



**SENATE STANDING COMMITTEE  
FOR THE  
SCRUTINY OF BILLS**

**SEVENTH REPORT  
OF  
2013**

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## SEVENTH REPORT OF 2013

The committee presents its *Seventh 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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# Asbestos Safety and Eradication Agency Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The committee dealt with this bill in the amendment section of *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 6 of 2013 - extract*

## **Background**

This bill provides for the establishment of a national agency, known as the Asbestos Safety and Eradication Agency, as recommended in the *Asbestos Management Review Report* released in June 2012.

## **Delegation of legislative power**

### **Amendment (8) section 23A**

This amendment introduces a broad power of delegation. The CEO may delegate all or any of the CEO's functions or powers to a person who is a member of the staff of the Agency. The rationale for this approach is that the Agency is not intended to have a large number of staff 'and within that staff possibly no officers within the Senior Executive Service'. **While the committee notes this explanation, the committee seeks the Minister's advice as to whether the power could be amended to include a requirement that the CEO be satisfied that the delegate has appropriate qualifications and experience to exercise the power in light of the nature of the power being delegated.**

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

### ***Minister's response - extract***

#### *Possible inappropriate delegation of legislative powers*

The Committee has expressed the view new section 23A of the Asbestos Safety and Eradication Agency Bill 2013 may be in breach of principle 1 (a) (iv) of its Terms of Reference which refers to provisions that 'inappropriately delegate legislative powers'.

This clause was inserted to enable the CEO to delegate their functions to a member of the staff of the Agency. This is intended to assist the CEO to carry out their functions and allow for the smooth operation of the Agency. It is intended that the Agency will not have a large number of staff, and no officers within the Senior Executive Service. Accordingly it is considered appropriate the CEO has power to delegate to non SES officers within the Agency as otherwise the ability to delegate would be of no utility.

Other Australian Government agencies have similar provisions in their governing legislation. For example the Fair Work Ombudsman under s683 of the Fair Work Act 2009 has the same capacity to delegate his or her functions and powers to any members of staff. In both provisions there is a requirement that the staff member given the delegation must comply with directions issued by the CEO/Fair Work Ombudsman. The CEO can accordingly delegate appropriately with directions tailored to the nature of the function/power delegated, and the skills/experience of the relevant staff member. That safeguard in my view addresses the concerns of the Committee.

It is also the case that section 23A does not allow the delegation of legislative functions. The delegation allows for the carrying out of existing functions, or the exercise existing powers, it does not allow for the changing of those functions or powers.

### ***Committee Response***

The committee thanks the Minister for this response. The committee prefers that delegations of power be restricted to member of the SES (though the committee notes the Minister's comments in this instance) and/or to persons with relevant qualifications or experience. **In the circumstances the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

# Australian Education Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Education, Employment and Workplace Relations

The committee dealt with this bill in the amendment section of *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

## Background

This bill sets out a legislative framework for the development of the National Plan for School Improvement. The bill commits the Commonwealth to work collaboratively with states, territories, the non-government sector and other partners to meet these goals through developing and implementing a national plan for school improvement and needs-based funding arrangements.

### *Alert Digest No. 6 of 2013 - extract*

#### **Broad discretionary power**

##### **Division 2, subclause 14(3)**

In a number of instances the bill confers broad discretionary powers on the Minister to determine particular matters if special circumstances exist. As the explanatory memorandum does not indicate what sort of circumstances may justify the exercise of the power **the committee seeks the Minister's advice as whether more guidance as to the appropriate exercise of the power may be included in the bill and the explanatory memorandum so as to ensure that the power is sufficiently defined and exercised appropriately.**

*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***

### **Broad discretionary power**

The Committee notes that the Australian Education Bill 'confers broad discretionary powers on the Minister to determine particular matters if special circumstances exist'. The Bill provides the Minister powers to determine matters when 'special circumstances' exist in the following provisions: subclause 7(3) (census day); subclause 10(2) (when a student receives education); subclause 15(3) (levels of education for a special school or special assistance school); paragraph 52(5)(c) (retrospective determination of a school's SES score); Division 3 of Part 5 (funding to schools in special circumstances); subclause 73(6) (retrospective approval of an approved authority); and subclause 83(5) (retrospective approval of a block grant authority).

The Committee would be aware that concept of 'special circumstances', and the analogous 'exceptional circumstances', is relatively common in statute law. It is intended to permit administrators wide discretion to depart from a standard rule or requirement where the strict application of that rule or requirement in the particular circumstances of the case would result in some unfairness or inconsistency of treatment, or would lead to an outcome that is contrary to or would undermine the underlying policy objective of the rule or requirement. It is, of course, often not possible to determine in advance what those "special circumstances" might be (hence the very need for the discretion).

This principle applies in each of the provisions noted above (with the exception of Division 3 of Part 5). Nevertheless, for the assistance of the Committee, I provide the following examples of circumstances that could trigger the exercise of the discretion:

- Subclause 7(3)- it may be necessary to determine a school's census day earlier than 5 weeks in advance if the school closed before the usual census day (first Friday in August), and the census day for that school should be the last day that it was open;
- Subclause 10(2) -the determination that a student has received education in special circumstances is a current discretion (paragraph 5(1)(b) of the *Schools Assistance Act 2008*) that is typically exercised to ensure funding is provided to schools who have a number of students who are itinerant or habitually absent - for example, some remote and very remote schools, and schools servicing students in custody or in State care;
- Subclause 15(3) -special schools- those providing specialised education services to students with disabilities - typically do not grade their students, and the distinction between primary and secondary students (each of whom attracts a different level of funding) is usually done by age (in most jurisdictions student~ up to age 11 are taken to be primary students, and students aged 12 to 21 are taken to be secondary students).

However, given the great degree of customisation inherent in special education, there will be students who should be treated as receiving a level of education which is not related to their age;

- Subclauses 73(6) and 83(5)- typically, funding for schools will be provided from the start of the calendar (i.e. school) year in which the entity approved to receive that funding is approved by the Minister. However, it is possible that a school could be in operation for some time before its application is approved, particularly if the Minister needs further information to confirm that the approved authority satisfies the criteria for approval. Thus, for example, a school might commence operation for the last half of a year, request approval, and not be approved by the Minister until early the following year. In those circumstances, the Minister might consider it appropriate to backdate the approval of the school's approved authority to when the school actually started operating, rather than the start of the year in which he or she approved it.

Information on funding in special circumstances is set out at p4 of the Revised Explanatory Memorandum for the Australian Education Bill. This funding is analogous to short-term emergency assistance ('STEa') under Division 2 of Part 6 of the *Schools Assistance Act 2008*. Relevant considerations for payment of STEa are set out in section 4.1 of the *Schools Assistance Act 2008 Administrative Guidelines 2013*, and are being carried over into regulations under the Australian Education Bill.

#### ***Committee Response***

The committee thanks the Minister for this response and notes that the key information, including the examples, would have been useful in the explanatory memorandum.

#### ***Alert Digest No. 6 of 2013 - extract***

#### **Delegation of legislative power**

##### **Division 2, subclause 22(1)**

This subclause provides that payment of financial assistance under this Act to a State or Territory is subject to the condition that the State or Territory implement national policy initiatives for school education in accordance with the regulations. Subclause 22(2) provides that before making regulations for the purposes of this section, the Minister must have regard to any decisions of the Ministerial Council relating to national policy initiatives and any relevant arrangement of a State or Territory (in its capacity as an approved authority for government schools). Although the effect of these provisions is that

much of the policy detail will be implemented through the regulations, there is a *Note* that explains that the national policy initiatives will be those agreed policies that the States and Territories have responsibility for implementing. The explanatory memorandum indicates that the policy framework will be agreed through the Standing Council for School Education and Early Childhood and reflect the reforms outlined in the National Education Reform Agreement. **In these circumstances the committee leaves the question of whether providing for the conditions attached to financial assistance be implemented through regulations is appropriate be left to the Senate as a whole.**

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

### ***Minister's response - extract***

#### **Delegation of legislative power (subclause 22(1))**

The Committee notes that Commonwealth financial assistance to states and territories will be subject to conditions on national policy initiatives that will be set out in regulations (subclause 22(1)). The Note to subclause 22(1) identifies the kinds of national policy initiatives that may be included in regulations. Subclause 22(2) requires that, before such regulations are made, the Minister must have regard to the decisions of the Standing Council on School Education and Early Childhood ('SCSEEC'), the National Education Reform Agreement ('NERA'), the National Education Agreement, and bilateral arrangements between the Commonwealth and States and Territories, as relevant.

Subclause 130(5) of the Bill requires that the Minister consult with SCSEEC before any regulations are made.

The scope of regulations made for subclause 22(1) of the Bill has been the subject of considerable discussion between Commonwealth and state and territory officials. Draft regulations have been prepared, and continue to be discussed. Those national policy initiatives that are agreed between the Commonwealth and states and territories will be included as conditions of financial assistance in the regulations.

The reason that these conditions have been delegated to regulation, rather than included in the Bill itself, is that they will change over time, as decisions of SCSEEC are made, and may be changed relatively frequently and rapidly. Furthermore, some are part-and-parcel of the current negotiations are around the NERA. Consequently, there is need for flexibility in setting these conditions.

I consider that the Bill provides ample mechanisms for state and territory involvement in the development of the regulations under subclause 22(1), and naturally, such regulations will be subject to Parliamentary scrutiny and disallowance. I consider, therefore, that appropriate checks-and-balances exist on the imposition of conditions on states and territories, and that regulations are a suitable vehicle for imposing those conditions.

### ***Committee Response***

The committee thanks the Minister for this additional information and notes that the key information would have been useful in the explanatory memorandum.

### ***Alert Digest No. 6 of 2013 - extract***

#### **Delegation of legislative power Clause 130**

It is noted that this bill is clearly framework legislation. Much of the detail as to the operation of the funding model and the associated regulatory requirements remains to be filled out in the regulations. For this reason it is regrettable that the explanatory memorandum does not address the appropriateness of this overall approach as doing so would assist the Senate in its consideration of the bill.

Clause 130 confers on the Governor-General a general regulation-making power. Subclause 130(2) specifically provides that the regulations may prescribe for (a) penalties, not exceeding 50 penalty units, for offences in the regulations relating to the requirement to provide information relating to a school's census or making records of, using or disclosing protected information, and (b) if a provision of the Act or regulations permits or requires a decision to be made, the regulations may prescribe matters that the decision-maker may or must have regard to in making the decision. Although the maximum penalty for a for an offence provided for in the regulations is within the maximum recommended in the *Guide to Framing Commonwealth Offences*, the explanatory memorandum does not address the general question of why it is appropriate for these matters to be dealt with in the regulations. The committee prefers that important matters are included in primary legislation whenever possible and expects that any proposal to delegate important matters will be comprehensively justified in the explanatory memorandum.

**Therefore, in relation to the overall reliance on regulations the committee seeks the Minister's further explanation of how the regulations and primary legislation are intended to inter-relate to one another and why more detail cannot be provided in the**

**bill. In addition, in relation to the matters in subclause 130(2), the committee seeks the Minister's explanation as to why the use of regulations for these matters is appropriate.**

Subclause 130(4) provides that despite subsection of 14(2) of the *Legislative Instruments Act*, the regulations may provide in relation to a matter by applying, adopting or incorporating with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The explanatory memorandum (at 48), states that the purpose of this provision is to enable reference in regulations to 'documents published from time to time by bodies including the Australian Curriculum Assessment and Reporting Authority, Australian Institute for Teaching and School Leadership and the Australian Bureau of Statistics, including documents prepared for and endorsed by the Standing Council on School Education and Early Childhood'.

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

In light of the explanation provided, the committee leaves the general question of whether the approach proposed in subclause 130(4) is appropriate to the Senate as a whole, **however the committee seeks the Minister's advice as to whether the bill can be amended to include a requirement that documents incorporated by reference be readily accessible and that the Departmental website clearly indicate when changes have been made to such documents that have the effect of changing the law.**

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

### ***Minister's response - extract***

Delegation of legislative power (clause 130)

The Committee notes that the Australian Education Bill leaves 'much of the detail as to the operation of the funding model and the associated regulatory requirements...to be filled out in regulations'.

The need for some aspects of the legislative scheme for schools funding and associated conditions is mentioned under preceding headings. In doing so, the schools funding

legislation adopts an approach similar to many Commonwealth legislative schemes, and is consistent with the current *Schools Assistance Act 2008* and the previous *Schools Assistance (Learning Together- Achievement through Choice and Opportunity Act) 2004*, each of which was accompanied by bodies of regulations setting out the detail of conditions and funding amounts and indices. The Committee also notes that, in accordance with paragraph 130(2)(b) of the Bill, regulations can prescribe offences in relation to census requirements and protected information, and inquires as to the appropriateness of offences in the regulations.

The two matters for which regulations can prescribe offences are matters of significance for the effective operation of the legislative scheme, and in respect of which the public interest may be served by imposing requirements backed up by criminal sanctions. The provision by schools of accurate data in a timely fashion is essential to proper funding determinations, and by necessary implication, proper expenditure of public funds. Equally, the proper use and transfer of information related to schools is essential to the administration of school education in Australia, with misuse of that information resulting in breaches of privacy and consequent lack of public trust in the institutions charged with administering education. In that light, the Government considers it important to have a residual ability to regulate these important areas through means that may include criminal sanctions, if necessary.

Subclause 5(2) of the Bill provides that the Crown (whether in right of the Commonwealth, or a state or territory) is not liable to be prosecuted for an offence.

The Committee correctly notes that the maximum penalty that can be imposed under such regulations (50 penalty units, or \$5500) is consistent with Commonwealth criminal law policy, as set out in the *Guide to Framing Commonwealth Offences*.

In addition, the Committee notes that, in accordance with subclause 130(4) of the Bill, regulations can incorporate non-legislative documents by reference, as those documents are published or in force from time to time, and seeks my advice as to whether the Bill can be amended to include requirements that incorporated documents are readily accessible and notification of changes are published on my Department's web site.

I am advised that a provision such as suggested by the Committee is not common in Commonwealth laws that authorise regulations to incorporate non-legislative documents by reference.

Nevertheless, I am also advised that the kinds of documents that are intended to be incorporated by reference into the regulations are readily accessible to the persons affected by the relevant provisions (predominantly states, territories, and approved authorities), who frequently have input into their development; and that in most cases they are freely available to the public on the internet. The regulations themselves will direct readers to web sites where the documents can be found.

I direct the Committee's attention, for example, to clause 4 of the draft regulations enclosed with this letter, which contains definitions of a number of documents that are referred to in the regulations, including the Australian Accounting Standards, Australian Auditing Standards, Australian Professional-Standards for Principals, Australian Professional Standards for Teachers, Australian Statistical Geography Standard ('AGSC'), and the Data Standards Manual: Student Background Characteristics. The draft regulations refer to a number of other documents. For example, clause 10 (conditions on states and territories) refers to the Measurement Framework for Schooling in Australia; Accreditation of Initial Teacher Programs: Standards and Procedures in Australia; Aboriginal and Torres Strait Islander Education Action Plan 2010-2014; clause 12 determines school ARIA scores by reference to information obtained from the Australian Population and Migrant Research Centre; clause 40 refers to the Australian Curriculum; clause 42 refers to the National School Improvement Tool and the National Safe Schools Framework; etc.

In all cases, these documents are well-known and understood generally (e.g. accounting and auditing standards, the AGSC), or have been developed by national education bodies in consultation with states, territories and non-government education authorities, and are well-known, accepted by, and available to, those persons.

Again, as the regulations themselves will be subject to Parliamentary oversight, I do not propose to amend the Australian Education Bill in the Senate as requested by the Committee.

### ***Committee Response***

The committee thanks the Minister for this detailed response and notes that the regulations will be disallowable. In the committee's view it is essential that material incorporated from time to time is readily accessible and those affected by the law will be aware of relevant changes to it. The committee notes the Minister's advice in relation to these points, which would have been useful in the explanatory memorandum.

## ***Alert Digest No. 6 of 2013 - extract***

### **Merits Review**

#### **Subclauses 122(2) and 122(3)**

Subclause 122(2) provides that an application may not be made to the AAT in respect of a decision to determine a total entitlement for an approved authority for a year if the amount of financial assistance to which the determination relates is transitional recurrent funding for participating schools. The result is that such decisions are only subject to internal review. No explanation this result is provided in the explanatory memorandum.

Subclauses 122(3) provides that applications to the AAT may only be made by or on behalf of the relevant person for the reviewable decision. The default standing provision in the AAT Act (subsection 27(1)) provides that any person whose interests are affected may apply for review. Subclause 122(4) states that subsection (2) has effect despite subsection 27(1) of the AAT Act. Although it is clear that standing to apply for review is intended to be so restricted, no explanation is given in the explanatory memorandum for this restriction.

**In light of the absence of explanatory material providing a justification for these provisions, the committee seeks the Minister's advice as to the rationale for the proposed approach in subclauses 122(2) and 122(3).**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

*Note:* Subclause 122(4) appears to refer to subsection (2) in error. It appears that the correct reference should be to subsection (3).

## ***Minister's response - extract***

### **Merits review (subclauses 122(2) and (3))**

The Committee seeks my advice as to why external merits review of transitional funding determinations is not available (subclause 122(2)) and why only specified persons have rights to seek merits review of decisions under the Bill (subclause 122(3)).

At the outset, I note for the Committee's consideration that the Australian Education Bill provides rights of merits review of decisions in relation to Commonwealth schools funding for the first time. The Australian Education Bill also provides a statutory guarantee of funding for non-government schools for the first time, substantially enhancing a statutory right to funding that has only existed for government schools since 2009 (under section 11 of the *Federal Financial Relations Act 2009*). In short, this Government is putting in place a legislative scheme that changes a system of discretionary grants for schooling that has been in place for more than four decades with a rights-based system upheld by the comprehensive Commonwealth administrative decisions review apparatus.

While acknowledging the Committee's right to request further information on the rationale for this approach, I do find it odd that the Committee has not seen fit to make any positive comments about this fundamental shift in the legal framework for provision of schools funding by the Commonwealth.

Subclause 122(2) has the effect of precluding review of determinations of funding under Division 5 of Part 3 of the Bill by the Administrative Appeals Tribunal. These determinations are so-called transitional funding determinations, which are designed to transition approved authorities for schools from current funding amounts (whether under the *Schools Assistance Act 2008* or the *Federal Financial Relations Act 2009*) to the schooling resource standard ('SRS') set out in Divisions 2 to 4 of Part 3.

The principal discretion available to the Minister in respect of transitional funding determinations is the discretion to determine funding under clause 59 of the Bill. That discretion is constrained in large measure by clause 60 of the Bill. These funding determinations will apply to the majority of approved authorities, which receive less funding under current arrangements than they will under the SRS formulas. Transitional funding for those approved authorities that currently receive more than they will receive under the SRS formulas will be determined mathematically, and without discretion, under clauses 61 and 62 of the Bill.

By-and-large, transitional funding determinations under clause 59 will be made in accordance with the 'relevant arrangements' of approved authorities -the bilateral agreements between the Commonwealth and states and territories, and memoranda of understanding between the Commonwealth and major nongovernment school systems. One of the purposes of these arrangements is to ensure that schools are transitioned to the new funding arrangements in a smooth, consistent, and financially-sustainable way, over a period of six years.

The bilateral agreements are intergovernmental agreements, which have their own dispute resolution clauses and processes. Any dispute about funding amounts payable in accordance with those agreements is to be resolved between governments. Similarly, memoranda of understanding between the Commonwealth and non-government education authorities will contain dispute resolution clauses and processes, which will be utilised where necessary.

While the Bill leaves open the ability for approved authorities to seek internal review of transitional funding determinations, I consider it inappropriate for the Administrative Appeals Tribunal to undertake an examination of the merits or otherwise of funding agreements reached by the Commonwealth with states and territories and non-government education authorities, which must operate consistently as a whole and in a manner that ensures the integrity of the Commonwealth budget.

Of course, once out of the transition period and beyond the duration of the relevant agreements, schools' funding will be calculated mechanically in accordance with the formulas in Divisions 2 and 3 of Part 3, and every recipient of funding will have the same extensive rights of review.

Subclause 122(3) precludes a person other than the person listed in column 3 of the table in clause 118 seeking review by the AAT of a reviewable decision. Naturally, the purpose of this provision is to limit the class of persons that can seek external merits review of decisions under the Bill. The rationale for this provision is to ensure that only the person whose rights and interests are directly affected by a decision can seek review of that decision, and persons who may have a peripheral interest in a decision cannot interfere with the operation of that decision by seeking review.

For example, where the Minister makes a decision to approve a person as an approved authority in relation to a new school, the Government considers that it is not appropriate for a person other than that approved authority to challenge that decision (which is fundamentally about entitlement to Commonwealth funding) to achieve an ulterior purpose. Thus, a particular interest group objecting to the establishment of a school in their local area is not entitled to challenge the Minister's decision to approve that school to receive Commonwealth funding. (That interest group may have rights under State or Territory planning laws etc. to challenge the siting of the school, for example).

Noting that this Bill provides merits review rights in relation to Commonwealth schools funding for the first time, there is naturally a need to balance those rights with certainty and finality of funding decisions. In providing review rights to those directly affected by decisions, and excluding others who may have an interest in interfering in decisions, I believe we have achieved the right balance. However, my Department will keep the matter under review, and may recommend that the Government expand the classes of persons able to seek review of decisions in the future if warranted.

### ***Committee Response***

The committee thanks the Minister for this comprehensive response. In relation to transitional funding determinations the committee notes the rationale provided and that it would have been useful for this justification to have been provided in the explanatory memorandum. In relation to the introduction of merits review of decisions in relation to Commonwealth school funding, the committee notes the need to balance the appropriate availability of appeal rights against the need for certainty of funding decisions and the fact that merits review is being made available for the first time.

### ***Alert Digest No. 6 of 2013 - extract***

#### **Trespass on personal rights and liberties – privacy Delegation of legislative power - clause 125**

Subclause 125(1) provides that the Minister may make a record of, use, or disclose protected information (including personal information) in accordance with the regulations and impose conditions on any record, use or disclosure of protected information. Subclause 125(2) provides that the Minister may publish, in any manner he or she thinks fit, protected information (except personal information). Subsection (3) provides that the regulations may prescribe the following matters: (a) the person or body to whom protected information may be disclosed, the purposes for which protected information may be recorded, used, or disclosed and the conditions on any record, use or disclosure of protected information. Subclause 130(2) provides that the general regulation-making power includes the power to prescribe penalties for making records of, using or disclosing protected information.

The explanatory memorandum does not address the question of whether clause 125 provides adequate protection of individual privacy. Although the regulations *may* provide for adequate protection, clause 124 authorises disclosure regardless of whether any adequate protections are included in the regulations. **The committee is concerned about the delegation of important matters and the potential impact on privacy and requests a detailed explanation from the Minister as to how individual interests in personal privacy will be adequately protected under the proposed approach to the disclosure of information obtained under or for the purposes of this Act.**

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

### ***Minister's response - extract***

The Committee seeks an explanation from me as to how individual interests in personal privacy will be protected under regulations made for the purposes of clause 125 of the Bill.

There are a number of data-sharing protocols between the Commonwealth, states and territories relating to school and school student data, and which involve disclosure of information to and between government departments, the Australian Bureau of Statistics, the Australian Curriculum, Assessment and Reporting Authority, and Ministerial companies (the Australian Institute of Teaching and School Leadership, and Education Services Australia).

The regulations will give effect to these existing processes, which already ensure minimal use and exchange of personal information (information on students is generally aggregated, and where it is not aggregated, it is de-identified). Each entity that collects, uses or discloses information is subject to, and must comply with relevant privacy laws (generally the *Privacy Act 1988*, but also state and territory privacy laws), and further, may be subject to additional legal requirements on collection, use and disclosure of information (see, for example, section 40 of the *Australian Curriculum, Assessment and Reporting Authority Act 2008*).

I note that, as part of the National Plan for School Improvement, the Commonwealth, states and territories, and non-government education authorities will be developing a National Education Data Plan, for the purpose of enhancing the national data collection on school education, to provide a better information base for policy development, research, planning, funding and public accountability for outcomes of school education.

The intention is that the regulations developed for the purposes of subclause 125(1) would regulate the use and disclosure of information (including personal information) in line with the agreed processes for the National Education Data Plan.

It would be my intention to undertake the proper processes for privacy impact assessment during the development of the National Plan and associated regulations, and the impacts on privacy under domestic law and the International Convention on Civil and Political Rights would be examined during that process. Naturally, the relevant regulations, on tabling, would include a Statement of Compatibility with Human Rights in the Explanatory Statement that addressed these issues.

### ***Committee Response***

The committee thanks the Minister for this detailed response and notes that the key information would have been useful in the explanatory memorandum.

### ***Alert Digest No. 6 of 2013 - extract***

#### **Standing appropriation**

##### **Clause 126**

In its *Fourteenth Report of 2005*, the committee stated (at 272) that:

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

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies. **In this instance the explanatory memorandum does not explain why a standing appropriation is necessary, so the committee seeks the Minister's explanation for the proposed approach.**

*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***

#### **Standing appropriation (clause 126)**

The Committee seeks my explanation for the use of a standing appropriation in clause 126 of the Bill. The Bill provides for standing appropriations for recurrent funding for schools, and for capital funding for block grant authorities. Recurrent funding for schools is unlimited but calculated by reference to formulas in the Bill. Capital funding for block grant authorities is capped (clause 68).

As the Committee would be aware, Commonwealth legislation providing for so-called 'demand-driven entitlements', where persons who meet specified eligibility criteria or who satisfy certain conditions, have a legal entitlement to funding that is calculated by reference to formulas, provide for standing appropriations to cover the financial liabilities created by that legislation. It is, as a practical matter, impossible to precisely determine annual appropriations to cover such liabilities. Such standing appropriations appear in social security legislation, veterans' entitlements legislation, aged care legislation, and family assistance legislation, to name a few. Insofar as the Australian Education Bill provides for recurrent funding for schools, it is such legislation.

The Committee would also be aware that Commonwealth legislation also frequently provides for standing appropriations where those amounts are capped, but there is a clear intention that funding be provided over multiple years and certainty of funding is important to achieve the legislation's intended policy outcomes (that is, funding should not be subject to change in annual Budgets). In my own portfolio, examples are the *Indigenous Education (Targeted Assistance) Act 2000*, and the *Schools Assistance Act 2008* and the *Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004* in relation to capital funding and funding for targeted assistance.

Clause 126 of the Australian Education Bill operates consistently with previous Commonwealth schools funding legislation.. I note that special circumstances funding, and capital funding for other than block grant authorities, will need to be supported by annual appropriations. This is mentioned at p4 of the Revised Explanatory Memorandum.

#### ***Committee Response***

The committee thanks the Minister for this detailed response and notes that the key information would have been useful in the explanatory memorandum.

### ***Additional comment from the Minister***

Noting that many of the Committee's concerns relate to the scope and content of regulations to be made under the Bill, I attach for the Committee's information a draft of the *Australian Education Regulation 2013*, as prepared to 19 June 2013. A copy of the draft Regulation will also be published on the Better Schools web site ([www.betterschools.gov.au](http://www.betterschools.gov.au)).

The draft Regulation is still under development, and officials of my Department are still in consultation with their counterparts in states and territories, and nongovernment education bodies, on the content of that Regulation. Nevertheless, this draft should assist the Committee in better understanding the Government's proposed legislative scheme for schools funding and education reform.

I trust the above response adequately addresses the Committee's concerns, and I thank the Committee for the opportunity to respond to those issues.

### ***Committee Response***

The committee thanks the Minister for the draft Regulation.

# Australian Education (Consequential and Transitional Provisions) Bill 2013

Introduced into the House of Representatives on 5 June 2013

Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 6 of 2013 - extract*

## **Background**

This bill amends the *Federal Financial Relations Act 2009* and the *Schools Assistance Act 2008* to enable Commonwealth recurrent funding and capital funding for schools to be appropriated under the proposed *Australia Education Act 2013* from 1 January 2014. The bill will also enable regulations to be made to prescribe modifications of the *Australia Education Act 2013* for transitional matters.

## **Delegation of legislative power—Henry VIII clause Schedule 2, item 12**

This item provides that before 1 January 2015 regulations may be made to prescribe modifications to the *Australian Education Act 2013* that are necessary or convenient to deal with transitional matters. Subitem 12(3) provides that the requirement to consult the Ministerial Council under subsection 130(5) of the *Australian Education Act 2013* does not apply in relation to regulations made before 1 January 2014.

Insofar as this item enables regulations to modify the operation of primary legislation, the committee's usual expectation is that the necessity for the inclusion of such a power will be justified in the explanatory memorandum. Although there may be good reasons to allow for regulations to modify the operation of statutes, especially when the power is limited to transitional matters and available for a limited period of time, it is unfortunate that the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach, including advice as to why consultation with the Ministerial Council is not required for any regulations made before 1 January 2014.**

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

### ***Minister's response - extract***

Delegation of legislative power- Henry VIII clause {Schedule 2. item 12)

The Committee notes that subitem 12(1) of Schedule 2 to the *Australian Education (Consequential and Transitional Provisions) Bill 2013* ('Consequential and Transitional Bill') enables regulations to amend the operation of the Australian Education Act- a so-called "Henry VIII clause"- for transitional purposes, up until the end of 2014.

The purpose of this provision is to enable regulations to make necessary and urgent adjustments to the operation of the Act to ensure it functions as intended, while amendments to the Act are prepared and presented to Parliament as a Bill.

The *Australian Education Bill 2013* ('Australian Education Bill') is a new and relatively complex piece of legislation, that will implement funding arrangements for schools that differ considerably from those that have operated in the past, and tied to education reform requirements whose manner of implementation differs from past arrangements.

The Bill has also been prepared and amended while negotiations on the subject matter of the Bill are still being negotiated with states, territories, and nongovernment education bodies, and the Government intends the Bill to be passed before the deadline for conclusion of those negotiations. (It is for this reason that many of the details of the operation of the Bill have been delegated to regulation, a matter also raised by the Committee and which I address below).

In these circumstances, the Government considers it prudent to include a residual ability to urgently adjust the Australian Education Act's operation if, following 1 January 2014, the strict legal application of the Act does not result in the negotiated and agreed funding outcomes for schools. Naturally, in that case, the Government would also prepare amendments to the Act for presentation to Parliament as a Bill, but it may be some months before those amendments were able to be introduced and passed. During that period, Commonwealth schools funding would need to continue to be paid in accordance with the agreements reached with states, territories and non-government education bodies.

As the Committee notes, sub item 12(1) of Schedule 2 to the Consequential and Transitional Bill only permits regulations to be made that operate until the end of 2014,

allowing any matters requiring amendment in the Australian Education Act to be identified and remedied during the Act's first year of operation.

***Committee Response***

The committee thanks the Minister for this detailed response and notes that the key information would have been useful in the explanatory memorandum.

# Australian Jobs Bill 2013

Introduced into the House of Representatives on 15 May 2013

Portfolio: Industry, Innovation, Climate change, Science, Research and Tertiary Education

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 25 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 6 of 2013 - extract***

## **Background**

This bill requires an Australian Industry Participation (AIP) plan to be prepared for projects with a capital expenditure of \$500 million or more and establishes an Authority to administer the functions under the legislation.

## **Delegation of legislative power**

### **Subclauses 6(2) and (3); Subclauses (5) and (6)**

These subclauses provide, respectively, that the:

- (1) legislative rules may declare that a specified thing, or a combination of 2 or more specified things, is an eligible facility for the purposes of this Act; and
- (2) Authority may, by legislative instrument, declare that a specified thing or a combination of things is not an eligible facility for the purposes of the Act.

The necessity for these provisions is not explained in the explanatory memorandum. **As the provisions affect the coverage of the bill and therefore deal with questions of significance, the committee seeks the Minister's advice as to the need to provide that delegated legislation can enable exceptions and extensions to the applicability of the legislation.**

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

### ***Minister's response - extract***

#### ***Delegation of Legislative Power***

As noted by the Committee in its review of the Bill, the necessity of subclauses 6(2), (3), (5) and (6) are not fully explained in the memorandum.

The subclauses (2) and (3) act as a 'catch all' mechanism within the Bill. It is neither practical nor effective to list every type of facility that might be built across all sectors of industry within Australia. The Bill lists the common types of eligible facilities above the major project threshold that are intended to be captured by the legislation. However, there may be facilities that the Bill should capture but are not covered by any of the listed definitions or there may be facilities built in the future that have not yet been conceived. Subclauses (2) and (3) allow the Minister to ensure that these types of situations do not occur while also preventing any possible avoidance of this legislation through labelling tactics or schemes.

Subclauses (5) and (6) operate to allow the Authority to declare that a facility that is, by default, captured by the Bill to not be an eligible facility for the purposes of the Bill. For example this situation may occur if there is a project above the threshold and the project proponent can demonstrate to the Authority that there is no contestable opportunities for Australian entities in the project. This could be due to all the key goods and services for the project having to be purchased overseas because no Australian capability exists. These clauses allow the Authority to deem that certain projects are not eligible facilities under this legislation and therefore not subject to the requirements.

#### ***Committee Response***

The committee thanks the Minister for this response and notes that the key information would have been useful in the explanatory memorandum.

## ***Alert Digest No. 6 of 2013 - extract***

### **Undue trespass on personal rights and liberties—privacy Clause 50**

This clause empowers the Authority to obtain information and documents from a person if it believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. The statement of compatibility indicates that the object of provisions in Part 4 of the bill (including this one) is only to obtain relevant commercial information. It is stated that the Authority will not request personal information and that ‘in the event that it is provided unintentionally by the project proponent or operator, the Authority will have a policy to deal with this’ (at 6).

While the intention appears to be to avoid the collection of personal information, on the basis of the bill and accompanying material it appears that the protection of personal information will depend on the practices and policies ultimately adopted by the authority. **The committee would prefer that a framework for privacy protection was included in the bill itself and therefore seeks the Minister's advice as to whether consideration has been given to how the legislation could ensure that these matters are appropriately dealt with.**

*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***

### ***Undue Trespass on Personal Rights and Liberties- Clause 50***

Clause 50 of the Bill empowers the Authority to obtain information and documents from a person if it believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Bill.

It is important to note that the objective of the Bill is the creation and retention of Australian jobs through the opportunities afforded through Australian Industry Participation (AIP) plans for major projects. Personal information will not be requested by the Authority as this type of information cannot reasonably be relevant to the operation of the Bill.

Notwithstanding the above point, consideration has been given to a privacy framework for the protection of personal information. In the event that personal information is collected or disclosed under the Bill, it will be subject to the safeguards under the Privacy Act 1988. It should be noted that, under Information Privacy Principle 11.3, a person, body or agency to whom personal information is disclosed shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency. The Authority will be bound by the Privacy Act 1988 and operate in accordance with the relevant principles when dealing with personal information.

### ***Committee Response***

The committee thanks the Minister for this response and notes that the key information would have been useful in the explanatory memorandum.

### ***Alert Digest No. 6 of 2013 - extract***

#### **Insufficiently defined administrative power Clause 57**

Clause 57 provides for administrative consequences following any non-compliance with the requirements of Parts 2, 3, or 4 of the Bill ‘without reasonable excuse’ (subclause 57(1)). Subclauses 57(2)-(5) empower the Authority to impose a number of adverse consequences including requiring the relevant person to publicise details of his or her non-compliance and any other matter the Authority considers appropriate.

It is concerning that the circumstances in which a person will be considered to have a ‘reasonable excuse’ are neither specified in the bill nor explained in the explanatory memorandum. Furthermore, the powers of the Authority to require that a person publicise particular information are framed in very broad terms. Although the Authority must afford a fair hearing prior to taking action under clause 57 and its decisions are reviewable by the AAT, the explanatory memorandum does not explain:

- the rationale for the proposed approach generally;
- why it is necessary to define the circumstances in which action may be taken using only the vague language of ‘reasonable excuse’; or
- why the power to require a person to publicise matters need to be so broadly framed so broadly.

**The committee therefore seeks the Minister's advice as to a detailed explanation for these powers including an indication as to whether similar powers, administered by administrative decision-makers, exist in other Commonwealth legislation.**

*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***

#### ***Insufficiently Defined Administrative Power***

Clause 57 of the Bill provides for administrative consequences of non-compliance. The rationale behind these powers is due to the inherent limitations in applying monetary penalties as a consequence of non-compliance. These limitations to the application of monetary penalties include a perceived lack of equity, deterrence values and the ability for a fine to be simply absorbed by a corporation. As the intent of the Bill is the creation and retention of Australian jobs through the opportunities afforded through AIP plans, a strong deterrent is needed to prevent corporations from contravening the provisions in this Bill.

The second aspect of this rationale is the form of penalty that will have the greatest chance of promoting compliance. As the Bill only deals with companies, adverse publicity against the corporation can have a significant impact and deterrent effect on a corporation. Adverse publicity is aimed at 'shaming' the offender by requiring a public confession of wrongdoing. While this is a relatively new concept at Commonwealth level, it has been a feature of some state regulatory schemes for some time. For example, under state and territory environmental legislation an offending company may be ordered to publish at its own expense and in specified media a notice outlining its conduct, explicitly stating that its conduct breached the relevant legislation.

This is the rationale as to why the Bill imposes the consequences of non-compliance under clause 57. Reputational damage is a significant issue for corporations and therefore placing that at risk by contravening this legislation serves as a deterrent for the purposes of the Bill.

As noted by the Committee, clause 57 applies without reasonable excuse by the relevant person. The issue whether a relevant person has a reasonable excuse for failing to comply with the Act would depend on the circumstances of the case. However, the reasonable excuse must be one that an ordinary member of the community would accept as reasonable in the circumstances. The failure must not only be a deliberate act of non-compliance. If the circumstance that prevented the relevant person from meeting their requirement was

unforeseeable or outside the organisation's control, this may constitute a reasonable excuse. For example, a natural disaster that has threatened the viability of an organisation could have been a factor in the organisation's failure to comply.

The provisions under clause 57 are framed broadly to provide for the exercise of flexibility and discretion by the Authority to tailor the penalty to suit the particular offender and the circumstances under which the contravention occurred. As the Bill deals with corporations conducting major projects across all sectors of industry, flexibility is required to ensure that the Authority can adjust to deal with a variety of circumstances, scenarios and corporate structures.

In regards to the Committee's question whether similar powers, administered by administrative decision-makers, exist in other Commonwealth legislation, the *Workplace Gender Equality Act 2012* (formerly the *Equal Opportunity for Women in the Workplace Act 1999*) contains similar consequences of non-compliance to the Bill which are administered by administrative decision makers.

#### ***Committee Response***

The committee thanks the Minister for this detailed response and notes that the key information would have been useful in the explanatory memorandum.

#### ***Alert Digest No. 6 of 2013 - extract***

### **Undue trespass on personal rights and liberties—privacy Clause 104**

Part 9 of the Bill deals with secrecy, and creates offences aimed at protecting sensitive information from unauthorised disclosure or use. As noted in the statement of compatibility, 'the majority of the provisions in Part 9 limit the disclosure of protected information to a specific purpose such as the performance of functions or the exercise of certain functions or powers' (at p. 6).

However, as is also noted at p. 6, clause 104 permits disclosure to the Minister, but is not subject to any limitation. The justification given for this approach is that 'the information being provided to the Minister under clause 104 will be purely of a commercial nature and not personal information'. **Although it may be that this is the intention underlying the clause, it is not clear why a limit to this effect is not included in the legislation. The committee therefore seeks the Minister's advice on this matter, including whether the**

**bill can be amended to include a requirement that information provided to the Minister will not include personal information.**

*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***

#### ***Undue Trespass on Personal Rights and Liberties- Clause 104***

The intention behind clause 104 is to ensure that the Minister can be informed, from time to time, of important matters relating to Australian Industry Participation. As noted in the statement of compatibility, this Bill deals with major project proponents and the provision of purely commercial information. Personal information will not be requested by the Authority under any circumstances. As mentioned above, the Authority will be bound by the Privacy Act 1988 and operate in accordance with the relevant principles when dealing with any personal information that is incidentally provided to the Authority.

There is also a number of drafting precedents in legislation for this clause. Some examples are as follows:

- Australian Communications and Media Authority Act 2005, Section 59 A.
- Carbon Credits (Carbon Farming Initiative) Act 2011, Section 272.
- Clean Energy Regulator Act 2011, Section 45.
- Competition and Consumer Act 2010 (former Trade Practices Act), Section 155AAA.
- National Gambling Reform Act 2012, Section 74.
- National Health Reform Act 2011, Sections 116 and 216.

### ***Committee Response***

The committee thanks the Minister for this response and notes that the key information would have been useful in the explanatory memorandum.

## ***Alert Digest No. 6 of 2013 - extract***

### **Undue trespass on personal rights and liberties—reversal of onus Subclauses 102(1), 107(4), 107(6), 111(4) and 111(6)**

These subclauses are said, in the statement of compatibility, to contain reverse burden of proof provisions that will place an evidential burden on the defendant in relation to an offence of unlawfully disclosing protected information. However, the bill does not contain any express statements that a defendant will bear an onus of proof where that is the intention. (Bills usually include a note to the effect that:

The justification given for the placing an evidential burden of proof in relation to proving exceptions to the offence of unlawful disclosure of protected information relies on two basic claims:

- (1) the importance of compliance with the secrecy provisions given that highly sensitive commercial and confidential information may be held by the Authority; and
- (2) the ‘regulatory context of these provisions in the Bill is clear and in cases where there is a breach, it is clearly more practical for the accused to prove a fact rather than the prosecution to disprove it’ (statement of compatibility at p. 7).

While the committee understands the relevance of the first claim, the second claim does not reach the level of specificity the committee expects from a justification for reversing the onus of proof: the explanatory memorandum should directly reference every instance where it is intended that an onus be placed on defendants and explain the rationale for each provision. The committee therefore seek the Minister's.

**The committee therefore seeks the Minister's clarification as to whether it is intended that all of these provisions will place an onus onto the defendant and, if so, further advice as to why this is appropriate and as to why *Notes* explaining the reversal of onus are not included in the bill in line with the normal drafting practice.**

*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***

Undue Trespass on Personal Rights and Liberties- reversal of onus

Subclauses 102(1), 107(4), 107(6), 111(4) and 111(6) are said in the statement of compatibility to contain reverse burden provisions. The statement of compatibility was drafted for a previous version of the Bill that did contain reverse burden provisions; however these provisions were subsequently changed following consultation. As the Committee notes, the Bill currently in front of the Parliament does not contain any express statements that the defendant will bear the onus of proof. It is not the intention of the Bill that the above mentioned provisions place the onus of proof on the defendant.

Thank you for raising your concerns with me and I trust the information provided is of assistance.

### ***Committee Response***

The committee thanks the Minister for this response, which clarifies the situation.

# Corporations and Financial Sector Legislation Amendment Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Treasury

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Parliamentary Secretary to the Treasurer responded to the committee's comments in a letter dated 19 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 5 of 2013 - extract***

## **Background**

This bill amends the *Corporations Act 2001*, the *Payment Systems and Netting Act 1998*, the *Mutual Assistance in Business Regulation Act 1992*, the *Australian Securities and Investments Commission Act 2001*, the *Reserve Bank Act 1959*, the *Clean Energy Regulator Act 2011* and the *Carbon Credits (Carbon Farming Initiative) Act 2011* to:

- provide that client positions and associated collateral of a defaulting participant in a clearing facility may be ported to another solvent participant despite legislative impediments;
- enable the Australian Securities Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) to determine how often they assess compliance by particular Australian market licence and clearing and settlement facility licence holders with their legal obligations; and make consequential amendments;
- extend the powers of the Parliamentary Joint Committee on Corporations and Financial Services to inquire into and report on the operation of any foreign business law which may affect the operation of the corporations law; require ASIC to report annually on the use of its information gathering powers and on additional information if required by the minister; and make consequential amendments;
- authorise ASIC to disclose protected information to international business regulators;
- enable the RBA to disclose protected information to external persons and bodies; and
- enable the Clean Energy Regulator to share protected information with licensed and prescribed trade repositories.

## **Trespass on personal rights and liberties—privacy**

### **Part 3, schedule 1, items 18 and 23**

This item proposes to insert new paragraph 127(4)(ca) into the *Australian Securities and Investments Commission Act 2001*. The effect of this paragraph is to authorise ASIC to disclose protected information (which may include personal information) to an international business regulator ‘to perform its functions or exercise its powers’. The Act already enables the disclosure of confidential or protected information to ‘a foreign body’ to perform a regulatory function, but it is unclear whether or not disclosure is authorised to ‘multi-jurisdictional regulators, for example pan-European regulators’ (explanatory memorandum at 25). According to the explanatory memorandum (at page 11):

...the ability of ASIC to share supervisory information with individual foreign regulators but not a group of multi-jurisdictional regulators, limits its ability to play a full part in international supervisory cooperation and coordination among the authorities responsible for and involved in the supervision of the different components of cross-border groups, specifically large groups.

The scope of this provision, enabling disclosure of protected information, is clarified by item 17 which inserts a definition of ‘international business regulator’. The explanatory memorandum notes that (at page 25):

...by limiting the disclosure of protected information and documents to assist regulatory functions authorised by a foreign law or treaty, the intention is to safeguard against the disclosure and the potential misuse of protected information for private commercial ends.

The statement of compatibility concludes that this amendment pursues a legitimate objective (ie the effective regulation of financial market in the context of the increasing complexity and globalisation of financial markets) and the limitations imposed on the right to privacy are not arbitrary. It is noted that ‘regulators *generally* have strict conditions imposed on them through their enabling legislation with respect to the use and disclosure of protected information, including appropriate penalties for breaches of those conditions’ (at 32). However, the explanatory memorandum is unclear as to the nature and extent of any risk that information that may be disclosed under the new provisions may lead to the disclosure of personal information by international business regulators.

Part 3, schedule 1, item 23 raises a similar issue.

**The committee therefore seeks the Minister's advice as to whether the claim (in the statement of compatibility) that ‘regulators *generally* have strict conditions imposed on them through their enabling legislation with respect to the use and disclosure of protected information, including appropriate penalties for breaches of those conditions’ applies equally in relation to international business regulators (as defined) and whether the extension of authority to disclose protected information to such**

bodies carries with it additional risks that the right to privacy may in practice be breached.

*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.*

### ***Parliamentary Secretary's response - extract***

#### ***Protections that apply in relation to personal information supplied to international regulators or regulators in other countries***

The amendments that would be made by Part 3 of Schedule 1 to the Bill would enable the Australian Securities and Investments Commission (ASIC) to share protected information, including personal information, with multi-jurisdictional business regulators. As indicated in the explanatory memorandum (EM) for the Bill, the amendments are mainly intended to ensure that information can be shared with certain pan-European regulators such as the European Securities Market Authority (ESMA) and the European Systemic Risk Board (ESRB).

Under ASIC's existing information-sharing provisions, as well as the provisions as expanded by the Bill, protections are available that guard against the misuse of personal information provided to overseas regulators. These protections are as follows:

- Under the *Mutual Assistance in Business Regulation Act 1992* (MABRA), a request for information from a foreign regulator must contain a written undertaking that the information or evidence provided will not be used for the purposes of criminal proceedings against the person or proceedings against the person for the imposition of a penalty, and to the extent to which it is within the ability of the foreign regulator to ensure it, will not be used by any other person, authority or agency for the purposes of any such proceedings. ASIC must not consider a request for information from a foreign regulator unless the written undertaking noted above is received (see MABRA s6(2)). Further, under MABRA, conditions may be imposed on an authorisation to gather information at the request of a foreign regulator (see MABRA s9). Section 7(2) provides that the conditions of a MABRA authorisation 'may include (but need not be limited to)' conditions relating to:
  - maintaining the confidentiality of anything provided in compliance with the request, in particular, information that is personal information within the meaning of the *Privacy Act 1988*;

- the storing of, use of, or access to, any such thing; and
- copying, returning or disposing of copies of documents provided in compliance with the request.
- Disclosure of information by ASIC to an 'international business regulator' under proposed s127(4)(ca) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) will be subject to the provisions of s 127( 4A) of the ASIC Act, which provides that conditions may be imposed on the information released under s127(4). ASIC has published Regulatory Guide 103: *Confidentiality and release of information* which (among other things) sets out ASIC policy on the conditions it will consider imposing on information released under its statutory powers, including under s 127 of the ASIC Act. Specifically RG 103.36 states: '*The conditions ASIC imposes [on the use of disclosed information] may relate to the manner in which the information may be used or may require an undertaking that ASIC be notified before the information is published.*' Further, RG 103.37 states: that 'ASIC may release information [to a statutory authority] on condition that the agency only uses the material internally.' The guidance in RG 103 will apply to releases made under proposed 127(4)(ca) of the ASIC Act.
- As noted in the EM, the main purpose of the provision in the Bill is to allow ASIC to share protected information with certain EU regulators, in particular ESMA and the ESRB. Both of these entities have secrecy provisions in place which ensure that any personal information will be given appropriate protection. For instance, any confidential information received by ESMA employees whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial market participants cannot be identified.<sup>1</sup>

With respect to the Reserve Bank of Australia (the RBA), the key point is that only in exceptional circumstances does it receive information of a personal nature, and that information is not provided to foreign regulators:

- The RBA collects limited 'protected information' which is, or 'protected documents' which contain, 'personal information' as defined in section 6 of the *Privacy Act 1988*. The bodies which the RBA hopes will be prescribed by regulation made under the new paragraph 79A(4J)(c) if the Bill is passed are bodies such as Australian Treasury, New Zealand Treasury, the International Monetary Fund, the Bank for International Settlements and the Financial Stability Board -all bodies with a mandate relating to stability and/or security of the financial or monetary system, but which are not 'financial sector supervisory agencies' as defined in section 79A(l) or central banks or monetary authorities of a foreign country (sharing with other central banks and with financial sector supervisory agencies is already permitted under paragraphs 79A(4)(a) and (b)). The information which may need to be shared with these bodies for the

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<sup>1</sup> The ESMA secrecy provisions are contained in Article 70 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council. The text of the Regulation is located at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1095:EN:NOT>. The ESRB secrecy provisions are in Article 8 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council, which is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1092:EN:NOT>.

purposes of assessment of financial stability, crisis prevention, crisis management, and co-operative oversight is information about institutions, not individuals. The very nature of the respective mandates of these bodies, and the purpose for which sharing with them would occur, means that the sharing of information about natural persons will not be necessary (or desirable). Their concerns primarily relate to entities of systemic importance. So the RBA does not contemplate that any personal information will need to be, or will be, shared if the Bill is passed and a regulation is made under the new section 79A(4)(c).

### ***Committee Response***

The committee thanks the Parliamentary Secretary for this detailed response and notes that the key information outlined above would have been useful in the explanatory memorandum.

### ***Alert Digest No. 5 of 2013 - extract***

#### **Trespass on personal rights and liberties—privacy Part 5, schedule 1, items 29, 31 and 32**

Item 25 introduces paragraph 79A(4)(b) into the *Reserve Bank Act 1959*. The effect of this provision is to enable the RBA to share protected information and documents on an ongoing basis with other persons or bodies (whether in or outside Australia) if those persons or bodies are prescribed by the regulations. The explanatory memorandum argues that the sharing of information for regulatory purposes is becoming an increasingly important part of the RBA's work (at page 12):

...in particular in collaborating with other regulators, both domestically and internationally, especially for purposes of crisis prevention and management.

The explanatory memorandum states that this approach to providing authority to share protected information is more transparent and is preferable for ongoing or regular disclosures than is the alternative of the Governor approving, in writing, the disclosure or production of protected information or production of protected documents to a person or body. The power is proposed to be inserted by item 31, subsection 79A(5) of the bill.

In justifying the new powers to disclose information, the explanatory memorandum emphasises the importance of domestic and international financial regulators being able to share information (at 12-13) and that the amendments in this part of the bill are modelled

on powers and provisions available to the Australian Prudential Regulation Authority. Second, it is noted that Australian financial regulators are subject to strict confidentiality requirements which prevent the regulator's staff and persons working for them from disclosing protected information. Thirdly, it is noted that item 32 of the bill will introduce subsection 79A(7), which will give the RBA the power (already enjoyed by ASIC and APRA) to impose conditions when information is shared with external entities. The explanatory memorandum explains that '...this power is used by regulators to ensure that confidential information entrusted to them by private entities is appropriately protected when it is provided to external entities' and it is noted that breach of these conditions is an offence subject to a penalty of 2 years imprisonment.

In response to this justification for the expanded powers to disclose information to external bodies in this bill, it may be argued that the primary legislation could impose conditions on external entities with whom information is shared, rather than conferring a discretionary power on the regulator (in this case the RBA) to impose conditions to be complied with in relation to the information disclosed. In relation to this issue, the explanatory memorandum argues that 'the wide range of circumstances in which information may be shared' means that it is preferable for regulators to be 'able to tailor the conditions they need to impose on a case-by case basis'. It is therefore concluded (at 14) that it is 'not appropriate to include general provisions in the legislation that would place limits on the types of conditions or the manner in which they could be imposed'.

The committee acknowledges the detailed explanation outlined in the explanatory memorandum and generally leaves the question of whether item 29 is appropriate to the consideration of the Senate as whole.

**However, as an additional safeguard the committee seeks the Minister's advice as to whether consideration has been given to including mechanisms in the bill that would require the regulator to consider the appropriateness of imposing conditions (pursuant to proposed subsection 79A(7), inserted by item 32) in relation to information disclosed or documents produced pursuant to proposed paragraph 79A(4) or subsection 79A(5).**

*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.*

### *Parliamentary Secretary's response - extract*

#### *Inclusion in the Bill of a mechanism requiring the regulator to consider the appropriateness of imposing conditions*

The Bill would permit the RBA when disclosing protected information or protected documents under s79A to impose conditions on recipients of such information or documents, breach of which will constitute an offence. This will strengthen protection with respect to such information or documents and is a prudent protection given the expansion in numbers of counterparties with whom the RBA shares protected information. The Committee requests advice whether consideration has been given to including mechanisms in the Bill requiring the RBA to consider the appropriateness of imposing conditions.

Administrative law imposes limits on the way administrative decision-makers may exercise their powers, and breaches of these limits provide rights to an affected person to challenge a decision. Grounds on which a person may challenge an administrative decision include several that may be considered to fall within the scope of what the Committee suggests. Examples include: failure to take into account relevant factors or taking into account irrelevant factors; imposing a decision for an improper purpose; making a decision that is evidently unreasonable; and acting in bad faith.

Given the constraints the law imposes on the exercise of its powers by the RBA, it is not considered that including such a mechanism as proposed by the Committee would significantly extend the rights of persons affected by a decision to impose conditions on the receipt of protected information or documents.

#### *Committee Response*

The committee thanks the Parliamentary Secretary for this response. The committee accepts that the grounds of judicial review will structure and constrain exercise of the power to disclose protected information and documents. **However, an express requirement to consider the appropriateness of imposing conditions would make it clear that the power can only be exercised if consideration has been given to this issue.** Given the difficulty of establishing that an administrative decision is invalid on the basis that it is 'evidently unreasonable' (it must be 'so unreasonable that no reasonable decision-maker could have reached the decision' ), the committee believes that there is value in explicitly providing that the decision-maker must consider the appropriateness of attaching conditions to any disclosure of protected information or documents. **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. 5 of 2013 - extract***

In addition, in relation to proposed subsection 79A(5) [discussed above], it is not clear why, given the insertion of paragraph 79A(4), it is considered necessary to empower the Governor to authorise particular disclosures to a person or body. The explanatory memorandum does not give examples or indicate why the power to prescribe persons or bodies in the regulations to enable disclosure is not adequate to deal with the need for the RBA to share information for regulatory purposes. The explanatory memorandum notes that proposed subsection 79A(5) is similar to a power in APRA's legislation and that such a power was 'previously in the RB Act but was automatically repealed under a sunset provision' (at 12). **Nevertheless, it remains unclear why this power is necessary and the committee therefore seeks further information in relation to this issue.**

*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.*

### ***Parliamentary Secretary's response - extract***

#### ***Broad power of Governor of the Reserve Bank of Australia to disclose protected information***

As noted by the Committee, the Bill provides a power for the Governor of the RBA and certain designated delegates to authorise the disclosure of protected information to any person or body.

The primary purpose of the power is to provide the flexibility to respond to a legitimate need for the sharing of information, particularly in the context of a crisis which, by its nature, may involve facts and circumstances which have not previously been contemplated.

This power would only be exercised on a case-by-case basis. As stated above, the RBA will use the power to make a regulation under section 79A(4)(c) to prescribe bodies with which it regularly shares information. This discretionary power would be used to permit sharing of information if such sharing was required as a matter of urgency. It is expected that it would be exercised in exceptional circumstances only - either in an emergency before a body could be listed in a then existing regulation made under section 79A(4)(c) or to cover a one off disclosure of a type that has not currently been identified as necessary.

### ***Committee Response***

The committee thanks the Parliamentary Secretary for this response and notes the arguments made in support of the proposed power for the Governor of the Reserve Bank of Australia to disclose protected information. **In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

# Court Security Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Attorney-General responded to the committee's comments in a letter received 20 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 5 of 2013 - extract***

## **Background**

This bill creates a new framework for court security arrangements for federal courts and tribunals. The bill replaces the current security framework for federal courts and tribunals under Part IIA of the *Public Order (Protection of Persons and Property) Act 1971*.

## **Delegation of legislative power—important matters in regulations**

### **Clause 9 and paragraph 33(1)(b)**

This clause enables the administrative head of a court to appoint security officers. Security officers may exercise a number of broad powers which risk trespass on personal rights and liberties. For example, security officers may conduct a security screening procedure using electronic equipment (clause 14) or a frisk search (clause 19). As noted in the explanatory memorandum, these powers are 'supported by the use of reasonable and necessary force (Division 4)'. Clause 9 also provides that a person may only be appointed as security officers if the person has 'qualifications prescribed by the regulations as a security officer for court premises generally or for specified court premises' (see further the comment in relation to clause 33 below).

Given the nature of the powers exercisable by security officers it is important that such officers have the appropriate training and experience. Unfortunately the explanatory memorandum does not indicate why qualification requirements for security officers cannot be dealt with in the primary legislation.

It should be noted that paragraph 33(1)(b) provides an additional requirement that a person may only exercise the powers of a security officer if the person is licensed under a law of the State or Territory to guard property. However, this provision also provides that this requirement is not essential if the person is prescribed by the regulations. The explanatory memorandum (at 29) argues that this is appropriate as it is 'necessary to ensure that persons who hold qualifications and training equivalent in nature to those held by licensed

guards are not prevented from being appointed as security officers'. However, there appears to be no legislative requirement to ensure that persons prescribed under paragraph 33(1)(b) must hold such equivalent qualifications and training.

**The committee therefore seeks the Attorney-General's advice as to whether consideration has been given to providing more legislative guidance on the appropriate qualifications of security officers and which non-licensed persons may be prescribed by the regulations as being entitled to exercise the powers of a security officer.**

*Pending the Attorney-General'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.*

### ***Attorney-General's response - extract***

#### *Paragraph 33(1)(b): Qualification requirements of security officers*

The Committee has sought advice as to whether more legislative guidance on the appropriate qualifications of security officers should be provided and which non-licensed persons may be prescribed as being entitled to exercise the powers of a security officer.

I share the Committee's view that, given the nature of the powers exercisable by security officers under the Bill, it is critical that the officers exercising those powers hold appropriate qualifications. I outline below the reasons for the approach taken in the Bill and why I consider that this approach is appropriate.

As the Committee notes, the approach of the Bill in relation to safeguards around the qualification requirements of appointed security officers is twofold. First, an administrative head of a court may only appoint a person as a security officer if the person has the qualifications prescribed by the regulations (clause 9). Second, a security officer may only exercise the powers of a security officer in relation to court premises if the person is licensed under a law of a State or Territory to guard property, or prescribed by the regulations (clause 33).

In relation to clause 9, I consider it appropriate and desirable that the qualification requirements for security officers are prescribed in regulations as opposed to being contained in the principal legislation. This ensures that they can be responsive to changes in the security environment, and keep up to date with developments in security threats and relevant technologies. I consider that building these requirements into principal legislation may mean that necessary changes to the qualification requirements are unable to be

implemented in an appropriate timeframe. Prescribing the qualification requirements in regulations allows them to be updated in a timelier manner.

I consider that prescribing the qualification requirements for security officers and authorised court officers in regulations strikes an appropriate balance between ensuring that these requirements are able to be amended in a timely manner to respond to changes in the security environment or new technologies and ensuring an appropriate level of parliamentary oversight. The qualification requirements will be developed in consultation with the federal courts and other relevant federal agencies including the Australian Federal Police.

I note that this approach is consistent with the approach taken in the *Defence Legislation Amendment (Security of Defence Premises) Act 2011*, which establishes the security framework for Defence premises. The Senate Standing Committee for Foreign Affairs, Defence and Trade reported on that Bill in March 2011, agreeing with that approach.

In relation to clause 33, all State and Territory licencing regimes contain probity requirements and minimum standards of qualifications for persons licenced to guard property. A person appointed as a security officer must have met these requirements unless prescribed by the regulations under subparagraph 33(b)(ii).

Paragraph 33(b) has been included to deal with situations where a federal court shares premises with a State or Territory court and security officers have been appointed to those premises under State and Territory court security legislation. These officers may not necessarily hold a licence under a law of a State or Territory to guard property, but will have been required to meet other relevant probity and qualification requirements. In these circumstances, it is desirable that the security framework established by the Court Security Bill is sufficiently flexible to allow the two jurisdictions to cooperate to ensure an optimal security arrangement for the shared premises, through the dual appointment of security officers as necessary.

For example, the Federal Court of Australia shares premises with a New South Wales court in Sydney. Section 21 of the *Court Security Act 2005* (NSW) provides that the Sheriff may, by instrument in writing, appoint as a security officer: (a) a sheriff's officer, and (b) any other person who holds a licence under the *Security Industry Act 1997*, to carry out security activities under that Act. Sheriff's officers provide court security services in all NSW courts and undertake some law enforcement functions. Sheriff's officers are not required to have a licence to guard property, but are defined as law enforcement officers for the purposes of the *Crimes Act 1900* (NSW) and need to take an oath or affirmation of office in accordance with the *Sheriff Act 2005* (NSW). Sheriff's officers undergo a 12 month probationary period and undertake competency based assessments, involving a combination of classroom instruction, defensive tactics training and appointments certification and also work to obtain a Nationally Accredited Certificate IV in Government (Court Compliance).

Paragraph 33(1)(b) ensures that there is a mechanism to provide that sheriff's officers appointed under the NSW Act, who do not hold a licence to guard property, but do hold other relevant qualifications, are not prevented from exercising security powers under the Court Security Bill if appointed to do so.

The types of officers that may be needed to be prescribed in the regulations will change from time to time as federal courts take up different court leasing and co-location arrangements with different State and Territory jurisdictions. In order to be appointed under clause 9, such persons will still need to meet the general qualification requirements set out in the regulations. Further, the regulations will be subject to tabling in Parliament and potential disallowance.

In light of the above noted safeguards, I consider that the flexibility provided by subparagraph 33(1)(b)(ii) to allow regulations under the Court Security Bill to prescribe that certain officers, or categories of officers, may exercise security powers under the Bill, even if they do not hold a licence to guard property, is necessary and appropriate.

#### ***Committee Response***

The committee thanks the Attorney-General for detailed response and notes the arguments made in support of the proposed approach and that any regulation will be subject to disallowance provisions. **The committee requests that the key information outlined above be included in the explanatory memorandum.**

#### ***Alert Digest No. 5 of 2013 - extract***

### **Trespass on personal rights and liberties—frisk searches**

#### **Clause 19**

This clause authorises a security officer to request a person seeking to enter, or who is on, court premises to undergo a frisk search. Subclause 19(2) provides that any frisk search may be conducted only by (a) a security officer of the same sex as the person, or (if such an officer is not available) (b) a member of the staff of a court who is of the same sex as the person who agrees to a request from a security officer to conduct the search under their direction and in the presence of a security officer. Nevertheless paragraph 19(2)(c) provides that if a search is not able to be conducted in either of these circumstances, a frisk search may be conducted by any security officer, including one of the opposite sex to the person.

The statement of compatibility concludes that the frisk search provisions strike an appropriate balance between a person's right to privacy and the right of others to security of the person (at 8). It is argued that:

- (1) the objective of the provision is to ensure the safety of all persons on court premises by preventing dangerous items being brought on to court premises; and
- (2) frisk searches are narrowly defined to mean 'a search of a person by quickly running hands over the person's outer garments and examining anything worn or carried by the person that is voluntarily removed by the person' (see clause 5).

Further, the explanatory memorandum emphasises that a person is not required to undergo a frisk search, though if they refuse they may be refused entry or directed to leave the court premises.

The arguments justifying the provision do raise matters relevant to the assessment of the appropriateness of the powers. Nevertheless, it is not sufficiently clear that frisk searches are necessary given the existence of other powers in the bill to screen persons for dangerous items (clause 14) and given that a frisk search can be conducted by a staff member of the same sex (19(2)(b)). **The committee therefore seeks the Attorney-General's further advice as to the necessity for including paragraph 19(2)(c). If it is intended that it be retained, the committee requests the Minister's advice as to whether it should not operate unless reasonable efforts have been made to utilise provisions 19(2)(a) and (b).**

*Pending the Attorney-General'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.*

### ***Attorney-General's response - extract***

#### *Clause 19: Frisk searches*

Clause 19 of the Bill provides that a security officer may request that a person who is seeking to enter, or is on, court premises undergo a frisk search. The Committee has requested further information about the necessity of paragraph 19(2)(c), which provides that a frisk search may be conducted by a person of the opposite sex of the person being searched if there is no security officer or member of staff of the same sex available to conduct the search.

It is also expected that where frisk searches are conducted, there will generally be a person of the same sex available to conduct the search. However, it is important that the Bill caters

for situations where this is not the case, particularly for court premises where electronic screening facilities are not available and where there is only a small number of court staff in attendance.

Paragraph 19(2)(c) is framed such that it may only be relied upon if a frisk search cannot be conducted in accordance with paragraphs 19(2)(a) and (b). That is, a frisk search could only be conducted by a security officer of the opposite sex to the person being searched if there were no security officers or members of court staff of the same sex. Accordingly, I do not consider that there is a need for an additional provision in this clause to the effect that paragraph 19(2)(c) can only be relied on unless reasonable efforts have been made to conduct a frisk search in accordance with paragraphs 19(2)(a) or (b).

While it is expected that frisk searches will not be used as a matter of course, and that generally where frisk searches are conducted there will be a person of the same sex available, it is important that the Bill is capable of dealing with situations where no person of the same sex is available and where a frisk search needs to be conducted to ensure the security of court premises.

#### ***Committee Response***

The committee thanks the Attorney-General for this response, but would prefer that the bill explicitly provided that a 'reasonable effort' be required to meet the 'no-one available' requirements. **However, in the circumstances the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

#### ***Alert Digest No. 5 of 2013 - extract***

#### **Trespass on personal rights and liberties—natural justice Clause 47**

This clause provides that the maker of a court security order need not disqualify himself or herself from hearing other proceedings to which the person is or later becomes a party. The explanatory memorandum simply repeats the terms of the clause.

**In the absence of detail in relation to whether it is intended that this clause abrogate that aspect of the rules of natural justice requiring that judicial decision-makers neither be nor appear to be biased, the committee seeks the Attorney-General's advice on this matter. If the clause is intended to affect the operation of the rule**

**against bias, the committee would expect a strong justification given that the rules of natural justice are considered to be fundamental common law principles.**

*Pending the Attorney-General'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.*

### ***Attorney-General's response - extract***

#### ***Clause 47: Court security orders***

Clause 47 has been included in the Bill to clarify that a judicial officer is not automatically required to disqualify him or herself from hearing other proceedings to which the person the subject of a security order is or becomes a party.

This provision is not intended to abrogate the natural justice rules against bias. The purpose of clause 47 is to ensure that the Bill does not seek to impinge on a court's ability to manage the hearing of proceedings before it independently of the Executive. Where the making of a court security order may lead to a perception of bias against a person, it would be a matter for the relevant court to arrange for proceedings involving that person to be heard before a different judicial officer, as it would be a matter for the court to arrange in other cases of perceived bias.

I trust that this information is of assistance to the Committee and the Senate in considering the Bill.

### ***Committee Response***

The committee thanks the Attorney-General for this response, which makes clear that the provision is not intended to abrogate the rule against bias.

# Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013

Introduced into the House of Representatives on 29 May 2013

Portfolio: Attorney-General

## *Introduction*

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Attorney-General responded to the committee's comments in a letter dated 25 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 6 of 2013 - extract*

## **Background**

This bill amends various Acts relating to criminal law and law enforcement.

Schedule 1 amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Law Enforcement Integrity Commissioner Act 2006* to ensure that the Integrity Commissioner is able to access all information held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) and allow the Australian Commission for Law Enforcement Integrity to second employees of police forces who are not sworn police officers.

Schedule 2 amends the *Crimes Act 1914* and the Criminal Code to ensure that victims and witnesses in Commonwealth criminal proceedings are afforded appropriate support and protection.

Schedule 3 amends the *Crimes Act 1914* and the *Migration Act 1958* to include a number of technical amendments relating to people smuggling prosecutions.

Schedule 4 amends the *Anti-Money Laundering and Counter-Terrorism Finance Act 2006* to enable expeditious review of decisions of AUSTRAC; enable AUSTRAC to engage secondees from the private sector; amend privacy protections and add the Clean Energy Regulator and the Integrity Commission of Tasmania as designated agencies.

Schedule 5 amends the *International Transfer of Prisoners Act 1997* and the *International War Crimes Tribunals Act 1995* to recognise the International Residual Mechanism for Criminal Tribunals.

Schedule 6 amends the *Australian Federal Police Act 1979* in relation to the provision of policing and regulatory services in the external Territories; and also amends the *Telecommunications (Interception and Access) Act 1979* to reflect new public sector anti-corruption arrangements in Victoria.

### **Trespass on personal rights and freedoms**

#### **Schedule 3, item 4, proposed section 236D**

This section provides that in specified proceedings relating to people smuggling offences under the *Migration Act* the prosecution bears the burden of proving, on the balance of probabilities, that the defendant was aged 18 or over when the offence was alleged to have been, or was, committed. The explanatory memorandum notes that this amendment makes it clear that the burden of proof for this element rests with the prosecution and not with the defendant. However, given the context it is not clear why the appropriate standard of proof is not the criminal standard of beyond reasonable doubt and the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of the criminal standard of proof in relation to age requirements in the context of people smuggling offences (subdivision A of Division 12 of Part 2 of the *Migration Act*).**

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

#### ***Attorney-General's response - extract***

### **Trespass on personal rights and freedoms - Schedule 3, item 4, proposed section 236D**

The Committee requested my advice as to whether consideration had been given to the appropriateness of the criminal standard of proof in relation to age requirements in the context of people smuggling offences (subdivision A of Division 12 of Part 12 of the *Migration Act 1958*).

Under subsection 236B(1) of the *Migration Act*, mandatory minimum penalties do not apply 'if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'. The Act does not specify which party bears the onus of proof. In practice, the onus of proof has generally been attributed to the prosecution. However, this issue has been dealt with inconsistently in each jurisdiction. To clarify the intention and achieve consistency, amendments to the *Migration Act* are proposed to expressly provide that, where a defendant raises the issue of age during proceedings, the prosecution bears the legal burden to

establish on the balance of probabilities that the defendant was an adult at the time the offence was committed.

Section 236A of the Migration Act provides that a court may make an order under section 19B of the *Crimes Act 1914* (to dismiss a charge without proceeding to conviction) in respect of a charge for specified people smuggling offences only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.

Subsection 236B(2) of the Migration Act provides that mandatory minimum penalties do not apply for specified people smuggling offences if it is established on the balance of probabilities that the convicted person was aged under 18 years when the offence was committed.

Requiring the defendant's age to be proved on the balance of probabilities under the proposed section 236D is consistent with the already entrenched intention of the Parliament regarding the prosecution and sentencing of persons claiming to be minors, as expressed by the abovementioned provisions of the Migration Act.

#### ***Committee Response***

The committee thanks the Attorney-General for this useful response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

#### ***Alert Digest No. 6 of 2013 - extract***

#### **Trespass on personal rights and liberties Schedule 3, item 4, proposed section 236E**

This item provides for the use of evidentiary certificates in the prosecution of people smuggling offences. These certificates constitute prima facie evidence of the matters contained within them. The relevant matters are set out in subsection 236E(3) and relate to factual matters such as the number of passengers on a boarded vessel, the number of crew on the vessel, the location of the vessel when intercepted and a description of secured or seized items.

The Statement of Compatibility with human rights notes that, although such certificates create a rebuttable presumption as to the facts, these may be challenged by defendants

during the court proceedings and that the defendant may require the person who signed a certificate to give evidence in person in respect to any matters in the certificate. The conclusion is that, as a result, ‘the defendant’s right to be presumed innocent and to test witnesses is preserved’ (at p. 15).

The justification of the use of evidentiary certificates is twofold. First, it is said that the amendments will mitigate operational difficulties and delays which ‘may prolong the pre-charge detention of suspected people smugglers’ because the relevant Border Patrol Personnel can remain at sea on patrol for up to six weeks at a time. For this reason the use of evidentiary certificates is said to promote the right to be tried without undue delay (statement of compatibility at 15). Second, the explanatory memorandum also focuses on the importance of minimising the time spent by personnel assigned to border protection by requiring them to appear in court proceedings for people smuggling offences. This reason is said to promote national security interests.

**In light of the rationale provided in the explanatory memorandum, the committee leaves the overall question of whether the use of evidentiary certificates is appropriate to the consideration of the Senate as a whole.**

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

### ***Attorney-General's response - extract***

#### **Trespass on personal rights and liberties - Schedule 3, item 4, proposed section 236E**

The Committee has raised the question of whether the use of evidentiary certificates is appropriate.

These measures will assist to alleviate delays in people smuggling investigations, and will also alleviate pressures on Border Protection Command crew resulting from the need for significant numbers of crew to give evidence in people smuggling prosecutions. This will result in persons accused of people smuggling offences spending less time in custody or immigration detention.

Evidentiary certificates in proposed section 236E of the Migration Act will contain material that is not likely to be in dispute. The certificates will state matters of a formal or technical nature, for example, matters might include the location of a vessel at the time the officer boarded and the number of passengers and crew on board the vessel. Evidentiary certificates will not be used to prove contentious matters such as the role allegedly played by the defendant on the vessel. However, under certain circumstances, the person charged

is entitled to require the person who issued the certificate to attend court as a witness. The person who issued the certificate would appear as a witness for the prosecution and would be available for cross-examination by the person charged.

An accused person is entitled to challenge the contents of an evidentiary certificate in court. The Bill provides that any evidence given in rebuttal of an evidentiary certificate must be considered on its merits and not discounted by reason of the fact that an evidentiary certificate has been admitted into evidence.

Evidentiary certificates are a commonly used mechanism to ensure that court resources are not tied up adjudicating on uncontested facts, and will allow parties to focus on facts that are at issue.

Evidentiary certificates are used in other legislative contexts. For example, section 55B of the *Privacy Act 1988* allows the Commissioner to issue a written evidentiary certificate setting out the findings of fact upon which certain determinations were based. Evidentiary certificates are also used in section 15MT of the *Crimes Act 1914*, which allows a chief officer of a law enforcement agency to sign a certificate stating certain facts. Section 62 of the *Surveillance Devices Act 2004* also allows for the use of evidentiary certificates by an appropriate authorising officer for a law enforcement officer, setting out any facts he or she considers relevant in respect to certain facts.

#### ***Committee Response***

The committee thanks the Attorney-General for this additional information.

#### ***Alert Digest No. 6 of 2011 - extract***

#### **Delegation of power**

##### **Schedule 3, item 4, proposed section 236E**

Further to the above comment, however, given the significance of the use of evidentiary certificates the committee is of the view that in general the matters that may be the subject of evidentiary certificates should be determined by primary legislation. **As paragraph 236E(3)(j) provides that the Minister may prescribe further matters which may be the subject of evidentiary certificates (i.e. by way of delegated legislation), the committee seeks the Minister's advice as to why this provision is necessary and appropriate.**

*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.*

### ***Attorney-General's response - extract***

#### **Delegation of power- Schedule 3, item 4, section 236E**

As mentioned above, evidentiary certificates in proposed section 236E of the Migration Act will contain material that is not likely to be in dispute. The certificates will state matters of a formal or technical nature and will not be used to prove contentious matters such as the role allegedly played by the defendant on the vessel.

I accept that this is a broad power to create a legislative instrument that sets out matters that may be set out in an evidentiary certificate. However, I note that an accused person is entitled to challenge the contents of an evidentiary certificate in court. There would be no reason to create a legislative instrument that allows more contentious matters to be set out in an evidentiary certificate. This is because these facts would be contested by the defendant, rendering the issuing of the certificate ineffective. The power merely allows flexibility to include at a later stage matters of a formal or technical nature that may be drawn to my attention in future.

#### ***Committee Response***

The committee thanks the Attorney-General for this useful response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

### ***Alert Digest No. 6 of 2011 - extract***

#### **Trespass on personal rights and freedoms—reversal of onus Schedule 4, item 24**

This provision creates an exception to the offence of a reporting entity providing a designated service under the AML-CTF Act to a customer who is using a false customer name where use of that false name is justified, or excused, by or under a law. The statement of compatibility notes that the effect of the provision is to impose an evidential

burden of proof in relation to establishing the exception on defendants, but does not otherwise justify the proposed approach by reference to the principles set out in the *Guide to Framing Commonwealth Offences*. **However, the committee accepts that circumstances relevant to the exception are likely to be peculiarly within the knowledge of the defendant and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

### ***Attorney-General's response - extract***

#### **Trespass on personal rights and liberties - Schedule 4, item 24, reversal of onus**

Item 24 of Schedule 4 of the Bill creates an exception to an existing offence. The existing offence applies strict liability to a reporting entity that provides a designated service to a person using a false customer name. The exception ensures that a regulated business does not commit an offence by providing a designated service to an individual using a false identity 'if the customer's use of that name is justified, or excused, by or under a law' such as an individual in witness protection or a member of an undercover law enforcement operation.

Because it is an exception to an existing offence, the defendant bears the evidential burden of adducing or pointing to evidence that suggests that the person had lawful reason for using the false customer name. If the defendant discharges that evidential burden, it then rests with the prosecution to disprove those matters beyond reasonable doubt. This is in accordance with the *Guide to Framing Commonwealth Offences*.

In practice, it is unlikely that charges would be brought against an entity that was providing a designated service to a person with a lawful reason for using a false identity, given the likely involvement of law enforcement in the legitimate use of false identification. However, this amendment is a response to concerns raised by regulated entities, in particular concerns raised by the major banks, that if they were to provide a designated service to an individual with a lawful false identity they would be committing an offence under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AMLICTF Act). The addition of this defence gives regulated businesses the benefit of an exception if such a situation were to occur.

Thank you for the opportunity to clarify these matters and for the continuing, important work of the Committee in assisting in the scrutiny of Bills brought before the Parliament.

***Committee Response***

The committee thanks the Attorney-General for this additional information and **requests that the key information outlined above be included in the explanatory memorandum.**

# Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013

Introduced into the House of Representatives on 20 March 2013 (*passed the House of Representatives 15 May 2013 and the Senate 16 May 2013*)

Portfolio: Home Affairs

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.5 of 2013*. During its deliberations and in light of the committee's request to the Minister in relation to appropriately confining the discretionary power to add further obligations or requirements by legislative instrument under new section 102CJ, the committee deferred its consideration of whether strict liability is appropriate until a reply was received. The Minister responded to the committee's comments in a letter dated 12 June 2013 which was published in its *Sixth Report of 2013*. The committee then sought further advice and the Minister responded in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 5 of 2013 - extract***

#### **Trespass on personal rights and liberties—strict liability Schedule 1, item 43, proposed subsection 102CK(2) and 102DE(2)**

This subsection creates a strict liability offence where a CTO fails to comply with an obligation or requirement set out in the new Division 2 or in a legislative instrument made under new section 102CJ. The explanatory memorandum notes the following:

- in developing the offence, consideration was given to the Committee's Sixth Report of 2002 on Application of Absolute and Strict Liability Offences and A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers;
- the regulatory nature of the offence; and
- the fact that the penalty is 60 penalty units (which is the maximum recommended for strict liability offences committed by individuals by the *Guide*).

The statement of compatibility makes similar points in relation to this new offence, and adds that this and other strict liability penalties 'significantly enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and collection of revenue' (at 9).

The same issue and approach can be taken in relation to proposed subsection 102DE(2).

While these factors are relevant to considering whether an offence of strict liability is appropriate, in light of the committee's request to the Minister in relation to appropriately confining the discretionary power to add further obligations or requirements by legislative instrument under new section 102CJ (see item above), the committee defers its consideration of whether strict liability is appropriate until a reply is received.

*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.*

### ***Committee Response***

The Minister's reply above identified an existing customs scheme that includes an 'any other purpose' formulation and notes that the scope of the proposed power is limited to the functions of the Customs Act. While it is true that discretionary powers are read in the context of the scope, purposes and structure of the legislation, in the committee's view the broader the discretionary power the more difficult it is to do this. **The committee also remains concerned that new offences of strict liability can be created through the use of legislative instruments (by imposing additional obligations on cargo terminal operators). The committee seeks the Minister's advice as to how operators will be made aware of any new obligations (and of the consequences for non-compliance) arising from these provisions.**

### ***Minister's Further Response - extract***

The Committee sought further advice on how cargo terminal operators will be made aware of any new obligations arising from provisions such as 102CE and 102CJ of the Act.

The Australian Customs and Border Protection Service (ACBPS) will inform cargo terminal operators through its normal industry communication channels such as publication of Customs and Border Protection Notices. Given the significance of non-compliance with any new obligations so imposed, ACBPS will also write to cargo terminal operators that have provided notification in accordance with section 102C.

Please note also that Regulations made under these provisions will be subject to disallowance under the *Legislative Instruments Act 2003* and will therefore be subject to Parliamentary scrutiny.

***Committee Response***

The committee thanks the Minister for this response and notes his awareness of the significance of non-compliance. In relation to this the committee notes the Minister's advice that cargo terminal operators will be individually advised of any new obligation in writing.

# Fair Work Amendment Bill 2013

Introduced into the House of Representatives on 21 March 2013

Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The committee dealt with this bill in the amendment section of *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 6 of 2013 - extract*

## **Background**

This bill amends the *Fair Work Act 2009* (FW Act) to:

- introduce new family friendly arrangements;
- require employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities;
- amend the modern awards objective to require that the Fair Work Commission (FWC), take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts;
- give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder;
- facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;
- give the FWC capacity to deal with disputes in relation to accommodation and transport arrangements;
- expressly confer on the FWC the function of promoting cooperative and productive workplace relations and preventing disputes; and
- make a number of minor technical amendments.

The bill also amends the FW Act to give effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying* "We just want it to stop" to:

- allow a worker who has been bullied at work in a constitutionally-covered business to apply to the FWC for an order to stop the bullying;
- adopt a definition of 'bullied at work' which is consistent with the definition of 'workplace bullying' recommended by the Committee in its report;
- require the FWC to start dealing with an application for an order to stop bullying within 14 days of the application being made; and
- enable the FWC to make any order it considers appropriate (other than an order for payment of a pecuniary amount) to stop the bullying.

**Trespass on personal rights and freedoms—fair hearing**  
**Item 6, section 376; item 19, section 780**

The explanatory memorandum states that this replacement section for the existing section 376 'will provide a strong deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative general protections disputes they know have no reasonable prospect of success'. The provision, it is explained, will also 'deter lawyers or paid agents from unreasonably encouraging a party to defend a general protections dispute with no reasonable prospect of success'. This deterrent is 'stronger' than that in the current provision 'as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the dispute before the FWC' (at 17). The SOC argues that this, and other measures in the amendments, will not prevent genuine claims from being pursued but will provide a deterrent against unreasonable conduct during proceedings' (at 7). A similar issue also arises in relation to item 19, new section 780.

It should be noted that the possibility of costs orders being made against lawyers and paid agents—even if limited to unreasonable actions—has the potential to affect the capacity of persons to access advice or the nature of the advice given. The extent of any such an impact is, however, is uncertain.

Nevertheless, in the committee's view the Senate's consideration of the appropriateness of the provision would be assisted by the presentation of evidence concerning the extent of the problem to which this provision is addressed. Without such evidence it is difficult to assess the necessity for strengthening the deterrent purpose of this provision. **The committee therefore seeks the Minister's advice on this matter.**

*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***

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

The Committee has expressed concern the two new sections (sections 376 and 780) allowing costs to be awarded against lawyers and paid agents in relation to general protections and unlawful termination claims could possibly trespass on personal rights and liberties. The Committee noted the sections extending the current powers of the Fair Work Commission (the Commission) to order costs against lawyers and paid agents have 'the potential to affect the capacity of persons to access advice or the nature of the advice given'.

The Commission's proposed power to order adverse costs against lawyers and paid agents under the amendments is an extension of the Commission's current powers to order costs. These powers are limited so as to allow costs orders to be made only where the unreasonable act or omission of a lawyer or paid agent engaged by one party has caused the other party to incur costs, including where the lawyer or paid agent has encouraged a person to start, continue or respond to a dispute when it should have been apparent the person had no reasonable prospect of success. The amendments are intended to prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order because they have not been formally granted permission by the Commission to appear on behalf of a party, or have not sought such permission. Importantly, they do not prevent a lawyer or paid agent from fully pursuing a genuine claim on behalf of their client.

These amendments are consistent with the existing provisions in relation to unfair dismissal claims which were enacted in 2012 in response to the recommendations of the Fair Work Act Review (the Review). A number of submissions to the Review advocated there be the capacity for the Commission to make such orders for general protections applications to discourage the incidence of unmeritorious and vexatious claims.

An example of where the Commission may award costs against a representative under the new provisions is where the representative knows that his or her client's general protections or unlawful termination claim is dishonest or without foundation but still actively encourages them to proceed with the claim to try and extract a remedy such as a financial settlement from the employer.

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

I thank the Committee for the opportunity to respond.

### ***Committee Response***

The committee thanks the Minister for this response and notes the advice in relation to submissions to the Fair Work Act Review advocating the extension of the commission's capacity in relation to costs orders. **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 consideration of the Senate as a whole.**

# Intellectual Property Laws Amendment Bill 2013

Introduced into the House of Representatives on 30 May 2013

Portfolio: Industry, Innovation, Climate Change, Science, Research and Tertiary Education

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 25 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 6 of 2013 - extract***

## **Background**

This bill amends various Acts relating to intellectual property.

Schedule 1 amends the *Patents Act 1990* to clarify the scope of Crown use and its operation.

Schedule 2 and 3 amend the *Patents Act 1990* to allow Australian pharmaceutical manufacturers to supply certain countries with patented medicines.

Schedule 4 amends the *Plant Breeder's Rights Act 1994* to extend the jurisdiction of the Federal Circuit Court to include plant breeder's rights the option of taking action against alleged infringers.

Schedule 5 amends the *Design Act 2003* to implement a single trans-Tasman patent attorney regime and single patent application and examination process for Australia and New Zealand.

Part 1 of Schedule 6 will make administrative changes to the *Designs Act 2003*, the *Patents Act 1990* and the *Trade Marks Act 1995* to repeal unnecessary document retention provisions.

Part 2 of Schedule 6 amends the *Patents Act 1990* to make a number of technical amendments to address minor drafting oversights.

**Trespass on personal rights and freedoms—retrospectivity**  
**Schedule 6, item 14, proposed new paragraph 119(3)(b)**

This amendment to paragraph 119(3)(b) of the *Patents Act* will ‘correct an inadvertently created inconsistency’ between that provision and a related provision created when the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* came into operation on 15 April 2013. The explanatory memorandum explains the need for the change as follows:

Ordinarily, if information about an invention is made publically available before a patent application is filed for the invention, the invention is not novel and so is unpatentable. However, section 24 of the Patents Act provides a ‘grace period’ so that, in certain circumstances, disclosure of an invention before filing the patent application for it does not make the invention unpatentable. To balance this against the interests of third parties who may have relied on the information being in the public domain, paragraph 119(3)(b) provides a countervailing exception to infringement. A third party does not infringe a patent if they derived the invention from information made publicly available by the applicant during the grace period.

Item 32 of Schedule 6 to the Raising the Bar Act amended paragraph 24(1)(a) of the Patents Act to omit the words ‘through the publication or use of the invention’. This was so that the grace period applies more widely to information made publically available. However, as an oversight, the same words appearing in paragraph 119(3)(b) were not also omitted. This item corrects the oversight, ensuring that the grace period and the countervailing infringement exemption continue to be aligned.

As stated in the explanatory memorandum, the amendment will ensure that the longstanding provisions of section 24 and 119 of the Patents Act continue to be aligned. The explanatory memorandum states that it ‘is both unlikely to have a substantive impact on users, and is consistent with existing policy’ (see p. 44). On the face of it the amendment appears reasonable and it appears that the provision is unlikely to have an adverse impact on individuals. **However, in determining the appropriateness of any change being made retrospectively the committee seeks to understand whether it is possible that a person’s rights may be adversely affected and the extent of any possible effect. As a result, the committee requests the Minister’s advice on these matters.**

*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***

### **Retrospective Commencement: Schedule 6, item 14**

The purpose of Schedule 6 to the Bill is to amend the *Patents Act 1990* (Patents Act) to correct minor technical errors, due to the drafting of the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Raising the Bar Act). The Raising the Bar Act introduced a wide range of intellectual property reforms designed to support innovation by encouraging research in technology in Australia, and by helping Australian businesses benefit from their good ideas. The Raising the Bar Act entered into full effect on 15 April 2013.

I note that the Committee seeks to understand whether it is possible that a person's rights may be adversely affected due to the retrospective commencement of item 14. This item aligns the infringement exemption in section 119 of the Patents Act with the 'grace period' in section 24 of the Act.

The grace period provided in section 24 of the Patents Act allows for public disclosure of an invention (under certain conditions) without affecting the validity of a subsequent patent application (provided that a complete application is filed within 12 months of the disclosure). This, in effect, provides a safety net for inventors who, possibly inadvertently, publicly disclose their invention before they apply for a patent.

To balance this against the interests of third parties who may have relied on the information being in the public domain during the grace period, section 119(3)(b) of the Patents Act provides a countervailing exception to infringement. If a potential patent applicant makes their invention available, a competitor might see the invention and not be aware that the potential applicant is taking advantage of the grace period. The potential applicant may later file a patent application that would make the competitor's conduct infringing. In this circumstance, it would be unfair to permit the patent applicant (later the patentee) to prevent the competitor from using an invention that they did not know would later be subject to a patent application (and subsequently granted patent).

The Raising the Bar Act repealed the requirement in section 24 that, for the grace period to apply, the information had to be made publicly available 'through any publication or use of the invention'. Now the grace period applies more generally to 'information made publicly available'. However, as an oversight, the same words in section 119(3)(b) regarding infringement exemptions were not deleted.

To ensure that the grace period of section 24 and infringement exemption of section 119 remain aligned, the Bill omits reference to 'publication or use of the invention' from section 119(3)(b). The amendment would commence retrospectively, to ensure that without doubt,

a third party does not infringe a patent if they derived the invention from information made publicly available by the applicant during the grace period.

This amendment will have little or no difference in practice, but puts the matter beyond legal doubt so that competitors of a patentee are not disadvantaged in relation to conduct before a patent application was filed. Infringement occurs where there is unauthorised use of a patented invention. As far as infringement is concerned, there is very little difference between the two meanings: the invention being made publicly available by publication or use; and information about the invention being made publicly available.

The commencement of item 14 of Schedule 6 is highly unlikely to have an effect on individual rights, liberties or obligations. The likelihood of a person's rights being adversely affected is so low that it is difficult to conceive of a situation where this might occur. It is the clear policy of the Patents Act as it stands that the infringement exemption be aligned with the grace period. Item 14, when enacted, will continue the existing policy that a patentee cannot sue a competitor for a use derived from information publicly disclosed by the patentee before they applied for a patent. Retrospective effect will ensure consistency of legislation, clarity for users, and put the matter beyond legal doubt.

Passage of the Bill in the Winter 2013 sittings will ensure that commencement of item 14 of Schedule 6 will only date back a matter of months, and ensure that this aspect of the Patents Act is consistent and operates as intended.

#### ***Committee Response***

The committee thanks the Attorney-General for his detailed reply and notes his advice that the bill is unlikely to affect personal rights.

#### ***Alert Digest No. 6 of 2013 - extract***

#### **Merits review**

##### **Schedule 1, item 5**

This item relates to Crown exploitation of inventions. It seeks to restructure existing provisions and introduce new ones. Relevantly, the *Patents Act* provides for the review of certain decisions, but these determinations relating to Crown exploitation do not appear to be reviewable. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of merits review (in the**

**Administrative Appeals Tribunal) of decisions made by the relevant Minister which enable Crown exploitation of an invention in proposed sections 163 and 163A.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

### ***Minister's response - extract***

#### **Merits Review: Schedule 1, item 5**

It is appropriate that decisions by the relevant Minister to approve Crown exploitation of a patented invention are not subject to merits review. Consideration has been given to the appropriateness of merits review of such decisions. The following factors were considered in deciding that it is not appropriate to include merits review of such decisions:

- the Minister's decision to approve Crown exploitation will depend primarily on policy considerations. Consistent with existing section 163(3) of the Patents Act, the Crown exploitation must be "necessary for the proper provision of those services in Australia". This makes it clear that the relevant Minister must focus on the policy need for the Crown use. This requirement is repeated in section 160A(4) of the Bill;
- the decision will be made by the relevant Minister personally. The power cannot be delegated; and
- it is intended that the power will continue to be used rarely (i.e. in situations of emergency, or where there is a compelling public interest consideration).

Additionally, section 165A of the Patents Act expressly allows a patent holder to apply to a prescribed court for a declaration that the exploitation is not, or is no longer, necessary for the proper provision of services for the Commonwealth or of a State. The court may further order that Crown exploitation is to cease. This provision will remain.

It is also notable that the proposed amendments in the Bill already significantly increase the transparency and governance surrounding Crown exploitation of a patented invention.

#### ***Committee Response***

The committee thanks the Attorney-General for this response and notes the arguments made in support of these provisions. **The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

### ***Alert Digest No. 5 of 2011 - extract***

#### **Rights liberties or obligations unduly dependent on non-reviewable decisions— accountability arrangements Schedule 5, item 25**

This item permits the Australian Patents Commissioner to delegate all or any of his or her powers and functions to a New Zealand patents official. Although decisions made by a New Zealand delegate would continue to be decisions made under Commonwealth legislation and, thus, judicial review under the ADJR Act and any merits review rights would continue to be available (this is confirmed by item 38, proposed section 227AB), the delegation of powers to New Zealand officials may mean that other accountability mechanisms are not available.

New Zealand delegates would not be ‘officers of the Commonwealth’ and, thus, their decisions would not be judicially reviewable under section 39B of the *Judiciary Act*. Further, as the jurisdiction of the Ombudsman and the coverage of the FOI Act is, in general, defined by reference to Commonwealth government agencies, it appears that these administrative law accountability arrangements will not apply in relation to action taken in connection decisions to be made under Commonwealth legislation where the relevant powers are exercised by a New Zealand patents official. **The committee therefore seeks the Minister's advice as to whether this possible reduction in accountability for decision-making under the *Patents Act* is appropriate.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

### ***Minister's response - extract***

Accountability Arrangements: Schedule 5, item 25

The provisions of the Patents Act to be introduced by Schedule 5 to the Bill allow for the streamlining of the processes for applying for patents in Australia and New Zealand, and for the examination of common applications. Single patent application and examination processes for Australia and New Zealand aim to remove duplication, making it easier for businesses to protect their intellectual property in both countries. This is part of the broader trans-Tasman Single Economic Market (SEM) agenda which aims to provide a streamlined

trans-Tasman business environment. The SEM was agreed to by the Australian and New Zealand Prime Ministers in August 2009.

Item 25 of the Bill would permit the Australian Commissioner of Patents to delegate all or any of the Commissioner's powers and functions under the Patents Act and its regulations to a New Zealand patents official. This allows the Australian Commissioner to delegate powers and functions to patent examiners in the Intellectual Property Office of New Zealand. It is not intended that the delegating powers be used otherwise.

Accordingly, the designation to a New Zealand examiner as a delegate of the Australian Commissioner provides that a decision made by that examiner would be deemed to be one that has been made by the Australian Commissioner.

As it would be the decisions of the Australian Commissioner under review, applications under the *Freedom of Information Act 1982* (the FOI Act) would be capable of being made in respect of those decisions. A request made under the FOI Act could therefore be made regardless of whether the FOI Act is extended specifically to provide coverage to the Intellectual Property Office of New Zealand. Consequently, one of the concerns expressed by the Committee does not present as a practical issue.

Furthermore, the vast majority of documents that are handled by patent examiners relating to patent applications become open to public inspection (OPI) 18 months after the application was first filed. The OPI system under the Patents Act provides an exemption for access to such documents under the FOI Act. IP Australia publishes most OPI documents on its website; copies of other OPI documents are available from IP Australia on request. Documents relating to patent applications that are handled by New Zealand delegates of the Australian Commissioner will be subject to the same OPI provisions as Australian examiners, and will all be published by IP Australia.

It is also necessary to clarify, following another concern of the Committee, that the jurisdiction of the *Ombudsman Act 1976* already has extraterritorial effect, and its application would apply to decisions made by a New Zealand examiner with the delegated powers of the Australian Commissioner.

Any decision made by a New Zealand delegate would be considered a decision of the Australian Commissioner and therefore would be reviewable through the normal procedure in the Patents Act. The concerns of the Committee with regard to section 39B of the *Judiciary Act 1903* do not present a significant practical issue in regards to reviewability of decisions, as the Bill provides that for the purposes of the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*, review by the Administrative Appeals Tribunal and the Federal Court would still be available to Australian applicants for decisions taken in New Zealand (Schedule 5 item 38, 227 AB).

Patent applicants may also be confident that their personal information, supplied to one office as part of an application, will be protected according to the law of the jurisdiction governing that office. A consistent application of privacy laws will apply to each jurisdiction by virtue of the revised *Privacy Act 1988* which, as of March 2014, will ensure that actions of Australian Government agencies in overseas territories will be regulated. The relevant provisions of Schedule 5 to the Bill will come into effect after March 2014, ensuring that the effects of the revised Privacy Act can be realised. This follows from the fact that Schedule 5 will not commence until the New Zealand Parliament has enacted its amended patents legislation, which will have a 12-month commencement period.

As practical matter, the decisions of New Zealand examiners will be monitored and quality controlled. The New Zealand examiners' performance will be subject to the same quality review systems as Australian examiners. If New Zealand examiners do not maintain sufficient standards, then their delegated ability to examine under the Australian Patents Act will be revoked.

IP Australia has numerous internal safeguards in place. Where decisions of examiners are subject to dispute by a patent applicant, the matter is referred to supervising examiners and to the Deputy Commissioner of Patents. If the dispute continues, the usual procedure is to request a hearing before a hearings delegate of the Australian Commissioner, who would be an officer of the Australian Public Service. It would be this decision, and not the decision of the New Zealand examiner, that would be appealed to a court.

In addition, an Australian patent applicant whose application is examined by a New Zealand delegate of the Australian Commissioner will be able to apply under the Compensation for Detriment caused by Defective Administration (CDDA) Scheme for any defective administrative action made by a New Zealand delegate. The CDDA Scheme exists to provide a discretionary remedy for defective actions of Financial Management and Accountability Act 1997 agencies.

This position has been confirmed by the Department of Finance and Deregulation, the Department with policy responsibility for the CDDA Scheme. IP Australia, not the New Zealand delegate or government would be able to consider and pay any claim.

I trust that the above advice addresses the matters raised by the Committee in relation to the Bill.

### ***Committee Response***

The committee thanks the Attorney-General for this response, which addresses its concerns.

# Marriage Amendment (Celebrant Administration and Fees) Bill 2013

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Attorney-General

## *Introduction*

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Attorney-General responded to the committee's comments in a letter received 20 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 5 of 2013 - extract*

## **Background**

This bill amends the *Marriage Act 1961* to:

- provide for a celebrant registration charge to be imposed from 1 July 2013 on Commonwealth-registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages;
- provide for the deregistration of celebrants who do not pay the celebrant registration charge or obtain an exemption;
- enable the imposition of a registration application fee for prospective celebrants seeking registration;
- provide for exemptions and the imposition of processing fees for applications for exemptions;
- remove the requirement for marriage celebrants performance reviews every five years; and
- make minor amendments to the Marriage Celebrants Program.

## **Delegation of legislative power**

### **Schedule 1, item 3, proposed subsection 39FA(3)**

This subsection provides for the making of regulations which may grant exemptions, on grounds specified in the regulations, from liability to the pay celebrant registration charge (paragraph (a)) and to provide for internal review of decisions to refuse to grant exemptions (paragraph (b)). The grounds for granting exemptions and the provision for

internal review of exemption decisions may be considered to raise important questions and it is not clear why they cannot be dealt with in the legislation.

The same issue arises in relation to item 6 of Schedule 1, in relation to registration application fees.

**As the committee prefers that important matters be included in primary legislation unless a strong justification is provided it seeks the Attorney-General's advice as to the justification for the proposed approach.**

*Pending the Attorney-General'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.*

### ***Attorney-General's response - extract***

The Committee has requested justification for the treatment of exemptions and internal review of exemption decisions in proposed subsection 39FA(3). The Committee inquires specifically about why these matters are not included in the primary legislation.

Proposed subsection 39FA(3) of the Bill allows regulations to provide for the granting of exemptions, on grounds specified in the regulations, from liability to pay celebrant registration charge in respect of a financial year; and to provide for internal review of decisions to refuse to grant exemptions. The Bill does the same in relation to the registration application fee- proposed subsection 39D(1C).

Following extensive consultation with celebrants prior to drafting the legislation, a policy decision was made to allow for the granting of exemptions from both the celebrant registration charge and the registration application fee, in certain circumstances. The Bill is drafted to allow for such exemptions, but for the Regulations to set exemption grounds and the process.

The reason for omitting the grounds from the primary legislation is merely to reduce complexity in the Bill.

The grounds for exemption will be contained in amendments to the *Marriage Regulations 1963* following passage of the Bill. The Regulations will allow celebrants to apply for an exemption from the celebrant registration charge on the basis of remoteness or specified circumstances. The intention of the former is to allow remote communities to maintain access to celebrancy services. The latter includes long term absence from Australia, serious illness or caring responsibilities. It is intended to apply only to celebrants who need a temporary period of 'time out' from their celebrancy duties due to personal circumstances, without having to resign and reapply to become a celebrant at a later date. Given that these

are administratively procedural concepts, it was decided that they were more appropriately placed in Regulations.

The Regulations will also allow an applicant to apply for an exemption from the registration application fee on the basis of remoteness.

Proposed paragraph 39FA(3)(c) allows regulations to provide for internal review of decisions to refuse to grant exemptions. Proposed subsection 39FA(5) sets out the possible outcomes of such an internal review decision. While the Regulations allow for the administrative process of applying for an internal review, the possible outcomes of that review are provided for in the primary legislation. This is mirrored in Item 6, Schedule 1 for the registration application fee. The reason for this is again to reduce complexity in the Bill and place process based provisions in the Regulations.

I note that the procedures set out in the Regulations will be subject to Parliamentary scrutiny and disallowance as the Regulations will be legislative instruments. This will assist in ensuring that the delegation of this power will be used appropriately.

#### ***Committee Response***

The committee thanks the Attorney-General for this response and notes that the regulations will be subject to disallowance. **The committee requests that the key information outlined above be included in the explanatory memorandum.**

# Private Health Insurance Legislation Amendment (Base Premium) Bill 2013

Introduced into the House of Representatives on 15 May 2013

Portfolio: Health and Ageing

## *Introduction*

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 6 of 2013 - extract*

## **Background**

This bill amends the *Private Health Insurance Act 2007* to index the Australian Government's private health insurance rebate for each private health insurance policy from 1 April 2014 to a proportion of the premium charged for that policy as at 1 April 2013.

## **Delegation of legislative power**

### **Item 4, proposed subsection 22-50(5)**

Item 4 establishes formulas and other relevant information to calculate the *base premium* for a private health insurance policy, which amount will then be used to determine other figures relating to health insurance rebates. One component of the calculation, the *weighted average ratio* described in subsection 22-50(5), will be determined in accordance with the Private Health Insurance (Incentive) Rules. The explanatory memorandum (at p. 8) notes this arrangement, but does not explain why it is appropriate to leave this matter to be dealt with by legislative instrument (the Rules) rather than including it in primary legislation. **The committee prefers that important matters are included in primary legislation whenever possible and therefore seeks the Minister's advice as to whether the use of the Rules for this purpose is appropriate.**

*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 my advice as to whether the use of the Private Health Insurance (Incentive) Rules is an appropriate instrument to deal with the calculation of the weighted average ratio described in subsection 22-50(5) of the Bill, rather than including it in the primary legislation.

On 17 June 2013, this matter was raised in the Senate by Senator Jacinta Collins, Manager of Government Business in the Senate and Parliamentary Secretary for School Education and Workplace Relations. As mentioned by Senator Collins, the calculation of a weighted average ratio is necessary to determine the base premium for product subgroups that are made available after 1 April 2013. The weighted average ratio will take effect on and from 1 April 2013, in line with the commencement of the relevant provisions of the Bill. Industry is to be consulted on the final specifics of the weighted average ratio.

On 6 June 2013, my Department provided a submission to the Senate Community Affairs Legislation Committee on the Bill. On page eight of the submission my Department gave a detailed example of how the weighted average ratio for new products is intended to work. The use of a weighted average ratio does not go beyond the more general operation of the Bill, which sets a base premium for every health insurance policy made available.

It is the Australian Government's view that the use of the weighted average ratio is a technical detail necessary to ensure consistency of the private health insurance rebate entitlement between existing and new policies. As with measures of this nature, it is required that Government continue to monitor implementation. Best practice monitoring of the operation of the technical specifics of the weighted average ratio, will involve continuous consultation and feedback from industry.

Over the course of time, it may be necessary to make adjustments to the technical detail of the weighted average ratio, as a result of feedback from industry, to guarantee that the objectives of the Bill are met without undue operational or implementation complexities. It was decided that the detailed specifics of the weighted average ratio be included in the Private Health Insurance (Incentives) Rules to facilitate effective continuation of the intended operation of the Bill.

It is a practicable and appropriate course of action to provide for the technical specifics of the weighted average ratio in the Private Health Insurance (Incentives) Rules rather than in the primary legislation.

In accordance with the *Legislative Instruments Act 2003*, any technical adjustments to the weighted average ratio after commencement of the Bill will be subject to consultation with industry and be tabled before each House of Parliament.

### ***Committee Response***

The committee thanks the Minister for this response and notes the technical and detailed nature of the relevant information, the need for continuous consultation and feedback and possible adjustments (subject to consultation with industry). **The committee requests that the key information outlined above be included in the explanatory memorandum.**

# Protection of Cultural Objects on Loan Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Regional Australia, Local Government, Arts and Sport

## *Introduction*

The Committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the Committee's comments in a letter dated 19 February 2013 which was published in the committee's *Second Report of 2013*. The committee sought further advice and the Parliamentary Secretary responded in a letter dated 17 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 1 of 2013 - extract*

## **Delegation of legislative power—important matters to be dealt with in regulations**

### **Clause 21**

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

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

### *Minister's First Response - extract*

The Committee has also requested further consideration of clause 21 of the PCOL Bill, which enables the Governor-General to make regulations prescribing matters required or permitted by the Bill and, in particular, provides that regulations dealing with consultation

requirements, publication requirements and reporting requirements may be made. The Committee has sought advice on whether those matters could be included in the primary legislation.

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

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

***Committee's initial response – further information sought***

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

***Parliamentary Secretary's Further Response - extract***

I understand that the Scrutiny of Bills Committee requested further information in relation to the regulation making power under section 21 of the Act, and was particularly interested

in how the temporary restriction on legal action is balanced by the consultation and publication requirements which will be included under regulations.

The primary purpose of the Act is to encourage the loan of significant cultural objects from overseas for temporary public exhibition in Australia thereby providing increased access for all Australians to foreign and Australian objects which are held in overseas collections. The Act achieves this by providing a level of protection to lenders that the cultural material will not be subject to legal action for the limited period it is in Australia.

Subsection 21(3) of the Act outlines the key areas where regulations may be made, including in relation to requirements for consultation, publication and reporting. As outlined in the Statement of Compatibility with Human Rights, the limitation on the ability of persons to take action through the Australian legal system, for the limited period of the loan, has been balanced against the public interest of the significant social, economic and cultural benefits that can be delivered through securing international loans for temporary public exhibition.

The consultation provisions, which will be included in regulations, will require borrowing institutions to consult with members of communities, or organisations representing them, about proposed loans of objects in circumstances where those communities or organisations may have a particular interest or relationship with the objects that will be the subject of the loan. As noted in the Statement of Compatibility, requiring consultation prior to the importation of the objects for exhibition is a transparency measure that provides a mechanism for the identification of any issues in relation to a proposed loan, as well as opportunities for members of communities to raise any concerns about a proposed loan. For example when considering the loan of objects which have been associated with periods of conflict consultation with groups representing the communities affected by that conflict is vital to ensure that despite the borrowers thorough research there are no perceived issues around the legal or ethical ownership of the items. In addition, it is envisaged that specific consultation requirements will be developed for loans of Aboriginal and Torres Strait Islander material to provide opportunities for Indigenous people who may have an interest in objects proposed for loan to learn about and be actively engaged in discussions on proposed loans. These requirements will provide principles and guidance on appropriate engagement with Aboriginal and Torres Strait Islander communities to provide opportunities for informed input into decisions regarding the loan and presentation of their cultural heritage. Further it is envisaged that this consultation will facilitate knowledge sharing regarding the Indigenous cultural material held in overseas collections.

The regulations will include requirements that borrowing institutions publish certain information about proposed loans of cultural objects from overseas prior to their importation into Australia. The publication provisions are an important transparency mechanism that, it is envisaged, will enable people to raise questions about the object's history and ownership. In addition to the consultation with specific communities it is considered that the provision of information to the broader public will provide a further

avenue to ensure that all aspects of interest in a proposed loan are considered before the objects enters Australia.

Consultations are being held around the country with major national, State and Territory collecting institutions, Indigenous Advisory Committees and other interested groups to ensure the requirements for consultation and publication that will be included in the regulation reflect best practice. The provision of this detail in regulation will ensure that there is sufficient flexibility to enable the requirements to remain relevant by reflecting current professional practice in the collections sector and ensure they provide a benchmark for Australian best practice.

The inclusion of this detail in regulation will not limit the effectiveness of these requirements as an effective balance to the protections offered by the Act or as accountability mechanisms. It is intended that borrowing institutions will be required to provide an annual report to the Minister on their activities relevant to the operation of the Act, including reporting on consultation and publication activities in relation to international loans.

I hope this information is of assistance to the Committee and thank you for your interest in this matter.

***Committee Further Response***

The committee thanks the Parliamentary Secretary for this further detailed response and notes that it would have been useful for the key information outlined above to have been included in the explanatory memorandum.

# Public Governance, Performance and Accountability Bill 2013

Introduced into the House of Representatives on 16 May 2013

Portfolio: Finance and Deregulation

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 25 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 6 of 2013 - extract***

## **Background**

This bill establishes a system of governance and accountability across Commonwealth entities by:

- establishing a uniform set of duties for accountable authorities; establishing a uniform set of duties for all officials who use or manage public resources;
- establishing a comprehensive and uniform reporting framework including requiring the development of corporate plans;
- placing a duty on entities to establish appropriate systems of risk oversight and management (earned autonomy);
- enabling Commonwealth entities to partner with the states, territories and not-for-profit sector; and
- clarifying the Finance Minister's role in relation to the financial framework.

## **Delegation of legislative power**

### **Clause 87**

This clause enables the executive government to establish new corporate Commonwealth entities through rules made for this purpose. This is a significant new power as new bodies corporate are usually established by an Act of Parliament. This clause provides power to create statutory bodies corporate, which are not companies, by rules made under this bill.

The explanatory memorandum includes a detailed justification of this new power. The following points are raised:

- The power cannot be used to abolish an entity that has been established by legislation or to wind up a company;
- Bodies established under this power will be subject to the *PGPA Act*;
- The power enables a more efficient option for forming and abolishing bodies corporate. An act of Parliament is time consuming and this limits the government's capacity to be responsive to its operating environment. Although the Government has the option to establish companies under the Corporations Act, this option is often inappropriate and the proposed power provides more scope for parliamentary accountability and oversight.
- Other legislative accountability frameworks, such as the *FOI Act*, can be applied to bodies corporate formed under this clause in accordance with paragraph 87(j).
- The power under this clause is not unprecedented—a similar power exists under the *Primary Industries and Energy Research and Development Act 1989* to create statutory authorities for research and development purposes.

In light of the explanation provided, the committee leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

However, while the creation of bodies corporate under the proposed power does have accountability advantages when compared to the formation of companies under the Corporations Act the committee has a concern in relation to accountability mechanisms. Proposed paragraph 87(j) provides only for the regulations to deal with the application of other Commonwealth laws to the body corporate and this does not seem to ensure that appropriate accountability mechanisms will definitely apply. The explanatory memorandum states that 'when the Finance Minister proposes to set up a body corporate under clause 87, he or she will undertake consultation with appropriate Ministers to ensure such frameworks apply' (at 58).

**The committee would prefer that this requirement be included in the primary legislation and therefore seeks the Minister's advice as to whether consideration has been given to making such consultations a statutory requirement or to including other legislative mechanisms to ensure that appropriate accountability frameworks apply.**

*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.*

## Delegation of legislative power—Henry VIII clause

### Clause 104

This clause provides that the Finance Minister may make rules to modify the application of the bill in relation to certain Commonwealth entities and companies, namely, intelligence, security or law enforcement agencies. The explanatory memorandum indicates that the application of the bill to some such entities may be contrary to the Commonwealth's security interests. It is further noted that this provision is equivalent to an existing section of the FMA Act. A similar power exists in relation to modifications being made to the application of the bill to the Commonwealth Superannuation Corporation 'so as not to interfere with its specific obligations as the corporate trustee of the Australian Government's main civilian and military superannuation schemes'. **In the circumstances the committee leaves question of whether the proposed approach is appropriate to the Senate as a whole.**

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

#### ***Minister's response - extract***

The approach taken under the proposed Bill is consistent with that taken under the existing legislation it seeks to replace; namely the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). As in the case of regulations issued under those pieces of legislation, the rules to be issued under the provisions of this Bill are legislative instruments. As a consequence they will need to be presented to Parliament and will be subject to disallowance.

The Government has also made commitments in the presentation of the Bill to the Parliament, in the Explanatory Memorandum and in the course of debate that the rules will be subject to extensive consultation, including with the Joint Committee of Public Accounts and Audit (JCPAA), before they are presented to the Parliament for consideration of disallowance.

The Government has also taken up the suggestion of the JCPAA by including (at clause 112 of the Bill) a requirement that the legislation is to be subject to review three years after it comes into full operation, with the resulting report to be tabled in both Houses.

Rules to be established under clause 87 (establishing new corporate Commonwealth entities), clause 104 (Rules modifying the application of this Act) and clause 105 (Rules in relation to other CRF money) will be subject to both the consultation commitments and to being subject to disallowance by the Parliament.

Clauses 87 and 104 are based on provisions in legislation previously approved by Parliament (the *Primary Industries and Energy Research and Development Act 1989* for clause 87 and existing provisions within the FMA and CAC Acts for Clause 104 ). Research and development corporations are already established under regulation in the way proposed in the Bill, and modifications for intelligence and security organisations are already achieved through regulation. Both arrangements are currently subject to disallowance in relation to their relevant regulations, and this disallowance requirement will continue.

### ***Committee Response***

The committee thanks the Minister for her response in relation to clauses 87 and 104. The committee notes the points made including that future rules will be subject to extensive consultation, the consistency with current legislation, the availability of disallowance processes and that research and development corporations are already established with intelligence and security organisation modifications achieved through regulation. **The committee's view remains, however, that it is preferable that schemes established primarily through delegated or non-legislative mechanisms are supported by provisions in relevant primary legislation that include a requirement for accountability and governance standards. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

### ***Alert Digest No. 6 of 2013 - extract***

#### **Standing appropriation Subclause 105(3)**

This clause provides that the CRF is appropriated for the purposes of the expenditure of other CRF money by a person other than the Commonwealth or a Commonwealth entity if the expenditure is in accordance with requirements prescribed the rules (pursuant to subclause 105(1)) and the Finance Minister is satisfied that the expenditure is not authorised by another appropriation. The explanatory memorandum notes that occasionally ‘it is the case that persons other than the Commonwealth... may hold and spend money that is part of the CRF’, for example if a person outside the Commonwealth was acting as an agent of the Commonwealth in, for example, collecting money payable to the Commonwealth and making payments from that money’. The explanatory memorandum argues that subclause 105(3) designed to ‘provide constitutional certainty for certain situations that may arise in relation to money’ that is not relevant money as defined in the Bill but ‘may nevertheless be money forming part of the CRF’. The clause will ensure that

appropriations in these circumstances are ‘appropriations made by law’ for the purposes of section 83 of the *Constitution*.

**In the circumstances the committee leaves question of whether the proposed approach is appropriate to the Senate as a whole.**

*In the circumstances, the committee makes no further comment on this matter.*

### ***Minister's response - extract***

Clause 105 relates to an extremely limited number of circumstances and has been included as a result of advice from the Australian Government Solicitor.

Other provisions within the Bill deal with the coverage of appropriated funds held by or to the credit of a bank account of a non-corporate Commonwealth entity. Clause 105 covers those circumstances that may arise where the funds are held by a party other than the Commonwealth, but the funds are still considered in a legal sense to be part of the Consolidated Revenue Fund. The Rules will cover such circumstances, they will be subject to disallowance, and will be the subject of extensive consultation to ensure their efficacy before they are submitted to Parliament for its consideration.

### ***Committee Response***

The committee thanks the Minister for this additional information.

# Student Identifiers Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Industry, Innovation, Science, Research and Tertiary Education

## *Introduction*

The committee dealt with this bill in *Alert Digest No.5 of 2013*. The Minister responded to the committee's comments in a letter dated 24 June 2013. A copy of the letter is attached to this report.

### *Alert Digest No. 5 of 2013 - extract*

## **Background**

This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2014 including:

- providing for student identifiers to be assigned, collected, used and disclosed; providing for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken;
- establishing the Student Identifiers Agency to administer the scheme; and
- providing for the functions, powers, appointment and terms and conditions of the Chief Executive Officer of the agency.

### *Additional comments by the Minister - extract*

In responding to the Committee's queries regarding the Student Identifier Bill 2013 (the SI Bill), it is important to provide context regarding the vocational education and training (VET) sector. The SI Bill, provides for the introduction of a unique student identifier for the Vocational Education and Training (VET) sector. The scheme is an initiative of the Council of Australian Governments (COAG) that has been jointly agreed between the Commonwealth, states and territories under the auspices of the Standing Council for Tertiary Education, Skills and Employment (the Standing Council).

The VET sector is governed primarily through the *National Vocational Education and Training Regulator Act 2011* (Cth) (the NVETR Act) and regulated by a national body set

up under that legislation- the Australian Skills Quality Authority (ASQA). However, the NVETR Act operates on the basis of referral of powers from the states. There are two States (Western Australia and Victoria) which have not referred the necessary powers to support the NCWRE Act. Registered Training Organisations (RTOs) that are not registered under the NCETR Act or the *Education Services for Overseas Students Act 2000* and which operate solely within the borders of one of those two states are governed under relevant state legislation and by state based regulators.

In order to maintain a cohesive national VET system, the Standing Council has agreed that the requirements on RTOs and Regulators in the non-referring states would be agreed by the Standing Council and reflected in the Australian Quality Training Framework (AQTF). The regulators in non-referring states regulate in accordance with the Standards under the AQTF.

The NVETR Act supports this national approach by enabling the Commonwealth Minister to make Standards for RTOs and Regulators and to specify data provision requirements, with the agreement of the Standing Council (see Part 4 of the NVETR Act).

### ***Alert Digest No. 5 of 2013 - extract***

#### **Trespass on personal rights and liberties—privacy**

#### **Delegation of legislative power**

#### **Parliamentary scrutiny**

#### **Various provisions**

As recognised in the statement of compatibility, the bill may impact on privacy interests of persons in a number of ways. In general, the Committee leaves the question of whether limitations on privacy are reasonable for achieving the bill's policy objectives to the Senate as a whole.

**However, the Committee is interested to better understand whether further protections of individual privacy have been considered or might be considered in relation to clauses 17 and 24 of the bill.** Both clauses enable the use of disclosure information (that will include personal information) if the use of disclosure is for the purposes of research and, among other things, that the disclosure 'meets the requirements specified by the Standing Council'.

The explanatory memorandum indicates (at pages 46 and 49) that these protocols will ensure the integrity of the scheme and provide a further layer of protection of individual privacy. The statement of compatibility states that research related use and disclosures will 'ultimately be for the benefit of students and the wider community' (at 7). It is unclear why protocols designed to protect privacy in relation to research related use and disclosure could not be included in the primary legislation. Further, although it may be accepted that

these protocols may have these beneficial outcomes, it is a matter of concern that they are not subject to any form of parliamentary accountability as they are not described as legislative instruments. **The committee is concerned that protocols relied upon to adequately protect privacy interests will not be subject to parliamentary scrutiny and requests a more detailed explanation from the Minister as to why this approach is necessary and considered appropriate. It is noted that if the protocols cannot be subjected to parliamentary scrutiny that consideration could be given to whether the bill could require the involvement of the Information Commissioner in the development of the protocols or review of the protocols. (Under clause 23 of the bill the Information Commissioner is given additional functions.)**

*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 and they may also 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***

#### **Issue 1: Trespass of personal rights and liberties – privacy**

*The Committee expressed interest in obtaining a better understanding of whether further protections of individual privacy have been considered or might be considered in relation to clauses 17 and 24 of the Bill. The Committee also expressed a concern that protocols relied upon to adequately protect privacy interests will not be subject to parliamentary scrutiny and requested a more detailed explanation from the Minister as to why this approach is necessary and considered appropriate. The Committee noted that if the protocols cannot be subjected to parliamentary scrutiny, that consideration could be given to whether the Bill could require the involvement of the Information Commissioner in the development of the protocols or review of the protocols.*

#### **Response**

To assist the Committee's understanding of the protections of individual privacy provided by clauses 17 and 24, it is relevant to consider the full set of privacy protections provided by the SI Bill. There have been broad ranging and iterative consultative processes with stakeholders during the past two years to identify potential issues associated with the introduction of a unique student identifier for the VET sector and to design solutions to ameliorate their impact. Given the potential impact on individual privacy, extensive consultations have been undertaken with the Office of the Australian Information Commissioner (OAIC) and the offices of the privacy commissioners in Queensland, NSW

and Victoria regarding the privacy aspects of the 51 Bill, including the 'requirements' as mentioned in Clause 24(2)(b) of the 51 Bill.

The principal features of the privacy protections in the scheme are:

- A Confidentiality Scheme: which provides that the student identifier must not be collected, used or disclosed by an entity if they are not the individual, or the collection, use or disclosure is not authorised in the 51 Bill or the Regulations (see clause 16). This protection of the identifier operates in conjunction with the existing privacy protections for personal information contained in Commonwealth and State/Territory privacy legislation.
- Individual Control: the principle underpinning the scheme is that individuals have control over their identifier and can determine who can have access to the personal and educational records associated with it (see subclause 26(1) and 26(3)). The ICT system which will underpin the scheme is specifically being designed and built to incorporate these important safeguards.
- Regulatory Oversight: Clause 22 establishes that contraventions of clause 10 (dealing with destruction of records used in applying for a student identifier), clause 15 (dealing with protection of the student identifier from misuse interference and loss), and clause 16 (dealing with unauthorised collection or disclosure of the student identifier), are to be taken to be an interference with the privacy of the individual for the purposes of the *Privacy Act 1988* (Cth) (the Privacy Act) and subject to the provisions of that Act. This means that the Privacy Commissioner can investigate a breach of clauses 10, 15 or 16.
- Retention and Storage of Information: the requirement that no personal information collected solely for the purpose of applying for a student identifier can be retained unless required by law (see clause 10).

In February 2013, the OAIC provided a submission to the Department's public consultation on the legislative package for the unique student identifier scheme.<sup>2</sup> In that submission, the OAIC notes that it provided policy advice about the privacy issues associated with the scheme at various stages in the development of the legislation. One of the issues raised in that submission was about the provisions that permit the disclosure of student information and student identifiers for research purposes.

The OAIC provided a further submission<sup>3</sup> in April this year - this time to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the 51 Bill. That submission indicates that the "OAIC and the Department have worked

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<sup>2</sup> See 'Consultation on the Legislative Package for the Unique Student Identifier: Submission to the Department of Industry, Innovation, Science, Research and Tertiary Education (February 2013)' at <http://www.oaic.gov.au/publications/submissions.html>

<sup>3</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=eet\\_ctte/student\\_identifiers/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/student_identifiers/submissions.htm).

collaboratively to address many of the issues raised in [the February] submission." OAIC went on to say that "the OAIC ... welcomes the approach taken in the [the 51 Bill] to reflect the principles in the Privacy Act by outlining specific circumstances in which particular entities may collect, use or disclose an individual's student identifier." The OAIC also stated that the approach to privacy protection adopted in the 51 Bill was welcome and reflects the principles in the Privacy Act in terms of both protecting the student identifier and protecting records, which reflect the security and access principles in the Privacy Act.

In addition, the independent privacy impact assessment undertaken by Minter Ellison Lawyers and Salinger Privacy in October 2012 found that a range of sensible privacy-positive design elements have been adopted in developing the student identifier system, which have eliminated or mitigated actual or potential privacy risks. The privacy impact assessment concluded that none of the identified risks present an unacceptable privacy impact, or require mitigation measures that would significantly delay the implementation of the scheme.

It is also worth noting that the provisions governing access to student identifiers would operate in addition to existing privacy provisions in both Commonwealth and State/Territory privacy legislation. This means that in collecting, using and disclosing student identifiers, individuals need to comply with both State/Territory and Commonwealth privacy legislation regulating the use of personal information, as well as specific restrictions in the SI Bill in relation to student identifiers.

Moving now to the Committee's specific area of interest, as noted in the EM (see page 12), currently longitudinal research databases for the VET sector can only be created through statistical matching. During consultations around the development of the Bill, the Australian Bureau of Statistics (ABS) raised with the department an example of how the national collection of VET data could be used if student identifiers were introduced. The ABS saw the value of developing a longitudinal data set across the various education sectors. In order to create this data set, a researcher would need to pull identified data from each education sector and match for individuals across those sectors. The resultant data set would then be altered so that no individual could be identified. It is the resultant data set that would be used to carry out the research, but in order to create that data set, identified data would need to be pulled from each education sector- in the VET sector, that would involve an initial disclosure of the student identifier.

Clauses 17 and 24 would enable the creation of reliable data sets on which to base longitudinal studies of VET activity and educational pathways over an individual's lifecycle, including the monitoring of learner pathways and transitions for disadvantaged learners (see page 22 of the EM). The 'requirements' mentioned in Clause 24(2)(b) are currently being prepared for consideration by the Standing Council. In this respect, the Department is working with the OAIC and it is expected that through the Standing Council all state and territory privacy commissioners will also be engaged in the development of the 'requirements', reflecting the cross jurisdictional nature of the Student Identifier as an initiative of the Council of Australian Governments.

In practical terms, **it is anticipated** that any relevant research proposal will need to satisfy three prerequisites:

1. demonstrate that the information is reasonably necessary for the proposed research, or the compilation or analysis of statistics, is in the public interest; and either:
  - a. that purpose cannot be served by the use of information that does not identify the individual or from which the individual's identity cannot be reasonably be ascertained, and it is impractical for the organisation to seek the consent of the individual for the use; or
  - b. reasonable steps are taken to de-identify the information.
2. provide an assurance that, if the information could reasonably be expected to identify individuals, the information will not be published in generally available publications.
3. the proposal would need to be examined and approved by an Ethics Committee, on the basis that the public interest in the research or the compilation or analysis of statistics substantially outweighs the public interest in the protection of privacy.

A compliant research proposal would be considered by a committee comprising a representative from the Student Identifier Agency and the National Centre for Vocational Education and Research (the NCVER) (either of which may be excluded in the case of perceived conflict of interest) and other members as appointed by the Minister in consultation with the Standing Council. It is worth noting that both the Student Identifier Agency and the NCVER are subject to the Privacy Act.

Given this, the provisions of the 51 Bill that relate to access by researchers to student identifiers reflect an appropriate balance between providing a high level of privacy protection for individuals regarding the collection, use and disclosure of student identifiers, and allowing sufficient flexibility to accommodate the wide range of legitimate requests for access to student identifiers by researchers. I submit that it does not inappropriately delegate legislative powers in breach of principle 1(a)(iv) of the Committee's terms of reference.

### ***Committee Response***

The committee thanks the Minister for her comprehensive response and notes the expected safeguards. **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 consideration of the Senate.**

### ***Alert Digest No. 5 of 2013 - extract***

#### **Delegation of legislative power**

##### **Clause 21**

Clause 21 of the bill provides that an entity is authorised to collect, use or disclose a student identifier of an individual if so authorised by the regulations. Clearly this clause enables the making of regulations that may infringe on an individual's privacy. As such, the committee expects to see a strong justification for departing from the general principle that important matters should be dealt with in primary legislation.

The explanatory memorandum addresses the appropriateness of this clause at pages 47 and 48. It is explained that the regulations made under this clause will authorise RTOs to collect and use student identifiers for the purposes of meeting its reporting obligations under the Australian Quality Training Framework Essential Conditions and Standards for Initial Registration and the Australian Quality Training Framework Essential Conditions and Standards for Continuing Registration. It is apparent that there is a need for the regulations to refer to these documents in order to ensure that the collection and use of student identifiers enables RTOs to comply with their up-to-date reporting obligations.

The regulations will, it is noted, provide for collection, use and disclosure to only a limited number of entities (eg former and current RTOs, schools whose students undertake a VET course, and other VET related bodies) in specific circumstances (at 47). The explanatory memorandum goes on to detail the initial matters it is envisaged will be covered by the regulations. The overall justification for providing for these matters is that permitted uses of student identifiers needs to be responsive to the national VET training system.

Although the need for a regulation making power may be accepted, it is not clear why many of the matters listed on p 48 of the explanatory memorandum to be dealt with by regulations cannot be dealt with in the primary legislation. However, as the regulations will be disallowable instruments and their making and amendment will require the agreement

of the states and territories through the Standing Council, **the committee notes the above comment but leaves the appropriateness of the overall approach to the Senate as a whole.**

*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***

#### **Issue 2: Delegation of Legislative Power- Clause 21**

*The Committee noted their concern that clause 21 of the Bill enables the making of regulations that may infringe on an individual's privacy and that as such, the Committee expects to see a strong justification for departing from the general principle that important matters should be dealt with in primary legislation. However, as the regulations will be disallowable instruments and their making and amendment will require the agreement of the states and territories through the Standing Council, the committee notes the above comment but leaves the appropriateness of the overall approach to the Senate as a whole.*

#### **Response**

As noted above, the development of the SI Bill has been the subject of wide ranging consultations. One of the issues raised by stakeholders during that development process was the need for an effective balance between privacy protection and the ongoing operation of the VET sector.

The 51 Bill contains a confidentiality scheme to protect the student identifier. This was seen as providing the highest level of protection to individuals. However, the consequence of including the confidentiality scheme is that it is necessary to authorise all uses of the student identifier that would take place in the normal business operations of entities in the VET sector. For example, where a student moves from one RTO to another, that student's records can be forwarded- this disclosure of the student identifier has to be specifically authorised. RTOs also have obligations to report data about the training they deliver. In meeting these requirements, RTOs provide data they have on students to, and through, a number of entities (for example, Boards of Studies, State Training Authorities, other funding bodies).

The matters listed on page 48 of the EM (and which are reflected in the draft Regulations that were released for public consultation along with the draft 51 Bill earlier this year) are a map of the existing data flows within the VET sector that will be impacted by the requirement for the Student Identifier to be captured with the data held by entities within the VET sector under the Australian VET Management Information Statistical Standard.

Some of the data reporting requirements on RTOs are governed by the Standards under the NVETR Act and the AQTF which will change from time to time. As noted above, the Standards are made under the NVETR Act by the Minister with the agreement of the Standing Council - see section 185 and 187 of the NVETR Act. I submit that, it is appropriate that the authorisation to collect, use and disclose the student identifier be managed in the same way.

As the Committee notes, the regulations will be a disallowable instrument, necessitating the scrutiny of the Commonwealth Parliament in relation to their creation and amendment. The creation and amendment of these regulations will also require the agreement of the states and territories through the Standing Council. I submit that this provides a sufficient level of parliamentary scrutiny. Moreover, the Bill operates alongside the protections provided to personal information under the Privacy Act (or the equivalent legislation within the State and Territory jurisdictions).

#### ***Committee Response***

The committee thanks the Minister for this additional information.

#### ***Alert Digest No. 5 of 2013 - extract***

#### **Merits review**

##### **Clause 25**

This clause provides that the CEO may, on request, give an individual who has been assigned a student identifier access to an authenticated VET transcript or extract from such a transcript. Although subclause 25(3) provides that the CEO must give reasons for any decision to refuse to give access, there does not appear to be any right to have such a decision reviewed. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of providing for merits review of these discretionary decisions and whether it is appropriate to include more guidance in the legislation as to how this discretionary power is to be exercised.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

### ***Minister's response - extract***

#### **Issue 3: Merits review - Clause 25**

*The Committee asked whether consideration had been given to the appropriateness of providing for merits review of the discretionary decisions of the Chief Executive Officer (CEO) under clause 25 relating to access to an authenticated VET transcript and whether it is appropriate to include more guidance in the legislation as to how this discretionary power is to be exercised.*

#### **Response**

In responding to the Committee's concern, it is relevant to consider the process for an individual being given access to an authenticated VET transcript under clause 25 of the SI Bill. In practice, this is a fully automated process managed by the national ICT system being developed within the department for the Student Identifiers Agency. That system will allow the individual to access their student identifier account (using a password) and the individual would be able to request an authenticated VET transcript. The ICT system will link the individual's account with records held within the NCVER associated with that student identifier and immediately return all of the relevant information to the individual in the form of an authenticated VET transcript.

The records held within the Student Identifier Agency and the NCVER are only linked when a valid request (that is, a request made by the individual- or someone authorised by the individual – and which includes the necessary information for the request to be processed) is made and the ICT system does not retain a copy of the transcript.

As indicated on page 52 of the EM, the discretionary power in clause 25 that would enable the CEO to not provide access to an authenticated VET transcript is to take account of circumstances such as when the CEO is resolving a problem with that particular student identifier, such as resolving duplicate student identifiers (as envisaged under clause 11 of the SI Bill). In practice, the power to not provide a transcript will only be exercised when the identifier has been flagged in the ICT system as one where the CEO has identified a problem, or it is being investigated because the CEO has concerns that there is a problem. Otherwise the transcript would be generated automatically upon request by the individual or someone authorised by the individual.

In cases where this is a problem with the student identifier (such as one identifier having been issued to more than one person, or the one person has more than one identifier), any authenticated VET transcript produced by the ICT system in relation to that student identifier could be incorrect. The resultant transcript could also contain personal information belonging to another individual. Given the implications of such a document being prepared by the Student Identifiers Agency and relied on by the individual into the future, I submit that it is appropriate that the CEO be empowered to not provide it.

In recognition of the potential impact that not providing an authenticated VET transcript may have on the individual, the CEO is required to provide notice of their decision and a statement of reasons for that decision.

Clause 12 of the SI Bill provides for review by the Administrative Appeals Tribunal (AAT) by an individual in respect of decisions by the CEO to refuse to assign an identifier to an individual under clause 9, and/or a decision under clause 11 to revoke a student identifier of the individual or to assign a new identifier to the individual. A similar approach was considered in respect of the CEO's decisions under clause 25. However, advice from the Administrative Law Unit within the Attorney General's Department indicated that:

- review of decisions under clause 25 of the Bill are not appropriate for the AAT as they relate to the granting of access to personal information;
- there are additional rights to access personal information available under the Privacy Act (under current Information Privacy Principle 6 and the new Australian Privacy Principle 12), and section 15 of the *Freedom of Information Act 1982* (Cth)(FOI Act) in addition to the right of access provided by clause 25 of the Bill; and
- including a right of review in clause 25 of the Bill may substantively overlap with the right of review available under the FOI Act.

For this reason, decisions under clause 25 were excluded from review by the AAT.

The Committee also asked whether it might be appropriate to provide more guidance in the legislation *as to* how this discretionary power is to be exercised. However, given the fully automated nature of the process, and the limited circumstances in which the CEO would not provide access, I submit that there is sufficient guidance already provided.

#### ***Committee Response***

The committee thanks the Minister for her response and **requests that the key points outlined above be included in the explanatory memorandum.**

## ***Alert Digest No. 5 of 2013 - extract***

### **Delegation of legislative power Clause 53**

Subclause 53(1) provides that a RTO must not issue a VET qualification or VET statement of attainment to an individual unless the individual has been assigned a student identifier. Subclause 53(2), however, provides for an exception in relation to an issue of such a qualification or statement of attainment under subsection 3, which provides that the Minister may, by legislative instrument, specify an issue to which subsection (1) does not apply by reference to one or more of:

- (a) the RTO issuing the qualification or statement of attainment;
- (b) the qualification or a statement of attainment being issued; or
- (c) the individual to whom the qualification or a statement of attainment is being issued.

The explanatory memorandum indicates that the exemptions will be limited to maintain the integrity of the scheme and that it 'is necessary to provide for limited exemptions in order to be consistent with existing legislative provisions, such as those relating to issues of national security' (at 62). Unfortunately this is an insufficiently detailed explanation of the reasons why exemptions need to be available and why these are not being included in the primary legislation. **The committee therefore seeks a fuller explanation from the Minister.**

*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***

### **Issue 4: Delegation of legislative power- Clause 53**

*The Committee noted that the explanatory memorandum indicates that the exemptions provided for in subclause 53(1) would be limited to maintain the integrity of the scheme and that it 'is necessary to provide for limited exemptions in order to be consistent with existing legislative provisions, such as those relating to issues of national security'. The Committee considered this an insufficiently detailed explanation of the reasons why*

*exemptions need to be available and why these are not being included in the primary legislation, and sought a fuller explanation from the Minister.*

## **Response**

In response to invitations to comment on the development of the student identifier scheme and related projects, a number of concerns were raised about the scheme's impact on the personal safety of serving police and border protection officers, national security and the administrative burden on RTOs.

By way of background, a number of police forces operate their own in-house RTOs. The Australian New Zealand Policing Advisory Agency, the Police Federation of Australia and a number of individual State police forces have raised with the department their concern that the Student Identifier system

could result in unauthorised third party access to demographic and qualifications related data for serving police officers and associated personnel. This data is currently collected and managed internally by police forces within secure ICT systems. Third party access to such data from the Student Identifiers Agency and the NCVER is seen as high risk to the safety of police, their families and that of the public. This is especially the case for police officers who engage in undercover, intelligence, witness protection and court hearing activities.

Similar concerns have been raised by the Department of Defence but with the additional concerns of national security.

In addition, there is a concern that some RTOs will not be ready to implement the Student Identifier scheme on 1 January 2014. Many still have to undertake a range of actions (for example, some RTOs will need to upgrade/purchase compliant software, as well as update business processes and train staff) before they can be in a position to meet the new requirements set out in the 51 Bill. In light of these concerns, the Standing Council agreed to the inclusion in the 51 Bill of a provision which allows the Commonwealth Minister, by legislative instrument, to make exemptions to the requirements of subclause 53(1).

It is anticipated that some of these exemptions may need to be quite specific, for example, exempting particular courses or types of students at a given RTO, such that it is more appropriate to specify the exemptions via legislative instrument. The VET sector, as well as the qualifications that are offered and the persons who receive these services are also highly susceptible to change. Therefore, it is preferable to exempt specific RTOs, qualifications and classes of individuals by way of legislative instrument rather than specifying the exemptions in the primary legislation as this will enable the exemptions to be more easily updated as the need arises.

Please also note that, under subclause 53(4), the Minister must obtain the agreement of the Standing Council to the making of such an instrument. The instrument itself is a disallowable instrument within the meaning of the *Legislative Instruments Act 2003* (Cth).

This is a similar approach to that taken in other parts of the SI Bill and, in my view, does provide a sufficient level of parliamentary scrutiny of the scheme into the future.

#### ***Committee Response***

The committee thanks the Minister for her comprehensive response and **requests that the key information outlined above be included in the explanatory memorandum.**

#### ***Alert Digest No. 5 of 2013 - extract***

### **Delegation of legislative power-incorporating material by reference Clause 57**

There is no explanation provided for the power to make regulations that apply, adopt or incorporate a matter contained in an instrument or other writing as in force or existing from time to time. The Committee routinely expects such provisions to be accompanied by an informative explanation as they may be considered to enable legislative changes to be made in the absence of proper parliamentary oversight. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. **The committee therefore seeks the Minister's advice as to why the power is necessary; examples of what material is likely to be incorporated by reference and whether it is publicly available; and how people affected by the regulation will be made aware of any changes in the law arising from changes to the incorporated material.**

*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***

### **Issue 5: Delegation of legislative power- Clause 57**

*The Committee has noted that there is no explanation provided for the power to make Regulations that apply, adopt or incorporate a matter contained in an instrument or other writing as in force or existing from time to time. The Committee notes that it routinely expects such provisions to be accompanied by an informative explanation as they may be considered to enable legislative changes to be made in the absence of proper parliamentary oversight. Such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. The Committee sought the Minister's advice as to why the power is necessary; examples of what material is likely to be incorporated by reference and whether it is publicly available; and how people affected by the regulation will be made aware of any changes in the law arising from changes to the incorporated material.*

### **Response**

As noted in the introduction to this paper, the VET sector is governed by Commonwealth legislation in most jurisdictions and by State legislation in the non-referring states. The national consistency across the sector is maintained through the AQTF, changes to which are agreed by the Standing Council.

Subclause 57(3) of the 51 Bill was drafted in such a way as to ensure that the regulation, once made, could refer to the documents such as the Standards under the AQTF as they are amended from time to time. As noted under issue 2 above, it is anticipated that within the proposed regulations, certain entities will be authorised to collect and use an individual's identifier in order to meet the entity's reporting obligations under the VET Standards. The definition of VET Standards in the proposed regulation includes the AQTF framework and it is intended that a reference to the AQTF framework should be a reference to the AQTF framework as it is amended. It is worth noting that the current Standards under the NVETR Act incorporate the AQTF as it exists from time to time.

Subsection 14(2) of the *Legislative Instruments Act 2003* (Cth) would prohibit the regulation referring to, or incorporating, the AQTF as it is amended. Therefore, to ensure that a reference to the AQTF framework is a reference to the AQTF framework as it is amended, a specific clause in the Bill was required to show contrary intention to that prohibition.

The AQTF comprises a series of public documents which are readily accessed by interested parties. They are widely accessed by RTOs in jurisdictions in which they apply as the basis for obtaining initial and ongoing registration of their businesses.

***Committee Response***

The committee thanks the Minister for her comprehensive response and **requests that the key information outlined above be included in the explanatory memorandum.**

# Sugar Research and Development Services Bill 2013

Introduced into the House of Representatives on 5 June 2013

Portfolio: Agriculture, Fisheries and Forestry

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.6 of 2013*. The Minister responded to the committee's comments in a letter dated 25 June 2013. A copy of the letter is attached to this report.

### ***Alert Digest No. 6 of 2013 - extract***

## **Background**

This bill provides the mechanism to implement key elements of reforms to sugar research and development (R&D) arrangements including:

- providing the Minister with the power to enter into a funding contract with an eligible company to enable it to receive and administer levies collected by the Commonwealth for R&D; and
- allowing the eligible company to receive the Commonwealth's matching funding for eligible R&D expenditure.

## **Delegation of legislative power - accountability concerns**

### **Various provisions**

This bill creates a complex funding mechanism with the purpose of delivering increased research and development efficiencies for the benefit of the sugar industry and the nation. The scheme involves a levy on industry participants to be collected by the Commonwealth. Monies raised from this levy will be used to fund an industry owned company (Sugar Research Australia Limited (SRA)). The bill also will allow SRA to receive the Commonwealth's matching funding for eligible R&D expenditure. More particularly, the bill provides for the Minister for Agriculture, Fisheries and Forestry to enter into a funding contract with an eligible company (intended to be SRA) which will enable that company to receive monies for R&D.

This mechanism for directing government money to sugar R&D means that the normal accountability arrangements which attend the expenditure of money by commonwealth bodies will not apply to decisions and actions taken by the industry-owned company responsible for the R&D functions. The explanatory memorandum addresses this issue in the following way:

The funding contract between the Commonwealth and the industry services body [i.e. the industry owned company] will set out certain obligations and accountability requirements for the company, including provisions relating to the use of levy monies and Commonwealth matching funding. The detail of the industry services body's accountability arrangements to the Commonwealth will be outlined in the funding contract.

The reliance on an industry-owned company to deliver outcomes for the benefit of the industry as a whole and the nation also raises issues as to the appropriateness of governance within that company. The bill does not contain provisions which deal with the question of ensuring that the company board is appropriately qualified and independent or how to ensure that any conflicts of interests are appropriately dealt with (given the expenditure of public money).

It may well be that the above issues will be adequately addressed through the funding agreement and in the development of the governance arrangements for the industry-owned company. Further, any Ministerial declarations of the 'industry services body', and also the funding contract, are subject to parliamentary scrutiny—each must be tabled in each House of the Parliament.

In this respect, it is noted that the Minister in his second reading speech concluded as follows:

With the Statutory Funding Agreement and the revised constitution [of the SRA], the government is confident that the governance arrangements for the new organisation will satisfy transparency and accountability requirements and support an efficient and effective organisation. This, in turn, should contribute to increased productivity and profitability for the sugar industry.

Nevertheless, it should be emphasised that this bill largely leaves the appropriate resolution of accountability and governance requirements to be established through non-legislative means. **While the committee accepts that the detail of these provisions will be subject to industry consultation, the committee requests the Minister's advice as to whether the bill can include a general requirement that the funding contract deal with accountability and governance issues.**

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

## ***Minister's response - extract***

### **Delegation of legislative power- accountability concerns**

The committee has drawn senators' attention to the provisions in this bill which provide for Commonwealth money to be directed to an industry owned company responsible for R&D functions. The committee has noted that this may be considered to delegate legislative powers inappropriately as the bill largely leaves accountability and governance requirements to be established through non-legislative means.

There are currently fifteen Research and Development Corporations that receive both industry levies and Commonwealth matching contributions to deliver research and development services. Nine of these are industry owned companies operating under similar arrangements as those proposed for Sugar Research Australia Limited (SRA). Such arrangements have been successfully in place since 1998. These industry owned companies are accountable to their members under the *Corporations Act 2001*, and to the Commonwealth under a Statutory Funding Agreement (SFA).

The Australian Sugar Industry Alliance submitted its proposal to restructure research and development arrangements for the sugar industry to the government on 20 September 2013. After submission, the government assessed the proposal in detail and worked closely with industry to ensure the arrangements for the new company were consistent with good governance practices and the *Corporations Act 2001* and were appropriate for an organisation receiving Commonwealth funds. This included, amongst other things, provision for a suitably skilled and independent board in SRA's Constitution and for the rights of levy paying members to be treated equitably.

The SFA will be modelled on existing SF A's in place for other industry owned companies and will ensure that the company has in place the necessary systems, processes and controls to prudently manage the funds provided by the Commonwealth and provide value for money for the funds invested. It will also hold the company accountable to the Commonwealth for the levy funds invested. Accountability arrangements contained in the SF A will include: annual compliance reports by independent auditors; comprehensive strategic plans approved by the Minister; provision of annual operational plans; risk management, fraud control, asset management and IP plans approved by the Department of Agriculture, Fisheries and Forestry; annual reporting against the various plans; regular performance reviews; and regular meetings with the department, the minister and industry.

The government is confident that, based on its detailed assessment of the SRA proposal and the success of the nine other industry owned companies operating under similar arrangements, the new organisation will operate in a transparent manner and will be held accountable for the industry and government funds invested.

I trust this information satisfies the committee's requirements.

***Committee Response***

The committee thanks the Minister for this response and notes the arguments made in support of the proposed approach. **The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator the Hon Ian Macdonald  
Chair



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

Our Ref BR13-002365

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

24 JUN 2013

*Ian*  
Dear Senator

I refer to the letter from the Committee Secretary of 20 June 2013 concerning the Committee's comments in *Alert Digest No. 6 of 2013* regarding the Asbestos Safety and Eradication Agency Bill 2013 and the Fair Work Amendment Bill 2013.

Asbestos Safety and Eradication Agency Bill 2013

*Possible inappropriate delegation of legislative powers*

The Committee has expressed the view new section 23A of the Asbestos Safety and Eradication Agency Bill 2013 may be in breach of principle 1(a) (iv) of its Terms of Reference which refers to provisions that 'inappropriately delegate legislative powers'.

This clause was inserted to enable the CEO to delegate their functions to a member of the staff of the Agency. This is intended to assist the CEO to carry out their functions and allow for the smooth operation of the Agency. It is intended that the Agency will not have a large number of staff, and no officers within the Senior Executive Service. Accordingly it is considered appropriate the CEO has power to delegate to non SES officers within the Agency as otherwise the ability to delegate would be of no utility.

Other Australian Government agencies have similar provisions in their governing legislation. For example the Fair Work Ombudsman under s683 of the *Fair Work Act 2009* has the same capacity to delegate his or her functions and powers to any members of staff. In both provisions there is a requirement that the staff member given the delegation must comply with directions issued by the CEO/Fair Work Ombudsman. The CEO can accordingly delegate appropriately with directions tailored to the nature of the function/power delegated, and the skills/experience of the relevant staff member. That safeguard in my view addresses the concerns of the Committee.

It is also the case that section 23A does not allow the delegation of legislative functions. The delegation allows for the carrying out of existing functions, or the exercise existing powers, it does not allow for the changing of those functions or powers.

Fair Work Act Amendment Bill 2013

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

The Committee has expressed concern the two new sections (sections 376 and 780) allowing costs to be awarded against lawyers and paid agents in relation to general protections and unlawful termination claims could possibly trespass on personal rights and liberties. The Committee noted the sections extending the current powers of the Fair Work Commission (the Commission) to order costs against lawyers and paid agents have 'the potential to affect the capacity of persons to access advice or the nature of the advice given'.

The Commission's proposed power to order adverse costs against lawyers and paid agents under the amendments is an extension of the Commission's current powers to order costs. These powers are limited so as to allow costs orders to be made only where the unreasonable act or omission of a lawyer or paid agent engaged by one party has caused the other party to incur costs, including where the lawyer or paid agent has encouraged a person to start, continue or respond to a dispute when it should have been apparent the person had no reasonable prospect of success. The amendments are intended to prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order because they have not been formally granted permission by the Commission to appear on behalf of a party, or have not sought such permission. Importantly, they do not prevent a lawyer or paid agent from fully pursuing a genuine claim on behalf of their client.

These amendments are consistent with the existing provisions in relation to unfair dismissal claims which were enacted in 2012 in response to the recommendations of the Fair Work Act Review (the Review). A number of submissions to the Review advocated there be the capacity for the Commission to make such orders for general protections applications to discourage the incidence of unmeritorious and vexatious claims.

An example of where the Commission may award costs against a representative under the new provisions is where the representative knows that his or her client's general protections or unlawful termination claim is dishonest or without foundation but still actively encourages them to proceed with the claim to try and extract a remedy such as a financial settlement from the employer.

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

I thank the Committee for the opportunity to respond.

Regards

A handwritten signature in dark ink, appearing to read 'Bill Shorten', with a stylized flourish at the end.

BILL SHORTEN



RECEIVED

25 JUN 2013

Senate Standing Committee  
for the Scrutiny  
of Bills

# The Hon Peter Garrett AM MP

Minister for School Education, Early Childhood and Youth

BR13-002390

24 JUN 2013

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



Dear Chair,

I refer to the letter of 20 June 2013 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills ('the Committee'), directing me to the comments of the Committee on the *Australian Education (Consequential and Transitional Provisions) Bill 2013* and the *Australian Education Bill 2012* (as amended in the House of Representatives) in the Committee's Alert Digest No. 6 of 2013.

The Committee has asked me to respond to those comments, and I seek to address each of them below.

## ***Australian Education (Consequential and Transitional Provisions) Bill 2013***

### Delegation of legislative power – Henry VIII clause (Schedule 2, item 12)

The Committee notes that subitem 12(1) of Schedule 2 to the *Australian Education (Consequential and Transitional Provisions) Bill 2013* ('Consequential and Transitional Bill') enables regulations to amend the operation of the Australian Education Act – a so-called "Henry VIII clause" – for transitional purposes, up until the end of 2014.

The purpose of this provision is to enable regulations to make necessary and urgent adjustments to the operation of the Act to ensure it functions as intended, while amendments to the Act are prepared and presented to Parliament as a Bill.

The *Australian Education Bill 2013* ('Australian Education Bill') is a new and relatively complex piece of legislation, that will implement funding arrangements for schools that differ considerably from those that have operated in the past, and tied to education reform requirements whose manner of implementation differs from past arrangements.

The Bill has also been prepared and amended while negotiations on the subject matter of the Bill are still being negotiated with states, territories, and non-government education bodies, and the Government intends the Bill to be passed before the deadline for conclusion of those negotiations. (It is for this reason that many of the details of the operation of the Bill have been delegated to regulation, a matter also raised by the Committee and which I address below).

In these circumstances, the Government considers it prudent to include a residual ability to urgently adjust the Australian Education Act's operation if, following 1 January 2014, the strict legal application of the Act does not result in the negotiated and agreed funding outcomes for schools. Naturally, in that case, the Government would also prepare amendments to the Act for presentation to Parliament as a Bill, but it may be some months before those amendments were able to be introduced and passed. During that period, Commonwealth schools funding would need to continue to be paid in accordance with the agreements reached with states, territories and non-government education bodies.

As the Committee notes, subitem 12(1) of Schedule 2 to the Consequential and Transitional Bill only permits regulations to be made that operate until the end of 2014, allowing any matters requiring amendment in the Australian Education Act to be identified and remedied during the Act's first year of operation.

### ***Australian Education Bill 2012***

#### Broad discretionary power

The Committee notes that the Australian Education Bill 'confers broad discretionary powers on the Minister to determine particular matters if special circumstances exist'. The Bill provides the Minister powers to determine matters when 'special circumstances' exist in the following provisions: subclause 7(3) (census day); subclause 10(2) (when a student receives education); subclause 15(3) (levels of education for a special school or special assistance school); paragraph 52(5)(c) (retrospective determination of a school's SES score); Division 3 of Part 5 (funding to schools in special circumstances); subclause 73(6) (retrospective approval of an approved authority); and subclause 83(5) (retrospective approval of a block grant authority).

The Committee would be aware that concept of 'special circumstances', and the analogous 'exceptional circumstances', is relatively common in statute law. It is intended to permit administrators wide discretion to depart from a standard rule or requirement where the strict application of that rule or requirement in the particular circumstances of the case would result in some unfairness or inconsistency of treatment, or would lead to an outcome that is contrary to or would undermine the underlying policy objective of the rule or requirement. It is, of course, often not possible to determine in advance what those "special circumstances" might be (hence the very need for the discretion).

This principle applies in each of the provisions noted above (with the exception of Division 3 of Part 5). Nevertheless, for the assistance of the Committee, I provide the following examples of circumstances that could trigger the exercise of the discretion:

- Subclause 7(3) – it may be necessary to determine a school's census day earlier than 5 weeks in advance if the school closed before the usual census day (first Friday in August), and the census day for that school should be the last day that it was open;
- Subclause 10(2) – the determination that a student has received education in special circumstances is a current discretion (paragraph 5(1)(b) of the *Schools Assistance Act 2008*) that is typically exercised to ensure funding is provided to schools who have a number of students who are itinerant or habitually absent – for example, some remote and very remote schools, and schools servicing students in custody or in State care;

- Subclause 15(3) – special schools – those providing specialised education services to students with disabilities – typically do not grade their students, and the distinction between primary and secondary students (each of whom attracts a different level of funding) is usually done by age (in most jurisdictions students up to age 11 are taken to be primary students, and students aged 12 to 21 are taken to be secondary students). However, given the great degree of customisation inherent in special education, there will be students who should be treated as receiving a level of education which is not related to their age;
- Subclauses 73(6) and 83(5) – typically, funding for schools will be provided from the start of the calendar (i.e. school) year in which the entity approved to receive that funding is approved by the Minister. However, it is possible that a school could be in operation for some time before its application is approved, particularly if the Minister needs further information to confirm that the approved authority satisfies the criteria for approval. Thus, for example, a school might commence operation for the last half of a year, request approval, and not be approved by the Minister until early the following year. In those circumstances, the Minister might consider it appropriate to back-date the approval of the school's approved authority to when the school actually started operating, rather than the start of the year in which he or she approved it.

Information on funding in special circumstances is set out at p4 of the Revised Explanatory Memorandum for the Australian Education Bill. This funding is analogous to short-term emergency assistance ('STEA') under Division 2 of Part 6 of the *Schools Assistance Act 2008*. Relevant considerations for payment of STEA are set out in section 4.1 of the *Schools Assistance Act 2008 Administrative Guidelines 2013*, and are being carried over into regulations under the Australian Education Bill.

#### Delegation of legislative power (subclause 22(1))

The Committee notes that Commonwealth financial assistance to states and territories will be subject to conditions on national policy initiatives that will be set out in regulations (subclause 22(1)). The Note to subclause 22(1) identifies the kinds of national policy initiatives that may be included in regulations. Subclause 22(2) requires that, before such regulations are made, the Minister must have regard to the decisions of the Standing Council on School Education and Early Childhood ('SCSEEC'), the National Education Reform Agreement ('NERA'), the National Education Agreement, and bilateral arrangements between the Commonwealth and States and Territories, as relevant.

Subclause 130(5) of the Bill requires that the Minister consult with SCSEEC before any regulations are made.

The scope of regulations made for subclause 22(1) of the Bill has been the subject of considerable discussion between Commonwealth and state and territory officials. Draft regulations have been prepared, and continue to be discussed. Those national policy initiatives that are agreed between the Commonwealth and states and territories will be included as conditions of financial assistance in the regulations.

The reason that these conditions have been delegated to regulation, rather than included in the Bill itself, is that they will change over time, as decisions of SCSEEC are made, and may be changed relatively frequently and rapidly. Furthermore, some are part-and-parcel of the current negotiations are around the NERA. Consequently, there is need for flexibility in setting these conditions.

I consider that the Bill provides ample mechanisms for state and territory involvement in the development of the regulations under subclause 22(1), and naturally, such regulations will be subject to Parliamentary scrutiny and disallowance. I consider, therefore, that appropriate checks-and-balances exist on the imposition of conditions on states and territories, and that regulations are a suitable vehicle for imposing those conditions.

#### Delegation of legislative power (clause 130)

The Committee notes that the Australian Education Bill leaves 'much of the detail as to the operation of the funding model and the associated regulatory requirements... to be filled out in regulations'.

The need for some aspects of the legislative scheme for schools funding and associated conditions is mentioned under preceding headings. In doing so, the schools funding legislation adopts an approach similar to many Commonwealth legislative schemes, and is consistent with the current *Schools Assistance Act 2008* and the previous *Schools Assistance (Learning Together – Achievement through Choice and Opportunity Act) 2004*, each of which was accompanied by bodies of regulations setting out the detail of conditions and funding amounts and indices.

The Committee also notes that, in accordance with paragraph 130(2)(b) of the Bill, regulations can prescribe offences in relation to census requirements and protected information, and inquires as to the appropriateness of offences in the regulations.

The two matters for which regulations can prescribe offences are matters of significance for the effective operation of the legislative scheme, and in respect of which the public interest may be served by imposing requirements backed up by criminal sanctions. The provision by schools of accurate data in a timely fashion is essential to proper funding determinations, and by necessary implication, proper expenditure of public funds. Equally, the proper use and transfer of information related to schools is essential to the administration of school education in Australia, with misuse of that information resulting in breaches of privacy and consequent lack of public trust in the institutions charged with administering education. In that light, the Government considers it important to have a residual ability to regulate these important areas through means that may include criminal sanctions, if necessary.

Subclause 5(2) of the Bill provides that the Crown (whether in right of the Commonwealth, or a state or territory) is not liable to be prosecuted for an offence.

The Committee correctly notes that the maximum penalty that can be imposed under such regulations (50 penalty units, or \$5500) is consistent with Commonwealth criminal law policy, as set out in the *Guide to Framing Commonwealth Offences*.

In addition, the Committee notes that, in accordance with subclause 130(4) of the Bill, regulations can incorporate non-legislative documents by reference, as those documents are published or in force from time to time, and seeks my advice as to whether the Bill can be amended to include requirements that incorporated documents are readily accessible and notification of changes are published on my Department's web site.

I am advised that a provision such as suggested by the Committee is not common in Commonwealth laws that authorise regulations to incorporate non-legislative documents by reference.

Nevertheless, I am also advised that the kinds of documents that are intended to be incorporated by reference into the regulations are readily accessible to the persons affected by the relevant provisions (predominantly states, territories, and approved authorities), who frequently have input into their development; and that in most cases they are freely available to the public on the internet. The regulations themselves will direct readers to web sites where the documents can be found.

I direct the Committee's attention, for example, to clause 4 of the draft regulations enclosed with this letter, which contains definitions of a number of documents that are referred to in the regulations, including the Australian Accounting Standards, Australian Auditing Standards, Australian Professional Standards for Principals, Australian Professional Standards for Teachers, Australian Statistical Geography Standard ('AGSC'), and the Data Standards Manual: Student Background Characteristics. The draft regulations refer to a number of other documents. For example, clause 10 (conditions on states and territories) refers to the Measurement Framework for Schooling in Australia; Accreditation of Initial Teacher Programs: Standards and Procedures in Australia; Aboriginal and Torres Strait Islander Education Action Plan 2010-2014; clause 12 determines school ARIA scores by reference to information obtained from the Australian Population and Migrant Research Centre; clause 40 refers to the Australian Curriculum; clause 42 refers to the National School Improvement Tool and the National Safe Schools Framework; etc.

In all cases, these documents are well-known and understood generally (e.g. accounting and auditing standards, the AGSC), or have been developed by national education bodies in consultation with states, territories and non-government education authorities, and are well-known, accepted by, and available to, those persons.

Again, as the regulations themselves will be subject to Parliamentary oversight, I do not propose to amend the Australian Education Bill in the Senate as requested by the Committee.

#### Merits review (subclauses 122(2) and (3))

The Committee seeks my advice as to why external merits review of transitional funding determinations is not available (subclause 122(2)) and why only specified persons have rights to seek merits review of decisions under the Bill (subclause 122(3)).

At the outset, I note for the Committee's consideration that the Australian Education Bill provides rights of merits review of decisions in relation to Commonwealth schools funding for the first time. The Australian Education Bill also provides a statutory guarantee of funding for non-government schools for the first time, substantially enhancing a statutory right to funding that has only existed for government schools since 2009 (under section 11 of the *Federal Financial Relations Act 2009*). In short, this Government is putting in place a legislative scheme that changes a system of discretionary grants for schooling that has been in place for more than four decades with a rights-based system upheld by the comprehensive Commonwealth administrative decisions review apparatus.

While acknowledging the Committee's right to request further information on the rationale for this approach, I do find it odd that the Committee has not seen fit to make any positive comments about this fundamental shift in the legal framework for provision of schools funding by the Commonwealth.

Subclause 122(2) has the effect of precluding review of determinations of funding under Division 5 of Part 3 of the Bill by the Administrative Appeals Tribunal. These determinations are so-called transitional funding determinations, which are designed to transition approved authorities for schools from current funding amounts (whether under the *Schools Assistance Act 2008* or the *Federal Financial Relations Act 2009*) to the schooling resource standard ('SRS') set out in Divisions 2 to 4 of Part 3.

The principal discretion available to the Minister in respect of transitional funding determinations is the discretion to determine funding under clause 59 of the Bill. That discretion is constrained in large measure by clause 60 of the Bill. These funding determinations will apply to the majority of approved authorities, which receive less funding under current arrangements than they will under the SRS formulas. Transitional funding for those approved authorities that currently receive more than they will receive under the SRS formulas will be determined mathematically, and without discretion, under clauses 61 and 62 of the Bill.

By-and-large, transitional funding determinations under clause 59 will be made in accordance with the 'relevant arrangements' of approved authorities – the bilateral agreements between the Commonwealth and states and territories, and memoranda of understanding between the Commonwealth and major non-government school systems. One of the purposes of these arrangements is to ensure that schools are transitioned to the new funding arrangements in a smooth, consistent, and financially-sustainable way, over a period of six years.

The bilateral agreements are intergovernmental agreements, which have their own dispute resolution clauses and processes. Any dispute about funding amounts payable in accordance with those agreements is to be resolved between governments. Similarly, memoranda of understanding between the Commonwealth and non-government education authorities will contain dispute resolution clauses and processes, which will be utilised where necessary.

While the Bill leaves open the ability for approved authorities to seek internal review of transitional funding determinations, I consider it inappropriate for the Administrative Appeals Tribunal to undertake an examination of the merits or otherwise of funding agreements reached by the Commonwealth with states and territories and non-government education authorities, which must operate consistently as a whole and in a manner that ensures the integrity of the Commonwealth budget.

Of course, once out of the transition period and beyond the duration of the relevant agreements, schools' funding will be calculated mechanically in accordance with the formulas in Divisions 2 and 3 of Part 3, and every recipient of funding will have the same extensive rights of review.

Subclause 122(3) precludes a person other than the person listed in column 3 of the table in clause 118 seeking review by the AAT of a reviewable decision. Naturally, the purpose of this provision is to limit the class of persons that can seek external merits review of decisions under the Bill. The rationale for this provision is to ensure that only the person whose rights and interests are directly affected by a decision can seek review of that decision, and persons who may have a peripheral interest in a decision cannot interfere with the operation of that decision by seeking review.

For example, where the Minister makes a decision to approve a person as an approved authority in relation to a new school, the Government considers that it is not appropriate for a person other than that approved authority to challenge that

decision (which is fundamentally about entitlement to Commonwealth funding) to achieve an ulterior purpose. Thus, a particular interest group objecting to the establishment of a school in their local area is not entitled to challenge the Minister's decision to approve that school to receive Commonwealth funding. (That interest group may have rights under State or Territory planning laws etc. to challenge the siting of the school, for example).

Noting that this Bill provides merits review rights in relation to Commonwealth schools funding for the first time, there is naturally a need to balance those rights with certainty and finality of funding decisions. In providing review rights to those directly affected by decisions, and excluding others who may have an interest in interfering in decisions, I believe we have achieved the right balance. However, my Department will keep the matter under review, and may recommend that the Government expand the classes of persons able to seek review of decisions in the future if warranted.

#### Privacy and delegation of legislative power (clause 125)

The Committee seeks an explanation from me as to how individual interests in personal privacy will be protected under regulations made for the purposes of clause 125 of the Bill.

There are a number of data-sharing protocols between the Commonwealth, states and territories relating to school and school student data, and which involve disclosure of information to and between government departments, the Australian Bureau of Statistics, the Australian Curriculum, Assessment and Reporting Authority, and Ministerial companies (the Australian Institute of Teaching and School Leadership, and Education Services Australia).

The regulations will give effect to these existing processes, which already ensure minimal use and exchange of personal information (information on students is generally aggregated, and where it is not aggregated, it is de-identified). Each entity that collects, uses or discloses information is subject to, and must comply with relevant privacy laws (generally the *Privacy Act 1988*, but also state and territory privacy laws), and further, may be subject to additional legal requirements on collection, use and disclosure of information (see, for example, section 40 of the *Australian Curriculum, Assessment and Reporting Authority Act 2008*).

I note that, as part of the National Plan for School Improvement, the Commonwealth, states and territories, and non-government education authorities will be developing a National Education Data Plan, for the purpose of enhancing the national data collection on school education, to provide a better information base for policy development, research, planning, funding and public accountability for outcomes of school education.

The intention is that the regulations developed for the purposes of subclause 125(1) would regulate the use and disclosure of information (including personal information) in line with the agreed processes for the National Education Data Plan.

It would be my intention to undertake the proper processes for privacy impact assessment during the development of the National Plan and associated regulations, and the impacts on privacy under domestic law and the International Convention on Civil and Political Rights would be examined during that process. Naturally, the relevant regulations, on tabling, would include a Statement of Compatibility with Human Rights in the Explanatory Statement that addressed these issues.

### Standing appropriation (clause 126)

The Committee seeks my explanation for the use of a standing appropriation in clause 126 of the Bill.

The Bill provides for standing appropriations for recurrent funding for schools, and for capital funding for block grant authorities. Recurrent funding for schools is unlimited but calculated by reference to formulas in the Bill. Capital funding for block grant authorities is capped (clause 68).

As the Committee would be aware, Commonwealth legislation providing for so-called 'demand-driven entitlements', where persons who meet specified eligibility criteria or who satisfy certain conditions, have a legal entitlement to funding that is calculated by reference to formulas, provide for standing appropriations to cover the financial liabilities created by that legislation. It is, as a practical matter, impossible to precisely determine annual appropriations to cover such liabilities. Such standing appropriations appear in social security legislation, veterans' entitlements legislation, aged care legislation, and family assistance legislation, to name a few. Insofar as the Australian Education Bill provides for recurrent funding for schools, it is such legislation.

The Committee would also be aware that Commonwealth legislation also frequently provides for standing appropriations where those amounts are capped, but there is a clear intention that funding be provided over multiple years and certainty of funding is important to achieve the legislation's intended policy outcomes (that is, funding should not be subject to change in annual Budgets). In my own portfolio, examples are the *Indigenous Education (Targeted Assistance) Act 2000*, and the *Schools Assistance Act 2008* and the *Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004* in relation to capital funding and funding for targeted assistance.

Clause 126 of the Australian Education Bill operates consistently with previous Commonwealth schools funding legislation. I note that special circumstances funding, and capital funding for other than block grant authorities, will need to be supported by annual appropriations. This is mentioned at p4 of the Revised Explanatory Memorandum.

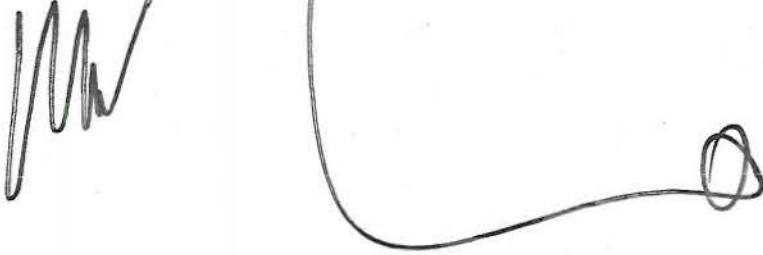
### ***Copy of draft Regulation***

Noting that many of the Committee's concerns relate to the scope and content of regulations to be made under the Bill, I attach for the Committee's information a draft of the *Australian Education Regulation 2013*, as prepared to 19 June 2013. A copy of the draft Regulation will also be published on the Better Schools web site ([www.betterschools.gov.au](http://www.betterschools.gov.au)).

The draft Regulation is still under development, and officials of my Department are still in consultation with their counterparts in states and territories, and non-government education bodies, on the content of that Regulation. Nevertheless, this draft should assist the Committee in better understanding the Government's proposed legislative scheme for schools funding and education reform.

I trust the above response adequately addresses the Committee's concerns, and I thank the Committee for the opportunity to respond to those issues.

Yours sincerely

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke ending in a small circle.

**Peter Garrett**





**Minister for Climate Change, Industry and Innovation**

C13/1275

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

25 JUN 2013

Dear Senator Macdonald

Thank you for your letter of 20 June 2013 on behalf of the Senate Standing Committee for the Scrutiny of Bills regarding the Australian Jobs Bill 2013 (the Bill). I note that the Committee has raised a number of issues which are addressed below.

***Delegation of Legislative Power***

As noted by the Committee in its review of the Bill, the necessity of subclauses 6(2), (3), (5) and (6) are not fully explained in the memorandum.

The subclauses (2) and (3) act as a 'catch all' mechanism within the Bill. It is neither practical nor effective to list every type of facility that might be built across all sectors of industry within Australia. The Bill lists the common types of eligible facilities above the major project threshold that are intended to be captured by the legislation. However, there may be facilities that the Bill should capture but are not covered by any of the listed definitions or there may be facilities built in the future that have not yet been conceived. Subclauses (2) and (3) allow the Minister to ensure that these types of situations do not occur while also preventing any possible avoidance of this legislation through labelling tactics or schemes.

Subclauses (5) and (6) operate to allow the Authority to declare that a facility that is, by default, captured by the Bill to not be an eligible facility for the purposes of the Bill. For example this situation may occur if there is a project above the threshold and the project proponent can demonstrate to the Authority that there is no contestible opportunities for Australian entities in the project. This could be due to all the key goods and services for the project having to be purchased overseas because no Australian capability exists. These clauses allow the Authority to deem that certain projects are not eligible facilities under this legislation and therefore not subject to the requirements.

### ***Undue Trespass on Personal Rights and Liberties- Clause 50***

Clause 50 of the Bill empowers the Authority to obtain information and documents from a person if it believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Bill.

It is important to note that the objective of the Bill is the creation and retention of Australian jobs through the opportunities afforded through Australian Industry Participation (AIP) plans for major projects. Personal information will not be requested by the Authority as this type of information cannot reasonably be relevant to the operation of the Bill.

Notwithstanding the above point, consideration has been given to a privacy framework for the protection of personal information. In the event that personal information is collected or disclosed under the Bill, it will be subject to the safeguards under the *Privacy Act 1988*. It should be noted that, under Information Privacy Principle 11.3, a person, body or agency to whom personal information is disclosed shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency. The Authority will be bound by the *Privacy Act 1988* and operate in accordance with the relevant principles when dealing with personal information.

### ***Insufficiently Defined Administrative Power***

Clause 57 of the Bill provides for administrative consequences of non-compliance. The rationale behind these powers is due to the inherent limitations in applying monetary penalties as a consequence of non-compliance. These limitations to the application of monetary penalties include a perceived lack of equity, deterrence values and the ability for a fine to be simply absorbed by a corporation. As the intent of the Bill is the creation and retention of Australian jobs through the opportunities afforded through AIP plans, a strong deterrent is needed to prevent corporations from contravening the provisions in this Bill.

The second aspect of this rationale is the form of penalty that will have the greatest chance of promoting compliance. As the Bill only deals with companies, adverse publicity against the corporation can have a significant impact and deterrent effect on a corporation. Adverse publicity is aimed at 'shaming' the offender by requiring a public confession of wrongdoing. While this is a relatively new concept at Commonwealth level, it has been a feature of some state regulatory schemes for some time. For example, under state and territory environmental legislation an offending company may be ordered to publish at its own expense and in specified media a notice outlining its conduct, explicitly stating that its conduct breached the relevant legislation.

This is the rationale as to why the Bill imposes the consequences of non-compliance under clause 57. Reputational damage is a significant issue for corporations and therefore placing that at risk by contravening this legislation serves as a deterrent for the purposes of the Bill.

As noted by the Committee, clause 57 applies without reasonable excuse by the relevant person. The issue whether a relevant person has a reasonable excuse for failing to comply with the Act would depend on the circumstances of the case. However, the reasonable excuse must be one that an ordinary member of the community would accept as reasonable in the circumstances. The failure must not only be a deliberate act of non-compliance. If

the circumstance that prevented the relevant person from meeting their requirement was unforeseeable or outside the organisation's control, this may constitute a reasonable excuse. For example, a natural disaster that has threatened the viability of an organisation could have been a factor in the organisation's failure to comply.

The provisions under clause 57 are framed broadly to provide for the exercise of flexibility and discretion by the Authority to tailor the penalty to suit the particular offender and the circumstances under which the contravention occurred. As the Bill deals with corporations conducting major projects across all sectors of industry, flexibility is required to ensure that the Authority can adjust to deal with a variety of circumstances, scenarios and corporate structures.

In regards to the Committee's question whether similar powers, administered by administrative decision-makers, exist in other Commonwealth legislation, the *Workplace Gender Equality Act 2012* (formerly the *Equal Opportunity for Women in the Workplace Act 1999*) contains similar consequences of non-compliance to the Bill which are administered by administrative decision makers.

#### ***Undue Trespass on Personal Rights and Liberties- Clause 104***

The intention behind clause 104 is to ensure that the Minister can be informed, from time to time, of important matters relating to Australian Industry Participation. As noted in the statement of compatibility, this Bill deals with major project proponents and the provision of purely commercial information. Personal information will not be requested by the Authority under any circumstances. As mentioned above, the Authority will be bound by the *Privacy Act 1988* and operate in accordance with the relevant principles when dealing with any personal information that is incidentally provided to the Authority.

There is also a number of drafting precedents in legislation for this clause. Some examples are as follows:

- *Australian Communications and Media Authority Act 2005*, Section 59A.
- *Carbon Credits (Carbon Farming Initiative) Act 2011*, Section 272.
- *Clean Energy Regulator Act 2011*, Section 45.
- *Competition and Consumer Act 2010* (former *Trade Practices Act*), Section 155AAA.
- *National Gambling Reform Act 2012*, Section 74.
- *National Health Reform Act 2011*, Sections 116 and 216.

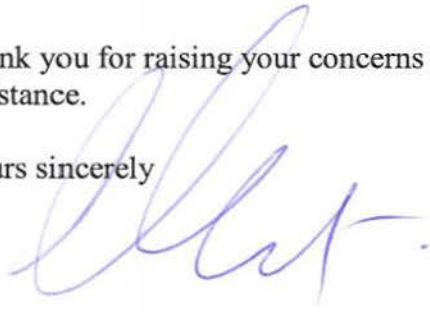
#### ***Undue Trespass on Personal Rights and Liberties- reversal of onus***

Subclauses 102(1), 107(4), 107(6), 111(4) and 111(6) are said in the statement of compatibility to contain reverse burden provisions. The statement of compatibility was drafted for a previous version of the Bill that did contain reverse burden provisions; however these provisions were subsequently changed following consultation.

As the Committee notes, the Bill currently in front of the Parliament does not contain any express statements that the defendant will bear the onus of proof. It is not the intention of the Bill that the above mentioned provisions place the onus of proof on the defendant.

Thank you for raising your concerns with me and I trust the information provided is of assistance.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Greg Combet', with a stylized flourish at the end.

GREG COMBET



**The Hon Bernie Ripoll MP**  
**Parliamentary Secretary to the Treasurer**  
**Parliamentary Secretary for Small Business**

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

19 JUN 2013

Via email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Dear Senator

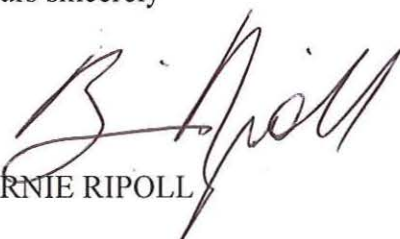
Thank you for your correspondence of 16 May 2013 to the Minister for Financial Services and Superannuation in which the Standing Committee for the Scrutiny of Bills (the Committee) seeks clarification with regard to certain provisions in the Corporations and Financial Sector Legislation Amendment Bill 2013 (the Bill). I note that this Bill is within my area of responsibility and I am therefore responding to your questions. I apologise for the delay in responding to your questions.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find attached detailed responses to the specific issues the Committee has raised.

I trust that this information adequately answers your questions.

Yours sincerely

  
BERNIE RIPOLL

## DETAILED RESPONSES TO QUESTIONS

### *Protections that apply in relation to personal information supplied to international regulators or regulators in other countries*

The amendments that would be made by Part 3 of Schedule 1 to the Bill would enable the Australian Securities and Investments Commission (ASIC) to share protected information, including personal information, with multi-jurisdictional business regulators. As indicated in the explanatory memorandum (EM) for the Bill, the amendments are mainly intended to ensure that information can be shared with certain pan-European regulators such as the European Securities Market Authority (ESMA) and the European Systemic Risk Board (ESRB).

Under ASIC's existing information-sharing provisions, as well as the provisions as expanded by the Bill, protections are available that guard against the misuse of personal information provided to overseas regulators. These protections are as follows:

- Under the *Mutual Assistance in Business Regulation Act 1992* (MABRA), a request for information from a foreign regulator must contain a written undertaking that the information or evidence provided will not be used for the purposes of criminal proceedings against the person or proceedings against the person for the imposition of a penalty, and to the extent to which it is within the ability of the foreign regulator to ensure it, will not be used by any other person, authority or agency for the purposes of any such proceedings. ASIC must not consider a request for information from a foreign regulator unless the written undertaking noted above is received (see MABRA s6(2)). Further, under MABRA, conditions may be imposed on an authorisation to gather information at the request of a foreign regulator (see MABRA s9). Section 7(2) provides that the conditions of a MABRA authorisation "may include (but need not be limited to)" conditions relating to:
  - maintaining the confidentiality of anything provided in compliance with the request, in particular, information that is personal information within the meaning of the *Privacy Act 1988*;
  - the storing of, use of, or access to, any such thing; and
  - copying, returning or disposing of copies of documents provided in compliance with the request.
- Disclosure of information by ASIC to an 'international business regulator' under proposed s127(4)(ca) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) will be subject to the provisions of s 127(4A) of the ASIC Act, which provides that conditions may be imposed on the information released under s127(4). ASIC has published Regulatory Guide 103: *Confidentiality and release of information* which (among other things) sets out ASIC policy on the conditions it will consider imposing on information released under its statutory powers, including under s127 of the ASIC Act. Specifically RG 103.36 states: "*The conditions ASIC imposes [on the use of disclosed information] may relate to the manner in which the information may be used or may require an undertaking that ASIC be notified before the information is published.*" Further, RG 103.37 states: that "ASIC may release information [to a statutory authority] on condition that the agency only uses the material internally." The guidance in RG 103 will apply to releases made under proposed 127(4)(ca) of the ASIC Act.
- As noted in the EM, the main purpose of the provision in the Bill is to allow ASIC to share protected information with certain EU regulators, in particular ESMA and the ESRB. Both of

these entities have secrecy provisions in place which ensure that any personal information will be given appropriate protection. For instance, any confidential information received by ESMA employees whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial market participants cannot be identified.<sup>1</sup>

With respect to the Reserve Bank of Australia (the RBA), the key point is that only in exceptional circumstances does it receive information of a personal nature, and that information is not provided to foreign regulators:

- The RBA collects limited 'protected information' which is, or 'protected documents' which contain, 'personal information' as defined in section 6 of the *Privacy Act 1988*. The bodies which the RBA hopes will be prescribed by regulation made under the new paragraph 79A(4)(c) if the Bill is passed are bodies such as Australian Treasury, New Zealand Treasury, the International Monetary Fund, the Bank for International Settlements and the Financial Stability Board – all bodies with a mandate relating to stability and/or security of the financial or monetary system, but which are not 'financial sector supervisory agencies' as defined in section 79A(1) or central banks or monetary authorities of a foreign country (sharing with other central banks and with financial sector supervisory agencies is already permitted under paragraphs 79A(4)(a) and (b)). The information which may need to be shared with these bodies for the purposes of assessment of financial stability, crisis prevention, crisis management, and co-operative oversight is information about institutions, not individuals. The very nature of the respective mandates of these bodies, and the purpose for which sharing with them would occur, means that the sharing of information about natural persons will not be necessary (or desirable). Their concerns primarily relate to entities of systemic importance. So the RBA does not contemplate that any personal information will need to be, or will be, shared if the Bill is passed and a regulation is made under the new section 79A(4)(c).

***Inclusion in the Bill of a mechanism requiring the regulator to consider the appropriateness of imposing conditions***

The Bill would permit the RBA when disclosing protected information or protected documents under s79A to impose conditions on recipients of such information or documents, breach of which will constitute an offence. This will strengthen protection with respect to such information or documents and is a prudent protection given the expansion in numbers of counterparties with whom the RBA shares protected information. The Committee requests advice whether consideration has been given to including mechanisms in the Bill requiring the RBA to consider the appropriateness of imposing conditions.

Administrative law imposes limits on the way administrative decision-makers may exercise their powers, and breaches of these limits provide rights to an affected person to challenge a decision. Grounds on which a person may challenge an administrative decision include several that may be considered to fall within the scope of what the Committee suggests. Examples include: failure to take into account relevant factors or taking into account irrelevant factors; imposing a decision for an improper purpose; making a decision that is evidently unreasonable; and acting in bad faith.

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<sup>1</sup> The ESMA secrecy provisions are contained in Article 70 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council. The text of the Regulation is located at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1095:EN:NOT>. The ESRB secrecy provisions are in Article 8 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council, which is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1092:EN:NOT>.

Given the constraints the law imposes on the exercise of its powers by the RBA, it is not considered that including such a mechanism as proposed by the Committee would significantly extend the rights of persons affected by a decision to impose conditions on the receipt of protected information or documents.

***Broad power of Governor of the Reserve Bank of Australia to disclose protected information***

As noted by the Committee, the Bill provides a power for the Governor of the RBA and certain designated delegates to authorise the disclosure of protected information to any person or body.

The primary purpose of the power is to provide the flexibility to respond to a legitimate need for the sharing of information, particularly in the context of a crisis which, by its nature, may involve facts and circumstances which have not previously been contemplated.

This power would only be exercised on a case-by-case basis. As stated above, the RBA will use the power to make a regulation under section 79A(4)(c) to prescribe bodies with which it regularly shares information. This discretionary power would be used to permit sharing of information if such sharing was required as a matter of urgency. It is expected that it would be exercised in exceptional circumstances only – either in an emergency before a body could be listed in a then existing regulation made under section 79A(4)(c) or to cover a one off disclosure of a type that has not currently been identified as necessary.



**Attorney-General  
Minister For Emergency Management**

MC13/06687

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

Dear Senator Macdonald

I refer to the Standing Committee for the Scrutiny of Bills comments about the Marriage Amendment (Celebrant Administration and Fees) Bill 2013 and the Court Security Bill 2013 contained in *Alert Digest No.5 of 2013* (15 May 2013).

**Marriage Amendment (Celebrant Administration and Fees) Bill 2013**

The Committee has requested justification for the treatment of exemptions and internal review of exemption decisions in proposed subsection 39FA(3). The Committee inquires specifically about why these matters are not included in the primary legislation.

Proposed subsection 39FA(3) of the Bill allows regulations to provide for the granting of exemptions, on grounds specified in the regulations, from liability to pay celebrant registration charge in respect of a financial year; and to provide for internal review of decisions to refuse to grant exemptions. The Bill does the same in relation to the registration application fee – proposed subsection 39D(1C).

Following extensive consultation with celebrants prior to drafting the legislation, a policy decision was made to allow for the granting of exemptions from both the celebrant registration charge and the registration application fee, in certain circumstances. The Bill is drafted to allow for such exemptions, but for the Regulations to set exemption grounds and the process.

The reason for omitting the grounds from the primary legislation is merely to reduce complexity in the Bill.

The grounds for exemption will be contained in amendments to the *Marriage Regulations 1963* following passage of the Bill. The Regulations will allow celebrants to apply for an exemption from the celebrant registration charge on the basis of remoteness or specified circumstances. The intention of the former is to allow remote communities to maintain access to celebrancy services. The latter includes long term absence from Australia, serious illness or caring responsibilities. It is intended to apply only to celebrants who need a temporary period of 'time out' from their celebrancy duties due to personal circumstances, without having to resign and reapply to become a celebrant at a later date. Given that these are administratively procedural concepts, it was decided that they were more appropriately placed in Regulations.

The Regulations will also allow an applicant to apply for an exemption from the registration application fee on the basis of remoteness.

Proposed paragraph 39FA(3)(c) allows regulations to provide for internal review of decisions to refuse to grant exemptions. Proposed subsection 39FA(5) sets out the possible outcomes of such an internal review decision. While the Regulations allow for the administrative process of applying for an internal review, the possible outcomes of that review are provided for in the primary legislation. This is mirrored in Item 6, Schedule 1 for the registration application fee. The reason for this is again to reduce complexity in the Bill and place process based provisions in the Regulations.

I note that the procedures set out in the Regulations will be subject to Parliamentary scrutiny and disallowance as the Regulations will be legislative instruments. This will assist in ensuring that the delegation of this power will be used appropriately.

### **Court Security Bill 2013**

The Committee has also requested further information about the operation of the Court Security Bill.

As the Committee states in *Alert Digest No. 5 of 2013*, the main purpose of the Court Security Bill is to establish a new legislative framework for security at federal court and tribunal premises. It does this by expanding and clarifying the security powers that may be exercised by security officers and authorised court officers on court premises. The Consequential Amendments Bill makes amendments to the *Public Order (Protection of Persons and Property) Act 1971* (the Public Order Act) reflecting that the new framework for court security will be contained in the Court Security Bill.

#### *Paragraph 33(1)(b): Qualification requirements of security officers*

The Committee has sought advice as to whether more legislative guidance on the appropriate qualifications of security officers should be provided and which non-licensed persons may be prescribed as being entitled to exercise the powers of a security officer.

I share the Committee's view that, given the nature of the powers exercisable by security officers under the Bill, it is critical that the officers exercising those powers hold appropriate qualifications. I outline below the reasons for the approach taken in the Bill and why I consider that this approach is appropriate.

As the Committee notes, the approach of the Bill in relation to safeguards around the qualification requirements of appointed security officers is twofold. First, an administrative head of a court may only appoint a person as a security officer if the person has the qualifications prescribed by the regulations (clause 9). Second, a security officer may only exercise the powers of a security officer in relation to court premises if the person is licensed under a law of a State or Territory to guard property, or prescribed by the regulations (clause 33).

In relation to clause 9, I consider it appropriate and desirable that the qualification requirements for security officers are prescribed in regulations as opposed to being contained in the principal legislation. This ensures that they can be responsive to changes in the security environment, and keep up to date with developments in security threats and relevant technologies. I consider that building these requirements into principal legislation may mean that necessary changes to the qualification requirements are unable to be implemented in an appropriate timeframe. Prescribing the qualification requirements in regulations allows them to be updated in a timelier manner.

The *Legislative Instruments Act 2003* ensures that there is significant parliamentary oversight over delegated legislation. The regulations containing the qualification requirements will be subject to tabling in Parliament and potential disallowance. As such the Parliament will have ultimate control over the qualification requirements that will be imposed on persons who will be authorised to exercise powers under this Bill.

I consider that prescribing the qualification requirements for security officers and authorised court officers in regulations strikes an appropriate balance between ensuring that these requirements are able to be amended in a timely manner to respond to changes in the security environment or new technologies and ensuring an appropriate level of parliamentary oversight. The qualification requirements will be developed in consultation with the federal courts and other relevant federal agencies including the Australian Federal Police.

I note that this approach is consistent with the approach taken in the *Defence Legislation Amendment (Security of Defence Premises) Act 2011*, which establishes the security framework for Defence premises. The Senate Standing Committee for Foreign Affairs, Defence and Trade reported on that Bill in March 2011, agreeing with that approach.

In relation to clause 33, all State and Territory licencing regimes contain probity requirements and minimum standards of qualifications for persons licenced to guard property. A person appointed as a security officer must have met these requirements unless prescribed by the regulations under subparagraph 33(b)(ii).

Paragraph 33(b) has been included to deal with situations where a federal court shares premises with a State or Territory court and security officers have been appointed to those premises under State and Territory court security legislation. These officers may not necessarily hold a licence under a law of a State or Territory to guard property, but will have been required to meet other relevant probity and qualification requirements. In these circumstances, it is desirable that the security framework established by the Court Security Bill is sufficiently flexible to allow the two jurisdictions to cooperate to ensure an optimal security arrangement for the shared premises, through the dual appointment of security officers as necessary.

For example, the Federal Court of Australia shares premises with a New South Wales court in Sydney. Section 21 of the *Court Security Act 2005* (NSW) provides that the Sheriff may, by instrument in writing, appoint as a security officer: (a) a sheriff's officer, and (b) any other person who holds a licence under the *Security Industry Act 1997*, to carry out security activities under that Act. Sheriff's officers provide court security services in all NSW courts and undertake some law enforcement functions. Sheriff's officers are not required to have a licence to guard property, but are defined as law enforcement officers for the purposes of the *Crimes Act 1900* (NSW) and need to take an oath or affirmation of office in accordance with the *Sheriff Act 2005* (NSW). Sheriff's officers undergo a 12 month probationary period and undertake competency based assessments, involving a combination of classroom instruction, defensive tactics training and appointments certification and also work to obtain a Nationally Accredited Certificate IV in Government (Court Compliance).

Paragraph 33(1)(b) ensures that there is a mechanism to provide that sheriff's officers appointed under the NSW Act, who do not hold a licence to guard property, but do hold other relevant qualifications, are not prevented from exercising security powers under the Court Security Bill if appointed to do so.

The types of officers that may be need to be prescribed in the regulations will change from time to time as federal courts take up different court leasing and co-location arrangements with different State and Territory jurisdictions. In order to be appointed under clause 9, such persons will still need to meet the general qualification requirements set out in the regulations. Further, the regulations will be subject to tabling in Parliament and potential disallowance.

In light of the above noted safeguards, I consider that the flexibility provided by subparagraph 33(1)(b)(ii) to allow regulations under the Court Security Bill to prescribe that certain officers, or categories of officers, may exercise security powers under the Bill, even if they do not hold a licence to guard property, is necessary and appropriate.

#### *Clause 19: Frisk searches*

Clause 19 of the Bill provides that a security officer may request that a person who is seeking to enter, or is on, court premises undergo a frisk search. The Committee has requested further information about the necessity of paragraph 19(2)(c), which provides that a frisk search may be conducted by a person of the opposite sex of the person being searched if there is no security officer or member of court staff of the same sex available to conduct the search.

It is expected that frisk searches will not be used in the first instance at most court premises. Court premises in major locations will usually have electronic screening facilities, which would generally be used in the first instance. However, where the federal courts sit in smaller locations, particularly in regional areas, there will sometimes be no electronic screening facilities available. I also note that some people seeking to enter court premises may prefer to undergo screening via a frisk search instead of electronic screening. For example, some people may use pacemakers or other types of devices which may cause them to have concerns about electronic screening. It is important that the Bill provides for an alternative method of screening where no electronic screening facilities are available or where a person requests an alternative to electronic screening.

It is also expected that where frisk searches are conducted, there will generally be a person of the same sex available to conduct the search. However, it is important that the Bill caters for

situations where this is not the case, particularly for court premises where electronic screening facilities are not available and where there is only a small number of court staff in attendance.

Paragraph 19(2)(c) is framed such that it may only be relied upon if a frisk search cannot be conducted in accordance with paragraphs 19(2)(a) and (b). That is, a frisk search could only be conducted by a security officer of the opposite sex to the person being searched if there were no security officers or members of court staff of the same sex. Accordingly, I do not consider that there is a need for an additional provision in this clause to the effect that paragraph 19(2)(c) can only be relied on unless reasonable efforts have been made to conduct a frisk search in accordance with paragraphs 19(2)(a) or (b).

While it is expected that frisk searches will not be used as a matter of course, and that generally where frisk searches are conducted there will be a person of the same sex available, it is important that the Bill is capable of dealing with situations where no person of the same sex is available and where a frisk search needs to be conducted to ensure the security of court premises.

*Clause 47: Court security orders*

Clause 47 has been included in the Bill to clarify that a judicial officer is not automatically required to disqualify him or herself from hearing other proceedings to which the person the subject of a court security order is or becomes a party.

This provision is not intended to abrogate the natural justice rules against bias. The purpose of clause 47 is to ensure that the Bill does not seek to impinge on a court's ability to manage the hearing of proceedings before it independently of the Executive. Where the making of a court security order may lead to a perception of bias against a person, it would be a matter for the relevant court to arrange for proceedings involving that person to be heard before a different judicial officer, as it would be a matter for the court to arrange in other cases of perceived bias.

I trust that this information is of assistance to the Committee and the Senate in considering the Bill.

The action officer in relation to the Marriage Amendment (Celebrant Administration and Fees) Bill is Esther Bogaart who can be contacted on 02 6141 3392 or [esther.bogaart@ag.gov.au](mailto:esther.bogaart@ag.gov.au). The action officer in relation to the Court Security Bill is Dianne Orr who can be contacted on 02 6141 2967 or [dianne.orr@ag.gov.au](mailto:dianne.orr@ag.gov.au).

Yours sincerely



**MARK DREYFUS QC MP**

20/6/13



**Attorney-General  
Minister For Emergency Management**

13/3890-01

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

Dear Mr Macdonald

**Response to *Alert Digest No.6 of 2013* (19 June 2013)**

The Australian Government welcomes the opportunity to provide the Standing Committee for the Scrutiny of Bills with comments in response to the issues identified in the *Alert Digest No.6 of 2013* (19 June 2013), concerning the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (the Bill).

**Trespass on personal rights and freedoms — Schedule 3, item 4, proposed section 236D**

The Committee requested my advice as to whether consideration had been given to the appropriateness of the criminal standard of proof in relation to age requirements in the context of people smuggling offences (subdivision A of Division 12 of Part 12 of the *Migration Act 1958*).

Under subsection 236B(1) of the Migration Act, mandatory minimum penalties do not apply 'if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'. The Act does not specify which party bears the onus of proof. In practice, the onus of proof has generally been attributed to the prosecution. However, this issue has been dealt with inconsistently by the courts in each jurisdiction. To clarify the intention and achieve consistency, amendments to the Migration Act are proposed to expressly provide that, where a defendant raises the issue of age during proceedings, the prosecution bears the legal burden to establish on the balance of probabilities that the defendant was an adult at the time the offence was committed.

Section 236A of the Migration Act provides that a court may make an order under section 19B of the *Crimes Act 1914* (to dismiss a charge without proceeding to conviction) in respect of a charge for specified people smuggling offences only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.

Subsection 236B(2) of the Migration Act provides that mandatory minimum penalties do not apply for specified people smuggling offences if it is established on the balance of probabilities that the convicted person was aged under 18 years when the offence was committed.

Requiring the defendant's age to be proved on the balance of probabilities under the proposed section 236D is consistent with the already entrenched intention of the Parliament regarding the prosecution and sentencing of persons claiming to be minors, as expressed by the abovementioned provisions of the Migration Act.

### **Trespass on personal rights and liberties — Schedule 3, item 4, proposed section 236E**

The Committee has raised the question of whether the use of evidentiary certificates is appropriate.

These measures will assist to alleviate delays in people smuggling investigations, and will also alleviate pressures on Border Protection Command crew resulting from the need for significant numbers of crew to give evidence in people smuggling prosecutions. This will result in persons accused of people smuggling offences spending less time in custody or immigration detention.

Evidentiary certificates in proposed section 236E of the Migration Act will contain material that is not likely to be in dispute. The certificates will state matters of a formal or technical nature, for example, matters might include the location of a vessel at the time the officer boarded and the number of passengers and crew on board the vessel. Evidentiary certificates will not be used to prove contentious matters such as the role allegedly played by the defendant on the vessel. However, under certain circumstances, the person charged is entitled to require the person who issued the certificate to attend court as a witness. The person who issued the certificate would appear as a witness for the prosecution and would be available for cross-examination by the person charged.

An accused person is entitled to challenge the contents of an evidentiary certificate in court. The Bill provides that any evidence given in rebuttal of an evidentiary certificate must be considered on its merits and not discounted by reason of the fact that an evidentiary certificate has been admitted into evidence.

Evidentiary certificates are a commonly used mechanism to ensure that court resources are not tied up adjudicating on uncontested facts, and will allow parties to focus on facts that are at issue.

Evidentiary certificates are used in other legislative contexts. For example, section 55B of the *Privacy Act 1988* allows the Commissioner to issue a written evidentiary certificate setting out the findings of fact upon which certain determinations were based. Evidentiary certificates are also used in section 15MT of the *Crimes Act 1914*, which allows a chief officer of a law enforcement agency to sign a certificate stating certain facts. Section 62 of the *Surveillance Devices Act 2004* also allows for the use of evidentiary certificates by an appropriate authorising officer for a law enforcement officer, setting out any facts he or she

considers relevant in respect to certain facts.

**Delegation of power — Schedule 3, item 4, section 236E**

As mentioned above, evidentiary certificates in proposed section 236E of the Migration Act will contain material that is not likely to be in dispute. The certificates will state matters of a formal or technical nature and will not be used to prove contentious matters such as the role allegedly played by the defendant on the vessel.

I accept that this is a broad power to create a legislative instrument that sets out matters that may be set out in an evidentiary certificate. However, I note that an accused person is entitled to challenge the contents of an evidentiary certificate in court. There would be no reason to create a legislative instrument that allows more contentious matters to be set out in an evidentiary certificate. This is because these facts would be contested by the defendant, rendering the issuing of the certificate ineffective. The power merely allows flexibility to include at a later stage matters of a formal or technical nature that may be drawn to my attention in future.

**Trespass on personal rights and liberties — Schedule 4, item 24, reversal of onus**

Item 24 of Schedule 4 of the Bill creates an exception to an existing offence. The existing offence applies strict liability to a reporting entity that provides a designated service to a person using a false customer name. The exception ensures that a regulated business does not commit an offence by providing a designated service to an individual using a false identity 'if the customer's use of that name is justified, or excused, by or under a law' such as an individual in witness protection or a member of an undercover law enforcement operation.

Because it is an exception to an existing offence, the defendant bears the evidential burden of adducing or pointing to evidence that suggests that the person had lawful reason for using the false customer name. If the defendant discharges that evidential burden, it then rests with the prosecution to disprove those matters beyond reasonable doubt. This is in accordance with the Guide to Framing Commonwealth Offences.

In practice, it is unlikely that charges would be brought against an entity that was providing a designated service to a person with a lawful reason for using a false identity, given the likely involvement of law enforcement in the legitimate use of false identification. However, this amendment is a response to concerns raised by regulated entities, in particular concerns raised by the major banks, that if they were to provide a designated service to an individual with a lawful false identity they would be committing an offence under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The addition of this defence gives regulated businesses the benefit of an exception if such a situation were to occur.

Thank you for the opportunity to clarify these matters and for the continuing, important work of the Committee in assisting in the scrutiny of Bills brought before the Parliament.

Yours sincerely



**MARK DREYFUS QC MP**

25/6/13

24 JUN 2013



**THE HON JASON CLARE MP**

Cabinet Secretary  
Minister for Home Affairs  
Minister for Justice

**RECEIVED**

24 JUN 2013

Senate Standing C'ttee  
for the Scrutiny  
of Bills

Ministerial number: 108016

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

Dear Chair

I refer to Ms Toni Dawes letter of 20 June 2013 regarding the Scrutiny of Bills Committee's consideration of the *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (the Act), which received Royal Assent on 28 May 2013.

The Committee sought further advice on how cargo terminal operators will be made aware of any new obligations arising from provisions such as 102CE and 102CJ of the Act.

The Australian Customs and Border Protection Service (ACBPS) will inform cargo terminal operators through its normal industry communication channels such as publication of Customs and Border Protection Notices. Given the significance of non-compliance with any new obligations so imposed, ACBPS will also write to cargo terminal operators that have provided notification in accordance with section 102C.

Please note also that Regulations made under these provisions will be subject to disallowance under the *Legislative Instruments Act 2003* and will therefore be subject to Parliamentary scrutiny.

The officer responsible for this matter in Customs and Border Protection is Anthony Seebach, National Manager Compliance Assurance, who can be contacted on 02 6275 6771.

Yours sincerely

**Jason Clare**



Minister for Climate Change, Industry and Innovation

25 JUN 2013

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

Dear Senator,

**Intellectual Property Laws Amendment Bill 2013**

Thank you for your letter of 20 June 2013 concerning the Intellectual Property Laws Amendment Bill 2013 (the Bill), which was introduced to Parliament on Thursday, 30 May 2013. I note that the Committee has raised some concerns about the Bill in its *Alert Digest No.6 of 2013*, with regard to the commencement date for item 14 of Schedule 6, the consideration of merits review under Schedule 1, item 5, and the accountability arrangements under Schedule 5, item 25. I trust that the following advice on each of these items will be of assistance to the Committee.

**Retrospective Commencement: Schedule 6, item 14**

The purpose of Schedule 6 to the Bill is to amend the *Patents Act 1990* (Patents Act) to correct minor technical errors, due to the drafting of the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Raising the Bar Act). The Raising the Bar Act introduced a wide range of intellectual property reforms designed to support innovation by encouraging research in technology in Australia, and by helping Australian businesses benefit from their good ideas. The Raising the Bar Act entered into full effect on 15 April 2013.

I note that the Committee seeks to understand whether it is possible that a person's rights may be adversely affected due to the retrospective commencement of item 14. This item aligns the infringement exemption in section 119 of the Patents Act with the 'grace period' in section 24 of the Act.

The grace period provided in section 24 of the Patents Act allows for public disclosure of an invention (under certain conditions) without affecting the validity of a subsequent patent application (provided that a complete application is filed within 12 months of the disclosure). This, in effect, provides a safety net for inventors who, possibly inadvertently, publicly disclose their invention before they apply for a patent.

To balance this against the interests of third parties who may have relied on the information being in the public domain during the grace period, section 119(3)(b) of the Patents Act provides a countervailing exception to infringement. If a potential patent applicant makes their invention available, a competitor might see the invention and not be aware that the potential applicant is taking advantage of the grace period. The potential applicant may later file a patent application that would make the competitor's conduct infringing. In this circumstance, it would be unfair to permit the patent applicant (later the patentee) to prevent the competitor from using an invention that they did not know would later be subject to a patent application (and subsequently granted patent).

The Raising the Bar Act repealed the requirement in section 24 that, for the grace period to apply, the information had to be made publicly available 'through any publication or use of the invention'. Now the grace period applies more generally to 'information made publicly available'. However, as an oversight, the same words in section 119(3)(b) regarding infringement exemptions were not deleted.

To ensure that the grace period of section 24 and infringement exemption of section 119 remain aligned, the Bill omits reference to 'publication or use of the invention' from section 119(3)(b). The amendment would commence retrospectively, to ensure that without doubt, a third party does not infringe a patent if they derived the invention from information made publicly available by the applicant during the grace period.

This amendment will have little or no difference in practice, but puts the matter beyond legal doubt so that competitors of a patentee are not disadvantaged in relation to conduct before a patent application was filed. Infringement occurs where there is unauthorised use of a patented invention. As far as infringement is concerned, there is very little difference between the two meanings: the invention being made publicly available by publication or use; and information about the invention being made publicly available.

The commencement of item 14 of Schedule 6 is highly unlikely to have an effect on individual rights, liberties or obligations. The likelihood of a person's rights being adversely affected is so low that it is difficult to conceive of a situation where this might occur. It is the clear policy of the Patents Act as it stands that the infringement exemption be aligned with the grace period. Item 14, when enacted, will continue the existing policy that a patentee cannot sue a competitor for a use derived from information publicly disclosed by the patentee before they applied for a patent. Retrospective effect will ensure consistency of legislation, clarity for users, and put the matter beyond legal doubt.

Passage of the Bill in the Winter 2013 sittings will ensure that commencement of item 14 of Schedule 6 will only date back a matter of months, and ensure that this aspect of the Patents Act is consistent and operates as intended.

#### **Merits Review: Schedule 1, item 5**

It is appropriate that decisions by the relevant Minister to approve Crown exploitation of a patented invention are not subject to merits review. Consideration has been given to the appropriateness of merits review of such decisions. The following factors were considered in deciding that it is not appropriate to include merits review of such decisions:

- the Minister's decision to approve Crown exploitation will depend primarily on policy considerations. Consistent with existing section 163(3) of the Patents Act, the Crown

- exploitation must be “necessary for the proper provision of those services in Australia”. This makes it clear that the relevant Minister must focus on the policy need for the Crown use. This requirement is repeated in section 160A(4) of the Bill;
- the decision will be made by the relevant Minister personally. The power cannot be delegated; and
  - it is intended that the power will continue to be used rarely (i.e. in situations of emergency, or where there is a compelling public interest consideration).

Additionally, section 165A of the Patents Act expressly allows a patent holder to apply to a prescribed court for a declaration that the exploitation is not, or is no longer, necessary for the proper provision of services for the Commonwealth or of a State. The court may further order that Crown exploitation is to cease. This provision will remain.

It is also notable that the proposed amendments in the Bill already significantly increase the transparency and governance surrounding Crown exploitation of a patented invention.

#### **Accountability Arrangements: Schedule 5, item 25**

The provisions of the Patents Act to be introduced by Schedule 5 to the Bill allow for the streamlining of the processes for applying for patents in Australia and New Zealand, and for the examination of common applications. Single patent application and examination processes for Australia and New Zealand aim to remove duplication, making it easier for businesses to protect their intellectual property in both countries. This is part of the broader trans-Tasman Single Economic Market (SEM) agenda which aims to provide a streamlined trans-Tasman business environment. The SEM was agreed to by the Australian and New Zealand Prime Ministers in August 2009.

Item 25 of the Bill would permit the Australian Commissioner of Patents to delegate all or any of the Commissioner’s powers and functions under the Patents Act and its regulations to a New Zealand patents official. This allows the Australian Commissioner to delegate powers and functions to patent examiners in the Intellectual Property Office of New Zealand. It is not intended that the delegating powers be used otherwise.

Accordingly, the designation to a New Zealand examiner as a delegate of the Australian Commissioner provides that a decision made by that examiner would be deemed to be one that has been made by the Australian Commissioner.

As it would be the decisions of the Australian Commissioner under review, applications under the *Freedom of Information Act 1982* (the FOI Act) would be capable of being made in respect of those decisions. A request made under the FOI Act could therefore be made regardless of whether the FOI Act is extended specifically to provide coverage to the Intellectual Property Office of New Zealand. Consequently, one of the concerns expressed by the Committee does not present as a practical issue.

Furthermore, the vast majority of documents that are handled by patent examiners relating to patent applications become open to public inspection (OPI) 18 months after the application was first filed. The OPI system under the Patents Act provides an exemption for access to such documents under the FOI Act. IP Australia publishes most OPI documents on its website; copies of other OPI documents are available from IP Australia on request. Documents relating to patent applications that are handled by New Zealand

delegates of the Australian Commissioner will be subject to the same OPI provisions as Australian examiners, and will all be published by IP Australia.

It is also necessary to clarify, following another concern of the Committee, that the jurisdiction of the *Ombudsman Act 1976* already has extraterritorial effect, and its application would apply to decisions made by a New Zealand examiner with the delegated powers of the Australian Commissioner.

Any decision made by a New Zealand delegate would be considered a decision of the Australian Commissioner and therefore would be reviewable through the normal procedure in the Patents Act. The concerns of the Committee with regard to section 39B of the *Judiciary Act 1903* do not present a significant practical issue in regards to reviewability of decisions, as the Bill provides that for the purposes of the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*, review by the Administrative Appeals Tribunal and the Federal Court would still be available to Australian applicants for decisions taken in New Zealand (Schedule 5 item 38, 227AB).

Patent applicants may also be confident that their personal information, supplied to one office as part of an application, will be protected according to the law of the jurisdiction governing that office. A consistent application of privacy laws will apply to each jurisdiction by virtue of the revised *Privacy Act 1988* which, as of March 2014, will ensure that actions of Australian Government agencies in overseas territories will be regulated. The relevant provisions of Schedule 5 to the Bill will come into effect after March 2014, ensuring that the effects of the revised Privacy Act can be realised. This follows from the fact that Schedule 5 will not commence until the New Zealand Parliament has enacted its amended patents legislation, which will have a 12-month commencement period.

As practical matter, the decisions of New Zealand examiners will be monitored and quality controlled. The New Zealand examiners' performance will be subject to the same quality review systems as Australian examiners. If New Zealand examiners do not maintain sufficient standards, then their delegated ability to examine under the Australian Patents Act will be revoked.

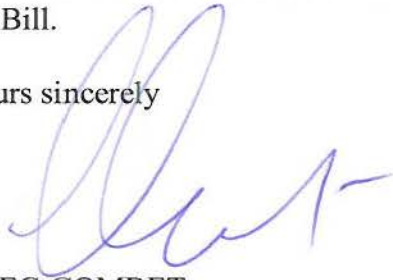
IP Australia has numerous internal safeguards in place. Where decisions of examiners are subject to dispute by a patent applicant, the matter is referred to supervising examiners and to the Deputy Commissioner of Patents. If the dispute continues, the usual procedure is to request a hearing before a hearings delegate of the Australian Commissioner, who would be an officer of the Australian Public Service. It would be this decision, and not the decision of the New Zealand examiner, that would be appealed to a court.

In addition, an Australian patent applicant whose application is examined by a New Zealand delegate of the Australian Commissioner will be able to apply under the Compensation for Detriment caused by Defective Administration (CDDA) Scheme for any defective administrative action made by a New Zealand delegate. The CDDA Scheme exists to provide a discretionary remedy for defective actions of Financial Management and Accountability Act 1997 agencies.

This position has been confirmed by the Department of Finance and Deregulation, the Department with policy responsibility for the CDDA Scheme. IP Australia, not the New Zealand delegate or government would be able to consider and pay any claim.

I trust that the above advice addresses the matters raised by the Committee in relation to the Bill.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Greg Combet', with a stylized flourish at the end.

GREG COMBET



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

**RECEIVED**

24 JUN 2013

Senate Standing C'ttee  
for the Scrutiny  
of Bills

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

Dear Senator Macdonald

I refer to correspondence of 20 June 2013 from the Senate Standing Committee for the Scrutiny of Bills, regarding the Private Health Insurance Legislation Amendment (Base Premium) Bill 2013. The Committee seeks my advice as to whether the use of the Private Health Insurance (Incentive) Rules is an appropriate instrument to deal with the calculation of the weighted average ratio described in subsection 22-50(5) of the Bill, rather than including it in the primary legislation.

On 17 June 2013, this matter was raised in the Senate by Senator Jacinta Collins, Manager of Government Business in the Senate and Parliamentary Secretary for School Education and Workplace Relations. As mentioned by Senator Collins, the calculation of a weighted average ratio is necessary to determine the base premium for product subgroups that are made available after 1 April 2013. The weighted average ratio will take effect on and from 1 April 2013, in line with the commencement of the relevant provisions of the Bill. Industry is to be consulted on the final specifics of the weighted average ratio.

On 6 June 2013, my Department provided a submission to the Senate Community Affairs Legislation Committee on the Bill. On page eight of the submission my Department gave a detailed example of how the weighted average ratio for new products is intended to work. The use of a weighted average ratio does not go beyond the more general operation of the Bill, which sets a base premium for every health insurance policy made available.

It is the Australian Government's view that the use of the weighted average ratio is a technical detail necessary to ensure consistency of the private health insurance rebate entitlement between existing and new policies. As with measures of this nature, it is required that Government continue to monitor implementation. Best practice monitoring of the operation of the technical specifics of the weighted average ratio, will involve continuous consultation and feedback from industry.

Over the course of time, it may be necessary to make adjustments to the technical detail of the weighted average ratio, as a result of feedback from industry, to guarantee that the objectives of the Bill are met without undue operational or implementation complexities. It was decided that the detailed specifics of the weighted average ratio be included in the Private Health Insurance (Incentives) Rules to facilitate effective continuation of the intended operation of the Bill.

It is a practicable and appropriate course of action to provide for the technical specifics of the weighted average ratio in the Private Health Insurance (Incentives) Rules rather than in the primary legislation.

In accordance with the *Legislative Instruments Act 2003*, any technical adjustments to the weighted average ratio after commencement of the Bill will be subject to consultation with industry and be tabled before each House of Parliament.

Yours sincerely



**Tanya Plibersek**

24.6.13



**The Hon Michael Danby MP**  
**Parliamentary Secretary for the Arts**

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C13/257

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

17 JUN 2013

Dear Senator Macdonald

Thank you for the letter of 28 February 2013, from the Scrutiny of Bills Committee Secretary to the former Minister for the Arts, the Hon. Simon Crean MP, concerning the Protection of Cultural Objects on Loan Bill 2012. I regret the delay in responding.

I note that the *Protection of Cultural Objects on Loan Act 2013* (the Act) received the Royal Assent on 14 March 2013, however I take this opportunity to provide additional information in response to the Committee's letter.

I understand that the Scrutiny of Bills Committee requested further information in relation to the regulation making power under section 21 of the Act, and was particularly interested in how the temporary restriction on legal action is balanced by the consultation and publication requirements which will be included under regulations.

The primary purpose of the Act is to encourage the loan of significant cultural objects from overseas for temporary public exhibition in Australia thereby providing increased access for all Australians to foreign and Australian objects which are held in overseas collections. The Act achieves this by providing a level of protection to lenders that the cultural material will not be subject to legal action for the limited period it is in Australia.

Subsection 21(3) of the Act outlines the key areas where regulations may be made, including in relation to requirements for consultation, publication and reporting. As outlined in the Statement of Compatibility with Human Rights, the limitation on the ability of persons to take action through the Australian legal system, for the limited period of the loan, has been balanced against the public interest of the significant social, economic and cultural benefits that can be delivered through securing international loans for temporary public exhibition.

The consultation provisions, which will be included in regulations, will require borrowing institutions to consult with members of communities, or organisations representing them, about proposed loans of objects in circumstances where those communities or organisations may have a particular interest or relationship with the objects that will be the subject of the loan. As noted in the Statement of Compatibility, requiring consultation prior to the importation of the objects for exhibition is a transparency measure that provides a mechanism for the identification of any issues in relation to a proposed loan, as well as opportunities for members of communities to raise any concerns about a proposed loan. For example when

considering the loan of objects which have been associated with periods of conflict consultation with groups representing the communities affected by that conflict is vital to ensure that despite the borrowers thorough research there are no perceived issues around the legal or ethical ownership of the items. In addition, it is envisaged that specific consultation requirements will be developed for loans of Aboriginal and Torres Strait Islander material to provide opportunities for Indigenous people who may have an interest in objects proposed for loan to learn about and be actively engaged in discussions on proposed loans. These requirements will provide principles and guidance on appropriate engagement with Aboriginal and Torres Strait Islander communities to provide opportunities for informed input into decisions regarding the loan and presentation of their cultural heritage. Further it is envisaged that this consultation will facilitate knowledge sharing regarding the Indigenous cultural material held in overseas collections.

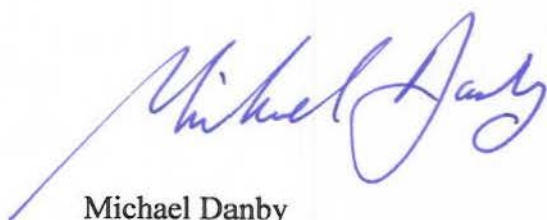
The regulations will include requirements that borrowing institutions publish certain information about proposed loans of cultural objects from overseas prior to their importation into Australia. The publication provisions are an important transparency mechanism that, it is envisaged, will enable people to raise questions about the object's history and ownership. In addition to the consultation with specific communities it is considered that the provision of information to the broader public will provide a further avenue to ensure that all aspects of interest in a proposed loan are considered before the objects enters Australia.

Consultations are being held around the country with major national, State and Territory collecting institutions, Indigenous Advisory Committees and other interested groups to ensure the requirements for consultation and publication that will be included in the regulation reflect best practice. The provision of this detail in regulation will ensure that there is sufficient flexibility to enable the requirements to remain relevant by reflecting current professional practice in the collections sector and ensure they provide a benchmark for Australian best practice.

The inclusion of this detail in regulation will not limit the effectiveness of these requirements as an effective balance to the protections offered by the Act or as accountability mechanisms. It is intended that borrowing institutions will be required to provide an annual report to the Minister on their activities relevant to the operation of the Act, including reporting on consultation and publication activities in relation to international loans.

I hope this information is of assistance to the Committee and thank you for your interest in this matter.

Yours sincerely



Michael Danby



# SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation

REF:B13/748

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

25 JUN 2013

Dear Chair

**Response to Senate Standing Committee for the Scrutiny of Bills  
Alert Digest No. 6 of 2013 (19 June 2013)**

Thank you for your letter of 20 June 2013 in relation to Alert Digest No. 6 and the comments of your Committee in relation to the *Public Governance, Performance and Accountability Bill 2013*.

The Digest raises a number of matters in relation to the Bill and whether the exercise of powers under its provisions will be subject to sufficient parliamentary scrutiny. I wish to make the following comments in relation to these concerns.

The approach taken under the proposed Bill is consistent with that taken under the existing legislation it seeks to replace; namely the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). As in the case of regulations issued under those pieces of legislation, the rules to be issued under the provisions of this Bill are legislative instruments. As a consequence they will need to be presented to Parliament and will be subject to disallowance.

The Government has also made commitments in the presentation of the Bill to the Parliament, in the Explanatory Memorandum and in the course of debate that the rules will be subject to extensive consultation, including with the Joint Committee of Public Accounts and Audit (JCPAA), before they are presented to the Parliament for consideration of disallowance.

The Government has also taken up the suggestion of the JCPAA by including (at clause 112 of the Bill) a requirement that the legislation is to be subject to review three years after it comes into full operation, with the resulting report to be tabled in both Houses.

Rules to be established under clause 87 (establishing new corporate Commonwealth entities), clause 104 (Rules modifying the application of this Act) and clause 105 (Rules in relation to other CRF money) will be subject to both the consultation commitments and to being subject to disallowance by the Parliament.

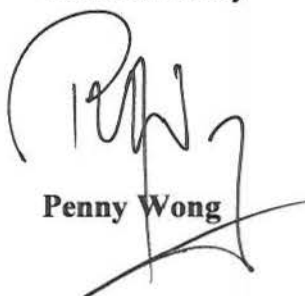
Clauses 87 and 104 are based on provisions in legislation previously approved by Parliament (the *Primary Industries and Energy Research and Development Act 1989* for clause 87 and existing provisions within the FMA and CAC Acts for Clause 104). Research and development corporations are already established under regulation in the way proposed in the Bill, and modifications for intelligence and security organisations are already achieved through regulation. Both arrangements are currently subject to disallowance in relation to their relevant regulations, and this disallowance requirement will continue.

Clause 105 relates to an extremely limited number of circumstances and has been included as a result of advice from the Australian Government Solicitor.

Other provisions within the Bill deal with the coverage of appropriated funds held by or to the credit of a bank account of a non-corporate Commonwealth entity. Clause 105 covers those circumstances that may arise where the funds are held by a party other than the Commonwealth, but the funds are still considered in a legal sense to be part of the Consolidated Revenue Fund. The Rules will cover such circumstances, they will be subject to disallowance, and will be the subject of extensive consultation to ensure their efficacy before they are submitted to Parliament for its consideration.

The contact for the response to this recommendation is Mr George Sotiropoulos, Assistant Secretary, Governance Branch, who can be contacted by telephone (02) 6215 3657 or email [cfar@finance.gov.au](mailto:cfar@finance.gov.au).

Yours sincerely



Penny Wong



**Hon Sharon Bird MP**  
Minister for Higher Education and Skills

**RECEIVED**

26 JUN 2013

Senate Standing C'ttee  
for the Scrutiny  
of Bills

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

Dear Senator MacDonald

I refer to the letter of 16 May 2013 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills to my Office drawing our attention to comments contained in the Committee's *Alert Digest No.5 of 2013* concerning the Student Identifier Bill 2013 and requesting my response.

I have now had an opportunity to consider the issues raised and my response is detailed in the attachment to this letter. I trust my responses address the concerns raised in *Alert Digest No.5 of 2013* to the Committee's satisfaction.

If you have any further questions, please do not hesitate to contact me again on this important matter.

Yours sincerely

SHARON BIRD MP

24 JUNE 2013

**Student Identifiers Bill 2013 – Responses to Issues Raised**

In responding to the Committee's queries regarding the Student Identifier Bill 2013 (the SI Bill), it is important to provide context regarding the vocational education and training (VET) sector.

The SI Bill, provides for the introduction of a unique student identifier for the Vocational Education and Training (VET) sector. The scheme is an initiative of the Council of Australian Governments (COAG) that has been jointly agreed between the Commonwealth, states and territories under the auspices of the Standing Council for Tertiary Education, Skills and Employment (the Standing Council).

The VET sector is governed primarily through the *National Vocational Education and Training Regulator Act 2011* (Cth) (the NVETR Act) and regulated by a national body set up under that legislation – the Australian Skills Quality Authority (ASQA). However, the NVETR Act operates on the basis of referral of powers from the states. There are two States (Western Australia and Victoria) which have not referred the necessary powers to support the NCWRE Act. Registered Training Organisations (RTOs) that are not registered under the NCETR Act or the *Education Services for Overseas Students Act 2000* and which operate solely within the borders of one of those two states are governed under relevant state legislation and by state based regulators.

In order to maintain a cohesive national VET system, the Standing Council has agreed that the requirements on RTOs and Regulators in the non-referring states would be agreed by the Standing Council and reflected in the Australian Quality Training Framework (AQTF). The regulators in non-referring states regulate in accordance with the Standards under the AQTF.

The NVETR Act supports this national approach by enabling the Commonwealth Minister to make Standards for RTOs and Regulators and to specify data provision requirements, with the agreement of the Standing Council (see Part 4 of the NVETR Act).

**Issue 1: Trespass of personal rights and liberties - privacy**

*The Committee expressed interest in obtaining a better understanding of whether further protections of individual privacy have been considered or might be considered in relation to clauses 17 and 24 of the Bill.*

*The Committee also expressed a concern that protocols relied upon to adequately protect privacy interests will not be subject to parliamentary scrutiny and requested a more detailed explanation from the Minister as to why this approach is necessary and considered appropriate. The Committee noted that if the protocols cannot be subjected to parliamentary scrutiny, that consideration could be given to whether the Bill could require the involvement of the Information Commissioner in the development of the protocols or review of the protocols.*

**Response**

To assist the Committee's understanding of the protections of individual privacy provided by clauses 17 and 24, it is relevant to consider the full set of privacy protections provided by the SI Bill. There have been broad ranging and iterative consultative processes with stakeholders during the past two years to identify potential issues associated with the introduction of a unique student identifier for

the VET sector and to design solutions to ameliorate their impact. Given the potential impact on individual privacy, extensive consultations have been undertaken with the Office of the Australian Information Commissioner (OAIC) and the offices of the privacy commissioners in Queensland, NSW and Victoria regarding the privacy aspects of the SI Bill, including the 'requirements' as mentioned in Clause 24(2)(b) of the SI Bill.

The principal features of the privacy protections in the scheme are:

- A Confidentiality Scheme: which provides that the student identifier must not be collected, used or disclosed by an entity if they are not the individual, or the collection, use or disclosure is not authorised in the SI Bill or the Regulations (see clause 16). This protection of the identifier operates in conjunction with the existing privacy protections for personal information contained in Commonwealth and State/Territory privacy legislation.
- Individual Control: the principle underpinning the scheme is that individuals have control over their identifier and can determine who can have access to the personal and educational records associated with it (see subclause 26(1) and 26(3)). The ICT system which will underpin the scheme is specifically being designed and built to incorporate these important safeguards.
- Regulatory Oversight: Clause 22 establishes that contraventions of clause 10 (dealing with destruction of records used in applying for a student identifier), clause 15 (dealing with protection of the student identifier from misuse interference and loss), and clause 16 (dealing with unauthorised collection or disclosure of the student identifier), are to be taken to be an interference with the privacy of the individual for the purposes of the *Privacy Act 1988* (Cth) (the Privacy Act) and subject to the provisions of that Act. This means that the Privacy Commissioner can investigate a breach of clauses 10, 15 or 16.
- Retention and Storage of Information: the requirement that no personal information collected solely for the purpose of applying for a student identifier can be retained unless required by law (see clause 10).

In February 2013, the OAIC provided a submission to the Department's public consultation on the legislative package for the unique student identifier scheme.<sup>1</sup> In that submission, the OAIC notes that it provided policy advice about the privacy issues associated with the scheme at various stages in the development of the legislation. One of the issues raised in that submission was about the provisions that permit the disclosure of student information and student identifiers for research purposes.

The OAIC provided a further submission<sup>2</sup> in April this year – this time to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the SI Bill. That submission indicates that the "OAIC and the Department have worked collaboratively to address many of the issues raised in [the February] submission." OAIC went on to say that "the OAIC ... welcomes the approach taken in the [the SI Bill] to reflect the principles in the Privacy Act by outlining specific circumstances in which particular entities may collect, use or disclose an individual's student identifier." The OAIC also stated that the approach to privacy protection adopted in the SI Bill was welcome and reflects the principles in the Privacy Act in terms of both protecting the student identifier and protecting records, which reflect the security and access principles in the Privacy Act.

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<sup>1</sup> See 'Consultation on the Legislative Package for the Unique Student Identifier : Submission to the Department of Industry, Innovation, Science, Research and Tertiary Education (February 2013)' at <http://www.oaic.gov.au/publications/submissions.html>

<sup>2</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=eet\\_ctte/student\\_identifiers/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=eet_ctte/student_identifiers/submissions.htm).

In addition, the independent privacy impact assessment undertaken by Minter Ellison Lawyers and Salinger Privacy in October 2012 found that a range of sensible privacy-positive design elements have been adopted in developing the student identifier system, which have eliminated or mitigated actual or potential privacy risks. The privacy impact assessment concluded that none of the identified risks present an unacceptable privacy impact, or require mitigation measures that would significantly delay the implementation of the scheme.

It is also worth noting that the provisions governing access to student identifiers would operate in addition to existing privacy provisions in both Commonwealth and State/Territory privacy legislation. This means that in collecting, using and disclosing student identifiers, individuals need to comply with both State/Territory and Commonwealth privacy legislation regulating the use of personal information, as well as specific restrictions in the SI Bill in relation to student identifiers.

Moving now to the Committee's specific area of interest, as noted in the EM (see page 12), currently longitudinal research databases for the VET sector can only be created through statistical matching. During consultations around the development of the Bill, the Australian Bureau of Statistics (ABS) raised with the department an example of how the national collection of VET data could be used if student identifiers were introduced. The ABS saw the value of developing a longitudinal data set across the various education sectors. In order to create this data set, a researcher would need to pull identified data from each education sector and match for individuals across those sectors. The resultant data set would then be altered so that no individual could be identified. It is the resultant data set that would be used to carry out the research, but in order to create that data set, identified data would need to be pulled from each education sector – in the VET sector, that would involve an initial disclosure of the student identifier.

Clauses 17 and 24 would enable the creation of reliable data sets on which to base longitudinal studies of VET activity and educational pathways over an individual's lifecycle, including the monitoring of learner pathways and transitions for disadvantaged learners (see page 22 of the EM).

The 'requirements' mentioned in Clause 24(2)(b) are currently being prepared for consideration by the Standing Council. In this respect, the Department is working with the OAIC and it is expected that through the Standing Council, all state and territory privacy commissioners will also be engaged in the development of the 'requirements', reflecting the cross jurisdictional nature of the Student Identifier as an initiative of the Council of Australian Governments.

In practical terms, **it is anticipated** that any relevant research proposal will need to satisfy three prerequisites:

1. demonstrate that the information is reasonably necessary for the proposed research, or the compilation or analysis of statistics, is in the public interest; and either:
  - a. that purpose cannot be served by the use of information that does not identify the individual or from which the individual's identity cannot be reasonably be ascertained, and it is impractical for the organisation to seek the consent of the individual for the use; or
  - b. reasonable steps are taken to de-identify the information.
2. provide an assurance that, if the information could reasonably be expected to identify individuals, the information will not be published in generally available publications.
3. the proposal would need to be examined and approved by an Ethics Committee, on the basis that the public interest in the research or the compilation or analysis of statistics substantially outweighs the public interest in the protection of privacy.

A compliant research proposal would be considered by a committee comprising a representative from the Student Identifier Agency and the National Centre for Vocational Education and Research (the NCVER) (either of which may be excluded in the case of perceived conflict of interest) and other members as appointed by the Minister in consultation with the Standing Council. It is worth noting that both the Student Identifier Agency and the NCVER are subject to the Privacy Act.

Given this, the provisions of the SI Bill that relate to access by researchers to student identifiers reflect an appropriate balance between providing a high level of privacy protection for individuals regarding the collection, use and disclosure of student identifiers, and allowing sufficient flexibility to accommodate the wide range of legitimate requests for access to student identifiers by researchers. I submit that it does not inappropriately delegate legislative powers in breach of principle 1(a)(iv) of the Committee's terms of reference.

## **Issue 2: Delegation of Legislative Power – Clause 21**

*The Committee noted their concern that clause 21 of the Bill enables the making of regulations that may infringe on an individual's privacy and that as such, the Committee expects to see a strong justification for departing from the general principle that important matters should be dealt with in primary legislation. However, as the regulations will be disallowable instruments and their making and amendment will require the agreement of the states and territories through the Standing Council, the committee notes the above comment but leaves the appropriateness of the overall approach to the Senate as a whole.*

## **Response**

As noted above, the development of the SI Bill has been the subject of wide ranging consultations. One of the issues raised by stakeholders during that development process was the need for an effective balance between privacy protection and the ongoing operation of the VET sector.

The SI Bill contains a confidentiality scheme to protect the student identifier. This was seen as providing the highest level of protection to individuals. However, the consequence of including the confidentiality scheme is that it is necessary to authorise all uses of the student identifier that would take place in the normal business operations of entities in the VET sector. For example, where a student moves from one RTO to another, that student's records can be forwarded – this disclosure of the student identifier has to be specifically authorised. RTOs also have obligations to report data about the training they deliver. In meeting these requirements, RTOs provide data they have on students to, and through, a number of entities (for example, Boards of Studies, State Training Authorities, other funding bodies).

The matters listed on page 48 of the EM (and which are reflected in the draft Regulations that were released for public consultation along with the draft SI Bill earlier this year) are a map of the existing data flows within the VET sector that will be impacted by the requirement for the Student Identifier to be captured with the data held by entities within the VET sector under the Australian VET Management Information Statistical Standard.

Some of the data reporting requirements on RTOs are governed by the Standards under the NVETR Act and the AQTF which will change from time to time. As noted above, the Standards are made under the NVETR Act by the Minister with the agreement of the Standing Council – see section 185 and 187 of the NVETR Act. I submit that, it is appropriate that the authorisation to collect, use and disclose the student identifier be managed in the same way.

As the Committee notes, the regulations will be a disallowable instrument, necessitating the scrutiny of the Commonwealth Parliament in relation to their creation and amendment. The creation and amendment of these regulations will also require the agreement of the states and territories through the Standing Council. I submit that this provides a sufficient level of parliamentary scrutiny. Moreover, the Bill operates alongside the protections provided to personal information under the Privacy Act (or the equivalent legislation within the State and Territory jurisdictions).

### **Issue 3: Merits review - Clause 25**

*The Committee asked whether consideration had been given to the appropriateness of providing for merits review of the discretionary decisions of the Chief Executive Officer (CEO) under clause 25 relating to access to an authenticated VET transcript and whether it is appropriate to include more guidance in the legislation as to how this discretionary power is to be exercised.*

#### **Response**

In responding to the Committee's concern, it is relevant to consider the process for an individual being given access to an authenticated VET transcript under clause 25 of the SI Bill. In practice, this is a fully automated process managed by the national ICT system being developed within the department for the Student Identifiers Agency. That system will allow the individual to access their student identifier account (using a password) and the individual would be able to request an authenticated VET transcript. The ICT system will link the individual's account with records held within the NCVER associated with that student identifier and immediately return all of the relevant information to the individual in the form of an authenticated VET transcript.

The records held within the Student Identifier Agency and the NCVER are only linked when a valid request (that is, a request made by the individual – or someone authorised by the individual – and which includes the necessary information for the request to be processed) is made and the ICT system does not retain a copy of the transcript.

As indicated on page 52 of the EM, the discretionary power in clause 25 that would enable the CEO to not provide access to an authenticated VET transcript is to take account of circumstances such as when the CEO is resolving a problem with that particular student identifier, such as resolving duplicate student identifiers (as envisaged under clause 11 of the SI Bill). In practice, the power to not provide a transcript will only be exercised when the identifier has been flagged in the ICT system as one where the CEO has identified a problem, or it is being investigated because the CEO has concerns that there is a problem. Otherwise the transcript would be generated automatically upon request by the individual or someone authorised by the individual.

In cases where this is a problem with the student identifier (such as one identifier having been issued to more than one person, or the one person has more than one identifier), any authenticated VET transcript produced by the ICT system in relation to that student identifier could be incorrect. The resultant transcript could also contain personal information belonging to another individual. Given the implications of such a document being prepared by the Student Identifiers Agency and relied on by the individual into the future, I submit that it is appropriate that the CEO be empowered to not provide it.

In recognition of the potential impact that not providing an authenticated VET transcript may have on the individual, the CEO is required to provide notice of their decision and a statement of reasons for that decision.

Clause 12 of the SI Bill provides for review by the Administrative Appeals Tribunal (AAT) by an individual in respect of decisions by the CEO to refuse to assign an identifier to an individual under clause 9, and/or a decision under clause 11 to revoke a student identifier of the individual or to assign a new identifier to the individual. A similar approach was considered in respect of the CEO's decisions under clause 25. However, advice from the Administrative Law Unit within the Attorney General's Department indicated that:

- review of decisions under clause 25 of the Bill are not appropriate for the AAT as they relate to the granting of access to personal information;
- there are additional rights to access personal information available under the Privacy Act (under current Information Privacy Principle 6 and the new Australian Privacy Principle 12), and section 15 of the *Freedom of Information Act 1982* (Cth)(FOI Act) in addition to the right of access provided by clause 25 of the Bill; and
- including a right of review in clause 25 of the Bill may substantively overlap with the right of review available under the FOI Act.

For this reason, decisions under clause 25 were excluded from review by the AAT.

The Committee also asked whether it might be appropriate to provide more guidance in the legislation as to how this discretionary power is to be exercised. However, given the fully automated nature of the process, and the limited circumstances in which the CEO would not provide access, I submit that there is sufficient guidance already provided.

#### **Issue 4: Delegation of legislative power – Clause 53**

*The Committee noted that the explanatory memorandum indicates that the exemptions provided for in subclause 53(1) would be limited to maintain the integrity of the scheme and that it 'is necessary to provide for limited exemptions in order to be consistent with existing legislative provisions, such as those relating to issues of national security'. The Committee considered this an insufficiently detailed explanation of the reasons why exemptions need to be available and why these are not being included in the primary legislation, and sought a fuller explanation from the Minister.*

#### **Response**

In response to invitations to comment on the development of the student identifier scheme and related projects, a number of concerns were raised about the scheme's impact on the personal safety of serving police and border protection officers, national security and the administrative burden on RTOs.

By way of background, a number of police forces operate their own in-house RTOs. The Australian New Zealand Policing Advisory Agency, the Police Federation of Australia and a number of individual State police forces have raised with the department their concern that the Student Identifier system

could result in unauthorised third party access to demographic and qualifications related data for serving police officers and associated personnel. This data is currently collected and managed internally by police forces within secure ICT systems. Third party access to such data from the Student Identifiers Agency and the NCVER is seen as high risk to the safety of police, their families and that of the public. This is especially the case for police officers who engage in undercover, intelligence, witness protection and court hearing activities.

Similar concerns have been raised by the Department of Defence but with the additional concerns of national security.

In addition, there is a concern that some RTOs will not be ready to implement the Student Identifier scheme on 1 January 2014. Many still have to undertake a range of actions (for example, some RTOs will need to upgrade/purchase compliant software, as well as update business processes and train staff) before they can be in a position to meet the new requirements set out in the SI Bill.

In light of these concerns, the Standing Council agreed to the inclusion in the SI Bill of a provision which allows the Commonwealth Minister, by legislative instrument, to make exemptions to the requirements of subclause 53(1).

It is anticipated that some of these exemptions may need to be quite specific, for example, exempting particular courses or types of students at a given RTO, such that it is more appropriate to specify the exemptions via legislative instrument. The VET sector, as well as the qualifications that are offered and the persons who receive these services are also highly susceptible to change. Therefore, it is preferable to exempt specific RTOs, qualifications and classes of individuals by way of legislative instrument rather than specifying the exemptions in the primary legislation as this will enable the exemptions to be more easily updated as the need arises.

Please also note that, under subclause 53(4), the Minister must obtain the agreement of the Standing Council to the making of such an instrument. The instrument itself is a disallowable instrument within the meaning of the *Legislative Instruments Act 2003* (Cth).

This is a similar approach to that taken in other parts of the SI Bill and, in my view, does provide a sufficient level of parliamentary scrutiny of the scheme into the future.

#### **Issue 5: Delegation of legislative power – Clause 57**

*The Committee has noted that there is no explanation provided for the power to make Regulations that apply, adopt or incorporate a matter contained in an instrument or other writing as in force or existing from time to time. The Committee notes that it routinely expects such provisions to be accompanied by an informative explanation as they may be considered to enable legislative changes to be made in the absence of proper parliamentary oversight. Such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. The Committee sought the Minister's advice as to why the power is necessary; examples of what material is likely to be incorporated by reference and whether it is publicly available; and how people affected by the regulation will be made aware of any changes in the law arising from changes to the incorporated material.*

## Response

As noted in the introduction to this paper, the VET sector is governed by Commonwealth legislation in most jurisdictions and by State legislation in the non-referring states. The national consistency across the sector is maintained through the AQTF, changes to which are agreed by the Standing Council.

Subclause 57(3) of the SI Bill was drafted in such a way as to ensure that the regulation, once made, could refer to the documents such as the Standards under the AQTF as they are amended from time to time. As noted under issue 2 above, it is anticipated that within the proposed regulations, certain entities will be authorised to collect and use an individual's identifier in order to meet the entity's reporting obligations under the VET Standards. The definition of VET Standards in the proposed regulation includes the AQTF framework and it is intended that a reference to the AQTF framework should be a reference to the AQTF framework as it is amended. It is worth noting that the current Standards under the NVETR Act incorporate the AQTF as it exists from time to time.

Subsection 14(2) of the *Legislative Instruments Act 2003* (Cth) would prohibit the regulation referring to, or incorporating, the AQTF as it is amended. Therefore, to ensure that a reference to the AQTF framework is a reference to the AQTF framework as it is amended, a specific clause in the Bill was required to show contrary intention to that prohibition.

The AQTF comprises a series of public documents which are readily accessed by interested parties. They are widely accessed by RTOs in jurisdictions in which they apply as the basis for obtaining initial and ongoing registration of their businesses.



Senator the Hon. Joe Ludwig

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Minister for Agriculture, Fisheries and Forestry  
Senator for Queensland

REF: MNMC2013-03794

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

Dear Senator MacDonald

I am writing in response to a letter of 20 June 2013 from Ms Toni Dawes, Secretary of the Senate Standing Committee for the Scrutiny of Bills, to my senior adviser requesting my response to issues contained in the committee's *Alert digest no.6 of 2013* about the Sugar Research and Development Services Bill 2013.

**Delegation of legislative power – accountability concerns**

The committee has drawn senators' attention to the provisions in this bill which provide for Commonwealth money to be directed to an industry owned company responsible for R&D functions. The committee has noted that this may be considered to delegate legislative powers inappropriately as the bill largely leaves accountability and governance requirements to be established through non-legislative means.

There are currently fifteen Research and Development Corporations that receive both industry levies and Commonwealth matching contributions to deliver research and development services. Nine of these are industry owned companies operating under similar arrangements as those proposed for Sugar Research Australia Limited (SRA). Such arrangements have been successfully in place since 1998. These industry owned companies are accountable to their members under the *Corporations Act 2001*, and to the Commonwealth under a Statutory Funding Agreement (SFA).

The Australian Sugar Industry Alliance submitted its proposal to restructure research and development arrangements for the sugar industry to the government on 20 September 2013. After submission, the government assessed the proposal in detail and worked closely with industry to ensure the arrangements for the new company were consistent with good governance practices and the *Corporations Act 2001* and were appropriate for an organisation receiving Commonwealth funds. This included, amongst other things, provision for a suitably skilled and independent board in SRA's Constitution and for the rights of levy paying members to be treated equitably.

The SFA will be modelled on existing SFA's in place for other industry owned companies and will ensure that the company has in place the necessary systems, processes and controls to prudently manage the funds provided by the Commonwealth and provide value for money for the funds invested. It will also hold the company accountable to the Commonwealth for the levy funds invested. Accountability arrangements contained in the SFA will include: annual compliance reports by independent auditors; comprehensive strategic plans approved by the Minister; provision of annual operational plans; risk management, fraud control, asset management and IP plans approved by the Department of Agriculture, Fisheries and Forestry; annual reporting against the various plans; regular performance reviews; and regular meetings with the department, the minister and industry.

The government is confident that, based on its detailed assessment of the SRA proposal and the success of the nine other industry owned companies operating under similar arrangements, the new organisation will operate in a transparent manner and will be held accountable for the industry and government funds invested.

I trust this information satisfies the committee's requirements.

Yours sincerely



Joe Ludwig

Minister for Agriculture, Fisheries and Forestry  
Senator for Queensland

25 June 2013