SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator G Marshall
Senator L Pratt
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2011

The Committee presents its Third Report of 2011 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:

Australian Civilian Corps Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 30 September 2010
Portfolio: Foreign Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on 21 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2010 - extract

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Background

This bill establishes the Australian Civilian Corps, and creates a legal framework for the employment and management of Australian Civilian Corps employees.

Wide discretionary administrative power
Clause 17

Subclause 17(1) of the bill allows the Director-General of AusAID to impose a number of sanctions for breach of the Code of Conduct (to be established by regulation). The sanctions include 'deductions from salary, by way of a fine'. This may be considered to make rights 'unduly dependent upon insufficiently defined administrative powers', in contravention of SO 24 (1)(a)(ii).

Subclause 17(2) does allow that the 'regulations may prescribe limitations on the power' to impose sanctions. At page 6 the explanatory memorandum gives as an example that a limitation on the amount that may be deducted from an employee's salary. This approach to sanctions for breach of the Code of Conduct reflects the approach taken in section 15 of the *Public Service Act 1999*. Nevertheless, the power to impose a fine is granted in very wide discretionary terms. The Committee therefore **seeks the Minister's advice** about whether some limits to its exercise should be prescribed in the primary legislation.

Pending the Minister's advice, 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.

Availability of appropriate review
Inappropriate delegation of legislative powers
Subclauses 17(3) and 17(6)

Subclause 17(6)(c) provides that procedures established under subclause 17(3) by the Director-General for determining whether the Code of Conduct has been breached must entitle an employee to a review of the decision as to whether there has been a breach and a decision to impose a sanction. This review is an 'internal review' as it is to be 'conducted within AusAID'.

Two issues arise with respect to such a review. First, subclause 17(7) provides that the procedures established under subclause 17(3) 'may provide for exceptions to the entitlement' to review. A note to the subclause gives an example of the regulations providing that there be no entitlement to review in relation to frivolous or vexatious applications. Whereas the *Public Service Act 1999* also allows for exceptions to be made to an entitlement to seek review, under that legislation any exceptions are to be made by regulations. Exceptions are, therefore, subject to some parliamentary scrutiny.

In the case of exceptions to the entitlement to review in the context of breaches of the Australian Civilian Corps Code of Conduct, these are to be made by the Director-General and are (by subclause 17(1)) declared not to be a legislative instrument. For this reason, the power to provide for exceptions to the entitlement to review may be thought to make rights unduly dependent upon (potentially) non-reviewable decision (Standing Order 24 (1)(a)(iii)). The problem also gives rise to concerns that the power to make exceptions is inappropriately delegated as it is not subject to parliamentary scrutiny (Standing Order (1)(a)(iv)).

The Committee therefore **seeks the Minister's advice** about why exceptions to the entitlement to review are potentially not reviewable, or not subject to parliamentary scrutiny.

The second issue is the absence of any form of external merits review. Unlike the similar decisions made under the *Public Service Act*, there is no review to a body such as the Merit Protection Commissioner. Given the significance of these decisions for an Australian Civilian Corps employee's rights and reputation, the Committee **seeks the Minister's advice** about why the opportunity for external merits review has not been provided.

Pending the Minister's advice, 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; and/or*

- *delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Wide delegation
Subclause 30(1)

Subclause 30(1)(c) would allow the Minister to delegate in writing any or all of his proposed powers to 'a person who holds an office or appointment under an Act'. Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum simply describes the effect of the provision and does not provide any explanation or justification of it. The Committee **seeks the Minister's advice** on this matter so as to better assess whether the clause makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

Pending the Minister's advice, 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

My response has been awaiting finalisation of the Government's response to the recommendations made by the Senate Foreign Affairs, Defence and Trade Legislation (FADTL) Committee on the ACC Bill, because some of the issues raised by the FADTL Committee are the same as those raised by the Scrutiny of Bills Committee.

The Government response to the FADTL Committee has now been finalised and was tabled out-of-sitting on 10 March 2011. I attach a copy for you. A copy has also been provided by officials of the Australian Agency for International Development (AusAID) to the Secretariat of the Scrutiny of Bills Committee.

Additional to the issues addressed in the Government response to the FADTL Committee, the Scrutiny of Bills Committee has also sought my advice on the reasons for the wide discretionary power of the Director General of AusAID under the ACC Bill to impose sanctions on misconduct of ACC employees, and the Minister's broad power to delegate his or her powers under the ACC legislation to any 'person who holds an office or appointment under an Act'.

The powers mentioned above are identical in scope to those under section 15 and subsection 78(4) of the *Public Service Act 1999* relating to imposition of sanctions and delegation of Ministerial powers. I consider this consistency to be appropriate. Accordingly, I also intend to propose regulations under the ACC Bill to prescribe the same limitations as those under the *Public Service Regulations 1999* on the imposition of sanctions.

I trust that this information is of assistance.

Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee

Recommendation 4

The committee recommends that the bill include a provision that would allow an ACC employee, following an adverse finding of AusAID's internal review, to apply for the matter to be referred to an external merits review authority). The committee suggests that this provision should be modelled on section 33 of the Public Service Act.

Agree to provide for external review of code of conduct decisions.

In light of the proposed external review right, the Government does not consider that it would be necessary for the Bill to also provide for internal review. Under the arrangement established pursuant to section 33 of the *Public Service Act 1999*, decisions on breaches of the APS Code of Conduct are not subject to internal review. Consistent with that, it is proposed that decisions relating to breaches of the ACC Code of Conduct will only be reviewable by an external party.

Under the proposed Government amendments to the Bill, the Director General of AusAID will be required to arrange for external review by a suitably qualified person or committee. AusAID has reached in-principle agreement with the Merit Protection Commissioner for the Commissioner to be a reviewer of code of conduct decisions, subject to further negotiation of the terms of the review arrangement. Under the present proposal, the Commissioner may agree to review decisions, for a fee, at the request of the Director General of AusAID from time to time pursuant to an MOU between the Director General of AusAID and the Commissioner. Following consultation with the Merit Protection Commissioner and the Australian Public Service Commission, it has been decided that the Bill and the regulations will not expressly refer to the Merit Protection Commissioner as the external reviewer. If the Commissioner declines for some reason to review a particular decision, the Director-General would be required by the amended Bill to find an alternative external reviewer who meets the criteria set out in the Bill in relation to independence and qualifications.

The proposed arrangement is similar to existing review arrangements established between the Merit Protection Commissioner and a number of other non-APS Government agencies.

Committee Response

The Committee thanks the Minister for this response and for his commitment to introduce regulations imposing appropriate limits on the imposition of sanctions and his agreement to introduce external review for code of conduct decisions.

The Committee also thanks the Minister for his explanation of the delay in providing the information (requested in October 2010), but notes that the delay has meant that the information was not received in time for the Committee to consider it before the recent passage of the legislation.

Combating the Financing of People Smuggling and Other Measures Bill 2011

Introduced into the House of Representatives on 9 February 2011
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Minister responded to the Committee's comments in a letter dated on 21 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), the *Financial Transaction Reports Act 1988* (FTR Act) and the Privacy Act 1988 (Privacy Act).

The main purpose of this bill is to:

- reduce the risk of money transfers by remittance dealers being used to fund people smuggling ventures and other serious crimes by introducing a more comprehensive regulatory regime for the remittance sector;
- introduce measures for the Australian Intelligence Community information sharing of financial intelligence prepared by the Australian Transaction Reports and Analysis Centre (AUSTRAC); and
- change requirements for businesses regulated under the AML/CTF Act to more effectively and efficiently verify the identity of their customers by enabling reporting entities under the AML/CTF Act to use personal information held on an individual's credit information file for the purposes of electronic verification of customer identity.

Also, the bill amends the FTR Act to enable the AUSTRAC Chief Executive Officer to exempt cash dealers from obligations under the FTR Act in the same way in which the AUSTRAC CEO can do so under the AML/CTF Act.

Trespass on personal rights and liberties
Schedule 1, items 16 to 18

Items 16 to 18 of Schedule 1 of this bill would amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* so as to extend the powers of AUSTRAC to request further information after a reporting entity has communicated a suspicious matter. Currently this power is limited to seeking further information from the reporting entity, but the amendments would extend this power to include the power to require the production of further information from the reporting entity or any other person where that information is in the possession or control of the entity.

At page 94 the explanatory memorandum states that this approach 'is consistent with the information gathering powers of a number of government agencies' (the ACCC, ASIC and ATO are listed as examples). The explanatory memorandum also gives the following example:

> If a casino submitted a suspicious matter report to AUSTRAC on the presentation by a customer of a large bank cheque in exchange for chips, the Act as currently drafted limits AUSTRAC to seeking further information only from the casino as the reporting entity.'

The explanatory memorandum argues at page 94 that the amendments 'will mean that AUSTRAC can also seek further information from the bank that issued the cheque so that it is better able to evaluate the matter.'

In the example it seems clear that in seeking further information from the bank the AUSTRAC CEO would have a reasonable belief that the bank would have information relevant to the suspicious matter. However, this belief does not seem to be included in the proposed legislation. In the Committee's view it is appropriate that the extension of the power to issue a notice to produce to 'any person' be subject to a requirement that the AUSTRAC CEO forms a reasonable belief that the person asked to produce further information has knowledge, or custody or control of documents or information which will assist in the administration of the legislative scheme. As stated in the *Guide to Framing Commonwealth Offences,* at page 97, such a requirement ensures that a person will not be subject to coercive powers without proper justification. The committee **seeks the Attorney-General's advice** as to whether this approach can be taken or alternative the justification for the proposed approach.

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

Minister's response - extract

Trespass on personal rights and liberties (Schedule 1, items 16 to 18)

The Bill empowers the AUSTRAC CEO to request further information from any person upon receipt of a suspicious matter report, an international funds transfer instruction report or a threshold transaction report to enable AUSTRAC to enhance its ability to evaluate the matter.

I agree with the Committee's view that the extension of the power to 'any person' should be subject to a requirement that the AUSTRAC CEO forms a reasonable belief that the person asked to produce the documents or information has knowledge, custody or control of documents or information which will assist in the administration of the legislative scheme.

I propose that amendments are moved in the Senate.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's support for amendments to the Bill to ensure that the ability to exercise this power should be subject to the decision-maker holding a 'reasonable belief' that a person has relevant information.

Alert Digest No. 2 of 2011 - extract

Trespass on personal rights and liberties
Schedule 1, items 16 to 18

Further to the above comments the existing power in section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, does not specify a minimum time period for the giving of information required by a notice. The *Guide to Framing Commonwealth Offences* at page 98 states that 14 days should generally be allowed for compliance with a notice to produce information or documents. As the proposed amendments extend this power to require information beyond a reporting entity to 'any person' the Committee **seeks the Attorney-General's advice** as to whether consideration has been given to this issue.

> *Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on*

personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

Trespass on personal rights and liberties (Schedule 1, items 16 to 18)

In my view, given the serious concerns to which this material may relate, a period specified in a notice of less than 14 days is appropriate in certain circumstances. The ability to follow the money trail in criminal investigations requires access to information in a timely manner.

The requirement in section 49 is consistent with the existing policy in the AML/CTF Act as reports are required to be submitted to AUSTRAC within specified periods that may be shorter than 14 days. For example, I note that reporting entities must submit suspicious matter reports within 3 business days, or within 24 hours where the report relates to the financing of terrorism.

Committee Response

The Committee thanks the Minister for this response. However, the Committee notes that the proposed amendment will extend the power to obtain information beyond reporting entities to 'any person' and **leaves to the Senate as a whole** the question of whether the proposed approach is appropriate.

Alert Digest No. 2 of 2011 - extract

Insufficient parliamentary scrutiny
Schedule 1, item 31, section 75C, 75G and 75H

Item 31 of Schedule 1 would insert a new regime for the registration of persons operating within the remittance sector. The proposed new section 75C requires the AUSTRAC CEO to register a person if satisfied that it is appropriate to do so having regard to (a) whether registering the person would involve a significant money laundering, financing or terrorism or people smuggling risk; and (b) such other matters if any as are specified in rules. Subsection (3) of the proposed section 75C sets out a non-exhaustive list of matters that may be specified under the rules. The Committee welcomes the inclusion of the list of matters in section 75C, but **seeks the Attorney-General's advice** as to whether

consideration has been given to whether all of the matters relevant to the making of a registration could be included in the primary legislation. A similar issue arises in relation to cancellation decisions under the proposed section 75G and suspension decisions under the proposed section 75H and the Committee also **seeks the Attorney-General's further advice** about these provisions.

> *Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Insufficient parliamentary scrutiny (Schedule 1, item 31, section 75C, 75G and 75H)

Item 31 in the Bill proposes a non-exhaustive list of matters that may be specified in the AML/CTF Rules for consideration by the AUSTRAC CEO when determining a person's application for registration, or the suspension or cancellation of a person's registration, as a provider of a remittance service.

In my view, it is appropriate to include these matters in the AML/CTF Rules rather than the AML/CTF Act to allow the AUSTRAC CEO to consider matters that may not have been considered at the time of legislation yet may still indicate a money laundering, terrorism financing or people smuggling risk. The techniques used by money launderers are continually changing. It is important that the AML/CTF regulatory framework is designed so that it can adapt quickly to the nature of the threat posed by these serious crimes.

The AML/CTF Rules are disallowable instruments which must be tabled in Parliament and registered on the Federal Register of Legislative Instruments.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 2 of 2011 - extract

Insufficient parliamentary scrutiny
Schedule 1, item 31, section 75M

Pursuant to proposed section 75 M, to be inserted by item 31 of Schedule 1, a registered person must advise AUSTRAC of material changes that could affect their registration and of any matters specified in the Rules. Failure to comply with this provision could result in a civil penalty (subsection 75M(5)). Under subsection 175(4) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the maximum civil penalty that the Federal Court may order is $11million for a body corporate and $2.2 million for a person other than a body corporate. Given the severity of the potential penalties, the Committee **seeks the Attorney-General's advice** as to how a registered person stays informed about the content of the Rules and whether the further matters that might be specified in the Rules could be specified in the primary legislation.

> *Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Insufficient parliamentary scrutiny (Schedule 1, item 31, section 75M)

AUSTRAC consults extensively with regulated entities during the development of the AML/CTF Rules. AUSTRAC's consultation procedures require draft AML/CTF Rules to be published on the AUSTRAC website for a minimum period of four weeks. This may be extended as a result of holiday periods or at the request of industry if a submission cannot be made within the consultation period.

AUSTRAC maintains an email list of organisations and persons who have requested to be notified about consultations regarding draft AML/CTF Rules. AUSTRAC directly contacts these entities by email when draft Rules are released for consultation, and when Rules are finalised and registered on the Federal Register of Legislative Instruments.

AUSTRAC liaises with relevant industry associations during the development and implementation of AML/CTF Rules who in tum keep their members informed of the issues. If a new or amended Rule is of particular interest to a segment of AUSTRAC's regulated population, AUSTRAC sends targeted emails and letters to regulated entities it considers to be most affected. The registration of AML/CTF Rules ensures that any

AML/CTF Rule may be accessed and scrutinised by reporting entities as well as the general public.

I consider it appropriate to specify additional matters of which the remittance dealer must advise the AUSTRAC CEO in the AML/CTF Rules rather than the Act. This will allow the AUSTRAC CEO to respond to any changes in the structure and nature of the regulated sector. The inclusion of detail in the AML/CTF Rules rather than the Act is consistent with the broader approach of the AML/CTF regime. As outlined above, the AML/CTF Rules are disallowable instruments which must be registered on the Federal Register of Legislative Instruments.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 2 of 2011 - extract

Reversal of onus
Schedule 3, item 6

Proposed sections 35H and 35K, to be inserted by item 6 of Schedule 3 of the bill, place an evidential burden of proof on a defendant in relation to offences imposed for the unauthorised access to verification information and the disclosure or unauthorised use of such information. This reverse onus applies in relation to the question of whether the action was in accordance with, or otherwise authorised by, the legislation or any other law. The explanatory memorandum is silent on this issue. The Committee expects explanatory memoranda to explain in detail why any reversal of the onus of proof is justified with reference to the *Guide to Framing Commonwealth Offences*. The Committee therefore **seeks the Attorney-General's advice** as to the justification for the approach so that the appropriateness of the provision can be better evaluated.

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

Minister's response - extract

Reversal of onus (Schedule 3, item 6)

These two offence provisions reflect the seriousness with which the Government views any breach of privacy through the misuse of verification information. The offences in proposed sections 35H and 35K reflect similar offences in the *Privacy Act* 1988 in relation to the access, use and disclosure of personal information by credit reporting agencies. The defence included in proposed section 35H and 35K is an acknowledgement that there are instances where access, use or disclosure is justified. The individual will have particular knowledge as to whether the defence applies and would be able to raise evidence about how access, use or disclosure was authorised.

The privacy impact assessment identified a need for strong offences to protect against unauthorised access of personal information. The way in which the offence is constructed in the Bill will act as a strong deterrent to accessing personal information without authorisation.

Committee Response

The Committee thanks the Minister for this information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 2 of 2011 - extract

***Legislative Instruments Act* - exemption**
Schedule 4, item 1

Item 1 of Schedule 4 of the Bill enables the AUSTRAC CEO to, by written instrument, exempt a specified person from one or more provisions of the *Financial Transaction Reports Act 1988*. The proposed new subsection 41A(5) of the *Financial Transaction Reports Act* states that such an instrument is not a legislative instrument. Unfortunately, the explanatory memorandum does not address the question of whether this is intended as a substantive exemption from the *LIA* and, if so, why the exemption is warranted. Although an exemption instrument under this provision applies in relation to a specified person it does appear to operate to change their legal rights and obligations. In these circumstances

the Committee **seeks the Attorney-General's advice** clarifying whether this is a substantive exemption from the LIA, and if so, the justification for this approach.

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

Minister's response - extract

Legislative Instruments Act - exemption (Schedule 4, item 1)

In my view, the exemption instrument proposed by item 1 of Schedule 4 of the Combating the Financing of People Smuggling and Other Measures Bill is not of legislative character. The exemption applies the law in a particular case rather than determining or altering the content of the law. As such, the proposed subsection 41A(5) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LIA). Accordingly, the Bill notes that the instrument is not a legislative instrument to assist readers. It is not reflective of a substantive exemption from the LIA.

The aim of the exemption power in the proposed new section 41A inserted by item 1 of Schedule 4 is to give the AUSTRAC CEO the ability to provide affected businesses with regulatory relief where the regulation imposed may be unnecessary or unreasonable.

Committee Response

The Committee thanks the Minister for this information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

Introduced into the House of Representatives on 23 February 2011
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Parliamentary Secretary to the Treasurer responded to the Committee's comments in a letter dated on 21 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

The bill provides for measures to amend Australia's executive remuneration framework and give shareholders more power over the pay of company directors and executives. It implements many of the recommendations made by the Productivity Commission (PC) in its recent inquiry into executive remuneration in Australia.

The key measures include:

- strengthening the non-binding vote on the remuneration report, by requiring a vote for directors to stand for re-election if they do not adequately address shareholder concerns on remuneration issues over two consecutive years;
- increasing transparency and accountability with respect to the use of remuneration consultants;
- addressing conflicts of interests that exist with directors and executives voting their shares on remuneration resolutions;
- ensuring that remuneration remains linked to performance by prohibiting hedging of incentive remuneration;
- requiring shareholder approval for declarations of 'no vacancy' at an annual general meeting (AGM);
- prohibiting proxy holders from 'cherry picking' the proxies they exercise, by requiring that any directed proxies that are not voted default to the Chair, who is required to vote the proxies as directed; and

- reducing the complexity of the remuneration report by confining disclosures in the report to the key management personnel (KMP).

Strict Liability
Schedule 1, item 8, subsections 206K(5), 206J(5) and 250W(6)

Item 8 of Schedule 1 of this bill would insert a new subsection 206K(5). This subsection makes it a strict liability offence for a company to enter into a contract where the proposed remuneration consultant has not been approved. The explanatory memorandum states at page 13 that strict liability is justified 'as a failure to seek approval would be a serious breach of the requirements and would diminish board accountability.'

The Committee has taken the view that fault liability is one of the most fundamental protections of the criminal law and that strict liability should only be introduced after careful consideration. Although the explanatory memorandum does address the issue, it does so briefly and with little evidence of careful consideration being given to the issue. The Committee understands that there are circumstances in which the proposed approach is appropriate, but in the circumstances **seeks the Treasurer's advice** as to a fuller explanation of the need for strict liability. Further, the offence contained in the proposed subsection 206J(5) is a strict liability offence. As there does not appear to be any commentary on this provision in the explanatory memorandum, it is suggested that the Committee also **seeks the Treasurer's advice** about the justification for the proposed approach.

The same general issue also arises in relation to (1) the proposed section 206 and section 250W. Subsection 206(3) makes it a strict liability offence for a remuneration consultant to fail to include with their recommendation a declaration that the recommendation is made free from undue influence. Subsection 250W(6) makes it a strict liability offence for a company to fail to hold a required spill meeting within 90 days of the spill resolution being passed. In these instances, there is a brief justification for the provision in the explanatory memorandum at page 14, but it does not demonstrate that the *Guide to Framing Commonwealth Offences* has been consulted. The Committee **seeks the Treasurer's advice** about the justification for the proposed approach in these provisions.

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

Minister's response - extract

Strict Liability

As you would be aware, the Bill contains new provisions that make it a strict liability offence should the requirements of the provisions be contravened. These new provisions are:

- A requirement that the board of directors or a remuneration committee of a company approve the engagement of a remuneration consultant (subsection 206K(5));

- A prohibition on key management personnel or a closely related party from hedging unvested equity remuneration or vested equity subject to holding locks (subsection 206J(5));

- A requirement for the remuneration consultant who makes a remuneration recommendation in relation to the key management personnel to include with the recommendation a declaration about whether the consultant's recommendation is made free from undue influence by the key management personnel to whom the recommendation relates (subsection 206M(3)); and

- A requirement for the company to hold a spill meeting within 90 days of the spill resolution being passed at the annual general meeting, should a spill resolution be passed after two strikes on the remuneration report (subsection 250W(6)).

The explanatory memorandum justified a number of these strict liability offences on the grounds that a failure of these requirements would compromise the ability of shareholders to make an informed assessment about the independence of remuneration consultants and to hold directors and executives accountable on remuneration issues. However, the Committee requested a fuller explanation of the need for strict liability in these provisions.

There is a need for these strict liability offences as the inclusion of offences that do not involve fault is likely to significantly enhance the effectiveness of the provision in deterring offences from occurring. The *Guide to Framing Commonwealth Offences* (the *Guide)* states that a strict liability offence can be justified where the offence involves unjustified recklessness. For example, if a company were to engage a remuneration consultant without the board or remuneration committee's approval, this would be a serious and unjustified recklessness on the part of the company of the requirement set out in subsection 250K(5).

The imposition of strict liability is hence intended to aid the enforcement of these provisions and ensure that the reforms contained in this Bill are effective in its objective of

empowering shareholders to hold directors accountable for their decisions on executive remuneration.

Although there are no comparable offence provisions in the *Corporations Act 2001* for the offences under subsections 206K(5), 206J(5) and 206M(3), the imposition of 60 penalty units, with no punishment through imprisonment, is consistent with the requirements in the *Guide* relating to the imposition of fines for individuals in the case of strict liability offences. An offence of strict liability under subsection 250W(6) carries only 10 penalty units.

The strict liability offence was introduced in these provisions only after careful consideration of all available options. It was considered that a strict liability offence was justified because contravention of the Bill's requirement involved unjustified recklessness and that imposition of strict liability would act as a deterrence measure.

Hence, the strict liability provisions in the Bill comply with the *Guide.*

Committee Response

The Committee thanks the Minister for this information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 2 of 2011 - extract

Reversal of onus
Various

There are a number of new provisions that place an evidential burden of proof on defendants:

- Subsection 250BD(2)
- Subsection 250BD(3)
- Subsection 250W(7)
- Subsection 250W(8)

Although such provisions may be justified, the matters relevant to this issue set out in the *Guide to Framing Commonwealth Offences* should be addressed in the explanatory memorandum. The Committee therefore **seeks the Treasurer's advice** about the justification for the proposed approach in these provisions.

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

Minister's response - extract

Reversal of onus

The Bill contains new provisions that place an evidential burden of proof on defendants:

- The first of these provisions relate to the prohibition of key management personnel and their closely related parties from voting undirected proxies on remuneration related resolutions.

  - Subsection 2508D(2) provides an exception to exercise undirected proxies where the person is the Chair of the meeting at which the resolution is voted on and the shareholders expressly provide informed consent. The Committee noted that the defendant bears an evidential burden in relation to the application of the exception in subsection 250BD(2).

  - Subsection 2508D(3) provides ASIC with the ability to provide relief from the prohibition, where it would not cause unfair prejudice to the interests of any shareholder of the company. The Committee also noted that the defendant bears an evidential burden in relation to this matter.

- The second of these provisions relates to the requirement for a company to hold the spill meeting within 90 days should the spill resolution be passed.

  - Subsection 250W(5) states that if the company fails to hold the spill meeting within 90 days of the spill resolution being passed, each person who is a director of the company at the end of the 90 days commits an offence. However, subsection 250W(4) states that the company need not hold the spill meeting within 90 days if, before the end of that period, none of the company's directors remain as directors of the company. Subsection 250W(7) provides that the offence under subsection 250W(5) is not an offence if none of the directors remain with the company. The Committee noted that the defendant under subsection 250W(7) also bears an evidential burden.

  - Subsection 250W(8) provides that the offence under subsection 250W(5) does not extend to a director appointed at a point in time that would not allow the requisite amount of notice for the meeting to be given. The Committee also noted that the defendant bears an evidential burden in relation to this matter.

The *Guide* states that "a matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish" (Part 4.6, page 28).

In relation to the first provision, it would be peculiarly within the Chair's knowledge, where the Chair would act as the defendant, that the Chair had been provided informed consent by shareholders to exercise undirected proxies (subsection 250BD(2)). It would also be peculiarly within the directors' knowledge that ASIC had provided relief from the prohibition (subsection 250BD(3)).

In relation to the second provision, it would be peculiarly within the directors' knowledge if none of the company's directors had remained as directors of the company (subsection 250W(7)). It would also be peculiarly within the knowledge of a director should they cease to occupy the position as director in accordance with subsection 250W(8).

As the information relating to all of these matters would not be available to the prosecution, it is legitimate to impose the evidential burden on the defendant.

Committee Response

The Committee thanks the Minister for this information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 2 of 2011 - extract

Poor explanatory memorandum – index

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this Committee), an explanatory memorandum greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

In the Committee's view particular care should be taken to ensure that an explanatory memorandum which adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) includes an index that is accurate and cross-references every provision in the bill.

In this instance an index is included, but every entry is incorrect and numerous provisions are not included at all. The Committee is aware that this may have been due to a technical issue.

In addition, some other problems of which the Committee is aware include:

- that there is no explanation for Schedule 1, item (in particular the reasons for the scope of the definition and why it is necessary to delegate a power to prescribe others in regulations); and
- an error in the page 22 paragraph 4.9 as the reference to Schedule 1 item 5, subsection 206J(4), should refer instead to item 8.

Given the importance of accurate explanatory memoranda the Committee **seeks the Treasurer's advice** about these matters and as to whether a corrected explanatory memorandum will be provided.

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

Minister's response - extract

Explanatory Memorandum

I note the concerns raised by the Committee in relation to errors in the explanatory memorandum. I have addressed two of these concerns with the issue of a Replacement Explanatory Memorandum. These concerns relate to the indexing of the amendments contained in the Bill and an error in the item reference number on page 22, paragraph 4.9.

The Committee also raised an issue with Item 1 in Section 1, which contains a new definition under section 9 of *closely related party*. The Committee requested further guidance on the reasons for the scope of the definition and why it is necessary to delegate a power to prescribe others in regulations.

This regulation making power will provide flexibility to include other parties that may be justified as closely related parties, if required. As part of the consultation process on the regulations, we intend to consult on other persons that would need to be included in the regulations (should any be required). The flexibility to clarify other cases that may be considered closely related parties is necessary given the range of people that may be

affected by the definition, and would address any unintended consequences that may arise as a result.

I am in agreement with the Committee's views on the importance of comprehensive and accurate Explanatory Memoranda.

I trust this information satisfactorily answers the Committee's issues and concerns about the Explanatory Memorandum to the Bill.

Committee Response

The Committee thanks the Minister for this response and for issuing a Replacement Explanatory Memorandum. In relation to the information about the definition of 'closely related parties' the Committee notes that it would have been helpful for some of this material to be included in the explanatory memorandum.

Customs Amendment (Serious Drugs Detection) Bill 2010

Introduced into the House of Representatives on 23 February 2011
Portfolio: Home Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Minister responded to the Committee's comments in a letter dated on 11 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Customs Act 1901* to enable officers of Customs, using prescribed equipment, to undertake an internal non-medical scan of a person who is suspected to be internally concealing a suspicious substance.

Possible trespass on personal rights and liberties
Various

This bill will allow Customs and Border Protection, using prescribed equipment, to undertake an internal non-medical scan of a person who is reasonably suspected to be internally concealing a suspicious substance. Clearly, this procedure can be considered as an encroachment on personal rights and liberties and in particular the right to privacy. However, the bill replicates existing levels of protections in relation to internal scans, which currently can only be undertaken by a medical practitioner.

Furthermore, the bill would only allow for an internal non-medical scan if the detainee gives their consent. In this regard it is noteworthy that the proposed subsection 219ZAA(1) sets out requirements designed to ensure that consent is informed consent, proposed subsection 219ZAA(2) provides for the invitation to consent and any consent to be recorded (by audiotape, videotape or other means or in writing), and proposed subsection 219ZAA(3) provides that the equipment used to undertake the scan be operated by an authorised officer of the same sex as the detainee.

The purpose of allowing authorised officers in Customs and Border Protection to undertake an internal non-medical scan by consent is to reduce the number of persons referred to hospital to undergo an internal search, thereby reducing the impact on the resources of the

AFP, hospital emergency units and Customs and Border Protection. (The provisions in relation to the prescription of equipment to be used and for the authorisation of officers to undertake the scans replicate existing provisions in the legislation, explanatory memorandum at pages 13-14.).

Lastly, it is worth noting that the Office of the Australian Information Commissioner provided input into the impact of the Bill on individual rights to privacy. The second reading speech reports that 'all comments have been incorporated' into the bill.

In the Committee's view the general question of whether this legislation is a proportionate encroachment on personal rights and liberties is one which should appropriately be **left to the Senate as a whole**.

Nevertheless, the Committee has specific questions in relation to two matters. First, the explanatory memorandum states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a 'locked calibration to limit the scan capability to internal cavities within a skeletal structure' (which cannot be changed by an officer at the airport) will be required. However, this important safeguard does not appear to be reflected in the legislation. The Committee **seeks the Minister's advice** about whether it is, or will be, included directly in the primary legislation.

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

Minister's response - extract

Legislative requirement for locked calibration of the body scan technology

The explanatory memorandum for the Bill states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a locked calibration to limit the scan capability to internal cavities within a skeletal structure (which cannot be changed by an officer at the airport) will be required. The Committee seeks my advice about whether it is, or will be, included in the primary legislation.

The procurement process for the body scanning technology has not yet commenced. It is therefore not presently known whether the technology to be procured will have a capability limited to internal body scanning or have a broader spectrum of scanning capability. However, if the technology procured does have a broader scanning capability I undertake that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier.

I advised Parliament in the Second Reading speech that both the Privacy and FOI Policy Branch of the Department of Prime Minister and Cabinet and the Office of the Australian Information Commissioner will be consulted prior to the prescription of body scan technology in the regulations.

I trust that including this restriction in the regulations, as opposed to the primary legislation, is acceptable to your Committee. I also undertake to provide a copy of the relevant regulations to your Committee once they are made.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's undertaking that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier and that a copy of the relevant regulations will be provided to the Committee once they are made. The Committee notes that these regulations will be disallowable and instruments and therefore subject to Parliamentary scrutiny.

However, given the significant potential to trespass on personal rights and liberties the Committee remains of the view that the principle that the capacity of any technology should be limited to the level necessary to undertake the action allowed by the legislation should be included in the primary legislation. It would be possible for the details relating to any particular machine to be prescribed by regulation. The Committee therefore **seeks the Minister's further advice about this matter**.

Alert Digest No. 2 of 2011 - extract

Secondly, item 16 would insert proposed paragraph 219SA(1)(a) which provides that an internal non-medical scan of the person may be undertaken if, inter alia, there are reasonable grounds to believe that the detainee is 'not in need of protection'. The explanatory memorandum states at page 8 that a person is in need of protection if he or she is under 18 years of age or is in a mental of physical condition that renders them incapable of managing their own affairs, but this information has not been included in the legislation. The Committee **seeks the Minister's advice** as to whether consideration has been given to including a definition of the circumstance when a person is in need of protection in the legislation.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights*

and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

Definition of 'in need of protection' in the legislation

Proposed paragraph 219SA(1)(a) of the *Customs Act 1901* (the Customs Act) (item 16 of the Bill) provides that an internal non-medical scan may be undertaken if, inter alia, there are reasonable grounds to believe that the detainee is not 'in need. of protection'. The explanatory memorandum states at page 8 that a person is in need of protection if he or she is under 18 years of age or is in a mental or physical condition that renders them incapable of managing their own affairs. The Committee seeks advice as to whether consideration has been given to including a definition in the legislation.

'In need of protection' is defined in section 4 of the Customs Act as follows:

For the purposes of Division 1B of Part XII, a person is in need of protection if, and only if, the person is:

(a) under 18 years of age; or
(b) in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs.

This definition applies to Division 1B of Part XII of the Customs Act and therefore applies to the new internal non-medical scan regime. For this reason, it is not necessary to further define the term in the Bill.

Committee Response

The Committee thanks the Minister for this response, which addresses its concern. The Committee notes that it would have been helpful for some of this information to be included in the explanatory memorandum.

Electronic Transactions Amendment Bill 2011

Introduced into the House of Representatives on 9 February 2011
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Attorney-General responded to the Committee's comments in a letter dated on 21 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Electronic Transactions Act 1999* to reflect internationally recognised standards on e-commerce.

The bill also provides for the following amendments which include:

- clarifying uncertainties in using electronic communications in formation and performance of contracts;
- clarifying that a contract can still be legally effective despite being formed by an automated message systems;
- refining default rules for determining whether the method used for an electronic signature is reliable; and
- providing default rules to ascertain the place of business of the parties to a transaction, taking into account modern business practices such as the use of automated message systems. Importantly, this will assist parties to determine the jurisdiction in which the contract was formed.

Retrospective effect
Schedule 1, item 22

Item 22 of Schedule 1 provides for transitional provisions in relation to the proposed amendments. Subsection 17(2) provides that proposed sections 15B, 15C, and 15D extend to relevant matters arising prior to the commencement date. The explanatory memorandum claims that 'these provisions do not have retrospective application in respect of a contract formed prior to the commencement of the provisions', but it is unclear whether there may

be any adverse impact on any person in relation to a contract formed after commencement. The Committee therefore **seeks the Attorney-General's further advice** as to the justification for approach and, in particular, an indication of whether it is possible that any individual may be detrimentally affected by this provision.

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

Minister's response - extract

The Committee expressed concern in Alert Digest 2/11 about the retrospective effect of Item 22 of Schedule 1 of the Bill. In particular, the Committee has requested an indication of whether it is possible that any individual may be detrimentally affected by the retrospective application of the relevant provisions.

Proposed sections 15B, 15C and 15D will only have retrospective application in circumstances where a contract is formed after the commencement date, but the proposals, actions, statements, declarations, demands, notices or requests (under those sections) in relation to that contract, were carried out prior to the commencement date. The proposed retrospective application of these new sections is to ensure that an entire contract is governed by consistent rules and procedures throughout all stages, including the negotiation, formation and performance of the contract.

The provisions do not have retrospective application to contracts formed before the commencement date. The following explanation of the provisions may further assist the Committee.

Proposed section 15B

The retrospective application of proposed section 15B would only apply where an 'invitation to treat' is made before the commencement date, and a resulting contract is formed by electronic communications after the commencement date. In these circumstances, proposed section 15B would operate to the extent necessary, to clarify the distinction between an 'offer' and an 'invitation to treat' in relation to any proposals made during the negotiations of the particular contract.

Proposed section 15C

The retrospective application of proposed section 15C would only apply where a contract is formed after the commencement date, but certain actions were carried out by automated message systems in relation to the contract before the commencement date. A practical

example of an action carried out by an automated message system would be where an office's printing equipment is programmed to issue an order for ink or toner when required.

Proposed section 15D

The retrospective application of proposed section 15D would only apply where a natural person has made an error in an electronic communication with an automated message system before the commencement date, and the resulting contract is formed after the commencement date. In these circumstances, the natural person could rely on proposed section 15D to withdraw the portion of the electronic communication in which the input error was made (only if the particular circumstances prescribed in proposed section 15D that give rise to the right to withdraw the error exist).

I confirm that the retrospective application of these provisions would only apply in relation to proposals, actions, statements, declarations, demands, notices or requests made in relation to contracts formed by electronic communications after the commencement date. Therefore, it is likely that these provisions would only apply in limited circumstances.

Corresponding provisions have already been passed by both New South Wales and Tasmania in their Electronic Transactions Acts. Stakeholders have not raised any concerns about this issue during consultations.

The limited retrospective effect of these transitional provisions is unlikely to detrimentally affect any individuals. The provisions confirm that the amendments will only cover contracts that individuals enter into once the Bill has commenced. In my view, this retrospective operation is necessary and justified to ensure that only one set of rules and procedures govern an entire electronic contract.

Committee Response

The Committee thanks the Minister for this information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Higher Education Support Amendment (No.1) Bill 2011

Introduced into the Senate on 10 February 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Attorney-General responded to the Committee's comments in a letter received on 22 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill introduces a number of measures to the *Higher Education Support Act 2003* to the Government's income contingent loan programs for the higher education and vocational education and training (VET) sectors i.e. FEE-HELP and VET FEE-HELP respectively, including to ensure consistency with other Commonwealth frameworks.

Broad delegation
Schedule 1, items 3 and 21

Items 3 and 21 of Schedule 1 propose to introduce amendments which introduce a new requirement that the Minister be satisfied that bodies seeking approval as a higher education provider or a VET provider be 'fit and proper'. In making this determination, the Minister must specify, by legislative instrument, criteria that must be considered. The explanatory memorandum does not indicate why these criteria or at least parameters for them, which structure the exercise of a broad discretionary power, cannot be specified in the legislation. The Committee **seeks the Minister's explanation** of the appropriateness of this delegation of legislative power.

> *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

I note the Committee's request for a response concerning the appropriateness of the delegation of legislative power for the 'fit and proper' requirements and whether consideration was given to procedural fairness before the Minister imposes a condition on a provider's approval.

The amendment for the 'fit and proper' requirements is to be specified in the *Higher Education Support Act 2003* (HESA) as a high-level framework that must be satisfied by an applicant to be eligible to be approved as a higher education provider or vocational education and training provider. With the diversity of providers-for example, private providers in contrast to publicly funded providers-that may be approved under HESA, initially and in the future, specific criteria is not specified in HESA and will be specified in specific legislative instruments.

This approach will maximise consistent application of the 'fit and proper' requirements and will ensure that only those requirements that are necessary for each sector of the industry, and any subcategories, are applied. The approach will also allow the Commonwealth to be responsive to the changing needs of the sector and minimise the risk to public monies. Where responsive action is required, the fact that a legislative instrument will be made, and accordingly have Parliamentary scrutiny, the application of 'fit and proper' requirements will still require justification through the necessary Explanatory Memorandum, and ultimately the legislative instrument may still be disallowed.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 2 of 2011 - extract

Procedural fairness
Schedule 1, items 5 and 23

Items 5 and 23 insert new provisions that would allow the Minister to impose conditions on the approval of a body as a higher education provider or a VET provider at or after the time a provider is notified of its approval. Although the Minister must notify a provider of

a decision to impose or vary a condition and give reasons for the decision, there is no statutory provision providing for a hearing in relation to such a decision. It is true that such a decision is reviewable (see items 18 and 31), but the reviewability of a decision is rarely sufficient to convince courts that the legislature has intended to exclude the operation of the fair hearing rule of procedural fairness. The Committee **seeks the Minister's advice** as to whether consideration has been given to an explicit statutory right to be heard in relation to the imposition or variation of conditions, especially where this occurs after the time of approval. Such a provision would remove potential doubts as to whether the common law would in any event require a hearing in such circumstances.

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

Minister's response - extract

I thank the Committee for seeking advice as to whether consideration has been given to the requirements for procedural fairness in relation to the imposition or variation of conditions on a body corporate's approval as a higher education or vocational education and training provider. The intent of the conditions of approval provision is to strengthen the Commonwealth's ability to manage provider risk in relation to the proper use and management of public money, and better manage risk in relation to provider quality.

While I note the Committee's comments specifically regarding the imposition or variation of conditions for already approved bodies corporate, it should be recognised that, unlike other regulatory licensing and authorisation regimes, approvals are given in perpetuity, with no renewal system in place for the purposes of assessing whether the approved body corporate continues to meet the quality requirements of the schemes. The amendment to allow for conditions to be placed on a body corporate's approval is by no means intended to unduly trespass on personal rights and liberties. Rather, it is intended to support the Commonwealth's ability to manage risk for already approved providers.

Notwithstanding the above, the Department of Education, Employment and Workplace Relations is committed to open, transparent and accountable government. Accordingly, the implementation of administrative and operational policies for decisions made in relation to conditions of approval would be fully subject to open, timely and thorough communication and consultation with a body corporate. Furthermore, I am aware that any decisions under these provisions would be subject to the *Administrative Decisions (Judicial Review) Act* 1977. The absence of an express procedural fairness provision does not exclude the operation of the common law rules of natural justice, and these principles would still apply.

I trust this information assists the Committee in its consideration of this Bill.

Committee Response

The Committee thanks the Minister for this response.

Human Services Legislation Amendment Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Human Services

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Minister responded to the Committee's comments in a letter dated on 28 February 2011. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2011 - extract

Background

This bill amends the *Medicare Australia Act 1973* (the MA Act) and the *Commonwealth Services Agency Delivery Act 1997* to formalises the changes already under way and further integrates service delivery agencies in the Portfolio by:

- The abolition of the statutory offices of Chief Executive Officer of Medicare Australia and Chief Executive Officer of Centrelink;
- The creation of the statutory offices of Chief Executive Medicare and Chief Executive Centrelink within the Department;
- The abolition of Medicare Australia and Centrelink as statutory agencies;
- Providing for service related functions currently delivered by Medicare Australia and Centrelink in support of their Chief Executives to be delivered by Departmental employees; and
- Providing for new functions taken on by the Chief Executive Medicare and the Chief Executive Centrelink in the future to be delivered by Departmental employees.

The bill clarifies the operation of program secrecy provisions after the restructure. to ensure, in particular, no new kinds of data sharing without customer consent

The bill also:

- amends the *Child Support (Registration and Collection) Act 1988* to align the provisions for the appointment of the Child Support Registrar with the provisions for

the appointment of the Chief Executive Centrelink and the Chief Executive Medicare; and

- makes consequential amendments to a number of other Acts that currently refer to the agencies or statutory authorities which will be abolished; and

- amends investigative search and seizure provisions of the Part IID of the MA Act.

Trespass on personal rights and liberties
Schedule 1, items 74 and 76

Item 74 has the effect of diminishing the obligations on the Chief Executive of Medicare to notify a patient that their records have been seized as part of a Part IIID investigation. The old law required notification in all cases, whereas the new provision requires notification only in cases where a patient's record is actually examined. The explanatory memorandum at page 26 states that the old arrangements were 'onerous and expensive' and could 'cause needless worry to patients whose records have not been examined'.

Item 76 further diminishes the existing notice requirement by stating that no notice is required where, after examining a record, the officer did not obtain any knowledge of clinical details relating to the patient. The Committee is concerned that these items will impact on the privacy of individuals and is particularly interested to understand who will determine whether clinical knowledge was obtained, what training they will have and whether any safeguards are in place to protect patients. The Committee therefore **seeks the Minister's further advice** about 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

Amendments to section 8ZN of the Medicare Australia Act 1973

Section 8ZN is a provision in Part 110 of the Medicare Australia Act 1973. Part IID confers a range of powers on the Chief Executive Officer of Medicare Australia to investigate non-compliance with certain legislative requirements. These powers support Medicare Australia's compliance functions in relation to Medicare, Pharmaceutical Benefits Scheme and other health programs delivered by Medicare Australia. The powers are limited to the investigation of certain offences and civil penalty provisions specified in the Medicare Australia Act 1973 and to certain civil penalty provisions specified in the Health Insurance Act 1973.

The Committee requested advice about items 74 and 76 of Schedule 1 of the Bill, which make amendments to section 8ZN of the Medicare Australia Act 1973. The Committee sought additional information on the impact of the proposed changes on the privacy of individuals, including who will determine whether clinical knowledge was obtained, what training they would receive and whether any safeguards are in place to protect patients.

In the course of exercising its powers under section 8ZN, from time to time Medicare Australia may seize or copy hard drives containing electronically recorded clinical data. The proposed amendments to section 8ZN seek to address anomalies which arise when a computer hard drive is seized or copied under warrant. A seized or copied hard drive may potentially contain a large number of patient records. In most cases, only a small number of those patient records will be relevant to the investigation. This may be because the investigation relates to particular services rendered to particular patients on specific dates.

The proposed amendments to section 8ZN seek to produce a sensible outcome which will ensure that patients continue to be notified when their clinical details have been scrutinised by Commonwealth officers. The amendments will put a stop to the unnecessary worry for patients and the waste of resources associated with large scale notifications to patients whose clinical details were never actually scrutinised. While the Committee expresses concern that the proposed amendments may impact on the privacy of individuals. Every patient whose clinical details are actually scrutinised would still need to be notified.

As amended. Part IID of the renamed Human Services (Medicare) Act 1973 will contain a number of safeguards to patient privacy in circumstances where multiple patient records are held together in electronic form:

- Under new section 8ZF, the authorised officer or an officer assisting may in certain circumstances take material or equipment to another place to examine it to determine whether it may be seized. New section 8ZGA will allow an officer who takes electronic equipment away under this provision to copy data from the equipment to a data storage device. If the data is not used in evidence, section 8ZF requires it to be destroyed.

- New section 8ZG allows the authorised officer or an officer assisting to operate electronic equipment found at the warrant premises to access data. In certain circumstances the officer may copy the data and take the device from the premises. If the data is not used in evidence, section 8ZG requires it to be destroyed.

- Under existing section 8ZM, any material seized but not used in evidence must be returned to the owner or the person from whom it was seized.

Whether or not a patient's clinical details are accessed or examined will be an operational decision to be determined in the context of the particular investigation. In most circumstances, the primary requirement which must be met for the coercive powers under Part IID of the *Medicare Australia Act* to be exercised is that the investigation must be into conduct of a criminal nature. For example, where an investigation centres on fraudulent claiming by a doctor for an item in the Medicare Benefits Schedule (MBS) which requires

the patient to have a particular medical condition, the records of patients who received that particular MBS item from the doctor may need to be examined for evidential purposes.

Delegation to seek to use these powers is held at Senior Executive Officer level only. The case must be strong enough for a magistrate to approve a warrant to enable Medicare Australia to seize records.

Medicare Australia currently has procedures in place to manage and secure records obtained as a result of the exercise of its search and seizure powers. Where patient records containing clinical details are seized and it is necessary to examine those clinical records, the examination is undertaken by appropriately trained and qualified Medical Advisers employed by Medicare Australia. In circumstances where it is necessary for Medicare Australia Compliance Officers to have access to clinical details, that access is overseen by Medicare Australia Medical Advisers.

Medicare Australia's Medical Advisers are appropriately qualified medical practitioners with current and unrestricted registration. Medicare Australia's Compliance Officers who undertake investigations into fraud allegations are required at a minimum to hold a Certificate IV in Government Investigations.

Further to these accreditations. Compliance Officers and Medical Advisers are also required to undergo privacy training as a part of their induction into Medicare Australia and receive annual privacy refresher training.

Medicare Australia has robust IT security infrastructure and physical security measures in place to ensure all patient records and other information obtained in the course of compliance activities is protected from unauthorised access. Only officers with a requirement to access these records are granted access to systems containing patient records and other information relevant to compliance activities. There have been no recorded instances of unauthorised access by Medicare Australia officers to patient records seized under warrant for compliance purposes.

Medicare Australia officers are also subject to the secrecy provisions of the *Health Insurance* Act *1973* and the *Notional Health Act 1953* that set penalties for the unauthorised disclosure of information, including fines and imprisonment. Medicare Australia is also subject to the requirements of the *Privacy Act 1988* that restrict and regulate the collection, use and disclosure of personal information.

If the Bill is passed, the powers and functions under Part IID will be exercised by officers of the Department of Human Services, rather than Medicare Australia and the existing controls would be continued by these officers.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's advice that 'every patient whose clinical details are actually scrutinised would still need to be notified'.

The Committee is particularly interested to understand whether there could be patients whose records are scrutinised but the patients are not notified of this because the officer did not obtain any knowledge of clinical details relating to the patient. For example, the Committee would like to know whether is it possible that there could be a category of patients whose records are examined and although no clinical details were obtained details other than clinical details (eg other personal or financial details) are obtained. If so, would there be an obligation to notify the patient that the record had been examined? The Committee **seeks the Minister's further advice** about this matter.

Alert Digest No. 1 of 2011 - extract

Retrospective effect
Schedule 5, item 1

It is noted that Item 1 of Schedule 5 enables the Governor-General to make regulations in relation to transitional matters arising out of the amendments made by this bill which, if made within six months of the commencement of this item, may be expressed to take effect at a 'time that is earlier than the time when the regulations are made' (but not earlier than the commencement of this item). The explanatory memorandum simply restates the effect of this item.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

A bill such as this involves many and complex technical issues relating to moving from one set of administrative and governance structures to another. Nevertheless, it would have been helpful for the explanatory memorandum to explain the need for the making of regulations which may have retrospective effect and whether it is envisaged that this may have any potential adverse consequences on affected persons. The Committee **seeks the Minister's advice** as to the appropriateness of the proposed approach.

> *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

Power to make regulations about transitional matters with retrospective effect

The Committee also requested advice about the appropriateness of item 1 of Schedule 5 in the Bill, which allows regulations to be made about transitional matters. Item 1 provides that, if regulations are made within six months of the commencement of the Human Services Legislation Amendment Act (the Act), the regulations may be expressed to take effect at a time that is earlier than the time when the regulations are made, as long as the regulations do not take effect earlier than the commencement date of the Act.

Given the size of, and scope of services delivered by, Centrelink, Medicare Australia and the Department of Human Services, many transitional arrangements are required. One of the key goals of the integration is that it will be seamless for customers and other consumers of services currently delivered by Medicare Australia and Centrelink. While every effort was made in preparing the transitional provisions to ensure they would operate correctly, it is possible that the transitional provisions will not adequately cover every circumstance. Accordingly, it is considered prudent to have the ability to make regulations on in relation to transitional matters.

As a practical matter, the need for transitional regulations may become apparent after a transitional issue is identified. Given the seriousness of any legislation with retrospective effect, two safeguards are built into item 1 of Schedule 5.

First, regulations will only have retrospective effect if they are made within six months of the Act commencing. Most transitional issues are likely to occur in the first six months after the integration takes effect, when large numbers of employees and assets are transferred, many instruments are affected by transitional provisions, and a number of reports are required. Accordingly, limiting the retrospective operation of the regulation making power in this way is considered to be an appropriate safeguard.

Second, regulations made under item 1 of Schedule 5 may only relate to transitional matters arising out of amendments made by the Act. In practice, this means that the scope of the regulations is limited to internal Government administration. The regulations cannot affect any other Act, such as program legislation that individuals receive benefits under and will have no effect on individuals' health and welfare entitlements.

Committee Response

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

Migration Amendment (Complementary Protection) Bill 2011

Introduced into the House of Representatives on 24 February 2011
Portfolio: Immigration and Citizenship

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Minister responded to the Committee's comments in a letter dated on 15 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Migration Act 1958* to establish a system for considering complementary protection claims, consistent with Australia's arrangements for meeting its *non-refoulement* obligations under the *International Covenant on Civil and Political Rights*, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

As the Minister noted in his second reading speech (at page 2), the Bill is based on a 2009 (introduced on 9 September 2009) and incorporates certain changes to address matters raised in the report of the Senate Legal and Constitutional Affairs Committee.

The only comment the Committee has in relation to the bill is to repeat comments it made in 2009 in relation to Schedule 1, item 13, subsections 36(2B) and 36(2C).

Trespass unduly on rights and liberties
Schedule 1, item 13, new subsections 36(2B) and (2C)

Proposed new subsections 36(2B) and (2C), to be inserted by item 13 of Schedule 1, contain specific exceptions for when Australia will *not* have a *non-refoulement* obligation to a non-citizen who seeks protection pursuant to the proposed complementary protection provisions. New subsection 36(2B) reflects that *non-refoulement* obligations exist only in circumstances of a 'real risk' of harm that is personal and present, by listing particular

circumstances when it will be taken *not* to be a real risk that a non-citizen will be irreparably harmed.

The Committee notes that new paragraphs 36(2C)(a) and (b) mirror, respectively, Articles 1F and 33(2) of the Refugee Convention. The explanatory memorandum states (at paragraphs 88 to 90) that the intended effect of these provisions is to provide the same exclusions to the complementary protection regime as applies to those who make a valid application for a protection visa, claiming protection under the Refugees Convention.

The explanatory memorandum explains (at paragraph 90) that, while the *International Covenant on Civil and Political Rights* (International Covenant) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) have absolute *non-refoulement* obligations which cannot be derogated from, it was considered necessary to exclude an obligation to certain applicants (including those who pose national security risks).

This is because the delivery of Australia's humanitarian program must be balanced 'with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern'. The explanatory memorandum notes further that there is no obligation on Australia to grant a particular form of visa to those to whom *non-refoulement* obligations are owed, and that it is intended that alternative case resolution solutions will be identified where a person might not be granted a protection visa because of this exclusion provision.

Under principle (1)(a)(i) of its terms of reference, the Committee has regard to whether provisions in bills trespass *unduly* on rights and liberties. The explanatory memorandum notes (at page 10) that the proposed exceptions will ensure Australia's obligations accord with international law (because the Covenant and the CAT require a high threshold for these obligations to be engaged), at the same time balancing the obligation to the Australian community. Since this is clearly a matter of policy, the Committee considers that further consideration of these provisions and whether they strike the appropriate balance **should be left to the Senate as a whole**.

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

Minister's response - extract

The Committee is concerned that proposed new subsections 36(2B) and (2C) to be inserted into the *Migration Act* 1958(item 14 of Schedule 1 to the Bill) 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.

As stated in the Explanatory Memorandum to the Bill, the purpose of:

- proposed new subsection 36(2B) is to ensure that Australia's *non-refoulement* obligations are applied and implemented consistently with international law; and

- proposed new subsection 36(2C) is to provide the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

It is the Government's view that these proposed provisions do not trespass unduly on personal rights and liberties.

If the Bill is passed by the House of Representatives, it can be considered by the Senate as to whether the proposed provisions trespass unduly on personal rights and liberties. As the Committee has noted, the issue is clearly a matter of policy and that further considerations of these provisions and whether they strike the appropriate balance should be left to the Senate as a whole.

I would like to reiterate that, for the reasons stated in the Explanatory Memorandum, the Government is of the view that the proposed provisions do not trespass unduly on personal rights and liberties.

Committee Response

The Committee thanks the Minister for this response. As outlined in *Alert Digest No. 2 of 2011* the Committee considers that further consideration of these provisions and whether they strike the appropriate balance **should be left to the Senate as a whole**.

National Broadband Network Companies Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Broadband, Communications and the Digital Economy

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Minister responded to the Committee's comments in a letter dated on 18 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2011 - extract

Background

This bill accompanies the Telecommunication Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010. The bill establishes the regulatory framework covering the ownership and operations of NBN Co, and the arrangements for the eventual sale of the Commonwealth's stake in NBN Co.

***Legislative instruments Act* - exemptions**
Various

This bill contains a number of provisions which state that instruments made by the relevant Ministers are not 'legislative instruments'. The effect of these provisions is to remove the operation of the *Legislative Instruments Act* (*LIA*).

The following discussion divides the various provisions into the following categories: (1) provisions which are clearly considered to be substantive exemptions from the operation of the *LIA* or provisions which exclude only the operation of section 42 (disallowance provisions) of the *LIA*; (2) provisions which are said to be included for the 'avoidance of doubt' but for which a substantive justification for exemption appears to be given, leading to confusion about whether or not an exemption is sought or needed.

1. Substantive Exemption Provisions
Clause 24

This clause enables the Communications Minister to determine, in writing, 'functional separation principles'. These operate as standards with which an NBN Corporation must comply (clause 23). Subclause 24(5) states that these determinations are not legislative instruments. The explanatory memorandum states at page 76 that this is a substantive

exemption from the LIA, which is justified on the basis that it is 'important that industry has certainty that the principles set out in legislation and in the determination will apply and will not be overturned, or modified, by the Parliament.' The Committee is concerned to ensure that Parliamentary oversight is maintained appropriately and therefore **seeks the Minister's further advice** as to the justification for this approach and whether certainty might be achieved by specifying the 'functional separation principles' fully in the legislation.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's response - extract

Legislative Instruments Act - Substantive exemption
Clause 24, Functional separation principles

Clause 24 of the NBN Companies Bill provides that the Communications Minister may, by writing, determine that specified principles are functional separation principles for the purposes of the application of the Act to a specified NBN corporation. As drafted, clause 24 sets out a number of principles (subclause 24(2)). Subclause 24(2) does not limit the matters to which the Minister may have regard. A determination by the Minister is not a legislative instrument (subclause 24(5)).

The Committee queried whether certainty might be achieved by specifying the functional separation principles fully in the legislation. If imposed upon a NBN corporation, functional separation could take a variety of forms, from strong separation (such as complete organisational separation of different business units) to weaker separation (such as requirements to maintain and publish separate financial statements for different business units). The nature of the form of separation that may be imposed at the relevant time will depend upon a number of factors, including the state of the market at the time, the particular competitive circumstances in the market and the degree of government intervention that is considered necessary to address those circumstances. Such circumstances are impossible to predict at this juncture.

The NBN Companies Bill therefore provides a baseline set of functional separation principles but properly maintains flexibility for the government of the day to determine, as required, additional principles that would address the specific circumstances in the market.

It is envisaged that functional separation principles would be published.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's advice that it is envisaged that functional separation principles will be published. The Committee supports appropriate transparency and scrutiny and **leaves to the Senate as a whole** the question of whether the level of parliamentary scrutiny is appropriate in the circumstances.

Alert Digest No. 1 of 2011 - extract

Clause 55

Under subparagraph 55(1)(i)(i) the Minister may declare a security or financial product to be a 'sale-scheme hybrid security'. Subclause 55(7) provides that such a declaration is a legislative instrument, but that section 42 of the *LIA* (disallowance) does not apply to it. The reason for this outlined at page 98 of the explanatory memorandum is said to be 'the interests of ensuring commercial certainty in connection with an NBN Co sale scheme'. In the circumstances the Committee leaves the question of whether this approach is appropriate to the **consideration of the Senate as a whole**.

> *Pending the Minister's advice, 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

Legislative Instruments Act - Instrument not subject to disallowance
Clause 55 - Sale-scheme hybrid securities

Under subparagraph 51(1)(i)(i), the Finance Minister may specify in a written declaration that a security or a financial product that relates directly or indirectly to NBN Co is a sale-scheme hybrid security. Under subclause 55(7), this declaration is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* (LIA) does not apply to it.

Clause 55 is a standard clause in legislation relating to the sale of Commonwealth enterprises. It is based on the previous section 8AJA (now revoked) of the Telstra Corporation Act 1991, which was inserted by the *Telstra (Transition to Full Private*

Ownership) Act 2005. The same approach to sale-scheme hybrid securities was also adopted in item 6 of Schedule 2 of the *Medibank Private Sale Act 2006*.

The declaration is required to maintain flexibility for the Commonwealth to determine the offer structure for the sale of NBN Co Limited, at the appropriate time, taking into account relevant commercial issues. Accordingly, it is important to allow the sale to respond to market circumstances and avoid unnecessary timetable delays and associated potential loss of buyer interest and sale value. To ensure that the sale process is not compromised, the declaration should not be a disallowable instrument.

Committee Response

The Committee thanks the Minister for this further information. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 1 of 2011 - extract

2. 'Avoidance of Doubt' Provisions

In a number of instances it was not clear whether provisions were thought to constitute substantive exemptions from the *LIA*. A common reason given for either (1) excluding the operation of the LIA or (2) 'avoiding doubt' or 'clarifying' the status of an instrument, is that the instruments would not be disallowable under the *LIA* by the operation of subsection 44(2), which concerns directions from a minister to a person. The fact that subsection 44(2) of the *LIA* may apply neither demonstrates an instrument is not of a legislative character (so that other provisions of the *LIA* would not apply) or that the instruments should be exempted from the other requirements set out in the *LIA*. For this reason, the reference to section 44(2) of the *LIA* in the explanatory memorandum was often apt to cause confusion.

Clause 25

This clause empowers the Communications Minister and the Finance Minister to make a written determination specifying requirements to be complied with by a draft or final functional separation undertaking given by a specified NBN Corporation. Subclause 25(5) states that these 'functional separation requirements determinations' are not legislative instruments. At page 77 of the explanatory memorandum this approach is said to reflect the 'fact that a direction from the Ministers to any person is not subject to disallowance (see

section 44 of the LIA) and the fact that the instrument made by the Ministers…operates as a direction to an NBN corporation to include certain requirements in its draft undertaking'.

Although it is true that the section 44 of the *Legislative Instruments Act* does operate to remove certain legislative instruments from the disallowance provisions, this does not change the *legislative* character of the instruments. Even if section 44 of the *LIA* applies, other requirements (such as the tabling requirements) continue to apply in relation to legislative instruments. The Committee there **seeks the Minister's advice** as to the reason for the exclusion of these further requirements or about whether consideration has been given to another form of publication requirement to improve transparency and accountability in relation to the making of these determinations.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Avoidance of doubt provisions
Clause 25 - Functional separation requirements determination

Subclause 25(5) states that a functional separation requirements determination is not a legislative instrument. The Committee queried whether consideration has been given to a form of publication requirement to improve transparency and accountability in relation to the making of these determinations.

Clause 25 is based on section 75 of the *Telecommunications Act 1997* (TA), which was inserted by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. Consistent with section 75, clause 25 is silent on whether a requirements determination should be published. It is envisaged that a determination which sets out requirements for separation to improve market outcomes would be made available to the public, for example through publication on the Department of Broadband, Communications and the Digital Economy's website.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's advice that it is envisaged that any determination will be published. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 1 of 2011 - extract

Clause 27

Subclauses 27(8) and 30(10) provide that that the following are not legislative instruments: (1) an instrument approving an original or replacement draft functional separation undertaking, and (2) a variation of a final functional separation undertaking. In relation to each, the explanatory memorandum states at pages 80 and 82 that disallowance provisions of the *LIA* would not apply on the basis that the undertakings function as a direction from the Minister to an NBN corporation. It is also said that disallowance would undermine certainty required by industry. These reasons appear to the Committee undermine the claim that the statement in the explanatory memorandum that the instruments are not legislative is 'for the avoidance of doubt', making it unclear whether these are intended to be substantive exemptions or not.

If a substantive exemption is intended, it is relevant to note that a measure of accountability and transparency is provided for by (1) requirements to undertake a consultation process (see subclauses 27((3)-(6)); 30((4)-(7)); and (2) the final functional separation undertaking must be published on the NBN corporation's website (clause 30). If, however, these arrangements were thought relevant to establishing a substantive exemption from the *LIA* it would have been helpful for this to have been explained in the explanatory memorandum as the instruments in question do create binding legal obligations on NBN corporations (see clause 32). The Committee **seeks the Minister's clarification** as to whether the inapplicability of the *LIA* is thought to be a substantive exemption and, if so, why this approach is thought appropriate.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Clauses 27 and 30 - Functional separation undertaking and variation

Subclause 27(8) provides that an undertaking provided by an NBN corporation to the Communications Minister and the Finance Minister is not a legislative instrument. Clause 30 provides for such an undertaking to be varied, and subclause 30(10) relevantly provides that a variation is also not a legislative instrument. Clause 30 is clearly dependent upon clause 27 for its operation.

The Committee queried whether substantive exemptions from the LIA were intended in respect of these clauses. Clauses 27 and 30 are based on sections 76 and 80 of the TA, and consistent with those sections, the undertaking or a variation are not legislative in character, because they are documents prepared by a Commonwealth company and as such would not be legislative instruments for the purposes of the LIA.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 1 of 2011 - extract

Clauses 33 and 34

Subclauses 33(1) and 34(1) provide for Ministerial directions to an NBN corporation to dispose of or transfer specified assets and for other directions considered necessary for these purposes. Subclauses 33(5) and 34(6) declare these notices not to be legislative instruments.

It is unclear whether this is intended as a substantive exemption as the explanatory memorandum states that each provision 'clarifies that the direction is not a legislative instrument. Nevertheless, at page 82 of the explanatory memorandum the subclauses are justified by reference to subsection 44(2) of the *LIA* and the potential threat disallowance would pose to industry and Government certainty. The Committee **seeks the Minister's further advice** as to whether these provisions are intended to be substantive exemptions for the LIA and, if so, the reasons why the provisions of the *LIA* which do not deal with disallowance do not apply.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Clauses 33 and 34 - Directions to dispose of or transfer assets

Clauses 33 and 34 provide for the Communications Minister and the Finance Minister to direct an NBN corporation to dispose of assets, or transfer assets to another NBN corporation. Subclauses 33(5) and 34(6) provide that such directions are not legislative instruments.

The Committee queried whether substantive exemptions from the LIA were intended. The divestiture and transfer provisions are an extension of the functional separation provisions, and consistent with those provisions. As the directions would be to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997*), they would not be legislative instruments for the purposes of the LIA, as provided for by item 5(a) of the table to section 7 of the LIA.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Alert Digest No. 1 of 2011 - extract

Clauses 79 and 80

Clause 79(6) provides that written guidelines issued by the Communications and Finance Minister under paragraph 79(4)(a) is not a legislative instrument. These guidelines concern the preparation of financial statements which NBN may be required to prepare. The explanatory memorandum at page 107 justifies this exclusion of the *LIA* by stating that the guidelines would function as directions to the Board of an NBN corporation and therefore would not be disallowable under section 44(2) of the *LIA* in any event. The same approach is taken in relation to guidelines which may be issued under clause 80. The Committee **seeks the Minister's advice** as to why provisions in the *LIA* other than those relating to disallowance should not apply to guidelines made under these provisions.

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's response - extract

Clauses 79 and 80 - Guidelines in relation to financial statements and notification of significant events

Subclause 79(4) requires the Board of NBN Co to prepare financial statements in accordance with written guidelines given to it by the Communications Minister and the Finance Minister. Subclause 80(3) provides that notifications by NBN Co, to both the Communications Minister and the Finance Minister, of significant events must follow guidelines that may be given by those Ministers. In both clauses 79 and 80, it is stated that such guidelines are not legislative instruments.

The Committee queried whether provisions in the LIA other than those relating to disallowance should apply to guidelines made under clauses 79 and 80. Clauses 79 and 80 are based on the similar provisions in Division 3 of Part 2 of the Telstra Corporation Act 1991 and sections 38 and 40 of the *Commonwealth Authorities and Companies Act 1997*. Consistent with those Acts, the guidelines are not legislative in character but function as directions to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997*). They would therefore not be legislative instruments for the purposes of the LIA, as provided for by item 5(a) of the table to section 7 of the LIA.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011

Introduced into the Senate on 10 February 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Minister responded to the Committee's comments in a letter received 22 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Education Services for Overseas Students Act 2000*, *Higher Education Support Act 2003* and the *Indigenous Education (Targeted Assistance) Act* to ensure that the new regulatory framework interacts properly with other regulatory frameworks and funding programs.

Incorporating material by reference
Schedule 1, items 29 and 39

Item 29 of Schedule 1 inserts new sections 176B and 176C into the ESOS Act. Under the proposed amendments the Minister may, by legislative instrument, make ELICOS Standards and Foundation Program Standards. The proposed subsections 176B(12) and 176C(2) provide that despite subsection 14(2) of the *LIA*, the standards may apply, adopt, incorporate, with or without modification any matter contained in any other instrument in writing as existing at a particular time or from time to time.

These provisions thus 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. Although the incorporation of instruments into regulations 'from time to time' may be justified in certain circumstances, it is unfortunate that the explanatory memorandum merely repeats the effect of these provisions without any explanation or justification of why this is considered an appropriate delegation of power in this instance. Therefore, the Committee **seeks the Minister's advice** about the justification for this approach.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's response - extract

I note the Committee has asked for advice about clauses 29 and 39 and the power to incorporate existing material. Each clause is addressed below:

Schedule 1, sub-item 29

The proposed new sections 176B(2) and 176C(2) of the *Education Services for Overseas Students Act 2000* do not oblige the Minister-when making legislative instruments under those provisions-to apply, adopt or incorporate matters contained in another instrument or writing. The Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms. This is because it is envisaged that both the National Vocational Education and Training (VET) Regulator and the Tertiary Education Quality Standards Agency would publicise on their websites the current versions of any document incorporated by reference in the legislative instruments in question.

Schedule 1, sub-item 39(4)

The proposed new subclause 17(4) of the *Higher Education Support Act 2003* (HESA) does not oblige the Minister to apply, adopt or incorporate matters contained in another instrument or writing, and the Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms.

This is because it is envisaged that for the purpose of subclause 17(2) of Schedule 1A of HESA the requirements referred to in the VET Provider Guidelines made under clause 99 of Schedule 1A of HESA would be those in either:

(a) for training organisations which are registered with the NVR-the legislative instruments regarding standards for NVR Registered Training Organisations, and regarding Fit and Proper Person Requirements, made under clauses 185 and 186 respectively of the main National VET Regulator Bill. The content of those instruments must be agreed by the Ministerial Council for Tertiary Education and Employment (the Ministerial Council). It is envisaged that these instruments would be well publicised by the National VET Regulator on its website. The requirements in the instrument under clause 185 will be very similar to those in

the Australian Qualifications Training Framework (AQTF). One of the reasons to embody the AQTF requirements in the instrument under clause 185 is so that the requirements can be made clearer and more precise in form, leading to greater certainty about their application. (The requirements in the instrument under clause 186 are not currently included in the AQTF).

(b) for Registered Training Organisations (RTOs) which will continue to be regulated by non-referring states-the Australian Qualifications Training Framework (AQTF), at least for the time being. It is possible that in future the non-referring states will enact mirroring legislation requiring their RTOs to comply with the requirements in the instruments under clauses 185 and 186 (as is envisaged by the current draft Intergovernmental Agreement regarding the National VET Regulator). The current AQTF is well publicised, being referred to on the homepage of the training.com.au website among other places, and available in full on that website. The AQTF could only be amended with the agreement of the Ministerial Council. It is unlikely that the AQTF will be amended in the interim period between when the requirements in the instruments under clauses 185 and 186 come into effect, and when non-referring states enact mirroring legislation, should they enact mirror legislation. If the AQTF was amended, the only likely change would be to make the requirements in the AQTF the same as those in the instruments under clauses 185 and 186.

I trust this information enables the Committee to finalise its consideration of the Bill.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No.1) Bill 2011

Introduced into the House of Representatives on 24 February 2011
Portfolio: Resources and Energy

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2011*. The Minister responded to the Committee's comments in a letter dated on 18 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2011 - extract

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003* (Safety Levies Act) to impose cost-recovery levies on holders of offshore petroleum titles in respect of wells and well-related activities in those titleholders' title areas.

The bill also amends the title of the Safety Levies Act to the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*, to reflect the expansion of its content to include levies relating to wells.

Imposing a levy by regulation
Schedule 1, item 17, clauses 9(4), 10(4) 10A(4) and 10B(4)

These proposed subsections provide that the rate of each well levy to be imposed is to be fixed by regulations, with no upper limit being set in the bill. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to

prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

In this instance, the Committee notes that the explanatory memorandum states that the levy in each case 'is the amount specified in or calculated in accordance with the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004*, but it is not clear whether it is intended that additional regulations will be made and how the levy will be calculated. The explanatory memorandum provides no explanation as to why the rate of the levy needs to be set by regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. The Committee **seeks the Minister's advice** in respect of these matters.

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

Minister's response - extract

The Regulatory Levies Bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003* (Safety Levies Act) to impose cost-recovery levies on offshore petroleum titleholders in respect of wells and well-related activities in those titleholders' title areas.

The National Offshore Petroleum Safety Authority (NOPSA) is funded on a full cost-recovery basis with levies raised by the offshore petroleum industry to fund NOPSA's regulatory activities. Levies currently imposed by the Safety Levies Act fund NOPSA's occupational health and safety regulatory activities in relation to offshore petroleum and greenhouse gas facilities. The Regulatory Levies Bill will amend the Safety Levies Act (which will be renamed the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (Regulatory Levies Act)) to impose levies on offshore petroleum titleholders to recover the costs of NOPSA in undertaking its augmented regulatory functions in relation to structural integrity and safety of wells and well-related equipment.

NOPSA's regulatory activities will vary from year to year, in particular in relation to the number of offshore petroleum operations being undertaken and in ensuring an adequate level of scrutiny for these operations. It may therefore be necessary to vary the amount of levy that can be collected by NOPSA on a regular basis to ensure that it has sufficient

funds to meet its costs and expenses in appropriately undertaking its functions and powers in relation to the regulation of well integrity and operations.

To ensure that the amount of levy can be amended regularly and expeditiously, I have proposed to include the levy amount in regulations made under the Regulatory Levies Act. Delays in amendments to levy amounts may result in NOPSA having a shortfall of funds available to undertake its important well integrity functions.

This is consistent with the approach taken for the calculation of the existing safety case levy and safety investigation levy under the Safety Levies Act. The Safety Levies Act sets out the conditions for imposition of these levies and provides that the levy amounts are specified in, or worked out in accordance with, the regulations. The specific levy amounts and method of calculation are set out in the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Regulations 2004* (Safety Levies Regulations).

I plan to make amendments to the Safety Levies Regulations (which will be renamed the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004* (Regulatory Levies Regulations)) under the Regulatory Levies Act to detail the calculation or composition of the well-related levies. It is proposed that the levies will be calculated as follows:

- The **annual** well levy will be payable by a titleholder to NOPSA in the amount of the amount specified in the Regulatory Levies Regulations multiplied by the number of eligible wells. "Eligible wells" are defined in the Regulatory Levies Bill as non-abandoned wells in the title area at the end of the calendar year, and wells that began to be drilled during the year but were abandoned prior to the end of the year.

- The **well activity levy** is triggered by the submission of a new well operations management plan, or a five yearly revision to a plan, or by submission of a request for an approval for an activity in relation to a specific well. Further detail in relation to the method of calculation to be included in the Regulatory Levies Regulations is being developed by NOPSA.

- The **well investigation levy** will be in the amount of the post-threshold costs and expenses reasonably incurred by NOPSA in conducting an inspection in relation to a breach or suspected breach of a titleholder's well-related duty of care in clause 13A of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (ie reasonable costs and expenses that exceed $30,000).

NOPSA is currently undertaking a process to determine the amount of levy that will be imposed under the Regulatory Levies Act and Regulations to recover the costs of its well-related regulatory activities. In determining the initial levy amounts, NOPSA is preparing a Cost Recovery Impact Statement (CRIS) and consulting with industry in relation to development of the CRIS.

In addition, regulation 37 of the Safety Levies Regulations requires the Chief Executive Officer (CEO) of NOPSA to conduct periodic reviews of cost-recovery in relation to the operations of NOPSA, including a comparison of the fees and levies collected with the regulatory activities undertaken in the period. Under regulation 38, the CEO must also prepare a financial report in respect of each financial year that assesses the cost-effectiveness of NOPSA's operations in that financial year. The report must be audited by an independent auditor, and be provided at a minimum to industry representatives and operators who were required to pay levies during the year.

Furthermore, regulation 39 of the Safety Levies Regulations requires the CEO of NOPSA to meet annually with representatives of the offshore petroleum industry to discuss the cost-effectiveness of NOPSA's operations, including presenting information in relation to NOPSA's costs and budget projections, and operating budget for the following year. Previous amendments to the Safety Levies Regulations to increase safety case levies have been raised with industry in the report required under regulation 38, and discussed at the cost-effectiveness meeting.

These arrangements will continue to apply in the re-named Regulatory Levies Regulations which will also impose the well levies. In addition, NOPSA may be required to prepare a new CRIS or an addendum to their current CRIS in relation to any planned levy increase. I submit that these requirements will be sufficient to ensure that levy amounts are not increased in an excessive or undue manner, so that it is not necessary to include an upper limit in the Regulatory Levies Bill on the amount of levy that may be imposed.

Committee Response

The Committee thanks the Minister for this detailed response and **leaves to the Senate as a whole the question of whether the proposed arrangements for determining and reviewing the amount of each levy is appropriate in the circumstances.**

Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Broadband, Communications and the Digital Economy

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Minister responded to the Committee's comments in a letter dated on 18 March 2011. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2011 - extract

Background

This bill accompanies the National Broadband Network Companies Bill 2010. The bill introduces new access, transparency and non-discrimination obligations relating to the supply of wholesale services by NBN Co Limited. It also extends technical and open access obligations to owners of other superfast networks.

***Legislative Instruments Act* - exemption**
Schedule 1, item 86

This item also enables, in proposed subsections 141(5) and (6), the Minister to, by written instrument, exempt specified owners or a specified network unit from the general requirements of the proposed section 141. Before making such an instrument the Minister must consult the ACCC and ACMA (subsection 141(8)) but the instrument is exempted from the operation of the *LIA* (subsection 141(9)). The explanatory memorandum indicates at page 167 that the potential for disallowance of the instruments would be inconsistent with the maintenance of industry certainty. This appears to be intended as a substantive exemption from the *LIA*. Although the need for industry certainty can be appreciated, the Committee **seeks the Minister's advice** as to whether this would be sufficiently achieved through excluding only section 42 of the *LIA* (disallowance) and allowing the other provisions of the *LIA* (such as requirements for publication) to continue to apply. The same issue also arises in relation to item 88 which would insert proposed subsection 389B(7) and the Committee also **seeks the Minister's advice** in relation to this provision.

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

Legislative Instruments Act
Schedule 1, item 86 – Exemptions from the operation of proposed section 141
Schedule 1, item 88 – Exemption from the operation of proposed section 389B

Proposed section 141 sets out obligations relating to the supply of Layer 2 bitstream services (as defined under the Bill). Proposed subsections 141(5) to (9) set out powers for the Minister to exempt a network owner or a network unit from the obligations. Proposed subsection (9) provides that such exemptions are not legislative instruments.

A similar exemption power is set out at proposed subsections 389B(4) to (7). The Minister could exempt a specified carrier or carriage service provider from complying with a technical standard. Proposed subsection (7) provides that an exemption is not a legislative instrument.

The Committee queried whether the exemption powers under proposed sections 141 and 389B should be subject to some provisions of the LIA, such as the requirement for publication. It is envisaged that exemption instruments of this sort would be published. At the very least, the regulator would need to be aware that a particular person or network unit was not subject to the obligations which it must enforce.

I trust this information is of assistance.

Committee Response

The Committee thanks the Minister for this response. The Committee requests that the key aspects of this information be reflected in the explanatory memorandum.

Senator the Hon Helen Coonan
Chair

THE HON KEVIN RUDD MP

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the letter of 28 October 2010 from Ms Toni Dawes, Committee Secretary, Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), seeking my response to a number of issues regarding the Australian Civilian Corps Bill 2010 (ACC Bill). My response has been awaiting finalisation of the Government's response to the recommendations made by the Senate Foreign Affairs, Defence and Trade Legislation (FADTL) Committee on the ACC Bill, because some of the issues raised by the FADTL Committee are the same as those raised by the Scrutiny of Bills Committee.

The Government response to the FADTL Committee has now been finalised and was tabled out-of-sitting on 10 March 2011. I attach a copy for you. A copy has also been provided by officials of the Australian Agency for International Development (AusAID) to the Secretariat of the Scrutiny of Bills Committee.

Additional to the issues addressed in the Government response to the FADTL Committee, the Scrutiny of Bills Committee has also sought my advice on the reasons for the wide discretionary power of the Director General of AusAID under the ACC Bill to impose sanctions on misconduct of ACC employees, and the Minister's broad power to delegate his or her powers under the ACC legislation to any 'person who holds an office or appointment under an Act'.

The powers mentioned above are identical in scope to those under section 15 and subsection 78(4) of the *Public Service Act 1999* relating to imposition of sanctions and delegation of Ministerial powers. I consider this consistency to be appropriate. Accordingly, I also intend to propose regulations under the ACC Bill to prescribe the same limitations as those under the *Public Service Regulations 1999* on the imposition of sanctions.

I trust that this information is of assistance.

Yours sincerely

Kevin Rudd

PO Box 6022, Parliament House, Canberra ACT 2600
Telephone (02) 6277 7500 Facsimile (02) 6273 4112

Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee

Australian Civilian Corps Bill 2010 [Provisions]

March 2011

Committee Recommendations	Government Response
Recommendation 1 *The committee recommends that the bill include a statement on the humanitarian and development purpose for establishing the Australian Civilian Corps.*	Not agreed. The Government does not consider it necessary to include such a statement in the Bill. The Government has sought to align the ACC with the broader aid program by making the Director General of AusAID responsible for the management of the ACC. The ACC Values, which will be prescribed by regulation, will further define the principles that will govern the operation of the ACC.
Recommendation 2 *The committee recommends that a new subsection (2) be added to section 12 as follows:* *(2) Regulations made under this Section must provide that Australian Civilian Corps Values be consistent with the APS Values.* *The committee recommends that a new subsection (1A) be added to section 15 as follows:* *(1A) Regulations made under this Section must provide that Australian Civilian Corps Code of Conduct incorporate the APS Code of Conduct and the AusAID Code of Conduct for Overseas Service.*	Not agreed. Nothing in the ACC Values will contradict the APS Values, and as the Explanatory Memorandum states, the intention is to broadly align the ACC Values and Code with existing APS Values and Code. The AusAID Code of Conduct for Overseas Service (the 'AusAID Overseas Code') will not apply to the ACC, although the ACC Code of Conduct will be broadly consistent with the AusAID Overseas Code. However, there are elements in the APS Values and existing Codes of Conduct that apply to APS employees which are not appropriate for, or relevant to, the ACC and its work environment. As a result, incorporation of the existing Codes of Conduct into the ACC Code would be inappropriate. Since there would inevitably be differences between the terms of the ACC Values and the APS Values, expressly requiring 'consistency' could create unnecessary difficulty in interpreting particular provisions of the ACC Values. The ACC Values and ACC Code of Conduct will be prescribed by regulation and as such will be tabled and subject to Parliamentary scrutiny and disallowance.

Recommendation 3 *The committee recommends that consistent with the Public Service Act, the bill require that exemptions to the entitlement to review be made under regulations and subject to Parliamentary scrutiny.*	Agree.

Recommendation 4 *The committee recommends that the bill include a provision that would allow an ACC employee, following an adverse finding of AusAID's internal review, to apply for the matter to be referred to an external merits review authority. The committee suggests that this provision should be modelled on section 33 of the Public Service Act.*	Agree to provide for external review of code of conduct decisions. In light of the proposed external review right, the Government does not consider that it would be necessary for the Bill to also provide for internal review. Under the arrangement established pursuant to section 33 of the *Public Service Act 1999*, decisions on breaches of the APS Code of Conduct are not subject to internal review. Consistent with that, it is proposed that decisions relating to breaches of the ACC Code of Conduct will only be reviewable by an external party. Under the proposed Government amendments to the Bill, the Director General of AusAID will be required to arrange for external review by a suitably qualified person or committee. AusAID has reached in-principle agreement with the Merit Protection Commissioner for the Commissioner to be a reviewer of code of conduct decisions, subject to further negotiation of the terms of the review arrangement. Under the present proposal, the Commissioner may agree to review decisions, for a fee, at the request of the Director General of AusAID from time to time pursuant to an MOU between the Director General of AusAID and the Commissioner. Following consultation with the Merit Protection Commissioner and the Australian Public Service Commission, it has been decided that the Bill and the regulations will not expressly refer to the Merit Protection Commissioner as the external reviewer. If the Commissioner declines for some reason to review a particular decision, the Director-General would be required by the amended Bill to find an alternative external reviewer who meets the criteria set out in the Bill in relation to independence and qualifications. The proposed arrangement is similar to existing review arrangements established between the Merit Protection Commissioner and a number of other non-APS Government agencies.

Recommendation 5 *The committee recommends that the government look closely at the provisions governing accrued entitlements to ensure that employees who take up employment with the ACC are not disadvantaged in respect of entitlements such as superannuation, long service and annual leave.*	Not agreed. While the Government is working to ensure that, to the extent possible, employees who take up employment with the ACC are not disadvantaged in respect of entitlements, there are constitutional and other limitations to the Commonwealth's ability to enact legislation seeking to interfere with the accrual of entitlements under State employment laws that ordinarily apply to relevant employees. It will be open to an employee not to accept an engagement with the ACC if the employee is not satisfied with the entitlements offered.
Recommendation 6 *The committee recommends that paragraph 27(2)(a) of the bill be amended to include the term 'at the request of the employees'. Paragraph 27(2)(a) to read:* *(a) the granting of leave to employees, at the request of the employees, for the purposes of service in the Australian Civilian Corps.*	Agree. While the Government does not consider the additional words to be necessary, this recommendation is consistent with the intention that participation in the ACC is entirely voluntary. Accordingly, an amendment to the Bill has been drafted to implement this recommendation.
Recommendation 7 *The committee recommends that subclause 23(2) be added requiring the notice to specify the ground or grounds that are relied on for termination.*	Agree.

Recommendation 8 *The committee recommends that the government give consideration to including in the bill provisions governing the protection of whistleblowers, prohibition on patronage and favouritism and promotion of employment equity.*	The Government agrees with the recommendation to include provisions in the Bill mirroring section 17 of the *Public Service Act 1999* against patronage and favouritism. The Government does not agree to the recommendation to include a provision governing the protection of whistleblowers. The Government has committed to enacting a broader ranging public interest disclosure scheme applying to Commonwealth employment which should be sufficient for the ACC's purposes. Accordingly, it is considered neither necessary nor appropriate for the ACC to have a separate arrangement under its own legislation. The Government does not agree to the recommendation to include a provision on promotion of employment equity as there will only be a limited number of ACC employees at any one time. ACC employees will be selected from the ACC register based on the needs identified by the hosting entity/country, as well as the specific skills, experience and capacity of an individual to operate in that potentially high threat environment. In these circumstances, the Government does not consider that it is appropriate to require the Director General of AusAID to establish a workplace diversity program for the ACC.

Recommendation 9 *The committee recommends that an additional subclause be inserted in clause 24 stating that any arrangements for, agreements on and actual secondments under this clause must be consistent with ACC Values and Code of Conduct and AusAID Code of Conduct for Overseas Service.*	Not agreed. The AusAID Code of Conduct for Overseas Service (the 'AusAID Overseas Code') will not apply to the ACC. However, the ACC Code of Conduct will be broadly consistent with the AusAID Overseas Code, with appropriate modifications to take into account the unique nature of the ACC's operations. As the Bill is currently drafted, the ACC Values will already apply in relation to secondment arrangements (eg. the obligation of the Director General of AusAID to uphold and promote the ACC Values will apply in relation to the making of secondment arrangements). In addition, the ACC Values and ACC Code of Conduct will continue to apply to an ACC employee on secondment (subject to directions issued by the Director General of AusAID under subclause 16(1)). Including a provision to require that secondments must in all respects be consistent with the ACC Values and ACC Code of Conduct is considered unnecessary and may have unintended consequences.
Recommendation 10 *The committee recommends that the Explanatory Memorandum be more explicit on ACC's reporting obligations by specifying that the report on the activities of the ACC will form a separate and discrete section in AusAID's Annual Report and will include financial statements.*	The Government agrees to amend the Explanatory Memorandum to specify that the activities of the ACC will be reported separately in AusAID's Annual Report but does not believe it is appropriate to include separate financial statements.
Recommendation 11 *The committee recommends that, subject to consideration of the committee's recommendations dealing with the provisions of the bill, the Senate pass the bill.*	Agree.

THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs
Minister for Justice

MIN-MC11/02690

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Chair Helen,

Thank you for your letter to the Attorney-General, the Hon Robert McClelland MP, dated 3 March 2011 seeking advice on issues identified in the *Alert Digest* relating to the Combating the Financing of People Smuggling and Other Measures Bill 2011 (the Bill). The matter has been referred to me as this Bill falls within my portfolio responsibilities.

I have responded to each of the issues raised below.

Trespass on personal rights and liberties (Schedule 1, items 16 to 18)

The Bill empowers the AUSTRAC CEO to request further information from any person upon receipt of a suspicious matter report, an international funds transfer instruction report or a threshold transaction report to enable AUSTRAC to enhance its ability to evaluate the matter.

I agree with the Committee's view that the extension of the power to 'any person' should be subject to a requirement that the AUSTRAC CEO forms a reasonable belief that the person asked to produce the documents or information has knowledge, custody or control of documents or information which will assist in the administration of the legislative scheme.

I propose that amendments are moved in the Senate.

Trespass on personal rights and liberties (Schedule 1, items 16 to 18)

In my view, given the serious concerns to which this material may relate, a period specified in a notice of less than 14 days is appropriate in certain circumstances. The ability to follow the money trail in criminal investigations requires access to information in a timely manner.

The requirement in section 49 is consistent with the existing policy in the AML/CTF Act as reports are required to be submitted to AUSTRAC within specified periods that may be shorter than 14 days. For example, I note that reporting entities must submit suspicious matter reports within 3 business days, or within 24 hours where the report relates to the financing of terrorism.

Telephone +61 2 6277 7290 | Parliament House, Canberra ACT 2600 Australia | Facsimile +61 2 6273 7098
mha@ag.gov.au

Insufficient parliamentary scrutiny (Schedule 1, item 31, section 75C, 75G and 75H)

Item 31 in the Bill proposes a non-exhaustive list of matters that may be specified in the AML/CTF Rules for consideration by the AUSTRAC CEO when determining a person's application for registration, or the suspension or cancellation of a person's registration, as a provider of a remittance service.

In my view, it is appropriate to include these matters in the AML/CTF Rules rather than the AML/CTF Act to allow the AUSTRAC CEO to consider matters that may not have been considered at the time of legislation yet may still indicate a money laundering, terrorism financing or people smuggling risk. The techniques used by money launderers are continually changing. It is important that the AML/CTF regulatory framework is designed so that it can adapt quickly to the nature of the threat posed by these serious crimes.

The AML/CTF Rules are disallowable instruments which must be tabled in Parliament and registered on the Federal Register of Legislative Instruments.

Insufficient parliamentary scrutiny (Schedule 1, item 31, section 75M)

AUSTRAC consults extensively with regulated entities during the development of the AML/CTF Rules. AUSTRAC's consultation procedures require draft AML/CTF Rules to be published on the AUSTRAC website for a minimum period of four weeks. This may be extended as a result of holiday periods or at the request of industry if a submission cannot be made within the consultation period.

AUSTRAC maintains an email list of organisations and persons who have requested to be notified about consultations regarding draft AML/CTF Rules. AUSTRAC directly contacts these entities by email when draft Rules are released for consultation, and when Rules are finalised and registered on the Federal Register of Legislative Instruments.

AUSTRAC liaises with relevant industry associations during the development and implementation of AML/CTF Rules who in turn keep their members informed of the issues.

If a new or amended Rule is of particular interest to a segment of AUSTRAC's regulated population, AUSTRAC sends targeted emails and letters to regulated entities it considers to be most affected. The registration of AML/CTF Rules ensures that any AML/CTF Rule may be accessed and scrutinised by reporting entities as well as the general public.

I consider it appropriate to specify additional matters of which the remittance dealer must advise the AUSTRAC CEO in the AML/CTF Rules rather than the Act. This will allow the AUSTRAC CEO to respond to any changes in the structure and nature of the regulated sector. The inclusion of detail in the AML/CTF Rules rather than the Act is consistent with the broader approach of the AML/CTF regime. As outlined above, the AML/CTF Rules are disallowable instruments which must be registered on the Federal Register of Legislative Instruments.

Reversal of onus (Schedule 3, item 6)

These two offence provisions reflect the seriousness with which the Government views any breach of privacy through the misuse of verification information. The offences in proposed sections 35H and 35K reflect similar offences in the *Privacy Act 1988* in relation to the access, use and disclosure of personal information by credit reporting agencies. The defence included in proposed section 35H and 35K is an acknowledgement that there are instances where access, use or disclosure is justified. The individual will have particular knowledge as to whether the defence applies and would be able to raise evidence about how access, use or disclosure was authorised.

The privacy impact assessment identified a need for strong offences to protect against unauthorised access of personal information. The way in which the offence is constructed in the Bill will act as a strong deterrent to accessing personal information without authorisation.

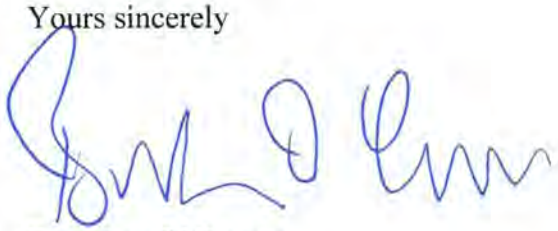
Legislative Instruments Act – exemption (Schedule 4, item 1)

In my view, the exemption instrument proposed by item 1 of Schedule 4 of the Combating the Financing of People Smuggling and Other Measures Bill is not of legislative character. The exemption applies the law in a particular case rather than determining or altering the content of the law. As such, the proposed subsection 41A(5) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LIA). Accordingly, the Bill notes that the instrument is not a legislative instrument to assist readers. It is not reflective of a substantive exemption from the LIA.

The aim of the exemption power in the proposed new section 41A inserted by item 1 of Schedule 4 is to give the AUSTRAC CEO the ability to provide affected businesses with regulatory relief where the regulation imposed may be unnecessary or unreasonable.

The officer responsible for this matter in the Attorney-General's Department is Tim Goodrick who can be contacted on (02) 6141 2809.

Yours sincerely



Brendan O'Connor

The Hon David Bradbury MP
Parliamentary Secretary to the Treasurer

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Helen Coonan,

Thank you for your letter of 3 March 2011 to the Deputy Prime Minister and Treasurer, seeking supplementary information on the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (the Bill), as identified in Alert Digest 2/11. Your letter has been referred to me as I have responsibility for the Bill. Below is my response to your comments.

Strict Liability

As you would be aware, the Bill contains new provisions that make it a strict liability offence should the requirements of the provisions be contravened. These new provisions are:

- A requirement that the board of directors or a remuneration committee of a company approve the engagement of a remuneration consultant (subsection 206K(5));
- A prohibition on key management personnel or a closely related party from hedging unvested equity remuneration or vested equity subject to holding locks (subsection 206J(5));
- A requirement for the remuneration consultant who makes a remuneration recommendation in relation to the key management personnel to include with the recommendation a declaration about whether the consultant's recommendation is made free from undue influence by the key management personnel to whom the recommendation relates (subsection 206M(3)); and
- A requirement for the company to hold a spill meeting within 90 days of the spill resolution being passed at the annual general meeting, should a spill resolution be passed after two strikes on the remuneration report (subsection 250W(6)).

The explanatory memorandum justified a number of these strict liability offences on the grounds that a failure of these requirements would compromise the ability of shareholders to make an informed assessment about the independence of remuneration consultants and to hold directors and executives accountable on remuneration issues. However, the Committee requested a fuller explanation of the need for strict liability in these provisions.

There is a need for these strict liability offences as the inclusion of offences that do not involve fault is likely to significantly enhance the effectiveness of the provision in deterring offences from occurring. The *Guide to Framing Commonwealth Offences* (the *Guide*) states that a strict liability offence can be justified where the offence involves unjustified recklessness. For example, if a

PO Box 6022
Parliament House
Canberra ACT 2600

Telephone: 02 6277 4199
Facsimile: 02 6277 8465
http://parlsec.treasurer.gov.au

company were to engage a remuneration consultant without the board or remuneration committee's approval, this would be a serious and unjustified recklessness on the part of the company of the requirement set out in subsection 250K(5).

The imposition of strict liability is hence intended to aid the enforcement of these provisions and ensure that the reforms contained in this Bill are effective in its objective of empowering shareholders to hold directors accountable for their decisions on executive remuneration.

Although there are no comparable offence provisions in the *Corporations Act 2001* for the offences under subsections 206K(5), 206J(5) and 206M(3), the imposition of 60 penalty units, with no punishment through imprisonment, is consistent with the requirements in the *Guide* relating to the imposition of fines for individuals in the case of strict liability offences. An offence of strict liability under subsection 250W(6) carries only 10 penalty units.

The strict liability offence was introduced in these provisions only after careful consideration of all available options. It was considered that a strict liability offence was justified because contravention of the Bill's requirement involved unjustified recklessness and that imposition of strict liability would act as a deterrence measure.

Hence, the strict liability provisions in the Bill comply with the *Guide.*

Reversal of onus

The Bill contains new provisions that place an evidential burden of proof on defendants:

- The first of these provisions relate to the prohibition of key management personnel and their closely related parties from voting undirected proxies on remuneration related resolutions.
  - Subsection 250BD(2) provides an exception to exercise undirected proxies where the person is the Chair of the meeting at which the resolution is voted on and the shareholders expressly provide informed consent. The Committee noted that the defendant bears an evidential burden in relation to the application of the exception in subsection 250BD(2).
  - Subsection 250BD(3) provides ASIC with the ability to provide relief from the prohibition, where it would not cause unfair prejudice to the interests of any shareholder of the company. The Committee also noted that the defendant bears an evidential burden in relation to this matter.
- The second of these provisions relates to the requirement for a company to hold the spill meeting within 90 days should the spill resolution be passed.
  - Subsection 250W(5) states that if the company fails to hold the spill meeting within 90 days of the spill resolution being passed, each person who is a director of the company at the end of the 90 days commits an offence. However, subsection 250W(4) states that the company need not hold the spill meeting within 90 days if, before the end of that period, none of the company's directors remain as directors of the company. Subsection 250W(7) provides that the offence under subsection 250W(5) is not an offence if none of the directors remain with the company. The Committee noted that the defendant under subsection 250W(7) also bears an evidential burden.
  - Subsection 250W(8) provides that the offence under subsection 250W(5) does not extend to a director appointed at a point in time that would not allow the requisite

amount of notice for the meeting to be given. The Committee also noted that the defendant bears an evidential burden in relation to this matter.

The *Guide* states that "a matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish" (Part 4.6, page 28).

In relation to the first provision, it would be peculiarly within the Chair's knowledge, where the Chair would act as the defendant, that the Chair had been provided informed consent by shareholders to exercise undirected proxies (subsection 250BD(2)). It would also be peculiarly within the directors' knowledge that ASIC had provided relief from the prohibition (subsection 250BD(3)).

In relation to the second provision, it would be peculiarly within the directors' knowledge if none of the company's directors had remained as directors of the company (subsection 250W(7)). It would also be peculiarly within the knowledge of a director should they cease to occupy the position as director in accordance with subsection 250W(8).

As the information relating to all of these matters would not be available to the prosecution, it is legitimate to impose the evidential burden on the defendant.

Explanatory Memorandum

I note the concerns raised by the Committee in relation to errors in the explanatory memorandum. I have addressed two of these concerns with the issue of a Replacement Explanatory Memorandum. These concerns relate to the indexing of the amendments contained in the Bill and an error in the item reference number on page 22, paragraph 4.9.

The Committee also raised an issue with Item 1 in Section 1, which contains a new definition under section 9 of *closely related party*. The Committee requested further guidance on the reasons for the scope of the definition and why it is necessary to delegate a power to prescribe others in regulations.

This regulation making power will provide flexibility to include other parties that may be justified as closely related parties, if required. As part of the consultation process on the regulations, we intend to consult on other persons that would need to be included in the regulations (should any be required). The flexibility to clarify other cases that may be considered closely related parties is necessary given the range of people that may be affected by the definition, and would address any unintended consequences that may arise as a result.

I am in agreement with the Committee's views on the importance of comprehensive and accurate Explanatory Memoranda.

I trust this information satisfactorily answers the Committee's issues and concerns about the Explanatory Memorandum to the Bill.

Yours sincerely

DAVID BRADBURY

21 MAR 2011

THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs
Minister for Justice

Ministerial No: 102430

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

17 MAR 2011

Dear Senator Coonan Helen,

I refer to the letter from the Secretary of the Standing Committe for the Scrutiny of Bills (the Committee) of 3 March 2011 which drew to my attention issues identified in the Committee's *Alert Digest No. 2 of 2011 (2 March 2011)* relating to the Customs Amendment (Serious Drugs Detection) Bill 2011 (the Bill).

My advice on the issues raised is as follows:

Legislative requirement for locked calibration of the body scan technology

The explanatory memorandum for the Bill states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a locked calibration to limit the scan capability to internal cavities within a skeletal structure (which cannot be changed by an officer at the airport) will be required. The Committee seeks my advice about whether it is, or will be, included in the primary legislation.

The procurement process for the body scanning technology has not yet commenced. It is therefore not presently known whether the technology to be procured will have a capability limited to internal body scanning or have a broader spectrum of scanning capability. However, if the technology procured does have a broader scanning capability, I undertake that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier.

I advised Parliament in the Second Reading speech that both the Privacy and FOI Policy Branch of the Department of Prime Minister and Cabinet and the Office of the Australian Information Commissioner will be consulted prior to the prescription of body scan technology in the regulations.

I trust that including this restriction in the regulations, as opposed to the primary legislation, is acceptable to your Committee. I also undertake to provide a copy of the relevant regulations to your Committee once they are made.

Telephone +61 2 6277 7290 Parliament House, Canberra ACT 2600 Facsimile +61 2 6273 7098
mha@ag.gov.au Australia

Definition of 'in need of protection' in the legislation

Proposed paragraph 219SA(1)(a) of the *Customs Act 1901* (the Customs Act) (item 16 of the Bill) provides that an internal non-medical scan may be undertaken if, inter alia, there are reasonable grounds to believe that the detainee is not 'in need of protection'. The explanatory memorandum states at page 8 that a person is in need of protection if he or she is under 18 years of age or is in a mental or physical condition that renders them incapable of managing their own affairs. The Committee seeks advice as to whether consideration has been given to including a definition in the legislation.

'In need of protection' is defined in section 4 of the Customs Act as follows:

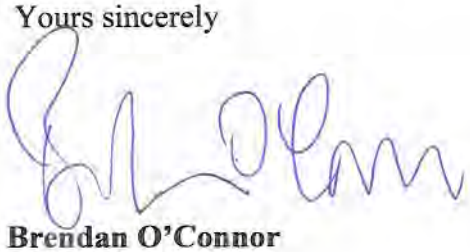
> For the purposes of Division 1B of Part XII, a person is in need of protection if, and only if, the person is:
>
> (a) under 18 years of age; or
>
> (b) in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs.

This definition applies to Division 1B of Part XII of the Customs Act and therefore applies to the new internal non-medical scan regime. For this reason, it is not necessary to further define the term in the Bill.

The contact officer in the Australian Customs and Border Protection Service is Ms Sally Macourt, Passengers Division, who can be contacted on 02 6275 8056.

I trust this information will be of assistance.

Yours sincerely



Brendan O'Connor

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

11/2266, AG-MC11/02692

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

Dear Senator Coonan

I refer to a letter dated 3 March 2011 from the Committee Secretary seeking further advice on matters raised by the Committee in relation to the Electronic Transactions Amendment Bill 2011. I understand that the Minister for Home Affairs will respond separately in relation to the Combating the Financing of People Smuggling and Others Measures Bill 2011.

The Committee expressed concern in Alert Digest 2/11 about the retrospective effect of Item 22 of Schedule 1 of the Bill. In particular, the Committee has requested an indication of whether it is possible that any individual may be detrimentally affected by the retrospective application of the relevant provisions.

Proposed sections 15B, 15C and 15D will only have retrospective application in circumstances where a contract is formed after the commencement date, but the proposals, actions, statements, declarations, demands, notices or requests (under those sections) in relation to that contract, were carried out prior to the commencement date. The proposed retrospective application of these new sections is to ensure that an entire contract is governed by consistent rules and procedures throughout all stages, including the negotiation, formation and performance of the contract.

The provisions do not have retrospective application to contracts formed before the commencement date. The following explanation of the provisions may further assist the Committee.

Proposed section 15B

The retrospective application of proposed section 15B would only apply where an 'invitation to treat' is made before the commencement date, and a resulting contract is formed by electronic communications after the commencement date. In these circumstances, proposed section 15B would operate to the extent necessary, to clarify the distinction between an 'offer' and an 'invitation to treat' in relation to any proposals made during the negotiations of the particular contract.

Proposed section 15C

The retrospective application of proposed section 15C would only apply where a contract is formed after the commencement date, but certain actions were carried out by automated message systems in relation to the contract before the commencement date. A practical example of an action carried out by an automated message system would be where an office's printing equipment is programmed to issue an order for ink or toner when required.

Proposed section 15D

The retrospective application of proposed section 15D would only apply where a natural person has made an error in an electronic communication with an automated message system before the commencement date, and the resulting contract is formed after the commencement date. In these circumstances, the natural person could rely on proposed section 15D to withdraw the portion of the electronic communication in which the input error was made (only if the particular circumstances prescribed in proposed section 15D that give rise to the right to withdraw the error exist).

I confirm that the retrospective application of these provisions would only apply in relation to proposals, actions, statements, declarations, demands, notices or requests made in relation to contracts formed by electronic communications after the commencement date. Therefore, it is likely that these provisions would only apply in limited circumstances.

Corresponding provisions have already been passed by both New South Wales and Tasmania in their Electronic Transactions Acts. Stakeholders have not raised any concerns about this issue during consultations.

The limited retrospective effect of these transitional provisions is unlikely to detrimentally affect any individuals. The provisions confirm that the amendments will only cover contracts that individuals enter into once the Bill has commenced. In my view, this retrospective operation is necessary and justified to ensure that only one set of rules and procedures govern an entire electronic contract.

The action officer in my Department for this matter is Debrah Pono who can be contacted on 02 6141 3445.

Yours sincerely

Robert McClelland

21 MAR 2011

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

Thank you for the Senate Standing Committee for the Scrutiny of Bills (the Committee) letter of 3 March 2011, Alert Digest No. 2 of 2011 (dated 2 March 2011), regarding the amendments to the Higher Education Support Amendment (No. 1) Bill 2011.

I note the Committee's request for a response concerning the appropriateness of the delegation of legislative power for the 'fit and proper' requirements and whether consideration was given to procedural fairness before the Minister imposes a condition on a provider's approval.

The amendment for the 'fit and proper' requirements is to be specified in the *Higher Education Support Act 2003* (HESA) as a high-level framework that must be satisfied by an applicant to be eligible to be approved as a higher education provider or vocational education and training provider. With the diversity of providers—for example, private providers in contrast to publicly funded providers—that may be approved under HESA, initially and in the future, specific criteria is not specified in HESA and will be specified in specific legislative instruments.

This approach will maximise consistent application of the 'fit and proper' requirements and will ensure that only those requirements that are necessary for each sector of the industry, and any subcategories, are applied. The approach will also allow the Commonwealth to be responsive to the changing needs of the sector and minimise the risk to public monies. Where responsive action is required, the fact that a legislative instrument will be made, and accordingly have Parliamentary scrutiny, the application of 'fit and proper' requirements will still require justification through the necessary Explanatory Memorandum, and ultimately the legislative instrument may still be disallowed.

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I thank the Committee for seeking advice as to whether consideration has been given to the requirements for procedural fairness in relation to the imposition or variation of conditions on a body corporate's approval as a higher education or vocational education and training provider. The intent of the conditions of approval provision is to strengthen the Commonwealth's ability to manage provider risk in relation to the proper use and management of public money, and better manage risk in relation to provider quality.

While I note the Committee's comments specifically regarding the imposition or variation of conditions for already approved bodies corporate, it should be recognised that, unlike other regulatory licensing and authorisation regimes, approvals are given in perpetuity, with no renewal system in place for the purposes of assessing whether the approved body corporate continues to meet the quality requirements of the schemes. The amendment to allow for conditions to be placed on a body corporate's approval is by no means intended to unduly trespass on personal rights and liberties. Rather, it is intended to support the Commonwealth's ability to manage risk for already approved providers.

Notwithstanding the above, the Department of Education, Employment and Workplace Relations is committed to open, transparent and accountable government. Accordingly, the implementation of administrative and operational policies for decisions made in relation to conditions of approval would be fully subject to open, timely and thorough communication and consultation with a body corporate. Furthermore, I am aware that any decisions under these provisions would be subject to the *Administrative Decisions (Judicial Review) Act 1977*. The absence of an express procedural fairness provision does not exclude the operation of the common law rules of natural justice, and these principles would still apply.

I trust this information assists the Committee in its consideration of this Bill.

Yours sincerely

CHRIS EVANS

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

Thank you for your letter of 3 March 2011 on behalf of the Standing Committee for the Scrutiny of Bills, regarding the Committee's comments in *Alert Digest No. 2 of 2011*, concerning the National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011 (the Bill).

I note the Committee has asked for advice about clauses 29 and 39 and the power to incorporate existing material. Each clause is addressed below:

Schedule 1, sub-item 29

The proposed new sections 176B(2) and 176C(2) of the *Education Services for Overseas Students Act 2000* do not oblige the Minister—when making legislative instruments under those provisions—to apply, adopt or incorporate matters contained in another instrument or writing. The Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms. This is because it is envisaged that both the National Vocational Education and Training (VET) Regulator and the Tertiary Education Quality Standards Agency would publicise on their websites the current versions of any document incorporated by reference in the legislative instruments in question.

Schedule 1, sub-item 39(4)

The proposed new subclause 17(4) of the *Higher Education Support Act 2003* (HESA) does not oblige the Minister to apply, adopt or incorporate matters contained in another instrument or writing, and the Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms.

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This is because it is envisaged that for the purpose of subclause 17(2) of Schedule 1A of HESA the requirements referred to in the VET Provider Guidelines made under clause 99 of Schedule 1A of HESA would be those in either:

(a) for training organisations which are registered with the NVR—the legislative instruments regarding standards for NVR Registered Training Organisations, and regarding Fit and Proper Person Requirements, made under clauses 185 and 186 respectively of the main National VET Regulator Bill. The content of those instruments must be agreed by the Ministerial Council for Tertiary Education and Employment (the Ministerial Council). It is envisaged that these instruments would be well publicised by the National VET Regulator on its website. The requirements in the instrument under clause 185 will be very similar to those in the Australian Qualifications Training Framework (AQTF). One of the reasons to embody the AQTF requirements in the instrument under clause 185 is so that the requirements can be made clearer and more precise in form, leading to greater certainty about their application. (The requirements in the instrument under clause 186 are not currently included in the AQTF).

(b) for Registered Training Organisations (RTOs) which will continue to be regulated by non-referring states—the Australian Qualifications Training Framework (AQTF), at least for the time being. It is possible that in future the non-referring states will enact mirroring legislation requiring their RTOs to comply with the requirements in the instruments under clauses 185 and 186 (as is envisaged by the current draft Intergovernmental Agreement regarding the National VET Regulator). The current AQTF is well publicised, being referred to on the homepage of the training.com.au website among other places, and available in full on that website. The AQTF could only be amended with the agreement of the Ministerial Council. It is unlikely that the AQTF will be amended in the interim period between when the requirements in the instruments under clauses 185 and 186 come into effect, and when non-referring states enact mirroring legislation, should they enact mirror legislation. If the AQTF was amended, the only likely change would be to make the requirements in the AQTF the same as those in the instruments under clauses 185 and 186.

I trust this information enables the Committee to finalise its consideration of the Bill.

Yours sincerely

CHRIS EVANS

The Hon Tanya Plibersek MP
Minister for Human Services
Minister for Social Inclusion

RECEIVED
- 2 MAR 2011
Senate Standing C'ttee
for the Scrutiny
of Bills

B11/98

Senator the Hon Helen Coonan
Chair,
Senate Scrutiny of Bills Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the letter of 9 February 2011 from Ms Toni Dawes, drawing my attention to the Senate Scrutiny of Bills Committee's *Alert Digest No 1 of 2011* (9 February 2011) and seeking my advice about amendments in the *Human Services Legislation Amendment Bill 2010* (the Bill).

Amendments to section 8ZN of the Medicare Australia Act 1973

Section 8ZN is a provision in Part IID of the *Medicare Australia Act 1973*. Part IID confers a range of powers on the Chief Executive Officer of Medicare Australia to investigate non-compliance with certain legislative requirements. These powers support Medicare Australia's compliance functions in relation to Medicare, Pharmaceutical Benefits Scheme and other health programs delivered by Medicare Australia. The powers are limited to the investigation of certain offences and civil penalty provisions specified in the *Medicare Australia Act 1973* and to certain civil penalty provisions specified in the *Health Insurance Act 1973*.

The Committee requested advice about items 74 and 76 of Schedule 1 of the Bill, which make amendments to section 8ZN of the *Medicare Australia Act 1973*. The Committee sought additional information on the impact of the proposed changes on the privacy of individuals, including who will determine whether clinical knowledge was obtained, what training they would receive and whether any safeguards are in place to protect patients.

In the course of exercising its powers under section 8ZN, from time to time Medicare Australia may seize or copy hard drives containing electronically recorded clinical data. The proposed amendments to section 8ZN seek to address anomalies which arise when a computer hard drive is seized or copied under warrant. A seized or copied hard drive may potentially contain a large number of patient records. In most cases, only a small number of those patient records will be relevant to the investigation. This may be because the investigation relates to particular services rendered to particular patients on specific dates.

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CANBERRA ACT 2600
Telephone: 02 6277 7200
Facsimile: 02 6273 4406

The proposed amendments to section 8ZN seek to produce a sensible outcome which will ensure that patients continue to be notified when their clinical details have been scrutinised by Commonwealth officers. The amendments will put a stop to the unnecessary worry for patients and the waste of resources associated with large scale notifications to patients whose clinical details were never actually scrutinised. While the Committee expresses concern that the proposed amendments may impact on the privacy of individuals, every patient whose clinical details are actually scrutinised would still need to be notified.

As amended, Part IID of the renamed *Human Services (Medicare) Act 1973* will contain a number of safeguards to patient privacy in circumstances where multiple patient records are held together in electronic form:

- Under new section 8ZF, the authorised officer or an officer assisting may in certain circumstances take material or equipment to another place to examine it to determine whether it may be seized. New section 8ZGA will allow an officer who takes electronic equipment away under this provision to copy data from the equipment to a data storage device. If the data is not used in evidence, section 8ZF requires it to be destroyed.

- New section 8ZG allows the authorised officer or an officer assisting to operate electronic equipment found at the warrant premises to access data. In certain circumstances the officer may copy the data and take the device from the premises. If the data is not used in evidence, section 8ZG requires it to be destroyed.

- Under existing section 8ZM, any material seized but not used in evidence must be returned to the owner or the person from whom it was seized.

Whether or not a patient's clinical details are accessed or examined will be an operational decision to be determined in the context of the particular investigation. In most circumstances, the primary requirement which must be met for the coercive powers under Part IID of the *Medicare Australia Act* to be exercised is that the investigation must be into conduct of a criminal nature. For example, where an investigation centres on fraudulent claiming by a doctor for an item in the Medicare Benefits Schedule (MBS) which requires the patient to have a particular medical condition, the records of patients who received that particular MBS item from the doctor may need to be examined for evidential purposes.

Delegation to seek to use these powers is held at Senior Executive Officer level only. The case must be strong enough for a magistrate to approve a warrant to enable Medicare Australia to seize records.

Medicare Australia currently has procedures in place to manage and secure records obtained as a result of the exercise of its search and seizure powers. Where patient records containing clinical details are seized and it is necessary to examine those clinical records, the examination is undertaken by appropriately trained and qualified Medical Advisers employed by Medicare Australia. In circumstances where it is necessary for Medicare Australia Compliance Officers to have access to clinical details, that access is overseen by Medicare Australia Medical Advisers.

Medicare Australia's Medical Advisers are appropriately qualified medical practitioners with current and unrestricted registration. Medicare Australia's Compliance Officers who undertake investigations into fraud allegations are required at a minimum to hold a Certificate IV in Government Investigations.

Further to these accreditations, Compliance Officers and Medical Advisers are also required to undergo privacy training as a part of their induction into Medicare Australia and receive annual privacy refresher training.

Medicare Australia has robust IT security infrastructure and physical security measures in place to ensure all patient records and other information obtained in the course of compliance activities is protected from unauthorised access. Only officers with a requirement to access these records are granted access to systems containing patient records and other information relevant to compliance activities. There have been no recorded instances of unauthorised access by Medicare Australia officers to patient records seized under warrant for compliance purposes.

Medicare Australia officers are also subject to the secrecy provisions of the *Health Insurance Act 1973* and the *National Health Act 1953* that set penalties for the unauthorised disclosure of information, including fines and imprisonment. Medicare Australia is also subject to the requirements of the *Privacy Act 1988* that restrict and regulate the collection, use and disclosure of personal information.

If the Bill is passed, the powers and functions under Part IID will be exercised by officers of the Department of Human Services, rather than Medicare Australia and the existing controls would be continued by these officers.

Power to make regulations about transitional matters with retrospective effect

The Committee also requested advice about the appropriateness of item 1 of Schedule 5 in the Bill, which allows regulations to be made about transitional matters. Item 1 provides that, if regulations are made within six months of the commencement of the Human Services Legislation Amendment Act (the Act), the regulations may be expressed to take effect at a time that is earlier than the time when the regulations are made, as long as the regulations do not take effect earlier than the commencement date of the Act.

Given the size of, and scope of services delivered by, Centrelink, Medicare Australia and the Department of Human Services, many transitional arrangements are required. One of the key goals of the integration is that it will be seamless for customers and other consumers of services currently delivered by Medicare Australia and Centrelink. While every effort was made in preparing the transitional provisions to ensure they would operate correctly, it is possible that the transitional provisions will not adequately cover every circumstance. Accordingly, it is considered prudent to have the ability to make regulations on in relation to transitional matters.

As a practical matter, the need for transitional regulations may become apparent after a transitional issue is identified. Given the seriousness of any legislation with retrospective effect, two safeguards are built into item 1 of Schedule 5.

First, regulations will only have retrospective effect if they are made within six months of the Act commencing. Most transitional issues are likely to occur in the first six months after the integration takes effect, when large numbers of employees and assets are transferred, many instruments are affected by transitional provisions, and a number of reports are required. Accordingly, limiting the retrospective operation of the regulation making power in this way is considered to be an appropriate safeguard.

Second, regulations made under item 1 of Schedule 5 may only relate to transitional matters arising out of amendments made by the Act. In practice, this means that the scope of the regulations is limited to internal Government administration. The regulations cannot affect any other Act, such as program legislation that individuals receive benefits under and will have no effect on individuals' health and welfare entitlements.

The contact officer in my Department for the Bill is Mr Paul Menzies-McVey, Executive Counsel, who can be contacted on (02) 6223 4512.

Yours sincerely

Tanya Plibersek

Tanya Plibersek

28.2.11

The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Senator the Hon H Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Senator

I refer to the recent consideration by the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Migration Amendment (Complementary Protection) Bill 2011 (the Bill) and the Committee's comment on an issue raised in its *Alert Digest No 2 of 2011* (2 March 2011).

The Committee is concerned that proposed new subsections 36(2B) and (2C) to be inserted into the *Migration Act 1958* (item 14 of Schedule 1 to the Bill) 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.

As stated in the Explanatory Memorandum to the Bill, the purpose of:

- proposed new subsection 36(2B) is to ensure that Australia's *non-refoulement* obligations are applied and implemented consistently with international law; and
- proposed new subsection 36(2C) is to provide the same exclusion to the complementary protection regime as applies to those who make a valid application for a protection visa claiming protection under the Refugees Convention.

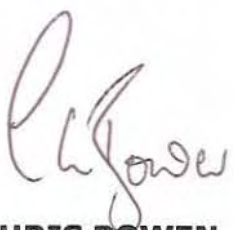
It is the Government's view that these proposed provisions do not trespass unduly on personal rights and liberties.

If the Bill is passed by the House of Representatives, it can be considered by the Senate as to whether the proposed provisions trespass unduly on personal rights and liberties. As the Committee has noted, the issue is clearly a matter of policy and that further considerations of these provisions and whether they strike the appropriate balance should be left to the Senate as a whole.

I would like to reiterate that, for the reasons stated in the Explanatory Memorandum, the Government is of the view that the proposed provisions do not trespass unduly on personal rights and liberties.

Thank you for your consideration and comment on this issue.

Yours sincerely



CHRIS BOWEN

15 MAR 2011

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

Thank you for your letter of 3 March 2011 on behalf of the Standing Committee for the Scrutiny of Bills, regarding the Committee's comments in *Alert Digest No. 2 of 2011*, concerning the National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011 (the Bill).

I note the Committee has asked for advice about clauses 29 and 39 and the power to incorporate existing material. Each clause is addressed below:

Schedule 1, sub-item 29

The proposed new sections 176B(2) and 176C(2) of the *Education Services for Overseas Students Act 2000* do not oblige the Minister—when making legislative instruments under those provisions—to apply, adopt or incorporate matters contained in another instrument or writing. The Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms. This is because it is envisaged that both the National Vocational Education and Training (VET) Regulator and the Tertiary Education Quality Standards Agency would publicise on their websites the current versions of any document incorporated by reference in the legislative instruments in question.

Schedule 1, sub-item 39(4)

The proposed new subclause 17(4) of the *Higher Education Support Act 2003* (HESA) does not oblige the Minister to apply, adopt or incorporate matters contained in another instrument or writing, and the Minister would only do so where appropriate. If the Minister did so, there would not appear to be any prospect of that creating uncertainty to the law or leading to those affected having inadequate access to its terms.

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This is because it is envisaged that for the purpose of subclause 17(2) of Schedule 1A of HESA the requirements referred to in the VET Provider Guidelines made under clause 99 of Schedule 1A of HESA would be those in either:

(a) for training organisations which are registered with the NVR—the legislative instruments regarding standards for NVR Registered Training Organisations, and regarding Fit and Proper Person Requirements, made under clauses 185 and 186 respectively of the main National VET Regulator Bill. The content of those instruments must be agreed by the Ministerial Council for Tertiary Education and Employment (the Ministerial Council). It is envisaged that these instruments would be well publicised by the National VET Regulator on its website. The requirements in the instrument under clause 185 will be very similar to those in the Australian Qualifications Training Framework (AQTF). One of the reasons to embody the AQTF requirements in the instrument under clause 185 is so that the requirements can be made clearer and more precise in form, leading to greater certainty about their application. (The requirements in the instrument under clause 186 are not currently included in the AQTF).

(b) for Registered Training Organisations (RTOs) which will continue to be regulated by non-referring states—the Australian Qualifications Training Framework (AQTF), at least for the time being. It is possible that in future the non-referring states will enact mirroring legislation requiring their RTOs to comply with the requirements in the instruments under clauses 185 and 186 (as is envisaged by the current draft Intergovernmental Agreement regarding the National VET Regulator). The current AQTF is well publicised, being referred to on the homepage of the training.com.au website among other places, and available in full on that website. The AQTF could only be amended with the agreement of the Ministerial Council. It is unlikely that the AQTF will be amended in the interim period between when the requirements in the instruments under clauses 185 and 186 come into effect, and when non-referring states enact mirroring legislation, should they enact mirror legislation. If the AQTF was amended, the only likely change would be to make the requirements in the AQTF the same as those in the instruments under clauses 185 and 186.

I trust this information enables the Committee to finalise its consideration of the Bill.

Yours sincerely

CHRIS EVANS

SENATOR THE HON STEPHEN CONROY
MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
MINISTER ASSISTING THE PRIME MINISTER ON DIGITAL PRODUCTIVITY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

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

18 MAR 2011

Dear Senator Coonan

National Broadband Network Companies Bill 2010 and Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010

I refer to the letter from the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee), dated 9 February 2011, seeking advice on a number of matters relating to the National Broadband Network Companies Bill (the NBN Companies Bill) and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (the NBN Access Arrangements Bill) identified in the Committee's *Alert Digest* No. 1 of 2011. My advice follows.

National Broadband Network Companies Bill 2010

Legislative Instruments Act – Substantive exemption
Clause 24, Functional separation principles

Clause 24 of the NBN Companies Bill provides that the Communications Minister may, by writing, determine that specified principles are functional separation principles for the purposes of the application of the Act to a specified NBN corporation. As drafted, clause 24 sets out a number of principles (subclause 24(2)). Subclause 24(2) does not limit the matters to which the Minister may have regard. A determination by the Minister is not a legislative instrument (subclause 24(5)).

The Committee queried whether certainty might be achieved by specifying the functional separation principles fully in the legislation. If imposed upon a NBN corporation, functional separation could take a variety of forms, from strong separation (such as complete organisational separation of different business units) to weaker separation (such as requirements to maintain and publish separate financial statements for different business units). The nature of the form of separation that may be imposed at the relevant time will depend upon a number of factors, including the state of the market at the time, the particular competitive circumstances in the market and the degree of government intervention that is considered necessary to address those circumstances. Such circumstances are impossible to predict at this juncture.

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The NBN Companies Bill therefore provides a baseline set of functional separation principles but properly maintains flexibility for the government of the day to determine, as required, additional principles that would address the specific circumstances in the market.

It is envisaged that functional separation principles would be published.

Legislative Instruments Act – Instrument not subject to disallowance
Clause 55 – Sale-scheme hybrid securities

Under subparagraph 51(1)(i)(i), the Finance Minister may specify in a written declaration that a security or a financial product that relates directly or indirectly to NBN Co is a sale-scheme hybrid security. Under subclause 55(7), this declaration is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* (LIA) does not apply to it.

Clause 55 is a standard clause in legislation relating to the sale of Commonwealth enterprises. It is based on the previous section 8AJA (now revoked) of the *Telstra Corporation Act 1991*, which was inserted by the *Telstra (Transition to Full Private Ownership) Act 2005*. The same approach to sale-scheme hybrid securities was also adopted in item 6 of Schedule 2 of the *Medibank Private Sale Act 2006*.

The declaration is required to maintain flexibility for the Commonwealth to determine the offer structure for the sale of NBN Co Limited, at the appropriate time, taking into account relevant commercial issues. Accordingly, it is important to allow the sale to respond to market circumstances and avoid unnecessary timetable delays and associated potential loss of buyer interest and sale value. To ensure that the sale process is not compromised, the declaration should not be a disallowable instrument.

Avoidance of doubt provisions
Clause 25 – Functional separation requirements determination

Subclause 25(5) states that a functional separation requirements determination is not a legislative instrument. The Committee queried whether consideration has been given to a form of publication requirement to improve transparency and accountability in relation to the making of these determinations.

Clause 25 is based on section 75 of the *Telecommunications Act 1997* (TA), which was inserted by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. Consistent with section 75, clause 25 is silent on whether a requirements determination should be published. It is envisaged that a determination which sets out requirements for separation to improve market outcomes would be made available to the public, for example through publication on the Department of Broadband, Communications and the Digital Economy's website.

Clauses 27 and 30 – Functional separation undertaking and variation

Subclause 27(8) provides that an undertaking provided by an NBN corporation to the Communications Minister and the Finance Minister is not a legislative instrument. Clause 30 provides for such an undertaking to be varied, and subclause 30(10) relevantly provides that a variation is also not a legislative instrument. Clause 30 is clearly dependent upon clause 27 for its operation.

The Committee queried whether substantive exemptions from the LIA were intended in respect of these clauses. Clauses 27 and 30 are based on sections 76 and 80 of the TA, and consistent with those sections, the undertaking or a variation are not legislative in character, because they are documents prepared by a Commonwealth company and as such would not be legislative instruments for the purposes of the LIA.

Clauses 33 and 34 – Directions to dispose of or transfer assets

Clauses 33 and 34 provide for the Communications Minister and the Finance Minister to direct an NBN corporation to dispose of assets, or transfer assets to another NBN corporation. Subclauses 33(5) and 34(6) provide that such directions are not legislative instruments.

The Committee queried whether substantive exemptions from the LIA were intended. The divestiture and transfer provisions are an extension of the functional separation provisions, and consistent with those provisions. As the directions would be to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997)*, they would not be legislative instruments for the purposes of the LIA, as provided for by item 5(a) of the table to section 7 of the LIA.

Clauses 79 and 80 – Guidelines in relation to financial statements and notification of significant events

Subclause 79(4) requires the Board of NBN Co to prepare financial statements in accordance with written guidelines given to it by the Communications Minister and the Finance Minister. Subclause 80(3) provides that notifications by NBN Co, to both the Communications Minister and the Finance Minister, of significant events must follow guidelines that may be given by those Ministers. In both clauses 79 and 80, it is stated that such guidelines are not legislative instruments.

The Committee queried whether provisions in the LIA other than those relating to disallowance should apply to guidelines made under clauses 79 and 80. Clauses 79 and 80 are based on the similar provisions in Division 3 of Part 2 of the *Telstra Corporation Act 1991* and sections 38 and 40 of the *Commonwealth Authorities and Companies Act 1997.* Consistent with those Acts, the guidelines are not legislative in character but function as directions to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997).* They would therefore not be legislative instruments for the purposes of the LIA, as provided for by item 5(a) of the table to section 7 of the LIA.

Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010

Legislative Instruments Act
Schedule 1, item 86 – Exemptions from the operation of proposed section 141
Schedule 1, item 88 – Exemption from the operation of proposed section 389B

Proposed section 141 sets out obligations relating to the supply of Layer 2 bitstream services (as defined under the Bill). Proposed subsections 141(5) to (9) set out powers for the Minister to exempt a network owner or a network unit from the obligations. Proposed subsection (9) provides that such exemptions are not legislative instruments.

A similar exemption power is set out at proposed subsections 389B(4) to (7). The Minister could exempt a specified carrier or carriage service provider from complying with a technical standard. Proposed subsection (7) provides that an exemption is not a legislative instrument.

The Committee queried whether the exemption powers under proposed sections 141 and 389B should be subject to some provisions of the LIA, such as the requirement for publication. It is envisaged that exemption instruments of this sort would be published. At the very least, the regulator would need to be aware that a particular person or network unit was not subject to the obligations which it must enforce.

I trust this information is of assistance.

Yours sincerely

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

18 MAR 2011

C11/589

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

Dear Senator Coonan

I am writing in response to comments contained in the Scrutiny of Bills Committee's *Alert Digest No. 2 of 2011* concerning the *Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011* (Regulatory Levies Bill).

The Regulatory Levies Bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003* (Safety Levies Act) to impose cost-recovery levies on offshore petroleum titleholders in respect of wells and well-related activities in those titleholders' title areas.

The National Offshore Petroleum Safety Authority (NOPSA) is funded on a full cost-recovery basis with levies raised by the offshore petroleum industry to fund NOPSA's regulatory activities. Levies currently imposed by the Safety Levies Act fund NOPSA's occupational health and safety regulatory activities in relation to offshore petroleum and greenhouse gas facilities. The Regulatory Levies Bill will amend the Safety Levies Act (which will be renamed the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (Regulatory Levies Act)) to impose levies on offshore petroleum titleholders to recover the costs of NOPSA in undertaking its augmented regulatory functions in relation to structural integrity and safety of wells and well-related equipment.

NOPSA's regulatory activities will vary from year to year, in particular in relation to the number of offshore petroleum operations being undertaken and in ensuring an adequate level of scrutiny for these operations. It may therefore be necessary to vary the amount of levy that can be collected by NOPSA on a regular basis to ensure that it has sufficient funds to meet its costs and expenses in appropriately undertaking its functions and powers in relation to the regulation of well integrity and operations.

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

To ensure that the amount of levy can be amended regularly and expeditiously, I have proposed to include the levy amount in regulations made under the Regulatory Levies Act. Delays in amendments to levy amounts may result in NOPSA having a shortfall of funds available to undertake its important well integrity functions.

This is consistent with the approach taken for the calculation of the existing safety case levy and safety investigation levy under the Safety Levies Act. The Safety Levies Act sets out the conditions for imposition of these levies and provides that the levy amounts are specified in, or worked out in accordance with, the regulations. The specific levy amounts and method of calculation are set out in the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Regulations 2004* (Safety Levies Regulations).

I plan to make amendments to the Safety Levies Regulations (which will be renamed the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004* (Regulatory Levies Regulations)) under the Regulatory Levies Act to detail the calculation or composition of the well-related levies. It is proposed that the levies will be calculated as follows:

- The **annual well levy** will be payable by a titleholder to NOPSA in the amount of the amount specified in the Regulatory Levies Regulations multiplied by the number of eligible wells. "Eligible wells" are defined in the Regulatory Levies Bill as non-abandoned wells in the title area at the end of the calendar year, and wells that began to be drilled during the year but were abandoned prior to the end of the year.
- The **well activity levy** is triggered by the submission of a new well operations management plan, or a five yearly revision to a plan, or by submission of a request for an approval for an activity in relation to a specific well. Further detail in relation to the method of calculation to be included in the Regulatory Levies Regulations is being developed by NOPSA.
- The **well investigation levy** will be in the amount of the post-threshold costs and expenses reasonably incurred by NOPSA in conducting an inspection in relation to a breach or suspected breach of a titleholder's well-related duty of care in clause 13A of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (ie reasonable costs and expenses that exceed $30,000).

NOPSA is currently undertaking a process to determine the amount of levy that will be imposed under the Regulatory Levies Act and Regulations to recover the costs of its well-related regulatory activities. In determining the initial levy amounts, NOPSA is preparing a Cost Recovery Impact Statement (CRIS) and consulting with industry in relation to development of the CRIS.

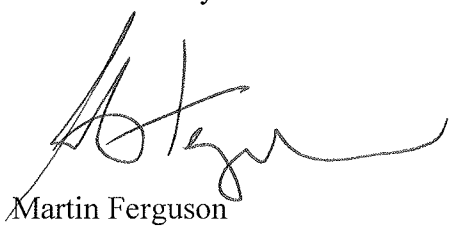
In addition, regulation 37 of the Safety Levies Regulations requires the Chief Executive Officer (CEO) of NOPSA to conduct periodic reviews of cost-recovery in relation to the operations of NOPSA, including a comparison of the fees and levies collected with the regulatory activities undertaken in the period. Under regulation 38, the CEO must also prepare a financial report in respect of each financial year that assesses the cost-effectiveness of NOPSA's operations in that financial year. The report must be audited by an independent auditor, and be provided at a minimum to industry representatives and operators who were required to pay levies during the year.

Furthermore, regulation 39 of the Safety Levies Regulations requires the CEO of NOPSA to meet annually with representatives of the offshore petroleum industry to discuss the cost-effectiveness of NOPSA's operations, including presenting information in relation to NOPSA's costs and budget projections, and operating budget for the following year. Previous amendments to the Safety Levies Regulations to increase safety case levies have been raised with industry in the report required under regulation 38, and discussed at the cost-effectiveness meeting.

These arrangements will continue to apply in the re-named Regulatory Levies Regulations which will also impose the well levies. In addition, NOPSA may be required to prepare a new CRIS or an addendum to their current CRIS in relation to any planned levy increase. I submit that these requirements will be sufficient to ensure that levy amounts are not increased in an excessive or undue manner, so that it is not necessary to include an upper limit in the Regulatory Levies Bill on the amount of levy that may be imposed.

I trust that this additional information will be sufficient to address the Committee's comments in *Alert Digest No. 2 of 2011* in relation to the Regulatory Levies Bill.

Yours sincerely



Martin Ferguson