty units (subsection 233BABAE(1)). The offence does not apply if the goods are brought into Australia in accordance with the Minister's written permission for this subsection (subsection 233BABAE(2)).

Proposed subsection 233BABAE(3) provides that restricted goods are goods that if imported would be prohibited imports (goods which have been prescribed in the regulations by the Governor-General under section 50 of the *Customs Act*) and that are prescribed as such under the regulations. It is noted that under the current regime prohibited imports cannot be seized in circumstances where there is no intention to import them, such as when they remain among the personal effects of ship crew and have not been 'landed'.

In general the committee raises concerns about the inclusions of significant elements of a criminal offence in regulations. In addition, concerns about the inclusion of elements of a

criminal offence in regulations are amplified in instances in which the offence is significant and one of strict liability.

The explanatory memorandum, at page 5, argues that the approach is justified on the basis that it will give Customs and Border Protection 'some flexibility in regulating goods consistent with international treaty obligations and matters of international concern without the need for legislative amendment'. It is also noted that proposed subsection 233BABAE(4) states that the section creating the new offence 'has effect only for purposes related to external affairs (including those related to giving effect to an international agreement and for those related to addressing matters of international concern).

The explanatory memorandum also states that, initially, it is intended to make child pornography and child abuse material a restricted good under the new provision. In this context, it is argued that 'given the nature of the material proposed to be included as restricted goods, 1000 penalty units is appropriately high so as to deter people from brining into Australia the kinds of goods which will be restricted goods.

Although the committee may accept that the penalty of 1000 penalty units for bringing goods such as child pornography into Australia is 'appropriately high', the explanatory memorandum has not provided a sufficiently detailed explanation for prescribing 'restricted goods' in regulations rather than including them in primary legislation. **The committee therefore seeks further information about the nature of other goods which may be prescribed as 'restricted goods' and the frequency with which the facility to prescribe such goods is likely to be exercised. The committee also seeks advice as to whether consideration has been given to including an obligation to ensure that persons entering Australia are informed of the prohibition on bringing restricted goods into Australia even where there is no intention to import such goods.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

Minister's response - extract

The Committee sought further information about the nature of other goods which may be prescribed as ' restricted' goods and the frequency with which the facility to prescribe such goods is likely to be exercised. Australian Customs and Border Protection Service (Customs and Border Protection) advises that all goods that are prohibited imports are capable of being prescribed as 'restricted goods', provided that the prohibited import is a good which is subject to Australia's international treaty obligations and the good is a matter of international concern. Customs and Border Protection has nominated child pornography

and child abuse material to be prescribed as meeting the new definition of 'restricted goods' as the existing controls relating to this material are insufficient, as described in the Explanatory Memorandum.

Initially, the facility will only be used by Customs and Border Protection to prescribe child pornography and child abuse material as 'restricted goods', as existing controls relating to other goods capable of being defined as 'restricted' are currently adequate and do not require additional regulatory intervention at present. Should circumstances change, the facility will be considered by Customs and Border Protection for additional usage, as required.

The Committee also sought advice as to whether consideration has been given to including an obligation to ensure that persons entering Australia are informed of the prohibition on bringing restricted goods into Australia even where there is no intention to import such goods. I can inform the Committee that Customs and Border Protection will engage with stakeholders so that the legislative change proposed in the Bill is publicly known.

Committee Response

The committee thanks the Minister for this response. The committee notes that Customs and Border Protection will engage with stakeholders to ensure that they are aware of the proposed prescribed 'restricted goods', though how this will occur in relation to the legislative change proposed in this Bill or if additional material is prescribed in the future is not explained.

More generally, the committee is concerned that the Minister's response does not explain why the power to prescribe further 'restricted' goods is necessary. In this regard, the response merely notes that circumstances may change and that the 'facility will be considered by Customs and Border Protection for additional usage, as required'. **The committee remains concerned about the appropriateness of this delegation of legislative power, but leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 1 of 2013 - extract

Trespass on personal rights and liberties—strict liability
Schedule 1, item 6, proposed section 233BABAE

As the explanatory memorandum does not address the appropriateness of strict liability for the offence created, **the committee seeks the Minister's advice as to the justification for the proposed approach and whether it is consistent with the principles set out in the committee's *Report 6/2002* discussed in the *Guide to Framing Commonwealth Offences*.**

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

Minister's response - extract

Finally, the Committee sought advice as to the justification for the proposed approach and whether it is consistent with the principles set out in the Committee's Report 6/2002 discussed in the Guide to Framing Commonwealth Offences.

In developing this new offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.* I consider the offence is consistent with these documents.

Committee Response

The committee thanks the Minister for this response, which confirms that the approach is consistent with the *Guide to Framing Commonwealth Offences*, but unfortunately does not outline the justification for this conclusion. Given the significant impact on potential defendants, the committee expects that information explaining why the use of strict liability is appropriate will be provided in the explanatory memorandum. **The committee therefore remains concerned about the provision, but leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012

Introduced into the House of Representatives on 19 September 2012
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No.12 of 2012*. The Minister responded to the committee's comments in a letter received 6 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2012 - extract

Background

This bill amends various Acts relating to superannuation and taxation.

Schedule 1 reinstates the temporary tax relief for merging superannuation funds with some modifications.

Schedule 2 introduces a registration regime for auditors of self-managed superannuation funds.

Schedule 3 amends the tax law to expand the existing reporting obligation for superannuation providers.

Schedule 4 facilitates the electronic transmission of payments and association information between certain funds, schemes and providers by providing for a register to be kept by the Commissioner of Taxation.

The bill also makes technical amendments in relation to eligible superannuation entities.

Retrospective operation
Schedule 1

Schedule 1 proposes to reinstate temporary loss relief and asset roll-over provisions for merging superannuation funds with the some modifications. This measure will apply for mergers that occur on or after 1 October 2011 and before 2 July 2017 and therefore has retrospective operation.

The explanatory memorandum explains that loss relief and asset roll-over removes income tax impediments to mergers between complying superannuation funds by permitting the roll-over of both revenue gains or losses and capital gains or losses (page 9). Loss relief

and asset roll-over was first introduced as a temporary concession to assist the superannuation industry to cope with the severe economic and financial market conditions in late 2008. The temporary loss relief and asset roll-over was granted for transfer events happening on or after 24 December 2008 and before 1 October 2011. The explanatory memorandum suggests that reinstatement of this taxation relief is appropriate 'given the potential benefits to members of facilitating industry consolidation and the possible costs for some entities transitioning to Stronger Super' (page 11).

While the explanatory memorandum indicates that the changes will be beneficial, **the committee seeks the Minister's advice to confirm that the amendments proposed in the Schedule will be beneficial to the industry, superannuation fund members and any other affected party**.

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

Minister's response - extract

I can confirm that Schedule 1 of the Bill will be beneficial to the industry and superannuation fund members. The schedule provides loss relief and an asset roll-over for mergers between superannuation funds ensuring tax considerations are not an impediment to funds seeking to merge and consolidate in response to the Stronger Super reforms.

In the absence of the relief, superannuation funds would face a major impediment to merge because the transfer of assets would result in either a tax liability or the extinguishment of tax losses, with the latter reducing members' account balances.

Providing temporary tax relief for fund mergers will be beneficial to the superannuation industry as it allows funds to achieve lower costs through scale efficiencies. This will benefit fund members through lower fees, ultimately resulting in higher retirement savings. The relief will also ensure members' benefits will not be impacted by the extinguishment of losses when their fund merges.

Committee Response

The committee thanks the Minister for this response and notes that, given the potential for provisions with a retrospective impact to have an adverse effect on persons, the committee expects that explanatory memoranda will expressly and comprehensively outline the impact of any provisions with retrospective effect.

Alert Digest No. 12 of 2012 - extract

Delegation of legislative power—incorporating material by reference
Schedule 2, item 9, proposed subsection 128Q(4)

Pursuant to proposed subsection 128Q(1) the Regulator may, by legislative instrument, determine 'competency standards to be complied with by all approved self-managed superannuation fund auditors'. Proposed subsection 128Q(4) provides that these standards may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, a matter contained in an instrument as in force or existing from time to time.

It is the committee's practice to seek a justification for such provisions as they diminish the capacity of the Parliament to adequately oversee the making of legislative instruments. As the explanatory memorandum does not explain why it is necessary to incorporate other instruments as they exist from time to time into the competency standards, **the committee seeks the Minister's advice in relation to the justification for this proposed approach**.

> *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.*

Minister's response - extract

With respect to the delegation of legislative power in Schedule 2, it is appropriate to provide the Regulator with flexibility to adjust the competency standards in response to emerging issues identified by the Regulator. The SMSF sector is subject to ongoing changes in legislative and market conditions that are likely to require modifications to the competency standards on a time-to-time basis. In addition, the Regulator may identify systematic issues in SMSF auditor competency in the course of its regulatory activities. It is appropriate that the Regulator has the power to adjust the competency standards to improve auditor competency in relation to such issues.

The provision of ASIC with the power to set competency standards was a recommendation of the Super System Review (Recommendation 8.8a). The purpose of the recommendation was to make all approved auditors subject to the same minimum competency standards.

Under existing SMSF auditor regulation, one way to be an approved auditor of SMSFs is to be a member of a professional association listed in Schedule 1AAA of the Superannuation Industry (Supervision) Act 1994 Regulations. These professional associations set competency standards for their members and may update these standards on an ongoing basis. It is appropriate for ASIC to have a similar level of flexibility in the proposed regulatory regime.

ASIC is committed to consultation with the industry with respect to the competency standards. ASIC's draft competency standards have undergone public consultation, and there has been direct consultation with the Joint Accounting Bodies and the SMSF Professionals' Association of Australia.

Committee Response

The committee thanks the Minister for this response and notes the arguments made in relation to the need for ASIC to have flexibility in setting competency standards and the public consultation that has taken place in relation to the draft standards. **However, the committee specifically sought advice as to why it is necessary to provide the power to incorporate other instruments as they exist from time to time into the competency standards, but unfortunately the response does not address this point. The committee therefore seeks the minister's further advice on this issue, including what information is likely to be incorporated by reference and whether that information will be publicly available.**

Senator the Hon Ian Macdonald
Chair

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2013-00866

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

Dear Senator Macdonald

I note the letter of 7 February 2013 about the views of the Senate Standing Committee for the Scrutiny of Bills legislation in my portfolio. This response addresses the issues raised about the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 (the Bill). I will be providing a separate response in relation to the Biosecurity Bill 2012 and Inspector-General of Biosecurity Bill 2012.

The committee sought further justification on two matters in the Bill and its associated explanatory material. To assist the committee, I have included additional information in Attachment 1. The contact officer in the department for any further information on this Bill is Marc Kelly and he may be contacted on 6272 5485 or marc.kelly@daff.gov.au.

I believe the Bill does not unduly trespass on personal rights and liberties because the measures in the Bill are reasonable and necessary in the context of protecting the community and the environment from the significant risks that these chemicals can pose.

Thank you for seeking clarification of these matters and for bringing the committee's views on the Bill to my attention.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

March 2013

Enc.

Attachment

Information for the Senate Standing Committee for the Scrutiny of Bills in relation to the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

General clarification

As noted by the Joint Parliamentary Committee on Human Rights the Bill promotes the right to health and a healthy environment, by regulating agricultural and veterinary chemicals (agvet chemicals). Agvet chemicals are designed to destroy pests and weeds, and prevent or cure diseases. They may be dangerous and are typically poisonous substances that often have deleterious consequences for human health and the environment.

Given the necessity of protecting the community and the environment from the hazards of agvet chemical products, measures in the Bill may limit personal rights and liberties but only as is reasonable and necessary to manage the risks associated with these chemical products.

The Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 will make amendments to the *Agricultural and Veterinary Chemicals Act 1994* (Agvet Act), *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act), the *Agricultural and Veterinary Chemicals Code Act 1994* (Code Act), including the Schedule to that Act (Agvet Code) and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Collection Act) (collectively called agvet chemical legislation).

The Senate Standing Committee for the Scrutiny of Bills (the committee) sought further advice on the following matters.

Schedule 1, items 54 and 58; Schedule 2, item 7

The committee advised:

> *The committee expects that the explanatory memorandum will demonstrate that the considerations relating to the use of strict liability outlined in the Guide have been taken into consideration in each instance in which it is sought to be applied.* ***The committee therefore seeks the minister's advice as to the justification for placing strict liability and an evidential burden of proof on defendants in relation to these specific provisions, particularly in light of the fact that the penalty for the strict liability offence is in excess of that recommended in the Guide.***

The committee specifically referred to the level of the penalty for the strict liability offences in new subsections 32(5) and 33(4) and sought advice as to why these vary from *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the guide). Sections 32 and 33 of the Agvet Code deal with notices to require persons to provide information that is relevant to a reconsideration. Reconsiderations are conducted where currently approved active constituents may not meet the safety criteria or where currently registered chemical products may not meet the safety criteria, trade criteria or efficacy criteria. Hindering a reconsideration by not providing relevant information may therefore have serious consequences for human health and the environment. As noted by the committee, these offences align with the current offences in relation to both the strict liability nature of the offences, the level of the penalty (120 penalty units) and the evidential burden for the defences in subsections 32(4) and 33(3).

The committee sought advice as to the justification for strict liability to apply in relation to the offences in subsections 32(5) and 33(4). These offences were included in the Agvet Code on its commencement in 1995 and at that time the penalty was 120 penalty units. These offences were made strict liability offences in 2001 in the *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001*. No change to the strict liability, evidential burden or level of penalty for these offences was proposed in the Bill. As no changes were proposed and regulated persons would already be aware of these offences, the explanatory memorandum did not specifically seek to justify these offences.

The current and longstanding penalty level of 120 penalty units in sections 32 and 33 is also considered to be commensurate with the need to protect human health and the environment, and sufficient to require persons to provide relevant information to support a reconsideration. The provision of this information will ensure that the APVMA has access to information to enable it to remain satisfied that currently approved active constituents or registered chemical products are acceptable for supply to the Australian marketplace.

While the amount of the penalty is more than that mentioned in the guide for a failure to lodge a report, not providing relevant information for a reconsideration is more related to obstructing or hindering the progress of a reconsideration that may have serious health or environmental consequences. Furthermore, this level of penalty is less than that for failing to provide new relevant information about a product (for example, where the use may be an undue hazard to the safety of people) (section 161, 300 penalty units). It is also significantly less than the 500 penalty unit strict liability offence in therapeutic goods legislation for the equivalent offence of failing to provide information about registered or previously registered therapeutic goods. Given the existing and other prevailing legislation and in the context of ensuring the ongoing protection of human health and the environment by requiring the provision of relevant information for a reconsideration, the current 120 penalty unit amount in the strict liability offences in subsections 32(5) and 33(4) is not considered to trespass unduly on personal rights and liberties.

The committee sought advice as to the justification for placing an evidential burden of proof on defendants for the defences in subsections 32(4) and 33(3), as these were not specifically addressed in the human rights statement of compatibility. The Criminal Code codifies principles of proof for Commonwealth offences. Where the law imposes a burden of proof on the defendant, it is an evidential burden and the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. As stated in the guide, an evidential burden of proof should generally apply to a defence and the default position in the Criminal Code should apply (section 4.3.2). In addition, the Bill does not alter the evidential burden for these defences. On this basis, the retention of the current evidential burden of proof on a defendant for the defences in subsections 32(4) and 33(3) would not trespass unduly on personal rights and liberties.

Schedule 3, item 120, new subsection 45C(4)

The committee advised that:

> *Although it may be accepted that a case for reversing the burden of proof can be made in these circumstances, it is not clear why a legal burden, as opposed to an evidential burden is necessary. More particularly, given that what a defendant may reasonably be expected to have known is not capable of clear definition, the fairness of requiring defendants to provide positive proof by*

such a criterion is questionable. ***The Committee therefore seeks a further justification of why an evidential burden is not sufficient to support the objectives of promoting human health and the environment in relation to this defence.***

The Joint Parliamentary Committee on Human Rights consideration of the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 raised similar issues with new subsection 45C(4).

The amendments in the Bill ensure minimal changes to existing offences so as not to disturb the existing provisions dealing with the evidential burden and legal burden. The exceptions are new section 45C of the Agvet Code (Schedule 3 of the Bill) and to a lesser degree new section 47E (Schedule 2 of the Bill). Section 47E mirrors current section 54. New section 47E contains the same defence as in current section 54 with the same evidential burden for the defence.

The current sections 45A and 55 have been amalgamated into new sections 45A, 45B and 45C. Just as is provided for in existing sections 45A and 55, new section 45C provides for a strict liability offence for possessing, having custody of or other dealing with a suspended or cancelled active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices that have been published. The amount of the penalty (300 penalty units) is for the same amount as the current sections 45A and 55. The defences in the current subsections 55(5) and (6) have been retained as subsections 45C(3) and (4). The defence and the reversal of the onus of proof in subsection 45C(4) mirrors the current defence and onus of proof in current subsection 55(6).

Subsection 45C(4) provides a defence to the defendant, who has not been given a notice, that he or she either did not know and could not reasonably have been expected to have known of the existence of the *Gazette* notice or that the possession etc was not in accordance with the instructions in the *Gazette* notice. This is an additional defence to the defence of honest and reasonable mistake of fact and, although the defendant bears the legal burden, is broader in scope. This is because it is not concerned with the requisite state of mistaken belief but is judged against the standard of what could be reasonably expected. The provision imposes the legal burden of proof on the defendant and this must be discharged on the balance of probabilities that the person did not know and could not reasonably be expected to have known of the existence of the notice.

The proposed defence, which remains unchanged, is that the defendant did not know *and* could not reasonably be expected to have known of the existence of the notice. As stated in the guide (section 4.3.2), a legal burden of proof on the defendant must be discharged *on the balance of probabilities* (section 13.5 of the Criminal Code). The issue therefore turns on whether the defendant should be expected to prove, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with suspended or cancelled chemical products or constituents.

It would not be likely that the defendant's knowledge of 'what they could reasonably be expected to have known' may be uncovered through the normal course of an investigation. In addition, the objectivity of this test will depend on the particular circumstances. More importantly, reducing the current legal burden to an evidential burden could be regarded as undermining the integrity of the agvet chemical regulatory system as it would reduce the need for suppliers to maintain the systems they currently have in place about the status of chemical products for supply.

While it is acknowledged that the placing of a legal burden on a defendant should be kept to a minimum, this specific circumstance of dealing with suspended or cancelled products is considered a situation where the defendant should continue to bear this burden. This is on the basis that dealing with some of these suspended or cancelled products is highly likely to be a concern for human health and the environment, and because the current and proposed burden on the defendant only extends to proving, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with these products.

In summary, while subsection 45C(4) is a new section, it does not represent a new obligation or an altered regulatory burden for regulated entities or an increased impact on any person's rights or liberties. On this basis and recognising the defence and the reversal of the onus of proof in new subsection 45C(4) mirrors the defence and onus of proof in current subsection 55(6), new subsection 45C(4) is considered reasonable and necessary. It is also consistent with the legitimate objective of protecting human health and the environment. It also results in the least impact on all parties to which the current and amended offence provisions relate.

SENATOR THE HON KATE LUNDY

MINISTER FOR SPORT
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER ASSISTING FOR INDUSTRY AND INNOVATION
SENATOR FOR THE A.C.T

12 MAR 2013

B13/144

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

Dear ~~Senator~~ Ian

Thank you for your letter of 28 February 2013 seeking clarification on a number of issues related to the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill) which amends the *Australian Sports Anti-Doping Authority Act 2006*. The Bill seeks to ensure that ASADA is best placed to meet future challenges being posed by the increasing use of systemic and sophisticated doping. Recent events have highlighted the need to ensure that ASADA has the capability for detecting the advanced doping practices that are now being used.

The harmful health effects of using prohibited substances and methods is well known, along with the potential for doping to undermine the important values that sport promotes within the community (such as the spirit of competition, honesty, fair play and dedication). In a sports-loving country like Australia, rigorous and effective anti-doping arrangements are essential to protect the value and integrity of sport, to discourage athletes and their support staff from doping, and to sanction those who do.

I would also preface my response by noting the structure of Australia's anti-doping legislative framework and that, subject to the passage of the Bill through the Parliament, the Regulations will be amended to give effect to the amendments contained in the Bill.

While the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) facilitates the operation of Australia's anti-doping arrangements, a significant amount of the detail in relation to the operation of these arrangements is specified in the *Australian Sports Anti-Doping Authority Regulations 2006* (the Regulations).

The Act provides for the making of regulations and specifies that the Regulations must prescribe a scheme that gives effect to Australia's international anti-doping obligations. Accordingly, the National Anti-Doping (NAD) Scheme appears at Schedule 1 of the Regulations.

The ASADA Act specifies what must be in the NAD Scheme. The Scheme details the protocols and procedures for the exercise of ASADA's functions. The functions which the NAD Scheme must authorise ASADA to do include:

- request an athlete to keep the ASADA informed of where they can be found;
- request an athlete to provide a sample;
- test, or arrange the testing of, samples;
- investigate possible violations of the anti-doping rules;
- disclose information obtained during such investigations for the purposes of, and in connection with, such investigations;
- notify athletes, support persons and sporting administration bodies of findings made by the Anti-Doping Rule Violation Panel in relation to a possible violation; and
- present such findings at hearings of the Court of Arbitration for Sport or other sporting tribunals.

The role of the NAD Scheme in underpinning the operational aspects of our anti-doping arrangements is highlighted in the Bill. The addition of sub-section 13(A)(2) would allow the NAD Scheme to include provisions in relation to new elements of the Bill, namely:

- disclosure notices;
- the form and conduct of interviews; and
- the form in which information, documents, things and answers to questions must or may be given.

I note that the Committee has sought my advice on a range of matters. These are addressed below.

The Committee seeks an explanation as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill.

The Bill proposes that the ASADA Act include the power for the NAD Scheme to authorise the ASADA Chief Executive Officer (CEO) to issue disclosure notices. The specific details around disclosure notices, including the information that must be included in a disclosure notice will be set out in the NAD Scheme. As outlined above, this approach is consistent with Australia's existing anti-doping legislative framework.

It is also important to note that there are a range of protections, both proposed in the Bill and entrenched in existing arrangements to ensure the appropriate use of this power by the CEO. For example:

- The Bill prescribes that the issuing of disclosure notices can only occur if the CEO has a reasonable belief that the individual concerned has information,

documents or things that may be relevant to the administration of the NAD Scheme.

- The CEO's reasonable belief will be informed by intelligence obtained by ASADA under the NAD Scheme. As a matter of administrative practice, the reasons which underpin the application of that discretion are to be properly recorded at the time of the decision.
- The Bill makes clear that the power to issue a disclosure notice cannot be delegated beyond the Senior Executive Service level within ASADA.
- The Bill includes provisions which require the ASADA CEO to report, in ASADA's annual report, on the issuing of disclosure notices.
- If a person believes that a decision to issue a disclosure notice is unreasonable, they can seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).
- Decisions made by the CEO can be scrutinised by the Commonwealth Ombudsman.
- Final decisions relating to an anti-doping rule violation are reviewable to the Administrative Appeals Tribunal.

In relation to proposed paragraph 13(1)(c), which provides that a person fails to comply with a disclosure notice if they do not comply with the notice within the period specified in the notice, the Committee seeks the Minister's advice as to whether the timeframe for a person to respond to a notice should be included in the Bill.

Consistent with the current specification of the NAD scheme, the specific details around the issuing of disclosure notices, including the form and content of the notice and how it is to be issued would all be detailed in the Regulations. The timeframe for responding to a disclosure notice will be 14 days.

The Committee seeks the Minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals.

The NAD scheme underpins ASADA's implementation of co-ordinated anti-doping programs and activities that comply with the requirements of the World Anti-Doping Code (the Code). The International Standard for the Protection of Privacy and Personal Information is established under the Code to ensure that all organisations involved in anti-doping adhere to a set of minimum privacy protections when collecting and using personal information.

In relation to holding an athlete's personal information, the Standard prescribes that information can be retained indefinitely, except for phone numbers and addresses which can be held for up to eight years. The Standard, however, recognises that national laws take precedence in relation to the collection, handling and dissemination of personal information.

The Code specifies that an anti-doping stakeholder must commence action on a possible anti-doping rule violation within eight years of the alleged violation. Accordingly, ASADA needs to keep information collected through the NAD scheme for a sufficient period to ensure that this provision could be activated if it receives information of a possible violation at any time within that eight year threshold.

To make this clearer I will issue amendments to the Regulations to include appropriate time periods. I trust that these proposed amendments will address your concerns.

The Committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to civil proceedings.
As a condition of receiving Australian Government funding, Australia's national sporting organisations (NSOs) are required to have in place an anti-doping policy that complies with the Code as well as acknowledges ASADA's powers and functions under the ASADA Act and NAD Scheme.

All NSO anti-doping policies replicate the essential parts of the Code (for example, Article 2 of the Code, which sets out the anti-doping rule violations). The effect of this is that when ASADA is exercising its legislative functions in relation to violations, it is also enforcing the anti-doping policy of the relevant sport.

NSOs then enforce their agreements with athletes through membership agreements and contracts. Penalties (sanctions) for doping offences usually involve bans from sport but, importantly, are not criminal penalties. Information obtained in response to a disclosure notice may assist ASADA in establishing an anti-doping rule violation against an athlete or athlete support person. Accordingly, to ensure effective delivery of ASADA's functions, it is counter-intuitive and unworkable to include an immunity in relation to all civil proceedings as anti-doping matters arise under the ASADA Act or Regulations (i.e. matters in relation to violations of the anti-doping rules) and are civil in nature.

However, when the Bill was being drafted, there was a concern that, unless the derivative use immunity was applied to other civil proceedings, this provision could potentially leave an individual exposed to civil penalties (when the purpose of the disclosure note is to collect information on possible anti-doping rule violations).

The Committee seeks the Minister's advice as to whether the view expressed in the Explanatory Memorandum that a statutory declaration would be sufficient for these purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection 13C(2).

The only situation where the evidential burden is being shifted to the recipient of a disclosure notice relates to the provision of material or documents being requested. Nevertheless, this burden needs to be reasonable and proportionate. Signing a document of legal standing to confirm that someone does not possess the requested items is a proportionate mechanism for achieving this. This option has not been reviewed by the courts however, I undertake to provide greater clarity around this issue through the Regulations.

The Committee seeks the Minister's advice as to why an infringement notice scheme is necessary and whether it is appropriate for the scheme to be provided for in regulations rather than being included in the primary legislation.

The Guide to Framing Commonwealth Offences recognises that an infringement notice scheme can be included in Regulations so long as the primary legislation includes a regulation-making power providing for this.

The operation of an infringement notice scheme provides the CEO with some flexibility to promptly manage matters that involve non-compliance. It allows the CEO to seek redress for non-compliance on less serious matters without the need to take the matter to the relevant court.

In relation to proposed subsection 68(5A) of the Bill, the Committee seeks the Minister's advice as to whether consideration has been given to appropriate limitations on this power (e.g. the requirement that the CEO be satisfied on reasonable grounds) or that the exercise of power be subject to reporting requirements.

The provisions requiring the CEO to advise the person of the proposed disclosure has been shown to have the potential to compromise an ongoing investigation thus affecting the outcomes from that investigation. Accordingly, the Bill proposes that, while retaining the existing provisions, the ASADA Act be amended so that the ASADA CEO would not have to disclose this information to a person if they believe it is likely to impinge a current investigation into a possible violation of the anti-doping rules.

I am, however, prepared to consider further your suggestion that the exercise of this power should be subject to appropriate reporting requirements. Thank you for the opportunity to provide clarification on the matters you have raised. Should you require any further assistance, please contact Ms Natasha Cole, Assistant Secretary, National Integrity in Sport Unit, on 6210 2705 or by email at natasha.cole@pmc.gov.au.

Yours sincerely

Kate Lundy

THE HON JASON CLARE MP
Minister for Home Affairs
Minister for Justice

Ministerial No. 107074

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2601

Dear Senator

I write in response to a letter of 7 February 2013 from Ms Toni Dawes, Committee Secretary to the Senate Standing Committee for the Scrutiny of Bills, in which several questions were asked via the Committee's *Alert Digest No.1 of 2013* pertaining to the Customs Amendment (Miscellaneous Measures) Bill 2012.

The Committee sought further information about the nature of other goods which may be prescribed as 'restricted' goods and the frequency with which the facility to prescribe such goods is likely to be exercised. Australian Customs and Border Protection Service (Customs and Border Protection) advises that all goods that are prohibited imports are capable of being prescribed as 'restricted goods', provided that the prohibited import is a good which is subject to Australia's international treaty obligations and the good is a matter of international concern. Customs and Border Protection has nominated child pornography and child abuse material to be prescribed as meeting the new definition of 'restricted goods' as the existing controls relating to this material are insufficient, as described in the Explanatory Memorandum.

Initially, the facility will only be used by Customs and Border Protection to prescribe child pornography and child abuse material as 'restricted goods', as existing controls relating to other goods capable of being defined as 'restricted' are currently adequate and do not require additional regulatory intervention at present. Should circumstances change, the facility will be considered by Customs and Border Protection for additional usage, as required

The Committee also sought advice as to whether consideration has been given to including an obligation to ensure that persons entering Australia are informed of the prohibition on bringing restricted goods into Australia even where there is no intention to import such goods. I can inform the Committee that Customs and Border Protection will engage with stakeholders so that the legislative change proposed in the Bill is publicly known.

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Finally, the Committee sought advice as to the justification for the proposed approach and whether it is consistent with the principles set out in the Committee's Report 6/2002 discussed in the Guide to Framing Commonwealth Offences.

In developing this new offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. I consider the offence is consistent with these documents.

The officer responsible for this matter in Customs and Border Protection is Mr Wayne Lodge, Director of Compliance and Enforcement who can be contacted on (02) 6275 6386.

I trust this information is of assistance.

Yours sincerely

Jason Clare

06 MAR 2013

THE HON BILL SHORTEN MP
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

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

Dear Senator Macdonald

Thank you for your letter of 11 October 2012 concerning the Superannuation Law Amendment (Capital Gains Tax and Other Efficiency Measures) Bill 2012 (the Bill).

In your letter, you seek my response in relation to issues identified about the Bill in the *Alerts Digest No.12 of 2012* (10 October 2012). The issues concern retrospectivity in Schedule 1 and the delegation of legislative power to a Regulator under Schedule 2.

I can confirm that Schedule 1 of the Bill will be beneficial to the industry and superannuation fund members. The schedule provides loss relief and an asset roll-over for mergers between superannuation funds ensuring tax considerations are not an impediment to funds seeking to merge and consolidate in response to the Stronger Super reforms.

In the absence of the relief, superannuation funds would face a major impediment to merge because the transfer of assets would result in either a tax liability or the extinguishment of tax losses, with the latter reducing members' account balances.

Providing temporary tax relief for fund mergers will be beneficial to the superannuation industry as it allows funds to achieve lower costs through scale efficiencies. This will benefit fund members through lower fees, ultimately resulting in higher retirement savings. The relief will also ensure members' benefits will not be impacted by the extinguishment of losses when their fund merges.

With respect to the delegation of legislative power in Schedule 2, it is appropriate to provide the Regulator with flexibility to adjust the competency standards in response to emerging issues identified by the Regulator. The SMSF sector is subject to ongoing changes in legislative and market conditions that are likely to require modifications to the competency standards on a time-to-time basis. In addition, the Regulator may identify systematic issues in SMSF auditor competency in the course of its regulatory activities. It is appropriate that the Regulator has the power to adjust the competency standards to improve auditor competency in relation to such issues.

The provision of ASIC with the power to set competency standards was a recommendation of the Super System Review (Recommendation 8.8a). The purpose of the recommendation was to make all approved auditors subject to the same minimum competency standards.

Under existing SMSF auditor regulation, one way to be an approved auditor of SMSFs is to be a member of a professional association listed in Schedule 1AAA of the Superannuation Industry

(Supervision) Act 1994 Regulations. These professional associations set competency standards for their members and may update these standards on an ongoing basis. It is appropriate for ASIC to have a similar level of flexibility in the proposed regulatory regime.

ASIC is committed to consultation with the industry with respect to the competency standards. ASIC's draft competency standards have undergone public consultation, and there has been direct consultation with the Joint Accounting Bodies and the SMSF Professionals' Association of Australia.

Yours sincerely

BILL SHORTEN