



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FIFTH 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

FIFTH REPORT OF 2013

The committee presents its *Fifth 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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Biosecurity Bill 2012

Introduced into the Senate 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 5 April 2013 on issues raised in relating to human health. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill replaces the *Quarantine Act 1908* to provide a modern regulatory framework and responds to the Nairn and Beale reviews (described in the explanatory memorandum) to:

- manage biosecurity risks, the risk of contagion of a listed human disease, the risk of listed human disease entering Australian territory, risks related to ballast water, biosecurity emergencies and human biosecurity emergencies; and
- give effect to Australia's international rights and obligations, including the World Health Organization's International Health Regulations and Agreement on the Application of Sanitary and Phytosanitary Measures, and the Convention on Biological Diversity.

Trespass on personal rights and liberties Clauses 31 and 33 and subclause 445(1)

These clauses outline a list of factors of which relevant biosecurity officials must be satisfied before exercising powers specified in the bill. These factors, broadly speaking, require decision-makers to be satisfied that measures taken will be effective and proportionate responses to particular risks. However, there is no additional requirement as to the level of belief to be held before the powers can be exercised and many of the decisions involved are significant and can restrict an individual's liberty and movement.

The same issue also arises in relation to the matters the Minister must be satisfied of in subclause 445(1).

The committee therefore seeks advice as to whether consideration has been given to amending the bill to require the decision-maker to be satisfied *on reasonable grounds* of the various factors. This would make it clear that a measure could only be taken if

there is the existence of facts sufficient to induce the mind of a reasonable person to be satisfied of the relevant considerations.

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

Clause 33- Trespass on personal rights and liberties

The Committee is seeking advice on the inclusion of an additional requirement for decision makers to be satisfied of various factors on *reasonable grounds*. The principles of general protection at clause 33 apply in relation to exercising powers or imposing measures under Chapter 2 of the Bill. These powers may only be exercised or imposed by specially appointed officers. Clause 80 specifies that personally restrictive and invasive powers may only be exercised by Human Biosecurity Officers or Chief Human Biosecurity Officers. These officers must have medical qualifications or appropriate clinical expertise, and these officers will therefore be using that particular knowledge or expertise when exercising powers or imposing measures. Consequently, I consider the more general requirement for the decision maker to be satisfied on *reasonable grounds* is not appropriate to Chapter 2 of the Bill.

Committee Response

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

The committee notes that it retains concerns given that the decisions involved are significant and can restrict an individual's liberty and movement. The committee does not consider that medical expertise and a requirement to be satisfied that powers are being exercised on reasonable grounds are mutually exclusive. **However, the Committee 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

Strict Liability Clause 56

This provision makes it an offence of strict liability for a person who is required under Chapter 2, Part 2, Division 6 of the bill to answer a question or provide written information to fail to answer the question or provide the information. The information that may be requested must relate to determining the level of risk to human health associated with the individual (subclause 53(2)). In relation to the power under clause 54 to require questions and answers from ‘any individual’ the requirement to provide answers or written information must be for the purpose of preventing a listed human disease from entering, or emerging, establishing itself or spreading in Australia, preventing such a disease from spreading to another country or determining the level of risk to human health associated with the relevant individual. The explanatory memorandum addresses the justifiability of strict liability offences in the bill in a general sense however, no mention is made of clause 56 (see pages 6 and 7).

The committee notes that strict liability offences are appropriate in certain circumstances including ‘for reasons such as public safety and the public interest in ensuring that regulatory schemes are observed’. It is further noted where the application of strict liability to certain offences in the bill has departed from the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the explanatory memorandum states that these departures have been approved by the Attorney-General. In addition, the committee notes that the penalty of 60 penalty units is consistent with the maximum penalties recommended in the *Guide*.

However, as it is possible that persons subject to requirements to answer questions may have recently arrived in Australia and may also be suffering from an illness, there may be instances where they are not reasonably able to comply with a request to answer questions or provide information as required. **The committee therefore seeks a fuller justification of the application of strict liability in this instance.**

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

Clause 56- Strict Liability

The Committee is seeking further justification on the application of a strict liability offence in this particular instance. The Bill requires information to be provided by any individual who an officer is satisfied has been exposed to a Listed Human Disease; or exposed to another individual who has signs or symptoms of a Listed Human Disease.

In all cases, this information may be uniquely known to the individual, and each individual may be able to provide important details about the epidemiology of the disease, the source of the disease, and the potential exposure of themselves and other individuals to the disease. This information is vital to address public health risk, and it is essential that as much information is collected as quickly as possible. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community, and potentially spread the disease to family and friends.

Alternative powers, such as monitoring and investigation powers, or enforcement, are not appropriate as the information being sought must be collected as soon as possible, to allow the Commonwealth to develop a picture of the disease needing to be managed, and the number of individuals potentially infected and in need of intervention.

Wherever possible, the Commonwealth will rely on voluntary disclosure; however, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

Clause 36 provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person must not be subject to a requirement of Chapter 2 of the Bill, and any urgent or life threatening medical needs must be met.

Committee Response

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

Adequacy of Merits Review Clause 75

This clause provides that section 28 of the *Administrative Appeals Tribunal Act* (which gives a right to obtain reasons for decisions which may be reviewed under the AAT Act) will not apply to a direction by the Director of Human Biosecurity to comply with an isolation or traveller movement measure. The explanatory memorandum explains that this is appropriate given that clause 70(7) of the bill provides that the notice requiring an individual to comply with a biosecurity measure must include ‘the reasons for the decision to give the notice’. As the terms of section 28 of the AAT Act deal with what is to be included in a statement of reasons with more specificity (that is, the decision-maker is required to set out ‘findings on material questions of fact’, to refer ‘to the evidence or other material on which those findings were based’ and to ‘give the reasons for the decision’), **the committee seeks the Minister’s advice as to why it is not appropriate to use the same statutory formulation as used in the AAT Act in clause 70(7) of the bill.** (The Note to clause 75 refers to paragraph 3(a), and this appears to be a typographical error.)

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

Clause 75 - Adequacy of Merits Review

The Committee is seeking advice as to why the formulation of s.28 of the *Administrative Appeals Tribunal Act 1975* is not appropriate. Chapter 2 of the Bill provides for independent external review of decisions that affect individuals. If the Director of Human Biosecurity issues a direction for an individual to comply with an isolation measure or traveller movement measure, the individual may seek review of that decision by the Administrative Appeals Tribunal (AAT). An isolation or traveller movement measure may only be applied if an individual has demonstrated signs or symptoms of, or exposure to, a Listed Human Disease. Individuals are temporarily isolated or restricted from travelling because they pose a serious communicable disease risk to the community.

If an individual applies to the AAT for review of a direction to comply with such a measure, clause 75(I) of the Bill alters the operation of the *Administrative Appeals*

Tribunal Act 1975 (AAT Act) by providing that s28 does not apply. Specifically, s.28(4) of the AAT Act requires a decision maker to set out 'findings on material questions of fact', to refer 'to the evidence or other material on which the findings were based', and to 'give reasons for the decision' within 28 days.

Clause 75(4) specifies that the Director of Human Biosecurity must provide the Tribunal and the individual with the reasons for making the decision, and every other document or part of a document that is relevant to the review. I am confident this provides the Tribunal and the individual with documents equivalent to, or greater than, those required by s28(4) of the AAT Act.

Committee Response

The committee thanks the Minister for this response. The committee notes the information provided, but remains unclear why it is necessary to depart from the requirements stated in s 28(4) of the AAT Act. **However, in light of the Minister's advice that clause 75(4) of the bill requires that the decision-maker provide the individual and tribunal with documents 'equivalent to, or greater than, those required by s 28(4) of the AAT Act' the committee 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

Delegation of legislative power Subclause 89(3)

Subclause 89(2) provides that an individual who has undergone an examination pursuant to section 88 'may be required...to provide...specified body samples for the purpose of determining the presence in the individual of' specified human diseases. Subclause 89(3) provides that the 'regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided under subsection (2)'. The *Note* to this provision states that the regulations may prescribe offences and civil penalties in relation to these requirements concerning body samples. The explanatory memorandum does not indicate why these important and sensitive issues cannot be appropriately dealt with in the primary legislation. It is important that safeguards in relation to these matters should be put in place and it is not clear why these should be dealt with in delegated legislation. **The committee therefore seeks an explanation as to why these issues should not be dealt with expressly 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

Clause 89(3) - Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the taking, labelling, transportation and storage of body samples should not be dealt with expressly in the Bill. Whilst the substantive powers relating to body samples are specified in the Bill; clause 89(3) allows for the making of regulations in relation to the taking labelling, transporting, storage, and use of body samples.

Clause 89 (2) of the Bill specifies that body samples may only be required if an individual is subject to a Human Biosecurity Control Order, has undergone an examination at a specified medical facility, and may only be required for diagnosis of a Listed Human Disease. Before requiring an individual to provide body samples, clause 33 also requires that officers must be satisfied that this is an appropriate and adapted measure, and that it is the least intrusive and invasive measure that may be applied to address the disease risk in the circumstances. Finally, clause 91 requires that appropriate medical and professional standards be used, and clause 92 specifies that force must not be used to oblige an individual to comply with a requirement to provide body samples.

The regulations are therefore intended to prescribe requirements relating to administrative matters only. For example, specifying that samples must be stored according to national standards applicable to laboratories where diagnostic testing is carried out.

Committee Response

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

Delegation of legislative power Clauses 257, 287 and 290

Clause 257 provides for the making of regulations to prescribe a scheme in relation to ship sanitation. Subclause 257(3) provides that the scheme must be appropriate and adapted to give effect to Australia's rights and obligations in relation to ship sanitation under the International health Regulations. It is not clear, however, why such a scheme cannot be included in the primary legislation.

The same issue arises in relation to clauses 287 and 290 in relation to ballast water management plans for vessels. **The committee prefers that important matters are included in primary legislation whenever possible and unfortunately a rationale for the proposed approach is not provided in the explanatory memorandum. The committee therefore seeks the Minister's explanation as to the justification for the proposed approach in these clauses.**

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

Clauses 257- Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the Ship Sanitation Certification Scheme should not be dealt with expressly in the Bill. Similar to clause 89(3), this regulation making power allows for the prescription of administrative arrangements in relation to the Ship Sanitation Certification Scheme.

The substantive powers of the scheme relating to inspection or treatment of vessels are expressly contained in Chapter 4 of the Bill. The regulations are limited to the prescription of administrative matters only, such as the types of certificates that can be issued, the format of the certificates, and the declaration of ports where inspections may be performed.

I thank the Committee for bringing these issues to my attention and trust this information will address the concerns of the Committee.

Committee Response

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

Migration Amendment (Reinstatement of Temporary Protection Visas) Amendment Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Morrison

Introduction

The committee dealt with this bill in *Alert Digest No.3 of 2013*. Mr Morrison responded to the committee's comments in a letter dated 2 May 2013. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2013 - extract

Background

This bill amends the *Migration Act 1958* to restore two classes of temporary protection visas to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the Refugee Convention.

Delegation of Legislative Power—important matters contained in regulations Schedule 1, item 4, proposed subsections 76D(2) and 76H(2)

This subsection provides that regulations made for the purposes of providing for access to social security and other benefits, to be prescribed in the regulations as visa conditions (for a temporary protection (offshore entry) visa), 'must ensure that the holder of the visa must participate in a mutual obligation program specified in the regulations in order to access relevant social security benefits'. The same issue arises in proposed subsection 76H(2) in relation to conditions of temporary protection for a 'secondary movement offshore entry' visa.

The committee's long-standing view is that important matters should be included in primary legislation whenever possible. As the explanatory memorandum does not elucidate the nature of the 'mutual obligations' that may be mandated by the regulations **the committee seeks an explanation as to what obligations are envisaged and why it is appropriate that they be provided for in the regulations.**

Pending the Shadow 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.

Shadow Minister's response - extract

The first related to an explanation of what was envisaged by mutual obligation and why it is appropriate for those obligations to be provided for in regulations.

Mutual obligation is a long established principle underpinning income support arrangements in Australia. It refers to the principle that it is fair and reasonable to expect unemployed people receiving income support to do their best to find work, undertake activities that will improve their skills and increase their employment prospects and in some circumstances, contribute to their community in return for income support. The Bill provides for similar obligations to apply for TPV holders who are dependent on government income support payments.

Mutual obligation activities vary depending on the individual circumstances of the TPV holder as is the case for Australian citizens receiving income support arrangements. The well founded principle of mutual obligation and the need for flexibility in its application based on individual circumstances are the reasons for specific obligations to be provided for by regulations.

Committee Response

The committee thanks the Shadow Minister for this response. The committee retains concerns about this matter given that there is insufficient detail in the explanation to assess the appropriateness of imposing mutual obligations through regulations. **If the bill proceeds to further stages of debate the committee may request further information to allow it to fully assess this matter.**

Alert Digest No. 3 of 2013 - extract

Rights, Liberties or obligations unduly dependent upon insufficiently defined administrative powers

Schedule 1, item 4, proposed subsections 76E(2) and 76E(7)

Proposed subsection 76E(2) gives the Minister a power to lift the bar (created by subsection 76E(1)) on the grant of a permanent visa for persons holding temporary protection visas. This power may be exercised on the basis of what the Minister thinks is in

the public interest. Subsection 76E(7) provides that the Minister ‘does not have a duty to consider whether to exercise the power under subsection (2) in respect of any person who holds a temporary protection (offshore entry) visa, whether the Minister is requested to do so by the visa holder or by any other person, or in any other circumstances’.

The result is that the power is conferred on the basis of broad discretionary considerations and, indeed, the Minister need not even consider whether or not it should be exercised. Although the courts’ judicial review jurisdiction is not ousted by these clauses, the practical result of the combination of a broadly framed power and a ‘no-consideration clause’ (ie subsection 76E(2)) would be that judicial review would not provide any significant control of the exercise of the powers. **As the explanatory memorandum does not specifically address the justification for the proposed approach in these subsections, the committee seeks further advice as to why the power should not be subject to clearer criteria and why the no-consideration clause is considered necessary given that the non-exercise or refusal to exercise this power does not appear to be subject any accountability mechanisms.**

Pending the Shadow 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.

Shadow Minister's response - extract

The power for the Minister to lift the bar on the grant of permanent visa for persons holding Temporary Protection Visas has also been raised by the Committee. The key feature of the Bill is the principle that circumstances in source countries constantly change and the need for protection is a temporary not permanent condition. This principle is reflected in Article 1C (paragraph 5) of the Refugee Convention. A permanent visa is therefore not available to a TPV Holder. The Bill recognises that there may be exceptional circumstances where it is in the national interest for a TPV Holder to be granted a permanent visa. The Government, which is electorally accountable to the Australian community, through the Minister is considered to be the only appropriate point of decision making on national interest grounds.

Committee Response

The committee thanks the Shadow Minister for this response. The committee notes the explanation provided, but retains concerns about the breadth of this discretionary power given that it directly affects important individual interests and there appears to be limited scope for judicial review. **However, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 2 of 2013 - extract

Delegation of legislative power—Henry VIII clause

Item 5

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. It is the practice of the committee to comment on so-called when the rationale for their use is not clear. In this instance, no explanation is provided for the necessity of paragraph (1) of this item which enables the regulations to amend Acts.

The committee accepts that there may be justification for the use of such clauses, but expects the issue to be comprehensively addressed in the explanatory memorandum accompanying the bill. **As the explanatory memorandum does not provide information about item 5(1), the committee seeks advice as to the rationale for including it in the bill.**

Pending the Shadow 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.

Shadow Minister's response - extract

Finally, the Committee also queried the rationale for Item 5(1) in the Bill.

This item includes a power for regulations to be made to amend Acts to enable any consequential issues that emerge in the future to be dealt with. It is intended to deal with unforeseen circumstances and any regulations would be subject to the usual scrutiny and disallowance regime.

Committee Response

The committee thanks the Shadow Minister for this response. **In the circumstances the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Small Business Commissioner Bill 2013

Introduced into the Senate on 25 February 2013

By: Senator Whish-Wilson

Introduction

The committee dealt with this bill in *Alert Digest No.3 of 2013*. Senator Whish-Wilson responded to the committee's comments in a letter dated 19 April 2013. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2013 - extract

Background

This bill establishes an Office of the Small Business Commissioner.

Insufficiently defined administrative powers

Subclauses 8(c) and (d)

These subclauses state that the commissioner has dispute resolution functions and powers to undertake *any* action appropriate for the purpose of facilitating the fair treatment of small business in their commercial arrangements with government departments and other government entities and, subject to constitutional limits, to undertake *any* action appropriate for the purpose of facilitating the fair treatment of small business in their commercial arrangements with other businesses.

These are broadly framed powers yet neither the limits of the powers nor the criteria for their exercise are specified. Regrettably, the explanatory memorandum merely repeats the text of these provisions without explaining their intended operation or why such broadly framed powers are necessary or appropriate. **The committee therefore seeks a detailed explanatory statement of the intended operation and effect of these provisions and a justification for the breadth of the powers.**

Pending the Senator'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.

Senator's response - extract

Insufficiently defined administrative powers- Subclauses 8 (c) and (d)

The bill is based on the South Australian *Small Business Commissioner Act 2011*. However, as noted by the Committee this bill provides for more broadly framed powers under Subclauses 8 (c) and (d). The powers outlined in section 8 are intended to provide the Small Business Commissioner (Commissioner) with a wide-ranging remit to advocate for small businesses.

These clauses have been inserted to ensure that the Commissioner does everything possible to facilitate fair treatment *of* small business in their commercial arrangements and the resolution of conflict between small business and Departments, Statutory Agencies or Executive Agencies of the Commonwealth and larger businesses. It is not intended that these clauses give the Commissioner further powers beyond those outlined in Clause 13.

The intended effect of these provisions is for the Commissioner to be seen and to act as a champion of the small business sector. These clauses are about ensuring fair treatment of small businesses in their commercial arrangements with Government and larger businesses. Small businesses find it difficult to pursue Government agencies and larger businesses over business to business issues. In many instances they do not have the financial resources or the extra time to attempt to resolve these disputes in a comprehensive way; this is why an effective Commissioner is required. The bill in general is about endeavouring to ensure the fair treatment of small businesses. This requires an appropriate remit for the Commissioner. It is intended that the Commissioner will use non coercive methods such as exchange of correspondence and formal meetings to also resolve disputes. These clauses provide this remit for the Commissioner to use any appropriate action within the limit *of* the powers provide under Clause 13.

Committee Response

The committee thanks the Senator for this response and requests that the key information be included in the explanatory memorandum. **The committee remains concerned about the breadth of the discretionary powers and, if the bill proceeds to further stages of debate, the committee may request further advice as to whether consideration has been given to providing for the intended relationship between these powers and the powers under clause 13 in the bill.**

Alert Digest No. 3 of 2013 - extract

Trespass on personal rights and liberties—various Division 3

This proposed Division includes a number of information gathering powers that empower the commissioner to issue notices in writing that require recipients (on pain of conviction of an offence) to produce documents or information or to attend a hearing to answer questions. These are coercive powers and it is regrettable that the explanatory memorandum does not explain why they are justified in this context. Further, the provisions do not conform with a number of the principles applicable to the drafting of such powers set out in Chapter 9 the *Guide to Framing Commonwealth Offences*.

It is also the case that the offence in subclause 13(6) for failing to comply with a notice to attend is (by subclause 13(7)) made an offence of strict liability, and that the defence set out in subclause 18(8) places an evidential burden of proof on the defendant. These are issues which, bearing in mind the principles set out in the *Guide to Framing Commonwealth Offences*, the committee expects to be explained in detail in the explanatory memorandum. **The committee therefore seeks a detailed explanation of the intended operation of Division 3 of the bill, including consideration of the principles set out in the *Guide to Framing Commonwealth Offences* as appropriate.**

Pending the Senator'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.

Senator's response - extract

Trespass on personal rights and liberties- various Division 3

Division 3 of the bill provides powers necessary to the role of the Commissioner. These powers are coercive and are included in the bill to ensure the Commissioner has the necessary powers to acquire information and documents. Without coercive powers the role of the Commissioner is weakened. The intention is that the Commissioner will rarely use these powers as is the case with State small business commissioners. However the threat of these powers is important as if used (or even the possibility of their use) will help ensure the Commissioner is able to secure information to help resolve a conflict before it proceeds to court. This is based on existing state based models. I anticipate that in the majority of cases Government Departments and businesses will be upfront and transparent in their

dealings with the Commissioner, however it is important the Commissioner has the power to acquire documents and require parties to appear.

Without these coercive powers there is no guarantee parties will appear to allow the Commissioner to attempt to resolve the issue. The intention is for court proceedings to be avoided and for conflict resolution to occur before it reaches the court stage. Many small businesses do not have the resources to be involved in a court setting.

Committee Response

The committee thanks the Senator for this response. **If the bill proceeds to further stages of debate the committee may request further advice, including whether the key provisions are appropriate taking into account the *Guide to Framing Commonwealth Offences*, for example, whether strict liability and the reversal of onus are appropriate; specifically why coercive powers are appropriate and examples of possible circumstances in which they might be needed.**

Alert Digest No. 3 of 2013 - extract

Trespass on personal rights and liberties—privacy Clause 11 and Division 3

Clause 11 of the bill empowers the commissioner to share information obtained in the exercise of the functions or powers set out in the Act with the ACCC and ASIC. As discussed above, Division 3 of the bill contains coercive information gathering powers. Neither the explanatory memorandum nor the statement of compatibility consider whether these provisions may be considered to unduly trespass on individual privacy or what protections are in place to limit the disclosure of personal information. **The committee therefore seeks further information on these matters.**

Pending the Senator'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.

Senator's response - extract

Trespass on personal rights and liberties- privacy Clause 11 and Division 3

I appreciate the Committee's view that the sharing of information as outlined by Clause 11 may be considered to unduly trespass on individual privacy. However I believe that in providing the Commissioner with the powers under Division 3, allowing information sharing between the Commissioner and other related agencies such as the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission will improve the operation of all agencies and prevent duplication of effort.

I would expect these agencies to have protocols in place in to protect information and the privacy of individuals. An appropriate information sharing relationship between these agencies with appropriate privacy provisions is suitable in spite of the privacy concerns.

Committee Response

The committee thanks the Senator for this response. **If the bill proceeds to further stages of debate the committee may request further information as to what protections are in place for sharing information, particularly as coercive information gathering powers are available to the commissioner.**

Alert Digest No. 3 of 2013 - extract

Insufficiently defined administrative powers—delegation of power Clause 27

This clause enables the commissioner to delegate all or any of his or her powers, other than the reporting function mentioned in clause 29, to a 'member of staff of the Office of the Small business commissioner'. Given the nature of the powers of the commissioner (some are broadly framed and others have a coercive effect) the committee expects that the necessity for the breadth of this power will be justified in the explanatory memorandum. In this regard it is noted that, in general, the committee's expectation is that notices to produce or attend should, due to their coercive nature, only be issued by relatively senior members of a government agency with appropriate safeguards in place. Similarly, it may be thought that the nature of the dispute resolution functions and powers conferred by clause 8 of the bill would limit the class of persons to whom an appropriate delegation should be made. **The committee seeks a justification of the approach taken to**

delegation, noting that the justification should consider the nature and variety of functions and powers proposed to be conferred on the commissioner.

Pending the Senator'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.

Senator's response - extract

Insufficiently defined administrative powers- delegation of power Clause 27

It is my understanding that initially the office of the Commissioner will have a small staff of fewer than 10 people. Therefore owing to the small size of the office, I would expect if power is delegated the Commissioner will be aware of how it has been used. It is expected that only senior members of staff will use delegated powers.

As Clause 27 outlines if the Commissioner is to delegate his powers, this must be done in writing. I believe this provides an appropriate safeguard to ensuring the Commissioner's powers are used appropriately if delegated.

Committee Response

The committee thanks the Senator for this response. However, the committee remains concerned by the breadth of delegation power without any legislative safeguards in place, especially given the nature of the commissioner's powers (some are broadly framed and others have a coercive effect). The committee has consistently drawn attention to legislation that allows delegation to many people with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. **If the bill proceeds to further stages of debate the committee may request further information to allow it to fully assess this matter.**

Senator the Hon Ian Macdonald
Chair



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12 APR 2013

Senate Standing C'ttee
for the Scrutiny
of Bills

**The Hon Tanya Plibersek MP
Minister for Health**

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

Dear Senator

You recently wrote to Minister Ludwig seeking advice or clarification on a number of issues identified in Alert Digest No.1 of 2013 (6 February 2013), in the relation to the Biosecurity Bill 2012 (The 'Bill'). The Bill is jointly administered by the Agriculture, Fisheries and Forestry portfolio and the Health portfolio. As Minister responsible for human health under the Bill, I am responding to the issues that have been raised in relation to human health. I understand Minister Ludwig will respond to all other issues raised by the Committee.

Clause 33 – Trespass on personal rights and liberties

The Committee is seeking advice on the inclusion of an additional requirement for decision makers to be satisfied of various factors on *reasonable grounds*. The principles of general protection at clause 33 apply in relation to exercising powers or imposing measures under Chapter 2 of the Bill. These powers may only be exercised or imposed by specially appointed officers. Clause 80 specifies that personally restrictive and invasive powers may only be exercised by Human Biosecurity Officers or Chief Human Biosecurity Officers. These officers must have medical qualifications or appropriate clinical expertise, and these officers will therefore be using that particular knowledge or expertise when exercising powers or imposing measures. Consequently, I consider the more general requirement for the decision maker to be satisfied on *reasonable grounds* is not appropriate to Chapter 2 of the Bill.

Clause 56 – Strict Liability

The Committee is seeking further justification on the application of a strict liability offence in this particular instance. The Bill requires information to be provided by any individual who an officer is satisfied has been exposed to a Listed Human Disease; or exposed to another individual who has signs or symptoms of a Listed Human Disease.

In all cases, this information may be uniquely known to the individual, and each individual may be able to provide important details about the epidemiology of the disease, the source of the disease, and the potential exposure of themselves and other individuals to the disease. This information is vital to address public health risk, and it is essential that as much information is collected as quickly as possible. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community, and potentially spread the disease to family and friends.

Alternative powers, such as monitoring and investigation powers, or enforcement, are not appropriate as the information being sought must be collected as soon as possible, to allow the Commonwealth to develop a picture of the disease needing to be managed, and the number of individuals potentially infected and in need of intervention.

Wherever possible, the Commonwealth will rely on voluntary disclosure; however, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

Clause 36 provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person must not be subject to a requirement of Chapter 2 of the Bill, and any urgent or life threatening medical needs must be met.

Clause 75 – Adequacy of Merits Review

The Committee is seeking advice as to why the formulation of s28 of the *Administrative Appeals Tribunal Act 1975* is not appropriate. Chapter 2 of the Bill provides for independent external review of decisions that affect individuals. If the Director of Human Biosecurity issues a direction for an individual to comply with an isolation measure or traveller movement measure, the individual may seek review of that decision by the Administrative Appeals Tribunal (AAT). An isolation or traveller movement measure may only be applied if an individual has demonstrated signs or symptoms of, or exposure to, a Listed Human Disease. Individuals are temporarily isolated or restricted from travelling because they pose a serious communicable disease risk to the community.

If an individual applies to the AAT for review of a direction to comply with such a measure, clause 75(1) of the Bill alters the operation of the *Administrative Appeals Tribunal Act 1975* (AAT Act) by providing that s28 does not apply. Specifically, s28(4) of the AAT Act requires a decision maker to set out 'findings on material questions of fact', to refer 'to the evidence or other material on which the findings were based', and to 'give reasons for the decision' within 28 days.

Clause 75(4) specifies that the Director of Human Biosecurity must provide the Tribunal and the individual with the reasons for making the decision, and every other document or part of a document that is relevant to the review. I am confident this provides the Tribunal and the individual with documents equivalent to, or greater than, those required by s28(4) of the AAT Act.

Clause 89(3) – Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the taking, labelling, transportation and storage of body samples should not be dealt with expressly in the Bill. Whilst the substantive powers relating to body samples are specified in the Bill; clause 89(3) allows for the making of regulations in relation to the taking labelling, transporting, storage, and use of body samples.

Clause 89 (2) of the Bill specifies that body samples may only be required if an individual is subject to a Human Biosecurity Control Order, has undergone an examination at a specified medical facility, and may only be required for diagnosis of a Listed Human Disease. Before requiring an individual to provide body samples, clause 33 also requires that officers must be satisfied that this is an appropriate and adapted measure, and that it is the least intrusive and invasive measure that may be applied to address the disease risk in the circumstances. Finally, clause 91 requires that appropriate medical and professional standards be used, and clause 92 specifies that force must not be used to oblige an individual to comply with a requirement to provide body samples.

The regulations are therefore intended to prescribe requirements relating to administrative matters only. For example, specifying that samples must be stored according to national standards applicable to laboratories where diagnostic testing is carried out.

Clauses 257– Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the Ship Sanitation Certification Scheme should not be dealt with expressly in the Bill. Similar to clause 89(3), this regulation making power allows for the prescription of administrative arrangements in relation to the Ship Sanitation Certification Scheme.

The substantive powers of the scheme relating to inspection or treatment of vessels are expressly contained in Chapter 4 of the Bill. The regulations are limited to the prescription of administrative matters only, such as the types of certificates that can be issued, the format of the certificates, and the declaration of ports where inspections may be performed.

I thank the Committee for bringing these issues to my attention and trust this information will address the concerns of the Committee.

Yours sincerely

A handwritten signature in blue ink that reads "Tanya Plibersek". The signature is written in a cursive style with a large initial 'T' and a long, sweeping underline.

Tanya Plibersek

5.4.13



Scott Morrison MP

SHADOW MINISTER FOR PRODUCTIVITY AND POPULATION
SHADOW MINISTER FOR IMMIGRATION AND CITIZENSHIP
FEDERAL MEMBER FOR COOK

RECEIVED

- 3 MAY 2013

**Senate Standing C'ttee
for the Scrutiny
of Bills**

Ms Toni Dawes
Committee Secretary
Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Dawes,

Migration Amendment (Reinstatement of Temporary Protection Visas) Amendment Bill 2013

Your letter dated 28 February 2013 sought a response in relation to three matters relating to the above Bill raised by the Committee.

The first related to an explanation of what was envisaged by mutual obligation and why it is appropriate for those obligations to be provided for in regulations.

Mutual obligation is a long established principle underpinning income support arrangements in Australia. It refers to the principle that it is fair and reasonable to expect unemployed people receiving income support to do their best to find work, undertake activities that will improve their skills and increase their employment prospects and in some circumstances, contribute to their community in return for income support. The Bill provides for similar obligations to apply for TPV holders who are dependent on government income support payments.

Mutual obligation activities vary depending on the individual circumstances of the TPV holder as is the case for Australian citizens receiving income support arrangements. The well founded principle of mutual obligation and the need for flexibility in its application based on individual circumstances are the reasons for specific obligations to be provided for by regulations.

The power for the Minister to lift the bar on the grant of permanent visa for persons holding Temporary Protection Visas has also been raised by the Committee. The key feature of the Bill is the principle that circumstances in source countries constantly change and the need for protection is a temporary not permanent condition. This principle is reflected in Article 1C (paragraph 5) of the Refugee Convention. A permanent visa is therefore not available to a TPV Holder. The Bill recognises that there may be exceptional circumstances where it is in the national interest for a TPV Holder to be granted a permanent visa. The Government, which is electorally accountable to the Australian community, through the Minister is considered to be the only appropriate point of decision making on national interest grounds.

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Finally, the Committee also queried the rationale for Item 5(1) in the Bill.

This item includes a power for regulations to be made to amend Acts to enable any consequential issues that emerge in the future to be dealt with. It is intended to deal with unforeseen circumstances and any regulations would be subject to the usual scrutiny and disallowance regime.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Scott Morrison', written in a cursive style.

Scott Morrison MP
Shadow Minister for Productivity and Population
Shadow Minister for Immigration and Citizenship
Federal Member for Cook

2 MAY 2012



SENATOR PETER WHISH-WILSON
Australian Greens Senator for Tasmania

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24 APR 2013

Senate Standing C'ttee
for the Scrutiny
of Bills

Senator Ian Macdonald
Committee Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

19 April 2013

Dear Senator Macdonald

Small Business Commissioner Bill 2013

I write in response to the issues raised by Standing Committee for the Scrutiny of Bills with my bill the *Small Business Commissioner Bill 2013* as outlined in the Committee's Alert Digest of 13 March 2013 (No.3 of 2013).

Insufficiently defined administrative powers – Subclauses 8 (c) and (d)

The bill is based on the South Australian *Small Business Commissioner Act 2011*. However as noted by the Committee this bill provides for more broadly framed powers under Subclauses 8 (c) and (d). The powers outlined in section 8 are intended to provide the Small Business Commissioner (Commissioner) with a wide-ranging remit to advocate for small businesses.

These clauses have been inserted to ensure that the Commissioner does everything possible to facilitate fair treatment of small business in their commercial arrangements and the resolution of conflict between small business and Departments, Statutory Agencies or Executive Agencies of the Commonwealth and larger businesses. It is not intended that these clauses give the Commissioner further powers beyond those outlined in Clause 13.

The intended effect of these provisions is for the Commissioner to be seen and to act as a champion of the small business sector. These clauses are about ensuring fair treatment of small businesses in their commercial arrangements with Government and larger businesses. Small businesses find it difficult to pursue Government agencies and larger businesses over business to business issues. In many instances they do not have the financial resources or the extra time to attempt to resolve these disputes in a comprehensive way; this is why an effective Commissioner is required. The bill in general is about endeavouring to ensure the fair treatment of small businesses. This requires an appropriate remit for the Commissioner. It is intended that the Commissioner will use non coercive methods such as exchange of correspondence and formal meetings to also resolve disputes. These clauses provide this remit for the Commissioner to use any appropriate action within the limit of the powers provide under Clause 13.



SENATOR PETER WHISH-WILSON
Australian Greens Senator for Tasmania

Trespass on personal rights and liberties – various Division 3

Division 3 of the bill provides powers necessary to the role of the Commissioner. These powers are coercive and are included in the bill to ensure the Commissioner has the necessary powers to acquire information and documents. Without coercive powers the role of the Commissioner is weakened. The intention is that the Commissioner will rarely use these powers as is the case with State small business commissioners. However the threat of these powers is important as if used (or even the possibility of their use) will help ensure the Commissioner is able to secure information to help resolve a conflict before it proceeds to court. This is based on existing state based models. I anticipate that in the majority of cases Government Departments and businesses will be upfront and transparent in their dealings with the Commissioner, however it is important the Commissioner has the power to acquire documents and require parties to appear.

Without these coercive powers there is no guarantee parties will appear to allow the Commissioner to attempt to resolve the issue. The intention is for court proceedings to be avoided and for conflict resolution to occur before it reaches the court stage. Many small businesses do not have the resources to be involved in a court setting.

Trespass on personal rights and liberties – privacy Clause 11 and Division 3

I appreciate the Committee's view that the sharing of information as outlined by Clause 11 may be considered to unduly trespass on individual privacy. However I believe that in providing the Commissioner with the powers under Division 3, allowing information sharing between the Commissioner and other related agencies such as the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission will improve the operation of all agencies and prevent duplication of effort.

I would expect these agencies to have protocols in place in to protect information and the privacy of individuals. An appropriate information sharing relationship between these agencies with appropriate privacy provisions is suitable in spite of the privacy concerns.

Insufficiently defined administrative powers – delegation of power Clause 27

It is my understanding that initially the office of the Commissioner will have a small staff of fewer than 10 people. Therefore owing to the small size of the office, I would expect if power is delegated the Commissioner will be aware of how it has been used. It is expected that only senior members of staff will use delegated powers.

As Clause 27 outlines if the Commissioner is to delegate his powers, this must be done in writing. I believe this provides an appropriate safeguard to ensuring the Commissioner's powers are used appropriately if delegated.



SENATOR PETER WHISH-WILSON
Australian Greens Senator for Tasmania

If the office of the Commissioner continues to grow, I acknowledge it would be important to further define the appropriate positions to which power could be delegated.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Peter Whish-Wilson".

Senator Peter Whish-Wilson
Greens Senator for Tasmania