SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
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

TENTH REPORT OF 2009

The Committee presents its Tenth Report of 2009 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:

Anti-Terrorism Laws Reform Bill 2009

Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009 *****

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 *****

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 *****

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 *****

National Consumer Credit Protection Bill 2009

National Consumer Credit Protection (Fees) Bill 2009

National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

National Health Security Amendment Bill 2009 *****

National Security Legislation Monitor Bill 2009

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 *****

Tax Laws Amendment (2009 Measures No. 4) Bill 2009

Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009

Veterans' Affairs and Other Legislation Amendment (Pension Reform) Bill 2009

***** Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to the bills, under Standing Order 24(9).

Anti-Terrorism Laws Reform Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. Senator Ludlam responded to the Committee's comments in a letter dated 7 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the Senate on 23 June 2009
By Senator Ludlam

Background

This bill seeks to amend and, in some cases, repeal provisions of the *Criminal Code Act 1995*, the *Crimes Act 1914* and the *Australian Security Intelligence Organisation Act 1979*.

In particular, the bill amends:

- the *Criminal Code Act 1995* to amend the definitions relating to terrorism offences, provisions relating to the proscription of 'terrorist organisations', offences relating to interaction with 'terrorist organisations', offences relating to 'reckless possession of a thing', and to repeal the offence of sedition;

- the *Crimes Act 1914* in relation to detention of terrorism suspects (including changes to the periods of detention of persons suspected of terrorism offences) and bail conditions of such persons; and

- the *Australian Security Intelligence Organisation Act 1979* in relation to the questioning of terrorism suspects and the detention of terrorism suspects.

The bill also repeals the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Trespass unduly on rights and liberties
Schedule 1, item 5

Principle 1(a)(i) of the Committee's terms of reference requires it to examine whether a proposed provision trespasses unduly on rights and liberties, which involves a balancing of rights. Item 5 of Schedule 1 provides for the repeal of section 101.4 of the *Criminal Code Act 1995* which contains an offence for possessing things connected with terrorist acts. The second reading speech for the bill states that the current provision is deficient because it lacks '(p)arameters for what may be included with[in] the scope of 'thing''.

The Committee considers that repeal of section 104.1 may go further than necessary in response to the stated need. For example, there could be inclusion of a non-exhaustive list of 'things' (see Parliamentary Library, *Bills Digest No 62, 2005-06*, Anti-Terrorism Bill 2005, at pages 6-7) or intention to use the thing as an element of the offence. The Committee **seeks the Senator's advice** as to whether amendment of section 101.4, rather than repeal, might be sufficient to balance rights and liberties in the circumstances.

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

Relevant extract from the response from the Senator

> Thank you for your letter of 13 August 2009 regarding the Anti-Terrorism Laws Reform Bill 2009, outlining the Committee's concerns with repealing section 101.4 of the *Criminal Code Act 1995* and the drafting of a new paragraph at section 102.1(2AB)(a) of the *Criminal Code Act 1995.*
>
> With regard to the Committee's concern that repealing section 101.4 of the *Criminal Code Act 1995* may be considered to 'trespass unduly on personal rights and liberties' I respectfully disagree. Rather I would suggest that the existing undefined offence of 'reckless possession of a thing' trespasses unduly on personal rights and liberties because the offence has no parameters. The Committee's proposal to include a non-exhaustive list of 'things' is unsatisfactory as the very nature of a non-exhaustive list fails to adequately define the offence. If the Committee is able to provide further details of how repealing section 104.1 would trespass on personal rights and liberties I am happy to reconsider this provision.

The Committee thanks the Senator for this response, and is of the view that any further consideration of this issue would be best **left for the Senate as a whole**.

Drafting note
Schedule 1, item 8, new paragraph 102.1(2AB)(a)

Item 8 of Schedule 1 repeals subsection 102.1(2) of the *Criminal Code Act 1995* and substitutes new subsections 102.1(1AA), (2), (2AA), (2AB), (2AC), (2AD) and (2AE). These subsections give effect to a recommendation in the Sheller Report (cited in the second reading speech) that the proscription of an organisation as a terrorist organisation should meet the requirements of administrative law.

Proposed new paragraph 102.1(2AB)(a) provides for notification to an organisation, 'if it is practical to do so', that a regulation has been made listing it as a terrorist organisation. Proposed new paragraph 102.1(2AB)(b) provides for the publication of information about the listing. Proposed new subsection 102.1(2AC) provides that, if a regulation is made that lists an organisation, and a foreign country has requested the listing, that information must be included in the published notice.

Practical and other considerations (including national security) may influence actions associated with notification and listing pursuant to proposed new subsections 102.1(2), 102.1(2AB) and 102.1(2AC). Therefore, as a drafting matter, the Committee considers that the words 'if it is practical to do so' in proposed new paragraph 102.1(2AB)(a) might be moved to the start of the subsection, following the word 'must.' The Committee **seeks the Senator's advice** on whether the subsection might be amended to allow the Minister more discretion in notification and listing.

Relevant extract from the response from the Senator

> The Committee has also proposed to move the words 'if practical to do so' at paragraph 102.1(2AB)(a) to the start of the subsection. The words 'if practical to do so' have been included to acknowledge the specific difficulty associated with notifying organisations that might not have easily identifiable contact points. I do not wish to amend the bill as suggested to cover other aspects of that subsection,

precisely because of the increased discretion it will give the Minister in notification and listing.

The Committee thanks the Senator for this response but, again, expresses the view that any further consideration of this issue would be best **left for the Senate as a whole**.

Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 19 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Aviation Transport Security Act 2004* to further strengthen the framework of Australia's aviation security regime.

In particular, the bill:

- enables the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government to designate security controlled airports (SCAs) as a particular category of airport, according to their risk profiles;
- allows unannounced inspections of businesses involved in air cargo;
- allows the Secretary of the Department to enter into enforceable undertakings with aviation industry participants in relation to any matter dealt with under the Aviation Transport Security Act; and
- expands the scope of 'compliance control directions' to cover operators of SCAs, screening authorities and screening.

Delayed commencement
Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that Part 1 of Schedule 1, which contains provisions relating to categories of security controlled airports, commences on the date of Proclamation but no later than 12 months after Royal Assent.

The Committee will generally not comment where any delay in commencement is six months or less in duration. However, where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No 1.3.

In this case, the explanatory memorandum and second reading speech do not explain the delayed commencement. Therefore, the Committee **seeks the Minister's advice** on the reasons for the potential delay in commencement of Part 1 of Schedule 1.

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.

Relevant extract from the response from the Minister

> Part 1 of Schedule 1 of the Bill would amend the *Aviation Transport Security Act 2004* to enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government to designate security controlled airports into a category based on their risk profiles.
>
> The purpose for the commencement of Part 1 of Schedule 1 being on proclamation or twelve months after the Act has received Royal Assent, is to enable industry to be consulted upon the details of different legislative requirements which may be implemented for each category of airport.
>
> Further, delay in the commencement would also ensure that any action taken will be consistent with the Aviation White Paper which is expected to be released later this year.
>
> I trust this letter addresses the concerns of the Committee in relation to the amending Bill.

The Committee thanks the Minister for this explanation, but **considers that this information should also be included in the explanatory memorandum**.

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 19 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to strengthen the regulatory framework relating to the payment of termination benefits to company directors and executives.

In particular, the bill:

- introduces a significantly lower threshold at which termination benefits to company executives (including directors, senior executives and key management personnel) must be approved by shareholders;
- clarifies and expands the definition of a termination benefit;
- better empowers shareholders to disallow excessive termination benefits, particularly where they are a reward for poor performance;
- requires unauthorised termination benefits to be repaid immediately;
- provides that retiring company directors and executives, who hold shares in the company, can no longer participate in a shareholder vote on their own termination benefit, except when acting as a proxy; and

- increases the penalties applicable to unauthorised termination benefits.

'Henry VIII' clause
Schedule 1, item 22, new subsection 200E(2C)

Item 22 of Schedule 1 inserts new subsections after subsection 200E(2) to restrict the right of a retiring director or executive, or their associate, from participating in a shareholder vote that includes their termination payment, although they can cast a vote if acting as a proxy. Proposed new subsection 200E(2C) provides that regulations may prescribe cases where subsection (2A) does not apply; that is, where the retiree *can* participate in a shareholder vote. The explanatory memorandum explains (at page 14) that this is to provide flexibility in the event that circumstances arise which give valid cause for retirees to exercise their vote. While recognising the need for flexibility in certain circumstances, the Committee, nevertheless, **seeks the Treasurer's advice** on the justification for the inclusion of a power to create regulations in response to specific individual circumstances.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> As you would be aware, the Bill contains a new provision prohibiting directors and executives from participating in the shareholder vote to approve their own termination benefit. This improves the integrity of the shareholder vote and removes the conflict of interest which exists with a person voting to approve their own termination benefit.
>
> However, there may be legitimate circumstances where directors and executives should be able to participate in the shareholder vote. One such example is identified in subsection 200E(2B) of the Bill, which provides an exception where the director or executive is casting a vote as a proxy on behalf of another person who is entitled to vote, in accordance with the directions on the proxy form.
>
> There may also be other unforeseen instances that may legitimately warrant the participation of directors or executives in the shareholder vote (for example, circumstances where the director or executive has somehow been dealt with extremely harshly and it would be unfair to prevent them from voting on the termination benefit). The Bill provides flexibility to address any harsh or

unanticipated outcomes, by including a regulation making power in subsection 200E(2C) which provides that the regulations may prescribe cases where the prohibition does not apply. The purpose of the regulation making power is to ensure that any unforeseen instances or unintended consequences can be addressed in a timely way.

Currently, there are no regulations prescribed under 200E(2C). I do not expect that the regulation making power would be relied upon unless significant events arose that would necessitate further exceptions to the prohibition.

The Committee thanks the Minister for this response, but seeks further clarification. It appears from the Minister's response that it is intended that regulations could be made to vary the provisions in the Act to enable a director or executive of a company to vote on their own termination benefit to remedy a perceived defect in their treatment. The Committee **seeks the Minister's further advice** as to whether alternative legislative approaches were considered to otherwise alleviate harsh or unanticipated outcomes.

Retrospective application
Schedule 1, subitem 43(2)

Subitem 43(2) of Schedule 1 provides for some retrospective application of amendments made by the bill in relation to a person's retirement from an office or position in a company. Subitem 43(2) provides that, for the purposes of sections 200F and 200G of the Corporations Act, a person's relevant period applies in relation to managerial or executive offices held 'before, on or after the commencement' of the relevant amendments. People currently occupying managerial and executive positions would be affected on commencement of the new provisions. While cognisant of the stated purpose of the proposed amendments, the Committee nevertheless **seeks the Treasurer's advice** as to the impact of their retrospective application on contractual entitlements.

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.

Relevant extract from the response from the Minister

The Bill provides a mechanism for calculating a person's average annual base salary which is dependent upon the 'relevant period' (or the period over which the person has held the relevant office in the company). The relevant period applies in relation to managerial or executive office held 'before, on or after the commencement' of the Bill.

The Committee noted that sub-item 43(2) may have the potential for the Bill to apply retrospectively and affect existing contractual entitlements, which may unduly trespass on personal rights and liberties.

However, sub-item 43(2) is relevant only for the purposes of determining a person's 'relevant period'. The Bill does not apply retrospectively by virtue of sub-item 43(1), which provides that the reforms apply only to new contracts entered into, renewed, extended or which have a variation of a condition on or after the commencement date. Therefore, the Bill will not affect existing contractual entitlements.

I trust this information will be of assistance to you.

The Committee thanks the Minister for this explanation, which satisfies its concerns.

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Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Attorney-General responded in a letter received on 4 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Attorney-General

Background

In April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a set of resolutions for a comprehensive national legislative and operational response to combat organised crime. This bill implements the Commonwealth's commitment as part of the SCAG agreement to enhance its legislation to combat organised criminal activity.

Schedules 1 and 2 amend the *Proceeds of Crime Act 2002*, the *Bankruptcy Act 1966*, the *Crimes Act 1914* and the *Family Law Act 1975* to strengthen the Commonwealth criminal assets confiscation regime, in response to recommendations of law enforcement agencies and to the *Report of the Independent Review of the Operation of the Proceeds of Crime Act* by Mr Tom Sherman AO (tabled in Parliament in October 2006).

Specifically, Schedule 1 introduces unexplained wealth provisions to target wealth that a person cannot demonstrate that he or she has lawfully acquired. Schedule 2:

- introduces freezing orders to ensure assets are not dispersed;
- removes time limitations on orders;

- provides for non-conviction-based restraint and forfeiture of instruments of serious crime;

- enhances information-sharing under the Proceeds of Crime Act, and

- reimburses legal aid commission legal costs from the Confiscated Assets Account.

Schedule 3 amends the *Crimes Act 1914* and the *Customs Act 1901* to implement model laws for controlled operations, assumed identities and witness identity protection.

Schedule 4 amends the *Criminal Code Act 1995* to extend criminal liability to persons who jointly commit offences, or engage in criminal activity as part of a group, to enable the prosecution to obtain higher penalties for such offenders by aggregating the conduct of offenders who operate together. Schedule 4 also amends the *Telecommunications (Interception and Access) Act 1979* to facilitate greater access to telecommunications interception for criminal organisation offences.

Reversal of the onus of proof
Schedule 1, item 13, new subsection 179E(3)

Item 13 of Schedule 1 inserts a new Part 2-6 on 'Unexplained wealth orders' into the Proceeds of Crime Act. Proposed new subsection 179E(3) reverses the usual burden of proof. Current section 317 of the Proceeds of Crime Act provides that the applicant, who would be the Director of Public Prosecutions, bears the onus of proving the matters necessary to establish the grounds for making a relevant order. Proposed new subsection 179E(3) provides that the person against whom the order is sought has the burden of proving that their wealth is *not* derived from one or more of the specified offences in proposed new paragraph 179E(1)(b). The court must be satisfied on reasonable grounds that the order should be granted (new paragraphs 179B(1)(b) and 179E(1)(a)). The explanatory memorandum does not explain this reversal of the onus of proof. The Committee is concerned about the potential impact of such an onerous provision on a person's civil liberties (for example, the right to privacy) and **seeks the Attorney-General's advice** on the reasons for the reversal of the onus of proof in these circumstances.

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

Relevant extract from the response from the Attorney-General

The Committee sought advice on the reasons for the reversal of the onus of proof in item 13 of Schedule 1 of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill).

While proposed subsection 179E(3) of the Bill does reverse the onus of proof, there are several safeguards, and procedural hurdles to be overcome by the Director of Public Prosecutions (DPP), before a respondent is required to demonstrate that his or her wealth is not derived from one of the offences mentioned in subparagraphs 179E(1)(b)(i)-(iii).

The first safeguard is the requirement, in paragraph 179E(1)(a) of the Bill, that a court must first have made a preliminary unexplained wealth order under subsection 179B(1) of the Bill in relation to the person.

Before a court can make a preliminary unexplained wealth order under subsection 179B(1) of the Bill, three conditions must be met. The first condition is that the DPP must apply for an unexplained wealth order in relation to the person. The second condition is that the court must be satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired. The third condition is that the affidavit requirements of subsection 179B(2) must be met.

The matters to be included in an affidavit are:

1. the grounds on which an authorised officer suspects that the total value of the person's wealth exceeds the value of the person's wealth that was lawfully acquired, and

2. the property the authorised officer knows or reasonably suspects was lawfully acquired by the person and the property he or she knows or reasonably suspects is owned by the person or is under the effective control of the person and the grounds for that knowledge or suspicion.

Thus before a court may make a preliminary unexplained wealth order, it must be satisfied that an authorised officer has reasonable grounds to suspect that a person has unexplained wealth. The onus of proving all of these requirements rests with the DPP.

If a court makes a preliminary unexplained wealth order, the next safeguard is a respondent's right to apply to have the order revoked under section 179C of the Bill. A person has 28 days after being notified of the preliminary unexplained wealth order to apply to a court for the revocation. The 28 day time limit for applying may be extended (not exceeding 3 months) by the court where the person applies within the 28 day time limit for an extension of time for applying for a revocation order.

It is only after the DPP has satisfied a court that an authorised officer has reasonable grounds to suspect that a person has unexplained wealth that the onus of proving certain matters is placed on the respondent. It is appropriate in these circumstances that a person be required to explain the source(s) of his or her wealth because he or she is best placed to know this. Details of the source of a person's wealth will be peculiarly within his or her knowledge.

Finally, if the onus of proof were placed on the DPP to prove the matters under subparagraphs 179E(1)(b)(i)-(iii) of the Bill, this would undermine the purpose of the unexplained wealth provisions. If the onus of proof were placed on the DPP in respect of subparagraphs 179E(1)(b)(i)-(iii), the unexplained wealth provisions would be similar in effect to the current asset confiscation options under the *Proceeds of Crime Act 2002.*

In its conclusions on unexplained wealth, the Parliamentary Joint Committee on the Australian Crime Commission (the Committee) noted that, 'unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime …' The Committee considered the unexplained wealth provisions in the Commonwealth's Bill to be a 'reasoned and measured approach to the problem of organised crime'.

The unexplained wealth provisions are aimed at people who organise and derive profit from crime, but who are not linked directly to the commission of the offence. Existing asset confiscation mechanisms require a link to the commission of an offence and can be avoided by those who remain at arm's length from the commission of offences. The unexplained wealth provisions will still require a connection between a person's unexplained wealth and criminal offences within the Commonwealth legislative power, but not of the commission of a specific Commonwealth offence.

The Committee thanks the Attorney-General for his explanation of the safeguards and procedures to be followed by the Director of Public Prosecutions; and notes the findings of the Parliamentary Joint Committee on the Australian Crime Commission relating to the apparent significant benefits of unexplained wealth provisions over other legislative means of combating serious and organised crime.

Retrospective application
Schedule 2, various items; Schedule 4, item 18

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. There are several application provisions in the bill which apply whether conduct constituting the particular offence occurred *before*, on or after commencement of the relevant amendment: items 8, 15, 18, 29, 31, 35, 42, 48, 50, 52, 54, 60, 63, 69 and 71 relating to amendments to the Proceeds of Crime Act; and item 18 of Schedule 4 relating to an amendment to the Telecommunications (Interception and Access) Act.

The explanatory memorandum does not explain the reasons for the retrospective effect of these provisions. Therefore, the Committee **seeks the Attorney-General's advice** on whether the reasons for the retrospective application of the provisions might be provided and also included in the explanatory memorandum to assist readers.

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.

Relevant extract from the response from the Attorney-General

The Committee sought advice on the reasons for the retrospective application of various items in Schedule 2, and item 18 of Schedule 4, of the Bill, and whether those reasons might be included in the explanatory memorandum to assist readers.

Item 8 of Schedule 2

This provision does not create any retrospective criminal liability through a new offence provision. Rather, it will allow an authorised officer to obtain a freezing order in relation to an account that is suspected, on reasonable grounds, to contain the proceeds of a specified offence or is an instrument of a serious offence, and where the conduct constituting the offence occurred before the commencement of Part 2-lA (Freezing orders).

Retrospective application is necessary to ensure the effectiveness of the freezing order provisions. Without retrospective application, freezing orders would not be able to be obtained in respect of proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, or an

instrument of a serious offence, where the conduct constituting the offence occurred before the commencement of the freezing order provisions.

There is a real risk that funds in a bank account that are the proceeds of one of the offences mentioned above, or the instrument of a serious offence, might be dissipated and/or placed outside the reach of Australian law enforcement officials before a restraining order is obtained. A person who has already committed one of the offences mentioned above should not be able to avoid the application of the freezing order provisions.

Items 15, 18, 29, 31 and 35 of Schedule 2

These provisions do not create any retrospective criminal liability through new offence provisions. Rather, they enable the DPP to apply for restraining, forfeiture, pecuniary penalty and production orders, where it is suspected, on reasonable grounds, that a person committed a serious offence (defined in section 338). The amendments remove the current limit that the serious offence must have been committed within 6 years preceding the application.

This 6 year limitation precludes confiscation if relevant offences are not detected until more than 6 years after the offence was committed. It may also hamper confiscation when extended criminal conduct is considered to be one offence stretching over more than six years. As criminals routinely attempt to conceal offences, and crimes such as fraud and money laundering may occur over extended periods, the time limit can pose significant obstacles for non-conviction-based recovery. The removal of the 6 year time limitation for non-conviction-based asset recovery will ensure that criminals are not able to benefit from their crimes, regardless of when they occurred.

Without retrospective application, restraining, forfeiture, pecuniary penalty and production orders would not be able to be obtained in respect of conduct constituting a serious offence that was committed more than 6 years before the application where the conduct constituting the offence occurred before the commencement of Part 2 of Schedule 2 of the Bill.

Items 42, 48, 50, 52, 54, 60 and 63 of Schedule 2

These provisions do not create any retrospective criminal liability through new offence provisions. Rather, they enable the restraint and forfeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction. Currently, the *Proceeds of Crime Act 2002* only permits instruments of indictable offences (other than terrorism offences) to be confiscated where a person is convicted of the offence.

If the amendments to sections 18, 19, 29, 47, 49 and 73 (items 42, 48, 50, 52, 54 and 60, respectively) were not given retrospective application, restraining orders, forfeiture orders, applications to exclude specified property from a restraining order and exclusion orders would not be able to be obtained for proceeds of specified offences or instruments of serious offences in respect of conduct constituting a

serious offence that occurred before the commencement of Part 3 of Schedule 2 of the Bill.

The need for the amendments to sections 45, 85 and 111 (items 48, 60 and 65) to have retrospective effect is consequential on the amendments discussed above. The amendments to sections 45, 85 and 111 are necessary to ensure that third parties whose property is covered by a restraining order are not disadvantaged and that persons cannot escape forfeiting their property to the Commonwealth in certain circumstances.

A person with proceeds or instruments of serious offences should not evade asset confiscation because their conduct, which constitutes a serious offence, occurred before the commencement of Part 3 of Schedule 2 of the Bill.

Items 69 and 71 of Schedule 2

The retrospective application of items 69 and 71 of Schedule 2 enables legal aid commissions to benefit from the simplified legal aid payment system introduced by Part 5 of Schedule 2 of the Bill.

Were item 69 not made retrospective in application, it would create a considerable administrative burden for both legal aid commissions and the Official Trustee, who would have to administer two schemes for legal aid payments. Potentially, payments under both systems could continue for several years.

Further, if item 69 were not given retrospective application, there could be situations in which legal aid represented a person before and after the commencement of Part 5 of Schedule 2 of the Bill and would be required to recover the costs incurred before commencement in one way, and the costs incurred after commencement in a different way. The effect of items 69 and 71 is that costs incurred before the commencement of item 69 can be recovered under the simplified scheme.

Item 18 of Schedule 4

The provisions do not retrospectively criminalise any action. They allow law enforcement agencies access to the same techniques to investigate criminal activity, regardless of when that criminal activity has occurred.

I agree that the reasons provided above for the use of retrospective application in the Bill should be included in the Explanatory Memorandum and have instructed my Department to do so.

The Committee thanks the Attorney-General for this very comprehensive response, noting that it would have been preferable if the proposed operation of the provisions had been clearer from an initial reading of the explanatory memorandum. The Committee welcomes the inclusion of the information in the explanatory memorandum and thanks the Attorney-General for his undertaking in this regard.

Drafting note
Definition of 'law enforcement officer'
Schedule 3, item 10, new section 15GC

Proposed new Part 1AB and Part 1AC of the Crimes Act, to be inserted by item 10 of Schedule 3, deal with amendments relating to controlled operations and assumed identities (respectively). Item 10 inserts a new section 15GC containing definitions for Part 1AB. The Committee notes that the term 'law enforcement officer' is not defined for the purposes of Part 1AB, even though the term is used in that Part (for example, in proposed new section 15GH regarding applications to conduct controlled operations).

The term *is* defined for the purposes of new Part 1AC in proposed new section 15K. The explanatory memorandum refers (at page 53) to use of the current definition in section 3 of the Crimes Act but it is unclear whether use of that definition throughout new Part 1AB is approved. The Committee **seeks the Attorney-General's advice** on whether a definition of 'law enforcement officer' should be specifically included in proposed new section 15GC.

Relevant extract from the response from the Attorney-General

> The Committee sought advice on whether a definition of 'law enforcement officer' should be specifically included in proposed new section 15GC.
>
> Section 3 of the *Crimes Act 1914* (Cth) provides definitions that apply throughout the Act unless the contrary intention appears. The proposed controlled operations provisions in Schedule 3 of the Bill, like the current provisions, rely upon the general definitions of 'law enforcement officer' and 'Australian law enforcement officer' at section 3 of the Crimes Act.

A separate definition is provided for 'law enforcement officer' for the purposes of the proposed assumed identities provisions in Schedule 3 of the Bill. This is provided because there are differences between the definition to be used for proposed new Part l AC and the general definition at section 3 of the Crimes Act. For example, the definition to be used for proposed new Part lAC would include officers of the Australian Taxation Office and any other agency specified in the regulations for that purpose (though no agency has as yet been prescribed).

The Committee thanks the Attorney-General for this explanation.

Wide delegation of powers
Schedule 3, item 10, new subsection 15HX(1)

Item 10 of Schedule 3 also provides new powers to the Ombudsman in relation to the new regime for controlled operations. Proposed new subsection 15HX(1) of the Crimes Act would permit the Ombudsman to delegate powers under new Division 3 of Part 1AB to 'an APS employee responsible to the Ombudsman' (paragraph 15HX(1)(a)) or to 'a person having similar oversight functions to the Ombudsman under the law of a State or Territory or to an employee responsible to that person' (paragraph 15HX(1)(b)).

As a consequence, the delegations in new subsection 15HX(1) may be to any APS employee, regardless of the position which such an employee holds, or of his or her qualifications; or to a person in a similar position in a state or territory. This is a delegation to a large class of persons with very limited specificity. Generally, the Committee prefers to see a limit set on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Therefore, the Committee **seeks the Attorney-General's advice** as to the justification for such a wide discretion, and whether it might be appropriate to limit the delegation in some way.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Attorney-General

The Committee sought advice on the justification for a wide discretion in the delegation of the Ombudsman's powers, and whether it might be appropriate to limit the delegation in some way.

I agree that there is a wide discretion to delegate and I have asked my Department to consult the Ombudsman on whether there are options to limit the delegation.

Please let me know if I can be of further assistance, or provide you with any further information.

The Committee thanks the Attorney-General for this response and his undertaking to consult the Ombudsman on whether there are options to limit the proposed delegation. The Committee looks forward to receiving the Attorney-General's further advice, following his receipt of the Ombudsman's views.

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 18 August 2009. The Minister's response was included in the Committee's *Ninth Report of 2009.*

Strict liability
Various clauses

Standing appropriations
Subclause 43(2), clause 70 and subclause 78(2)

In its *Ninth Report of 2009*, the Committee thanked the Minister for her comprehensive and helpful responses in relation to these issues. The Committee also expressed the view that the information contained in the responses should be included in the explanatory memorandum to assist readers.

In a further letter to the Committee dated 1 September 2009 (attached to this *Report*), the Minister advised that the explanatory memorandum has been amended accordingly and that it will be tabled in the Parliament in due course.

The Committee thanks the Minister for this further response, and is very pleased to note that an amended explanatory memorandum will be tabled in the Parliament.

National Consumer Credit Protection Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 20 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 25 June 2009
Portfolio: Treasury

Background

This bill, along with the National Consumer Credit Protection (Fees) Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, establishes a new national consumer credit regime. The new regime gives effect to the Council of Australian Governments' (COAG) agreements of 25 March 2008 and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth. It also implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth, as agreed by COAG on 2 October 2008.

Key components of the proposed national credit regime include:

- a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence (ACL), to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;
- industry-wide responsible lending conduct requirements for licensees;
- improved sanctions and enhanced enforcement powers for the regulator; and

- enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.

Schedule 1 contains the new National Credit Code. It largely replicates the Uniform Consumer Credit Code (UCCC), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld), and applied in the states and territories since 1996.

'Henry VIII' clauses
General commentary

There are a large number of 'Henry VIII' clauses in the bill which provide for regulations to change entitlements and obligations conferred by the principal legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

The Committee does not condone the use of 'Henry VIII' clauses as a standard drafting practice. However, such clauses have been used so extensively in this bill that it is not possible to provide commentary in relation to all of them. The Committee **leaves to the Senate as a whole** any consideration of the legislative approach taken regarding 'Henry VIII' clauses in this particular bill, as well as the question of the apparent increasing reliance on such provisions in legislation more generally.

Where the need and justification for 'Henry VIII' clauses in the bill have been explained in the explanatory memorandum (noting, in this context, that the bill gives effect to COAG agreement), the Committee has not made any specific comments. Instead, the Committee has focused its commentary on those clauses that have not been accompanied by any explanations in the explanatory memorandum.

Relevant extract from the response from the Minister

> I refer to the letter from the Secretary of the Standing Committee for the Scrutiny of Bills (Committee) dated 13 August 2009 to the Senior Adviser to the Treasurer, regarding the Committee's comments on the National Consumer Credit Protection

Bill 2009 and related bills (the Bills). The letter was referred to me as I have responsibility for this matter.

The Government welcomes the opportunity to clarify the approach that has been developed and put forward as part of the National Consumer Credit regime.

I understand that the Committee has raised concerns with the scope of a number of regulation making powers that have been included in the Bills, as well as a number of the penalties and fee arrangements…

You will see that the Government has endeavoured to ensure that there is adequate flexibility in the new arrangements to ensure the smooth transition to a national credit regime. This flexibility is necessary to address the inevitable concerns of industry and consumers at a time of regulatory change. I believe that the current Bills achieve the appropriate regulatory balance.

I am sure that both you and your Committee will continue to work with the Government in order to achieve this important national law reform.

The Committee thanks the Minister for his clarification of the approach taken in the bill. However, the Committee reiterates its long-held view that 'Henry VIII' clauses involve a clear delegation of legislative power under its terms of reference. The apparent increasing reliance on the potential use of regulations to alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation is cause for concern to the Committee. The Committee does not condone widespread use of 'Henry VIII' clauses, even where the explanatory memorandum provides reasons for that use or where the bill reflects COAG agreement. Notwithstanding this general view, the Committee considers that the Parliament should be fully advised as to the need and justification for the inclusion in legislation of each and every 'Henry VIII' clause, and that such information should be provided in explanatory memoranda as a matter of course.

‘Henry VIII’ clauses
Paragraphs 14(3)(b) and 15(5)(b)

Part 1-2 of Chapter 1 contains definitions and clause 14 defines ‘person’ to generally include a partnership. Paragraph 14(3)(b) provides that regulations may exclude or modify the effect of subsections 14(1) and 14(2). Similarly, clause 15 defines ‘person’ to generally include multiple trustees. Paragraph 15(5)(b) provides that regulations may exclude or modify the effect of subsections 15(2), 15(3) and 15(4). The explanatory memorandum provides no explanation for the use of regulations to change definitions. The Committee **seeks the Treasurer’s advice** on the need for the use of the regulation-making power to change definitions in the principal Act.

Pending the Treasurer’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.

Relevant extract from the response from the Minister

Clauses 14 and 15 of the Credit Bill address the application of the Credit Bill to partnerships and trusts with two or more trustees. The sections determine, in relation to the partners in the partnership or the multiple trustees, first, who is required to comply with obligations under the Credit Bill, and, second, who bears liability for any contravention of the Credit Bill.

Paragraphs 14(3)(b) and 15(5)(b) enable regulations to be made that can exclude or modify the obligations on partners in the partnership or the multiple trustees. It is considered that a power of this type is appropriate to allow for a flexible application of the Credit Bill to partnerships or trustees. While no regulations are proposed at this time, it is envisaged that the most likely future use of the power would be to address situations where a modification or change is necessary so that a partnership or trust can operate as a lender or a credit service provider. In particular, it is noted that trusts are used extensively in securitisation processes, and that it is desirable to be able to change these requirements through the regulations where necessary to accommodate variations in existing structures.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

'Henry VIII' clause
Clause 28

Division 2 of Part 2-2 of Chapter 2 pertains to the prohibition on engaging in credit activities without a licence. Clause 28 allows regulations to prescribe a day for commencement of Division 2: '(t)his Division applies on or after 1 July 2011, or a later day prescribed by the regulations. The Committee **seeks the Treasurer's advice** on the need for the use of the regulation-making power to prescribe commencement.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> Clause 28 allows regulations to prescribe a later date for commencement of Division 2, that is, the prohibition on engaging in credit activities without a licence.
>
> Assuming passage of the Credit Bill in 2009, it is expected that Division 2 will commence on 1 July 2011. The power to defer commencement of this provision to a later date by regulation is included out of abundance of caution, that unforseen events may require licensing to be delayed, possibly at relatively short notice. Given the consequences of not being able to delay licensing (persons who lend would be committing an offence) it is considered desirable to allow for a regulation making power.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum** be amended to include this information.

'Henry VIII' clause
Clause 110

Part 2-6 of Chapter 2 provides for exemptions and modifications relating to the Chapter (Licensing of persons who engage in credit activities). Clause 110 enables regulations to allow exemptions from licensing provisions and credit activities; and to omit, modify or vary provisions. The Committee **seeks the Treasurer's advice** on the need for this very broad regulation-making power in these particular circumstances.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> Clause 110 contains a broad regulation making power, to allow for exemptions from licensing provisions and credit activities, or to omit, or modify or vary provisions. This arrangement will facilitate a flexible approach to the application of the licensing requirements and reflects the Government's decision to adopt a broad definition of 'engaging in credit activities' and exclude activities that should not be subject to licensing requirements.
>
> This broad approach may capture activities that should not be regulated and this will need to be addressed through appropriate exemptions. The draft National Consumer Credit Protection Regulations 2009 contain draft exemptions identified in the consultation process.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

'Henry VIII' clauses
Subclauses 123(5) and 124(5)

Division 6 of Part 3-1 of Chapter 3 contains a prohibition on licensees suggesting, or assisting with, unsuitable credit contracts. Clause 123 prohibits suggesting, or assisting consumers to enter, or increase the credit limit under, unsuitable contracts; and subclause 124 prohibits suggesting to consumers to remain in unsuitable credit contracts. Subclauses 123(2) and 124(2) prescribe when a contract will be unsuitable for a consumer.

Subclause 123(5) provides that regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subclause (2). Similarly, subclause 124(5) provides that regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subclause (2). The explanatory memorandum does not explain why regulations are to be used for these purposes. The Committee **seek the Treasurer's advice** on the need for the use of the regulation-making power in subclauses 123(5) and 124(5).

Pending the Treasurer'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.

Relevant extract from the response from the Minister

Subclauses 123(5) and 124(5) give a power to make regulations that may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer (notwithstanding that the credit contract would otherwise be unsuitable).

The requirement on lenders and brokers to assess suitability is a new obligation, and is seen as a key element by the government. While no regulations are proposed at this time it is envisaged that the most likely future use of the power would be to accommodate changes in product design or delivery where it is unnecessary to impose the existing unsuitability requirements.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

'Henry VIII' clause
Clause 326

Chapter 7 of the bill contains miscellaneous clauses and Division 2 concerns the liability of persons for conduct of their agents. Clause 326 provides that regulations may modify Division 2 'for the purposes prescribed in the regulations'. The explanatory memorandum provides no explanation for this provision. The Committee **seeks the Treasurer's advice** on the need for the use of this extremely broad regulation-making power.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> Clause 326 provides that regulations may modify the law in Division 2 of Part 7-1, determining the liability of persons for conduct of their agents. No regulations are proposed at this time.
>
> The power to make regulations is restricted to modifying the relevant law, that is, it is not possible to exclude the application of these provisions. The inclusion of this power will enable the existing law to be modified where this is necessary to give clarity as to liability in a particular context or to achieve a policy objective (for example, to make clear that a principal may be liable or not liable for particular conduct of their agent).

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

'Henry VIII' clauses
Subclauses 333(2) and (3)

Subclause 333(1) provides that a contravention of a requirement in the Act does not affect the validity or enforcement of any transaction, contract, instrument or other arrangement. Subclause 333(2) provides that this is subject to any express provision to the contrary in regulations. Subclause 333(3) provides that regulations can provide that a failure to comply with a specified requirement in subclause (1) has a specified effect on the validity or enforcement of a transaction, contract, instrument or arrangement. The explanatory memorandum provides no explanation for the necessity of these provisions. The Committee **seeks the Treasurer's advice** on the need for the use of this broad regulation-making power.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> The Commonwealth does not propose at this time that regulations will be made under subclauses 333(2) of the Credit Bill. The reason for including this regulation making power is that regulations [allowing] for the modification of the general rule in clause 333 will only be created if and when this is considered appropriate.
>
> This regulation making power is consistent with section 1101H of the *Corporations Act 2001* (Corporations Act).

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

'Henry VIII' clause
Schedule 1, paragraph 45(2)(d)

Schedule 1 of the bill contains the National Credit Code. Part 3 of the National Credit Code concerns related mortgages and guarantees. Clause 45 refers to mortgage of property acquired after the mortgage is entered into but paragraph 45(2)(d) provides that the clause does not apply to a provision specified by the regulations. The explanatory memorandum provides no explanation for this 'Henry VIII' clause. The Committee **seeks the Treasurer's advice** on the need for the use of the regulation-making power in paragraph 45(2)(d) of the National Credit Code.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> This provision, including the regulation making power, is replicated from the State Code. No regulations were made by the States and the Commonwealth does not propose any at this time.
>
> Any regulation made under these provisions would be a legislative instrument subject to disallowance by Parliament.

The Committee thanks the Minister for the explanation provided in the first paragraph above and **requests that the explanatory memorandum be amended** to include this information. With respect to the second paragraph above, the Committee considers that the fact that regulations are subject to disallowance does not provide automatic justification for the use of broad regulation-making powers in principal Acts. The Committee reiterates that, as a general principle, it is a breach of parliamentary propriety for delegated legislation to deal with matters more appropriately included in a bill. These are matters which, by their nature, should be subject to debate and the other procedural safeguards provided by the parliamentary passage of a bill.

Strict liability
Various clauses

There is a substantial number of strict liability offences included in the bill. The Committee generally draws to the Senate's attention any provisions that create offences of strict liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum. In most cases in the explanatory memorandum to this bill, explanations are provided for the imposition of strict liability. However, the Committee notes that there appears to be no reference to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*.

The following clauses contain strict liability offences identified by the Committee that have not been accompanied by specific or clear explanation in the explanatory memorandum: subclauses 258(3), 274(5), 284(5), 300(2) and 319(4); Schedule 1 (National Credit Code), subclauses 33(5), 36(7), 38(9), 51(4), 53(3), 64(6), 65(4), 66(4), 67(3), 68(3), 71(6), 72(4), 73(3), 85(11), 87(4), 88(7), 90(2), 91(3), 94(3), 95(4), 108(4), 109(5), 136(3), 143(3), 145(4), 173(4), 174(4), 175(3), 178(3), 190(3).

The Committee **seeks the Treasurer's advice** on the reasons for the imposition of strict liability in each case. The Committee also **seeks the Treasurer's advice** as to whether the explanatory memorandum might be amended to include the relevant explanations.

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.

Relevant extract from the response from the Minister

Subclauses 258(3), 274(5), 284(5), 300(2) and 319(4)

Certain offences in the Credit Bill carry strict liability as they do not require a 'fault' element to be proved and are procedural in their application. The application of strict liability to these provisions will significantly enhance the ability of the Australian Securities and Investments Commission (ASIC) to administer the enforcement regime. This is because infringement notices can be issued for contraventions of strict liability offences. ASIC may issue an infringement notice to address one off or

irregular instances of non-compliance. The availability of civil or criminal penalties should deter repeated non-compliance.

Paragraph 4.17 of the Explanatory Memorandum to the Credit Bill notes that the overall structure of the sanctions regime reflects considerations of the *Review of Sanctions in Corporate Law* (Treasury, 2007), and the *Commonwealth Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Attorney General's Department, 2007) (Commonwealth Guide). The use of strict liability offences in the Credit Bill is included in this sanctions regime and is used having regard to the criteria regarding strict liability as set out in the Commonwealth Guide. This criteria states that such offences should be properly justified having regard to the level of the penalty units by which the offence is punishable, the likelihood that the effectiveness of the enforcement regime will be significantly enhanced, and the legitimacy of the grounds for penalising persons whose conduct lacks fault.

Generally, the particular strict liability provisions have been replicated from the ASIC Act to ensure that ASIC has consistent enforcement powers in the consumer credit context.

These criteria have been applied to:

- Subclause 258(3): The signing of a record of examination affects its evidentiary use, as a signed record is prima facie evidence of the statements that it records. A failure to comply with a requirement to sign a record of examination can jeopardise the effective use of statements made in examinations in the course of subsequent proceedings. Encouraging compliance with this provision will significantly enhance ASIC's effectiveness as the national regulator. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of a particular scenario without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold identified by the Commonwealth Guide. This strict liability offence is consistent with an analogous offence in paragraph 24(2)(a) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

- Subclause 274(5): Failure to comply with a requirement from ASIC that a person give all reasonable assistance in connection with a prosecution under section 274 of the Credit Bill can jeopardise ASIC's ability to understand and use material involved in such a prosecution, and inhibit ASIC exercising its functions to ensure compliance with the law. Encouraging compliance with this offence will significantly enhance ASIC's effectiveness as the national regulator. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Therefore, there are sound reasons for this offence carrying strict liability. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold identified by the

- Subclause 284(5): The ability of ASIC to require persons to appear before an ASIC hearing, give evidence on oath, answer questions, and produce documents are essential elements of ASIC's enforcement functions. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold identified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 58(4A) of the ASIC Act.

- Subclause 300(2): The orders that ASIC can make under section 300 of the Credit Bill are intended to be used on a short term basis to preserve the status quo and restrain certain dealings. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 25 penalty units, below the threshold identified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 73(3) of the ASIC Act.

- Subclause 319(4): Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 50 penalty units, below the threshold identified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 91(3A) of the ASIC Act.

Schedule 1, subclauses 33(5), 36(7), 38(9), 51(4), 53(3), 64(6), 65(4), 66(4), 67(3), 68(3), 71(6), 72(4), 73(3), 85(11), 87(4), 88(7), 90(2), 91(3), 94(3), 95(4), 108(4), 109(5), 136(3), 143(3), 145(4), 173(4), 174(4), 175(3), 178(3) and 190(3).

The Uniform Consumer Credit Code (UCCC), as administered by the States, contains criminal offence provisions not drafted in the Commonwealth style. As part of the Council of Australian Governments' (COAG) decision, it was agreed that the UCCC would be replicated and enacted into Commonwealth legislation.

If not identified as strict liability offences, the replicated UCCC offences would have attracted the default 'fault' elements of the Criminal Code. This would have made the offences operate differently and would have made their enforcement in the Commonwealth context difficult. Changing the operation of these offences would not meet the policy objectives of the National Credit Code.

Despite some penalty levels being in excess of the penalty level recommended in the Commonwealth Guide, in order to maintain the original policy objectives of the

offences in the Commonwealth context, these offences have been identified as strict liability.

Paragraph 8.25 of the Explanatory Memorandum to the Credit Bill notes that certain offences were identified as strict liability to maintain the same operational effect as currently exists in the State jurisdictions, consistent with the policy intention of the provisions.

The Committee thanks the Minister for this comprehensive and helpful explanation. The Committee considers that information pertaining to strict liability offences should be included in explanatory memoranda for the benefit of readers and those potentially affected by the operation of the legislation. Accordingly, the Committee **requests that the explanatory memorandum be amended** to include the information contained in the Minister's response so that the true meaning and impact of the proposed provisions can be readily understood.

Wide discretion
Inappropriate delegation of legislative power
Paragraphs 55(2)(d) and (e)

Chapter 2 governs the licensing of persons who engage in credit activities. Division 6 of Part 2-2 of Chapter 2 provides for the suspension, cancellation or variation of a person's credit licence after offering them a hearing. In suspending or cancelling a licence, ASIC must have regard to the matters listed in clause 55 but can, pursuant to paragraphs 55(2)(d) and (e), have regard to any other matter it considers relevant, and any other matter prescribed by the regulations.

This combination may create some uncertainty for persons engaging in credit activities about the behaviour expected of them due to the broad delegation of power. Therefore, the Committee **seeks the Treasurer's advice** in relation to the rationale for the broad discretion and delegation of power provided for in paragraphs 55(2)(d) and (e).

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

Relevant extract from the response from the Minister

Concerns have been raised that paragraphs 55(2)(d) and (e) may create uncertainty for persons engaging in credit activities about the standards of conduct expected of them, given that ASIC may take into account any other matter ASIC considers relevant and any matters prescribed by regulations.

The matters that ASIC may consider as relevant under paragraph 55(2)(d) are restricted by the opening words of subsection 55(2) to matters relevant to ASIC's opinion under paragraphs 55(1)(b) and (c), that is, that the licensee is either likely to contravene an obligation under section 47, or that the licensee is not a fit and proper person to engage in credit activities. The standards of conduct are therefore specified elsewhere in the legislation. Further, licensees would be aware of these standards when applying for a licence.

In relation to paragraph 55(2)(e), the draft regulations prescribe one matter to be taken into account, a failure by the licensee to lodge an annual compliance certificate as required by clause 53 of the Credit Bill. The inclusion of this in the regulations is an appropriate way of making public to licence holders matters which may affect a decision in respect of their licence.

The Committee thanks the Minister for this explanation.

Wide delegation of power
Clauses 206 and 337

Clause 206 provides that, in any proceedings for an offence under the Act, any information, charge, complaint or application may be laid or made by a delegate of ASIC or 'another person authorised in writing by the Minister to bring the proceedings'. Similarly, clause 337 provides that the Minister may delegate such of the Minister's functions and powers under the Act as are prescribed to 'an ASIC staff member'. The Committee generally prefers that senior officers exercise the Minister's functions and powers. In the circumstances, therefore, the Committee **seeks the Treasurer's advice** on the level, position or qualifications of ASIC staff members who are expected to exercise functions and powers under the Act; and those delegates of ASIC and 'other persons' who are expected to bring proceedings pursuant to clause 206.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

Clause 206 is an equivalent of section 1315 of the Corporations Act which provides that the power to lay charges is a power of ASIC, a delegate of ASIC or a person authorised by the Minister. Delegations within ASIC are made under section 102 of the ASIC Act. The power under section 1315 of the Corporations Act is exercised by senior ASIC staff. It is expected that the same practice would apply to the power in clause 206.

Clause 337 is an equivalent of subsection 1345A(1A) of the Corporations Act under which specified functions and powers of the Minister may be delegated to a member of ASIC or a staff member of ASIC. At this stage, no regulations are proposed to prescribe functions and powers for the purposes of this provision.

Under the Corporations Act, the Ministerial powers that may be delegated to ASIC members and staff members are the powers to consent to a name being available to a company, Australian registrable body or foreign company. This power may be delegated to senior officers of ASIC. Those delegates must have regard to written guidelines issued by the Minister in exercising that power.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

Wide discretion
Schedule 1, subclause 171(4)

Part 11 of the National Credit Code (in Schedule 1) regulates consumer leases. Division 1 of Part 11 contains interpretation and application provisions, including provisions which describe the leases regulated. Subclause 171(4) provides that 'ASIC may exclude, from the application of all or any provisions of this Part, a consumer lease specified by ASIC'. The Committee notes that this gives ASIC a broad discretion, is not a legislative instrument, and will not be subject to scrutiny. The explanatory memorandum does not explain why such a wide discretion is necessary. The Committee **seeks the Treasurer's advice** on the reasons for providing such broad discretion to ASIC in these circumstances.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

Subclause 171(4) of the National Credit Code (in Schedule 1) provides that 'ASIC may exclude, from the application of all or any provisions of this Part, a consumer lease specified by ASIC'.

The Committee has noted that this gives ASIC a broad discretion to exclude leases through an exemption power that is not a legislative instrument, and will not be subject to scrutiny.

The intention of subclause 171(4) was to only enable ASIC to exercise an exemption power that was not a legislative instrument, in accordance with section 5 of the *Legislative Instruments Act 2003*, that is, the exemption would be limited to a particular consumer lease rather than applying more broadly. In this context, it is to

be contrasted with subclause 171(5) which enables ASIC to exercise an exemption power that is a legislative instrument, in respect of a class of consumer leases.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

Incorporating material as in force from time to time
Schedule 1, clause 215

Clause 215 of the National Credit Code provides that a statutory instrument made under the Code may apply, adopt or incorporate (with or without modification) the provisions of an Act, statutory instrument or other document 'as in force at a particular time or as in force from time to time'.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed in such a manner without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, the reason for incorporation by reference is not explained in the explanatory memorandum. Therefore, the Committee **seeks the Treasurer's advice** on the need and justification for including this incorporation by reference in the regulation-making power.

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

Relevant extract from the response from the Minister

This clause has been included to allow for the incorporation of the Australian Bureau of Statistics' most recent publication entitled *Housing Finance, Australia* in order to maintain the mechanism used by the States and Territories for setting the thresholds

for hardship variations and stays of enforcement (Transitional Bill, Schedule 1, subitems 3(5) and 3(6)).

This mechanism has had to be maintained as there are constitutional limitations on the ability of the Commonwealth to increase these thresholds for existing contracts.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

National Consumer Credit Protection (Fees) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 20 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 25 June 2009
Portfolio: Treasury

Background

Part of a package of three bills to implement a new national consumer credit regime, this bill allows for the imposition of fees, as taxes, for things done under the National Consumer Credit Protection Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (such as the lodgement of documents or the inclusion of a document in, or inspection of, a register maintained by the Australian Securities and Investments Commission (ASIC)).

Imposing a tax by regulation
Clause 5

Clause 5 provides for regulations to prescribe fees for 'chargeable matters' (which are defined in subclause 4(1)). Subclause 5(2) provides that such fees are imposed as taxes. The explanatory memorandum states (at paragraph 1.9) that such fees will be imposed as a tax to ensure compliance with constitutional requirements. However, there is no explanation relating to the imposition of a tax by way of regulation (although the Committee notes that clause 6 limits the amount that may be charged in a fee). The Committee **seeks the Treasurer's advice** on the justification for using a regulation-making power to impose a tax.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

The National Consumer Credit Protection (Fees) Bill 2009 (Fees Bill) enables the imposition of fees, as taxes, for things done under the Credit laws, such as the lodgment of documents, or inclusion of a document in, or inspection of, a register maintained by ASIC.

The Fees Bill defines the matters for which a fee may be charged (chargeable matters) and that the fees relating to these chargeable matters are so imposed as taxes. The regulations prescribe amounts which may be charged for these chargeable matters. Therefore, it is the Fees Bill which imposes the tax on chargeable matters. The regulations do not impose the tax but merely determine the quantum of tax.

The approach taken in the Fees Bill is generally consistent with the *Corporations (Fees) Act 2001* which deals with the imposition of fees under the Corporations Act.

The Committee thanks the Minister for this clarification, which addresses its concerns.

National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 20 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 25 June 2009
Portfolio: Treasury

Background

Part of a package of three bills to implement a new national consumer credit regime, this bill sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the states and territories to the Commonwealth.

Schedule 1 deals with the transition from the regime provided in the old Credit Code to the new consumer credit regime provided for in both the National Consumer Credit Protection Bill 2009 and Schedule 2 to this bill, including:

- the application of the existing legislation or the proposed legislation to legal proceedings that arose before the change;
- the rights or liabilities a person may have under the existing legislation; and
- the extent to which the existing legislation may continue to have effect under the National Consumer Credit Protection Bill.

Schedule 2 sets out the requirement for persons currently engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence.

Schedule 3 includes consequential amendments to the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

'Henry VIII' clauses
Subclauses 6(2), (3) and (6)

There are several 'Henry VIII' clauses in the bill which enable regulations to change responsibilities and entitlements conferred by the principal legislation. Some relate to activities undertaken pursuant to the old Credit Code and the Committee accepts the explanation that they are necessary to ensure a smooth transition to the new Code. Discussed below are those clauses which are not accompanied by any explanation in the explanatory memorandum.

Subclause 6(2) provides that regulations may prescribe matters of a transitional nature and that the regulations have effect 'despite anything else in this Act'. There is no explanation of this provision in the explanatory memorandum. Subclause 6(3) provides that: '(t)he regulations may provide that certain provisions of this Act are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified'. Similarly, there is no explanation for this 'Henry VIII' clause in the explanatory memorandum. Subclause 6(6) provides that '(t)he provisions of this Act that provide for regulations to deal with matters do not limit each other'. Again, the explanatory memorandum provides no explanation for the existence of this provision.

Since all these provisions purport to authorise a regulation to amend the Act, or purport to authorise a regulation that is beyond the scope of the Act, the Committee **seeks the Treasurer's advice** on why such a broad use of the regulation-making power is considered necessary in the circumstances.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

Subclause 6(2) provides that regulations may prescribe matters of a transitional nature and that the regulations have effect 'despite anything else in this Act'.

Given that the basis of the new national credit law scheme emanates from a referral of State constitutional power and involves transferring law from eight jurisdictions, it is necessary that subclause 6(2) be included in the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) to deal with matters of a transitional nature because:

- it is not possible to consider all of the transitional issues at the time of enactment which emanate from the referral of constitutional power and the transfer of the eight regulatory regimes into one national scheme;

- the need to ensure that any necessary consequential amendments that are inadvertently not provided for in the Credit Bill and the Transitional Bill can be made without the need for the enactment of another Act; and

- the requirement to maintain a comprehensive national law on credit regulation which provides certainty for industry participants and consumers.

Subclauses 6(3) and 6(6) explain the legal effect of the making of these regulations. These subclauses are necessary to ensure that the matters under the regulations achieve their policy intent.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information in order to provide context for the use of the regulation-making power in the circumstances.

'Henry VIII' clause
Schedule 1, subitem 15(4)

Subitem 15(1) of Schedule 1 provides that references in the new Credit Code generally include references to events, circumstances or things that happened or arose before commencement, unless a contrary intention is expressed. However, subitem 15(4) enables regulations to provide that this does not apply to a particular reference or class of references in the new Credit Code.

The explanatory memorandum does not explain the reason for this provision and the Committee **seeks the Treasurer's advice** on the need for this particular regulation-making power in these circumstances.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

> The effect of subitem 15(1) is that a reference in the new Credit Code to an event, circumstance or thing of a particular kind is not confined to any such event, circumstance or thing happening or arising after the commencement of the Credit Bill, but can also include such an event, circumstance or thing that happened before the commencement, unless the contrary intention is expressed.
>
> Subitem 15(4) enables regulations to provide that subitem 15(1) does not apply to a particular reference or class of references in the new Credit Code. The reason for this regulation making power is that there may be references to an event, circumstance or thing of a particular kind before the commencement of the new Credit Code which should not be referenced. For example, it may be necessary to make a regulation to exclude unreasonable conditions imposed by a credit provider in its consent to the mortgagor's assignment or disposal of mortgaged property.
>
> It should be noted that subitem 15(4) is similar to subsection 1404(3) in the Corporations Act.

The Committee thanks the Minister for this explanation and **requests that the explanatory memorandum be amended** to include this information.

National Health Security Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 18 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Health and Ageing

Background

This bill amends the *National Health Security Act 2007* to enhance Australia's controls for the security of certain biological agents that could be used as weapons. Such an agent is known as a security sensitive biological agent (SSBA).

In particular, the bill:

- enables the Minister for Health and Ageing, following advice from relevant experts, to suspend certain existing regulatory requirements and specify new conditions to ensure that adequate controls are maintained in the event of an SSBA-related disease outbreak;

- establishes new controls relating to the handling of biological agents suspected of being SSBAs;

- provides for additional search and seizure powers to bring the powers in line with those exercised by other regulatory bodies such as the Gene Technology Regulator; and

- makes a number of minor amendments (for example, to include new reporting requirements to local police forces for certain SSBA-related events, to clarify the reporting obligations of registered entities, and to amend the definition of 'biological agents').

Insufficient parliamentary scrutiny
Schedule 1, item 1, new sections 60A and 60B

Item 1 of Schedule 1 inserts a new Division 5A into the National Health Security Act to provide for suspension of Division 5 to deal with threats. Proposed new subsections 60A(4), (5) and (6), also to be inserted by item 1 of Schedule 1, provide that legislative instruments created to suspend the usual regulatory obligations for specified periods in emergency situations have effect despite section 12 of the *Legislative Instruments Act 2003*, and according to their own terms. This would allow instruments to take effect before they are registered on the Federal Register of Legislative Instruments.

The explanatory memorandum explains (at page 7) that this allows instruments to take effect without delay in order to deal with particular emergency disease situations: for example, if there is a need to put measures in place immediately to deal with the extreme threat posed by the spread of an SSBA-related disease outbreak.

Similarly, proposed subsections 60B(4) and (5), also inserted by item 1 of Schedule 1, provide for the issue of a new legislative instrument to vary or revoke an instrument made pursuant to new subsection 60A(1). Such new legislative instruments would also take effect despite section 12 of the Legislative Instruments Act. The explanatory memorandum explains (at page 8) that this is necessary because there may be cases where there is a need to vary or revoke the legislative instrument immediately to deal with an increased threat posed by a disease outbreak.

While the Committee is cognisant of the need to deal with emergency disease situations expediently, these provisions would allow legislative instruments to cover important matters without having the benefit of scrutiny by the Parliament. Accordingly, the Committee **seeks the Minister's advice** as to how scrutiny of any emergency arrangements is intended to be provided.

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.

Relevant extract from the response from the Minister

New section 60A of the Bill enables me, as the Minister, to suspend controls imposed by Division 5, Part 3 of the *National Health Security Act 2007* (the Act) for a specified period, if I am satisfied that there is a threat involving a security sensitive biological agent (SSBA), to the health or safety of people, the economy or the environment. I am able to do so by legislative instrument. New section 60B enables me, by legislative instrument, to vary or revoke the earlier legislative instrument. The legislative instruments would take effect on the day on which the instrument is made or, if the instrument specifies a later day, on that day.

The Committee notes that, because the new provisions would allow instruments to take effect before they are registered on the Federal Register of Legislative Instruments, the legislative instruments could cover important matters without Parliamentary scrutiny. The Committee seeks advice as to how scrutiny of any emergency arrangements is intended to be provided.

My discretion to make the principal legislative instrument to suspend some or all of the provisions in Division 5 is confined by the circumstances in subsection 60A(2). I am required to be satisfied of two principal matters, that:

1. there is a threat involving the SSBA to the health or safety of people, the economy or the environment; and
2. the making of the legislative instrument would help to reduce the threat and maintain adequate controls for the security of all SSBAs.

For example, if the pandemic (H1N1) 2009 had been caused by an SSBA, I may have suspended the requirement for laboratories undertaking testing for the virus from reporting to the National Register on the transfer of samples for a period of three to six months. Such a decision would have taken away an onerous administrative burden which might otherwise have impeded their ability to undertake essential laboratory testing during the pandemic.

In being satisfied of the first matter, I must consider advice from the Commonwealth Chief Medical Officer, the Commonwealth Chief Veterinary Officer and any other person who I believe has scientific or technical knowledge in relation to SSBAs. In being satisfied of the second matter, I must consider advice from the Secretary of the Department of Health and Ageing.

Similarly, in making a legislative instrument to vary or revoke the principal legislative instrument in order to respond to the threat, my discretion to do so is confined by legislative preconditions. Those preconditions include considering further advice from the persons whose advice was considered for the purposes of making the earlier principal instrument.

The Explanatory Memorandum to the Bill explains that the delegation of legislative power is warranted by the extreme nature of a threat posed by an SSBA-related disease outbreak. The legislative instruments will facilitate an appropriate and immediate response to the challenge of safeguarding public health and safety in an

emergency disease situation which presents unpredictable scenarios. Because the legislative instrument is a disallowable instrument, it will be subject to Parliamentary tabling and scrutiny processes, albeit that a disallowance would only take effect after the legislative instrument has come into effect.

I am confident that the above process provides the best balance of parliamentary scrutiny in the context of responding appropriately and immediately to an emergency disease situation involving an SSBA.

The Committee thanks the Minister for her comprehensive and helpful response.

Review of decisions
Schedule 1, item 53, new subsection 55A(5)

Proposed new section 55A, to be inserted by item 53 of Schedule 1, provides for total cancellation or facility cancellation in relation to an entity's registration on the National Register, upon application by the entity for cancellation. Proposed new subsection 55A(4) contains the notification of cancellation procedures that must be followed by the Secretary if he or she decides to cancel the registration; namely, that the entity must be informed in writing of the decision. However, proposed new subsection 55A(5) provides that failure to follow these notification procedures does not affect the validity of the decision.

This has the effect that the obligations of an entity may be altered without notice or without an opportunity for review of the decision. The explanatory memorandum does not provide an explanation for the inclusion of this provision. Therefore, the Committee **seeks the Minister's advice** on the reasons for inclusion of new subsection 55A(5) in the bill.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

New section 55A enables an entity to apply for total cancellation of its registration as an entity, or cancellation of its registration for one or more facilities. The Secretary must decide to cancel the registration in accordance with the application or refuse the application. The Secretary may decide to cancel the registration only if he or she is satisfied that the entity or its facility does not handle any SSBA that is on the National Register.

New section 55A was introduced to enable entities to apply for cancellation of their registration if they no longer handle SSBAs. Cancellation of registration means that the entity is no longer required to comply with the regulatory obligations imposed under the Act. Therefore, if registration is cancelled at the entity's request, that entity would not be deprived of any rights or liberties.

In contrast, the Secretary's decision to refuse an application for cancellation is a reviewable decision. This amendment was inserted by item 54 of the Bill. Subsection 81(1) provides that the Secretary must notify the entity as soon as practicable after making a reviewable decision. The Secretary's decision is then subject to internal review and application to the Administrative Appeals Tribunal, as set out in sections 82 and 83 respectively.

I trust that this clarifies the matters the Committee has raised.

The Committee thanks the Minister for this clarification, which addresses its concerns.

National Security Legislation Monitor Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The - responded to the Committee's comments in a letter dated 6 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the Senate on 25 June 2009
Portfolio: Cabinet Secretary

Background

This bill establishes the position of the National Security Legislation Monitor (Monitor). The standing function of the Monitor will be to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis to ensure that the laws operate in an effective and accountable manner, are consistent with international human rights law and maintain public confidence. The establishment of an independent reviewer of terrorism laws is consistent with the recommendations of a number of recent reviews and reports.

Specifically, the bill:

- provides for the appointment of the Monitor;
- prescribes the functions and powers of the Monitor;
- requires the Monitor to report his or her comments, findings and recommendations to the Prime Minister, and in turn the Parliament, on an annual basis;
- requires the Monitor to consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individuals' rights, and whether it remains necessary;

- requires the Monitor to have regard to Australia's international obligations and the agreed national counter-terrorism arrangements between the Commonwealth and the states and territories;

- allows the Monitor to initiate his or her own investigations; and

- enables the Prime Minister to refer a matter to the Monitor for review within a specified timeframe.

Determination of important matters by regulation
Clause 4, definition of 'law enforcement or security agency'

Clause 4 of the bill contains definitions. In addition to specified law enforcement and security agencies, the definition of the term 'law enforcement or security agency' includes 'any other agency prescribed by regulations' (paragraph (l)). The explanatory memorandum does not provide any explanation for the need to expand or modify the scope of the definition by means of regulations, and does not give any indication of the circumstances where such expansion or modification may be required. The Committee **seeks the Cabinet Secretary's advice** on the need and justification for the use of the regulation-making power to expand a definition in the principal Act.

Pending the Cabinet Secretary'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.

Relevant extract from the response from the Cabinet Secretary

> As the Minister responsible for the Bill I would like to respond to the two issues raised in the *Alert Digest* concerning the Bill.
>
> The first issue concerns the regulation-making power to expand the definition of 'law enforcement or security agency' contained in paragraph (1) clause 4 of the Bill. This regulation-making power was included specifically to ensure that any new law enforcement or security agency could be captured under this definition in the future if necessary. The power to make regulations for this would be provided under paragraph 32(a). This power is consistent with many Acts and there is Parliamentary scrutiny of regulations.

The Committee thanks the Cabinet Secretary for this response.

Insufficient parliamentary scrutiny
Various clauses

Subclause 29(1) provides that the Monitor must prepare and give to the Prime Minister an annual report relating to the performance of the Monitor's functions as set out in paragraphs 6(1)(a) and (b) of the bill. The Prime Minister must present the annual report to the Parliament (subclause 29(5)). The Committee notes that the annual report does not relate to references given to the Monitor by the Prime Minister pursuant to paragraph 6(1)(c). There is provision for the excision of sensitive information from the annual report (subclause 29(3)) which must be provided to the Prime Minister in a supplementary report (subclause 29(7)).

If the Prime Minister refers a matter to the Monitor (which he or she may do under clause 7, either at the Monitor's suggestion or on his or her own initiative), then the Monitor must report on that reference to the Prime Minister (subclause 30(1)). The Monitor may give the Prime Minister an interim report (subclause 30(2)), and must give an interim report to the Prime Minister if the Prime Minister so directs (subclause 30(3)).

However, there is no provision requiring the Prime Minister to present to the Parliament the report, an abridged version of the report or a statement announcing the reference or completion of the report. The Committee **seeks the Cabinet Secretary's advice** on whether greater parliamentary scrutiny could be provided in relation to the Monitor's third function in paragraph 6(1)(c) of reporting on a reference given by the Prime Minister.

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

Relevant extract from the response from the Cabinet Secretary

> The second issue concerns the reporting requirements in clause 29 of the Bill. Clause 29 provides that the Monitor's report relating to the performance of the Monitor's functions under paragraphs 6(1)(a) and (b) must be provided to the Prime Minister, who in turn tables the annual report in Parliament. This ensures that the core functions of the Monitor to review and consider the legislation would be captured in the annual report and open to Parliamentary scrutiny.
>
> Paragraph 6(c) provides that the Monitor must report on a reference to the Prime Minister if a matter relating to counter-terrorism or national security is referred by the Prime Minister to the Monitor. In the legislation as it stands, the Monitor is not required to report on these references in the annual report. I am pleased to advise the Committee that I am giving this issue serious consideration and will advise the Senate of the outcome of these deliberations in due course.
>
> I thank the Committee for its diligence.

The Committee thanks the Cabinet Secretary for this response, and welcomes his advice that he is giving serious consideration to the issue of parliamentary scrutiny of reports by the Monitor which relate to matters referred by the Prime Minister. The Committee awaits the Cabinet Secretary's further advice to the Senate regarding the outcome of those deliberations.

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter dated 26 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Treasury

Background

This bill makes consequential and transitional amendments to a number of Acts to facilitate the smooth transition from the current law regarding the registration of tax agents to the new regulatory regime provided for in the *Tax Agent Services Act 2009* (which received Royal Assent on 26 March 2009).

Among other things, the bill:

- repeals certain provisions that will no longer have any effect due to the commencement of the Tax Agent Services Act (such as Part VIIA of the *Income Tax Assessment Act 1936* relating to the registration of tax agents);
- amends, repeals or inserts relevant definitions and reference in other Acts to ensure consistency with the Tax Agent Services Act;
- amends certain provisions in the *Taxation Administration Act 1953* to reflect the enhanced independence of the Tax Practitioners Board from the Commissioner of Taxation, as provided for in the Tax Agent Services Act;
- expands the definition of 'taxation law' to include the Tax Agent Services Act, and associated regulations; and

- amends the Tax Agent Services Act to correct typographical errors and to expand the circumstances in which the Tax Practitioners Board can disclose information to the Commissioner of Taxation.

Inappropriate delegation of legislative power
Insufficient parliamentary scrutiny
Schedule 2, items 15 and 16

Items 15 and 16 of Schedule 2 contain transitional provisions providing for references to, and things done by, or in relation to, a Tax Agents' Board. Subitem 15(1) provides for a thing done by a Tax Agents' Board under the old law to be taken to have been done by the new Tax Practitioners Board for the purposes of the operation of any law after commencement.

The explanatory memorandum gives the example (at page 53) that if a state Board had cancelled a tax agent's registration and the decision had been overturned by the Administrative Appeals Tribunal (AAT), then the Board could appeal the AAT's decision to the Federal Court. Subitem 15(2) states that the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified thing done by, or in relation to, a Tax Agents' Board. Such a determination is not a legislative instrument (subitem 15(4)). The explanatory memorandum explains that this 'provides flexibility for the Minister to ensure that the appropriate outcome is achieved in all circumstances'.

Similarly, subitem 16(1) provides that a reference to a Tax Agents' Board in an instrument in force immediately before commencement has effect after commencement, as if the reference were to the Tax Agents' Board. Under subitem 16(2), the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified reference; under subitem 16(3), this is not a legislative instrument.

The Committee considers that, in each case, the Minister is given a very broad discretion. In the example provided in the explanatory memorandum, it appears that the Minister, or his or her delegate, could substitute a less favourable decision without this being subject to scrutiny. Accordingly, the Committee **seeks the Treasurer's advice** in relation to how it is anticipated that the transitional provisions in items 15 and 16 will be accompanied by sufficient scrutiny.

Pending the Treasurer'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; and 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.

Relevant extract from the response from the Assistant Treasurer

I refer to a letter of 13 August 2009 from Ms Julie Dennett, Secretary, Standing Committee for the Scrutiny of Bills, to the Treasurer regarding the Committee's concerns about two provisions contained in the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009. The letter has been referred to me as I have portfolio responsibility for this matter.

Items 15 and 16 of Schedule 2 to the Bill have been included to ensure continuity in the transfer of responsibility for the regulation of tax agents from the existing state tax agents' boards (the old boards) to the new, national Tax Practitioners Board created by the *Tax Agent Services Act 2009.* Relevantly, item 15 deems things done by, or in relation to, an old board to be things done by, or in relation to, the new board. Similarly, item 16 deems a reference in an instrument to the old board to be a reference to the new board.

Since it is difficult to identify every circumstance where it is appropriate for the new board to be considered to be the old board, these provisions are necessarily phrased in broad terms. To address the *possibility* that this may have an unforseen and inappropriate outcome, these provisions include a ministerial discretion to determine that they do not apply in particular instances.

In relation to the Committee's concerns, this discretion could not be used by the new board (or a minister) to substitute a less favourable decision (with respect to one originally made by the old boards). Significantly, the other provisions in the Bill ensure that existing decisions of the old board (whether they be to register an entity or terminate that entity's registration) continue to apply under the new regulatory regime administered by the new board. The ministerial discretion under items 15 and 16 cannot alter this.

The example provided in the explanatory memorandum highlights a situation where it is appropriate for the new board to be deemed to 'stand in the shoes of' an old board. It notes that item 15 will allow the new board to appeal a decision of the Administrative Appeals Tribunal (AAT) to overturn a previous decision of an old board (that is, it transfers the appeal rights from the old board to the new board).

Taking this example, if for instance the ministerial discretion was exercised so that item 15 did not operate in this case, then the only result would be that the new board could not appeal the AAT's decision. This would not result in a decision being substituted but, rather, would merely prevent the matter being subject to judicial review.

Thank you for providing me with an opportunity to address the Committee's concerns in relation to this Bill.

The Committee thanks the Assistant Treasurer for his response and considers that this information should also be included in the explanatory memorandum for the benefit of readers.

With respect to the comment that item 15 could 'merely' prevent matters being subject to judicial review, the Committee is concerned that the word 'merely' seems to suggest that the impact and scope of the provision would be insignificant. The Committee recognises, of course, that item 15 is a type of transitional provision designed to ensure flexibility, and that Ministerial discretion is a valid Executive function. However, the prevention of judicial review goes to the heart of the separation of powers and, in this context, the Committee notes that privative clauses are normally used to limit judicial review. Accordingly, the Committee **seeks the Assistant Treasurer's further advice** as to whether specific examples might be provided of the circumstances in which it is envisaged that a decision of the AAT would not be the subject of judicial review but, instead, would be the subject of Ministerial discretion.

Tax Laws Amendment (2009 Measures No. 4) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter received on 7 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 25 June 2009
Portfolio: Treasury

Background

This bill amends various Acts to implement a range of changes to Australia's taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1936* to increase the research and development (R&D) expenditure cap for eligibility to the R&D Tax Offset from $1 million to $2 million.

Schedule 2 amends the *A New Tax System (Australian Business Number) Act 1999*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* in relation to prescribed private funds (PPFs) to, among other things, rename PPFs as private ancillary funds and move the full administration of those funds under the authority of the Commissioner of Taxation.

Schedule 3 amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, and the *Income Tax (Transitional Provisions) Act 1997* to provide relief from capital gains tax (CGT) to members and insured entities of friendly societies that have a life insurance business and/or a private health insurance business, and the friendly society demutualises to a for-profit entity.

Schedule 4 amends the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to ensure that losses transferred to the head company of a consolidated group, or a multiple entry consolidated group, by a joining entity that is insolvent at the joining time, can be used by the head company in certain circumstances.

Schedule 5 makes technical corrections and other minor amendments to a number of Acts relating to taxation laws.

Insufficient parliamentary scrutiny
Schedule 2, subitem 26(2)

Item 26 of Schedule 2 provides for transitional arrangements relating to prescribed private fund declarations. Specifically, subitem 26(1) provides for the Minister, by legislative instrument, to declare a trust to be a prescribed private fund; and subitem 26(2) provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003,* the declaration has effect during the period starting at the time stated in the declaration (which must be before the commencement date) and ending just before the commencement time.

The explanatory memorandum states (at paragraph 2.92) that '(f)or reasons of simplicity and certainty', the Treasurer may make a declaration after 1 October 2009 which lists those funds that have been approved but not yet prescribed. The declaration will have the effect of 'deeming those listed funds to have been prescribed from the date set out in the declaration'.

While the Committee has always accepted that transitional arrangements are needed to ensure a smooth transition to new legislative schemes, the process of deeming funds to have been prescribed creates rights and obligations. The Committee **seeks the Treasurer's advice** on how parliamentary scrutiny will be achieved for the transitional arrangements contained in subitem 26(2) of Schedule 2.

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

Relevant extract from the response from the Assistant Treasurer

Your letter has been referred to me as I have portfolio responsibility for this matter.

The Senate Standing Committee for the Scrutiny of Bills has drawn attention to Tax Laws Amendment (2009 Measures No. 4) Bill 2009, and in particular Schedule 2, subitem 26(2). Schedule 2 introduces various provisions that aim to improve the integrity of a group of private philanthropic trust funds currently known as prescribed private funds (PPFs) (to be called private ancillary funds (PAFs) from 1 October 2009). The Senate Committee has raised concerns with item 26 of Schedule 2, which provides transitional arrangements for existing PPFs, seeking advice on how parliamentary scrutiny will be achieved for the transitional arrangements.

Currently, the Governor-General is responsible for prescribing trust funds as PPFs. The date a fund is prescribed is usually backdated to the day that a Treasury minister agrees to recommend prescription to the Governor-General. The Governor-General's prescription is subject to disallowance by either House of Parliament.

However, responsibility for the administration of PPFs is being moved to the Commissioner of Taxation. From 1 October 2009, PPFs will no longer be prescribed by regulation in the *Income Tax Assessment Regulations 1997*. Rather, the Commissioner will be responsible for determining whether a trust fund is a PAF (according to a legislative definition) and determining whether that fund is entitled to be endorsed as a deductible gift recipient (DGR). This will bring the treatment of PAFs into line with other DGRs.

It is possible that on 1 October 2009, there will be a limited number of funds that: have been approved by a Treasury minister for recommendation to the Governor-General that a trust fund be prescribed as a PPF; but have not yet been prescribed in the *Income Tax Assessment Regulations 1997* as a PPF.

The transitional arrangements include a method of dealing with this group of funds. The Treasurer will be given the power to make a declaration, by way of legislative instrument, after 1 October 2009 that those funds that have been approved by a Treasury minister, but have not yet been prescribed, are taken to be PPFs.

This treatment is consistent with the movement of responsibility for the administration of PPFs to the Commissioner of Taxation. Parliamentary scrutiny will be maintained, as the Minister’s declaration will be by way of legislative instrument which is reviewable (and disallowable by either House of the Parliament. This is consistent with the current prescription mechanism undertaken by the Governor-General.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this very comprehensive response and **requests that the explanatory memorandum be amended** to include this information to provide context and background to the proposed amendment.

Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter received on 20 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the Senate on 25 June 2009
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Telecommunications Act 1997* to allow for network information to be provided to the Commonwealth by telecommunications carriers and other utilities, for purposes related to the planning and rollout of the National Broadband Network.

In particular, the bill:

- amends the provisions in Part 27A that impose the requirement to provide information so that the requirement may apply to utilities as well as to telecommunications carriers;

- amends the provisions in Part 27A that set out the purposes for which information is permitted to be disclosed and used; and

- amends the sunset periods applying to certain provisions in Part 27A (as amended) so that information can be disclosed and used during the period of the roll-out of the National Broadband Network.

Delegation of legislative power
Schedule 1, item 32, new subparagraph 531G(3A)(b)(iii)

Proposed new section 531F, to be inserted by item 25 of Schedule 1, requires carriers and utilities to give information to an authorised information officer. Proposed new subsection 531G(3A), to be inserted by item 32 of Schedule 1, provides that an entrusted public official may use protected network information for the purposes of the Implementation Study for the National Broadband Network (paragraph 531G(3A)(a). It also provides that the information may be used for purposes specified in the regulations, so long as the purpose relates to: the creation or development of a broadband telecommunications network (subparagraph 531G(3A)(b)(i)); or to the supply of a carriage service using a broadband telecommunications network (subparagraph 531G(3A)(b)(ii)); or to 'a matter incidental or ancillary to' these matters (subparagraph 531G(3A)(b)(iii)).

The explanatory memorandum states (at page 32) that this is to allow for use of protected network information after the Implementation Study is completed. An example of such use might be to allow officials to use the information for the purposes of the Minister or Cabinet in relation to matters covered in the Implementation Study report. The power may also be limited by conditions that may be imposed by a determination made by the Minister pursuant to proposed new subsection 531G(3AA), to be inserted by item 35 of Schedule 1, although the exercise of this power is discretionary.

While the breadth of the regulation-making power in subparagraph 531G(3A)(b)(iii) is limited to some extent by the preceding subparagraphs, the Committee notes that there is no time limit on the period during which the information may be used. The Committee **seeks the Minister's advice** in relation to the need and justification for this broad regulation-making power, and whether it might be appropriate to include in the bill some further specificity or limitation on the use of such a power.

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.

Relevant extract from the response from the Minister

For your information, the Government introduced the *Telecommunications Legislation Amendment (National Broadband Network Measures—Network Information) Bill 2009* into the House of Representatives on 19 August 2009. This Bill will replace the *Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009* currently before the Senate. The only difference in this Bill is to the definition of the term 'NBN Company', which has been updated to reflect the fact that the company established by the Government has recently changed its name to NBN Co Limited.

My response to the two issues of concern raised in the *Alert Digest No. 9 of 2009* in relation to the Bill follows.

…

I note the Committee's concern about the operation of the regulation-making power in proposed paragraph 531G(3A)(b), specifically the issue of whether there is a time limit on the period during which information can be used, and on the scope of the power to make regulations for a purpose 'ancillary or incidental to' a matter set out in proposed subparagraphs 531G(3A)(b)(i) and (ii).

Period during which information can be used by an entrusted public official

Section 531G relates to the protection and use of information by entrusted public officials. Subsection 531G(1) (as proposed to be amended) would provide that an entrusted public official must not disclose or use protected network information. Subsections 531G(2) and (3A) (as proposed to be amended) would provide exceptions to this general prohibition on disclosure and use.

Proposed subparagraph 531G(3A)(b), which would provide that an entrusted public official may use protected network information for a purpose specified in the regulations, is subject to a sunset period of 10 years: see proposed subsection 531G(3AC). The Explanatory Memorandum notes on page 33:

> *Proposed subsection 531G(3AC) would provide that the exception in paragraph 531G(3A)(b) would cease to have effect at the end of the period of 10 years beginning on the day on which this subsection commences. It is appropriate that the power to specify purposes in the regulations for which disclosure to other entrusted public officials would be permitted is time-limited, so that use of the information by entrusted public officials can occur during the roll-out of the NBN, but after the completion of the Implementation Study, for purposes that relate to a broadband telecommunications network.*

Any regulations made under subparagraph 531G(3A)(b) ceases to have effect at the end of the period of 10 years beginning on the day on which this subsection commenced. This will mean that after that period, an entrusted public official cannot use the protected network information for purposes that have been specified in the

regulations, and that, unless one of the other exceptions under proposed subsection 531G(3A) applies, the entrusted public official would not be permitted to use the information at all.

I note that proposed paragraph 531G(2)(b) operates in the same way with respect to the disclosure by entrusted public officials of protected network information, and is similarly subject to a 10-year sunset period (see proposed subsection 531G(2C)).

Scope of regulation-making power

I am satisfied that the scope of the regulation-making power in proposed paragraph 521G(3A)(b) is sufficiently defined. It is intended that the regulations may only specify purposes that relate to the creation or development of a broadband telecommunications network, the supply of carriage services over such a network, or related matters. In my view the legislation makes it clear that the power to specify a purpose in the regulations is limited, and that a purpose specified must be related to the development of such a network, the supply of services over such a network, or related matters.

I note that any regulations made specifying purposes for which information may be used (under proposed paragraph 531G(3A)(b)) or disclosed (under proposed paragraph 531G(2)(b)) would be subject to disallowance by either House of Parliament, and this provides an avenue for parliamentary scrutiny of the purposes that are specified in any regulations that are eventually made.

The Committee thanks the Minister for this comprehensive response, which addresses its concerns.

Denial of natural justice
Schedule 1, item 39, new subsection 531H(2)

Proposed new subsection 531H(2), to be inserted by item 39 of Schedule 1, provides that an authorised information officer is not required to give a carrier or utility an opportunity to be heard in relation to a decision to disclose protected network information to an entrusted company officer under subsection 531H(1).

The explanatory memorandum explains (at page 35) that this is to 'facilitate the development of the National Broadband Network' and to ensure that it 'is not undermined by delays created by the potential need for an authorised information officer to consult with a carrier or utility every time the authorised information officer wishes to disclose information under section 531H. This is intended to displace any common law obligation to consult a carrier or utility'.

The Committee notes that natural justice principles require that those whose interests are affected should be given an opportunity to be heard. The Committee **seeks the Minister's advice** on whether alternatives were considered, apart from the proposed legislative override of the principles of natural justice in proposed new subsection 531H(2).

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

Relevant extract from the response from the Minister

The provision contained in the Bill is identical to the provision contained in the current subsection 531H(2) of the *Telecommunications Act 1997.*

The effect of this provision is that an authorised information officer (being a Commonwealth officer who receives protected network information from carriers and utilities, and who is permitted to disclose the information in certain circumstances) is not required to give a carrier or a utility an opportunity to be heard in relation to a decision to disclose protected network information to the NBN Company or another designated broadband company.

It is important to note that affected carriers and utilities would have been consulted, and would have had the opportunity to express their views, at the outset of the process, when they were initially required to provide the information. The Bill provides that carriers and utilities that are to be required to provide information in accordance with an instrument made by the Minister under subsection 531C must be consulted and will have five business days to make a submission in relation to the draft instrument (see subsection 531C(4)). Carriers and utilities would be aware that information that they may be required to provide will be used to assist the Implementation Study and, subject to further Ministerial approval, may be disclosed to the NBN Company or to another designated broadband company. As noted in the Explanatory Memorandum (page 35), affected carriers and utilities would have the opportunity to comment on the possible subsequent disclosure of that information by

an authorised information officer to those companies as part of the initial consultation process that is required by subsection 531C(4).

The Bill is intended to exclude any obligation that may arise under common law rules of natural justice to consult carriers about decisions to disclose the information to the NBN Company or to any other designated broadband company. As was the case when the original provision was included in Part 27A in 2008, this is intended to minimise the potential for legal challenges to the process stalling the planning and roll-out of the National Broadband Network.

This provision would not, however, affect the Courts' ability to examine the making by an authorised information officer of a decision to disclose protected network information to the NBN Company or another designated broadband company.

The Committee thanks the Minister for his response and **requests that the explanatory memorandum be amended** to include this information in order to assist readers and those affected by the legislation.

Veterans' Affairs and Other Legislation Amendment (Pension Reform) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2009*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter received on 4 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 10 of 2009

Introduced into the House of Representatives on 12 August 2009
Portfolio: Veterans' Affairs

Background

This bill amends the *Veterans' Entitlements Act 1986*, the *Social Security Act 1991*, the *Military Rehabilitation and Compensation Act 2004*, the *Income Tax Assessment Act 1997*, the *Social Security (Administration) Act 1999* and the *Aged Care Act 1997* to give effect to the Federal Government's Secure and Sustainable Pension Reform package in respect of eligible veterans and their dependants.

Schedule 1 increases the single maximum basic rate of service pension by $1,560 per annum, or $30 per week, on and from 20 September 2009. This measure also applies an increase to war widow pension and ceiling rate income support supplement and service pension.

Schedule 2 allows for the indexation of the maximum basic rate of service pension to the new Pensioner and Beneficiary Living Cost Index.

Schedule 3 introduces a new 'combined couple benchmark' for pension rates, which will be 41.76 per cent of the annualised Male Total Average Weekly Earnings figure; the single pension will be benchmarked at 66.33 per cent of the combined couple benchmark.

Schedule 4 simplifies the payments made to certain income support pensioners by consolidating a number of smaller payments and allowances into one 'pension supplement'; and provides for an increase to pension payments of an estimated $10.10 per week for couples combined and $2.50 per week for singles. The new 'veterans supplement' and 'MRCA supplement' will replace the pharmaceutical and telephone allowances for eligible persons who do not receive an income support payment under the Veterans' Entitlements Act or the Social Security Act.

Schedule 5 allows for an increase in pensions to compensate for anticipated increases in the cost of living arising from the introduction of the Carbon Pollution Reduction Scheme.

Schedule 6 increases the income test taper rate from 40 cents to 50 cents per dollar of income over the ordinary income free area and removes the additional income test free area for dependent children from the calculation of the amount of a person's ordinary income free area.

Schedule 7 introduces a new Work Bonus into the veterans' entitlements law, which allows for a certain amount of employment income that is earned, derived or received in a pension period by a person, who is of qualifying age and is in receipt of service pension or income support supplement, to be disregarded for the purposes of the ordinary income or adjusted income tests.

Schedule 8 closes the pension bonus scheme to new entrants from 20 September 2009.

Schedule 9 ensures that the current entitlements of existing veterans' affairs pensioners who would otherwise be affected by the income test changes made by the bill, and whose pension would be reduced, will be maintained in real terms.

Schedule 10 increases, under the Veterans' Entitlements Act, the pension age for persons other than veterans, from 65 to 67 years by six months every two years commencing on 1 July 2017.

Schedule 11 enables veterans' affairs pensioners to have greater access to advances of pensions and income support supplement.

Schedule 12 ensures that pensioners are not charged higher aged care fees than intended.

Delayed commencement
Omission in explanatory memorandum
Subclause 2(1)

Item 21 in the table to subclause 2(1) provides that Schedule 11 commences on 1 July 2010, resulting in delayed commencement. The Committee will generally not comment where any delay in commencement is six months or less. However, where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No 1.3.

In this case, the explanatory memorandum does not specifically explain the delay but it does refer to provisions in Schedule 11 which implement measures that are part of the Secure and Sustainable Pension Reform package. The Committee notes that the Secure and Sustainable Pension Reform Package includes provisions which take effect at the end of the current financial year. Nevertheless, the Committee **seeks the Minister's advice** as to whether the reasons for the delayed commencement could be specifically included in the explanatory memorandum to assist readers and those affected by the legislation.

Relevant extract from the response from the Minister

> The Committee sought advice as to whether the reasons for the delayed commencement applicable to Schedule 11 could be specifically included in the explanatory memorandum to assist readers and those affected by the legislation.
>
> Schedule 11 contains reforms to the advance payment arrangements for pensions and income support supplement. The reforms provide for increased flexibility in the number and the amount of advances that are payable over a 12 month period. The reforms also provide for increases in the maximum amount of advances that are in line with increases in the pension rates.
>
> The commencement of this measure on 1 July 2010 provides pensioners and my Department with a period of time to adjust to the significant reforms to the payment arrangements for pensioners occurring on 20 September 2009.
>
> The second measure to be implemented on 1 July 2010 is the extension of the option to receive the minimum Pension Supplement on a quarterly basis. This measure is also designed to give veterans' affairs pensioners greater choice and more flexibility to plan and budget effectively.
>
> I have arranged for the attached correction to the explanatory memorandum to be presented as soon as possible.

I trust the information I have provided is of assistance to the Committee.

The Committee thanks the Minister for this response, and welcomes the advice that a correction to the explanatory memorandum has been prepared which includes the reasons for the delay in commencement. The Committee notes that the correction to the explanatory memorandum has now been tabled in the Senate.

Senator the Hon Helen Coonan
Chair

SENATOR SCOTT LUDLAM
AUSTRALIAN GREENS
SENATOR FOR WESTERN AUSTRALIA

Ms. Julie Dennett
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House,
Canberra, ACT 2600

7 September 2009

Dear Ms. Dennett,

Thank you for your letter of 13 August 2009 regarding the Anti-Terrorism Laws Reform Bill 2009, outlining the Committee's concerns with repealing section 101.4 of the *Criminal Code Act 1995* and the drafting of a new paragraph at section 102.1(2AB)(a) of the *Criminal Code Act 1995*.

With regard to the Committee's concern that repealing section 101.4 of the *Criminal Code Act 1995* may be considered to 'trespass unduly on personal rights and liberties' I respectfully disagree. Rather I would suggest that the existing undefined offence of 'reckless possession of a thing' trespasses unduly on personal rights and liberties because the offence has no parameters. The Committee's proposal to include a non-exhaustive list of 'things' is unsatisfactory as the very nature of a non-exhaustive list fails to adequately define the offence. If the Committee is able to provide further details of how repealing section 104.1 would trespass on personal rights and liberties I am happy to reconsider this provision.

The Committee has also proposed to move the words 'if practical to do so' at paragraph 102.1(2AB)(a) to the start of the subsection. The words 'if practical to do so' have been include to acknowledge the specific difficulty associated with notifying organisations that might not have easily identifiable contact points. I do not wish to amend the bill as suggested to cover other aspects of that subsection, precisely because of the increased discretion it will give the Minister in notification and listing.

Sincerely

Senator Ludlam

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The Hon Anthony Albanese MP
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

Reference: 5965-2009

19 AUG 2009

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

Dear Senator Coonan Helen,

Thank you for your letter dated 13 August 2009 about the Aviation Transport Security Amendment Regulations 2009 (No. 1) Bill 2009 (the Bill).

Part 1 of Schedule 1 of the Bill would amend the *Aviation Transport Security Act 2004* to enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government to designate security controlled airports into a category based on their risk profiles.

The purpose for the commencement of Part 1 of Schedule 1 being on proclamation or twelve months after the Act has received Royal Assent, is to enable industry to be consulted upon the details of different legislative requirements which may be implemented for each category of airport.

Further, delay in the commencement would also ensure that any action taken will be consistent with the Aviation White Paper which is expected to be released later this year.

I trust this letter addresses the concerns of the Committee in relation to the amending Bill.

Yours sincerely

ANTHONY ALBANESE

PARLIAMENT HOUSE CANBERRA ACT 2600
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RECEIVED
26 AUG 2009
Senate Standing C'ttee for the Scrutiny of Bills

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

25 AUG 2009

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

Dear Senator Coonan

Thank you for the letter of 13 August 2009 concerning the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009. Your Committee provided comments on two aspects of the Bill. Below is my response to the Committee's comments.

Schedule 1, item 22, new subsection 200E(2C)

As you would be aware, the Bill contains a new provision prohibiting directors and executives from participating in the shareholder vote to approve their own termination benefit. This improves the integrity of the shareholder vote and removes the conflict of interest which exists with a person voting to approve their own termination benefit.

However, there may be legitimate circumstances where directors and executives should be able to participate in the shareholder vote. One such example is identified in subsection 200E(2B) of the Bill, which provides an exception where the director or executive is casting a vote as a proxy on behalf of another person who is entitled to vote, in accordance with the directions on the proxy form.

There may also be other unforseen instances that may legitimately warrant the participation of directors or executives in the shareholder vote (for example, circumstances where the director or executive has somehow been dealt with extremely harshly and it would be unfair to prevent them from voting on the termination benefit). The Bill provides flexibility to address any harsh or unanticipated outcomes, by including a regulation making power in subsection 200E(2C) which provides that the regulations may prescribe cases where the prohibition does not apply. The purpose of the regulation making power is to ensure that any unforseen instances or unintended consequences can be addressed in a timely way.

Currently, there are no regulations prescribed under 200E(2C). I do not expect that the regulation making power would be relied upon unless significant events arose that would necessitate further exceptions to the prohibition.

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Schedule 1, sub-item 43(2)

The Bill provides a mechanism for calculating a person's average annual base salary which is dependent upon on the 'relevant period' (or the period over which the person has held the relevant office in the company). The relevant period applies in relation to managerial or executive office held 'before, on or after the commencement' of the Bill.

The Committee noted that sub-item 43(2) may have the potential for the Bill to apply retrospectively and affect existing contractual entitlements, which may unduly trespass on personal rights and liberties.

However, sub-item 43(2) is relevant only for the purposes of determining a person's 'relevant period'. The Bill does not apply retrospectively by virtue of sub-item 43(1), which provides that the reforms apply only to new contracts entered into, renewed, extended or which have a variation of a condition on or after the commencement date. Therefore, the Bill will not affect existing contractual entitlements.

I trust this information will be of assistance to you.

Yours sincerely

CHRIS BOWEN

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

MC09/12241

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

Dear Chair

Thank you for your letter of 13 August 2009 seeking my response to matters raised by the Senate Scrutiny of Bills Committee in relation to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

My response to the issues raised by the Committee is set out below.

Reversal of the onus of proof

The Committee sought advice on the reasons for the reversal of the onus of proof in item 13 of Schedule 1 of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill).

While proposed subsection 179E(3) of the Bill does reverse the onus of proof, there are several safeguards, and procedural hurdles to be overcome by the Director of Public Prosecutions (DPP), before a respondent is required to demonstrate that his or her wealth is not derived from one of the offences mentioned in subparagraphs 179E(1)(b)(i)-(iii).

The first safeguard is the requirement, in paragraph 179E(1)(a) of the Bill, that a court must first have made a preliminary unexplained wealth order under subsection 179B(1) of the Bill in relation to the person.

Before a court can make a preliminary unexplained wealth order under subsection 179B(1) of the Bill, three conditions must be met. The first condition is that the DPP must apply for an unexplained wealth order in relation to the person. The second condition is that the court must be satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired. The third condition is that the affidavit requirements of subsection 179B(2) must be met.

The matters to be included in an affidavit are:

1. the grounds on which an authorised officer suspects that the total value of the person's wealth exceeds the value of the person's wealth that was lawfully acquired, and

2. the property the authorised officer knows or reasonably suspects was lawfully acquired by the person and the property he or she knows or reasonably suspects is owned by the person or is under the effective control of the person and the grounds for that knowledge or suspicion.

Thus before a court may make a preliminary unexplained wealth order, it must be satisfied that an authorised officer has reasonable grounds to suspect that a person has unexplained wealth. The onus of proving all of these requirements rests with the DPP.

If a court makes a preliminary unexplained wealth order, the next safeguard is a respondent's right to apply to have the order revoked under section 179C of the Bill. A person has 28 days after being notified of the preliminary unexplained wealth order to apply to a court for the revocation. The 28 day time limit for applying may be extended (not exceeding 3 months) by the court where the person applies within the 28 day time limit for an extension of time for applying for a revocation order.

It is only after the DPP has satisfied a court that an authorised officer has reasonable grounds to suspect that a person has unexplained wealth that the onus of proving certain matters is placed on the respondent. It is appropriate in these circumstances that a person be required to explain the source(s) of his or her wealth because he or she is best placed to know this. Details of the source of a person's wealth will be peculiarly within his or her knowledge.

Finally, if the onus of proof were placed on the DPP to prove the matters under subparagraphs 179E(1)(b)(i)-(iii) of the Bill, this would undermine the purpose of the unexplained wealth provisions. If the onus of proof were placed on the DPP in respect of subparagraphs 179E(1)(b)(i)-(iii), the unexplained wealth provisions would be similar in effect to the current asset confiscation options under the *Proceeds of Crime Act 2002*.

In its conclusions on unexplained wealth, the Parliamentary Joint Committee on the Australian Crime Commission (the Committee) noted that, 'unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime ...'.[1] The Committee considered the unexplained wealth provisions in the Commonwealth's Bill to be a 'reasoned and measured approach to the problem of organised crime'.[2]

The unexplained wealth provisions are aimed at people who organise and derive profit from crime, but who are not linked directly to the commission of the offence. Existing asset confiscation mechanisms require a link to the commission of an offence and can be avoided by those who remain at arm's length from the commission of offences. The unexplained wealth provisions will still require a connection between a person's unexplained wealth and criminal

[1] Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 17 August 2009, paragraph 5.66.

[2] *Ibid*, paragraph 5.84.

offences within the Commonwealth legislative power, but not of the commission of a specific Commonwealth offence.

Retrospective application

The Committee sought advice on the reasons for the retrospective application of various items in Schedule 2, and item 18 of Schedule 4, of the Bill, and whether those reasons might be included in the explanatory memorandum to assist readers.

Item 8 of Schedule 2

This provision does not create any retrospective criminal liability through a new offence provision. Rather, it will allow an authorised officer to obtain a freezing order in relation to an account that is suspected, on reasonable grounds, to contain the proceeds of a specified offence or is an instrument of a serious offence, and where the conduct constituting the offence occurred before the commencement of Part 2-1A (Freezing orders).

Retrospective application is necessary to ensure the effectiveness of the freezing order provisions. Without retrospective application, freezing orders would not be able to be obtained in respect of proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, or an instrument of a serious offence, where the conduct constituting the offence occurred before the commencement of the freezing order provisions.

There is a real risk that funds in a bank account that are the proceeds of one of the offences mentioned above, or the instrument of a serious officers, might be dissipated and/or placed outside the reach of Australian law enforcement officials before a restraining order is obtained. A person who has already committed one of the offences mentioned above should not be able to avoid the application of the freezing order provisions.

Items 15, 18, 29, 31 and 35 of Schedule 2

These provisions do not create any retrospective criminal liability through new offence provisions. Rather, they enable the DPP to apply for restraining, forfeiture, pecuniary penalty and production orders, where it is suspected, on reasonable grounds, that a person committed a serious offence (defined in section 338). The amendments remove the current limit that the serious offence must have been committed within 6 years preceding the application.

This 6 year limitation precludes confiscation if relevant offences are not detected until more than 6 years after the offence was committed. It may also hamper confiscation when extended criminal conduct is considered to be one offence stretching over more than six years. As criminals routinely attempt to conceal offences, and crimes such as fraud and money laundering may occur over extended periods, the time limit can pose significant obstacles for non-conviction-based recovery. The removal of the 6 year time limitation for non-conviction-based asset recovery will ensure that criminals are not able to benefit from their crimes, regardless of when they occurred.

Without retrospective application, restraining, forfeiture, pecuniary penalty and production orders would not be able to be obtained in respect of conduct constituting a serious offence that

was committed more than 6 years before the application where the conduct constituting the offence occurred before the commencement of Part 2 of Schedule 2 of the Bill.

Items 42, 48, 50, 52, 54, 60 and 63 of Schedule 2

These provisions do not create any retrospective criminal liability through new offence provisions. Rather, they enable the restraint and forfeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction. Currently, the *Proceeds of Crime Act 2002* only permits instruments of indictable offences (other than terrorism offences) to be confiscated where a person is convicted of the offence.

If the amendments to sections 18, 19, 29, 47, 49 and 73 (items 42, 48, 50, 52, 54 and 60, respectively) were not given retrospective application, restraining orders, forfeiture orders, applications to exclude specified property from a restraining order and exclusion orders would not be able to be obtained for proceeds of specified offences or instruments of serious offences in respect of conduct constituting a serious offence that occurred before the commencement of Part 3 of Schedule 2 of the Bill.

The need for the amendments to sections 45, 85 and 111 (items 48, 60 and 65) to have retrospective effect is consequential on the amendments discussed above. The amendments to sections 45, 85 and 111 are necessary to ensure that third parties whose property is covered by a restraining order are not disadvantaged and that persons cannot escape forfeiting their property to the Commonwealth in certain circumstances.

A person with proceeds or instruments of serious offences should not evade asset confiscation because their conduct, which constitutes a serious offence, occurred before the commencement of Part 3 of Schedule 2 of the Bill.

Items 69 and 71 of Schedule 2

The retrospective application of items 69 and 71 of Schedule 2 enables legal aid commissions to benefit from the simplified legal aid payment system introduced by Part 5 of Schedule 2 of the Bill.

Were item 69 not made retrospective in application, it would create a considerable administrative burden for both legal aid commissions and the Official Trustee, who would have to administer two schemes for legal aid payments. Potentially, payments under both systems could continue for several years.

Further, if item 69 were not given retrospective application, there could be situations in which legal aid represented a person before and after the commencement of Part 5 of Schedule 2 of the Bill and would be required to recover the costs incurred before commencement in one way, and the costs incurred after commencement in a different way. The effect of items 69 and 71 is that costs incurred before the commencement of item 69 can be recovered under the simplified scheme.

Item 18 of Schedule 4

The provisions do not retrospectively criminalise any action. They allow law enforcement agencies access to the same techniques to investigate criminal activity, regardless of when that criminal activity has occurred.

I agree that the reasons provided above for the use of retrospective application in the Bill should be included in the Explanatory Memorandum and have instructed my Department to do so.

Definition of 'law enforcement officer' for controlled operations

The Committee sought advice on whether a definition of 'law enforcement officer' should be specifically included in proposed new section 15GC.

Section 3 of the *Crimes Act 1914* (Cth) provides definitions that apply throughout the Act unless the contrary intention appears. The proposed controlled operations provisions in Schedule 3 of the Bill, like the current provisions, rely upon the general definitions of 'law enforcement officer' and 'Australian law enforcement officer' at section 3 of the Crimes Act.

A separate definition is provided for 'law enforcement officer' for the purposes of the proposed assumed identities provisions in Schedule 3 of the Bill. This is provided because there are differences between the definition to be used for proposed new Part 1AC and the general definition at section 3 of the Crimes Act. For example, the definition to be used for proposed new Part 1AC would include officers of the Australian Taxation Office and any other agency specified in the regulations for that purpose (though no agency has as yet been prescribed).

Delegation of Ombudsman's powers

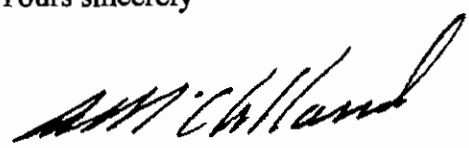
The Committee sought advice on the justification for a wide discretion in the delegation of the Ombudsman's powers, and whether it might be appropriate to limit the delegation in some way.

I agree that there is a wide discretion to delegate and I have asked my Department to consult the Ombudsman on whether there are options to limit the delegation.

Please let me know if I can be of further assistance, or provide you with any further information.

The action officer for this matter in my Department is Sarah Chidgey who can be contacted on (02) 6141 2800.

Yours sincerely



Robert McClelland

THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

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

Dear Senator Coonan Helen

I refer to the Standing Committee for the Scrutiny of Bills Ninth Report (19 August 2009) in which the Committee advised that it considered that further information should be added to the Explanatory Memorandum of the Midwife Professional Indemnity (Commonwealth Contribution) Bill 2009 to provide further explanation concerning the offences of strict liability and the standing appropriation.

The Explanatory Memorandum has been amended accordingly and I have arranged for it to be tabled in Parliament.

I appreciate the opportunity to address the Committee's comments on the bills.

Yours sincerely

NICOLA ROXON

1 SEP 2009

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7220 Facsimile: (02) 6273 4146

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

RECEIVED
21 AUG 2009
Senate Standing C'ttee for the Scrutiny of Bills

20 AUG 2009

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

Dear Senator Coonan

I refer to the letter from the Secretary of the Standing Committee for the Scrutiny of Bills (Committee) dated 13 August 2009 to the Senior Adviser to the Treasurer, regarding the Committee's comments on the National Consumer Credit Protection Bill 2009 and related bills (the Bills). The letter was referred to me as I have responsibility for this matter.

The Government welcomes the opportunity to clarify the approach that has been developed and put forward as part of the National Consumer Credit regime.

I understand that the Committee has raised concerns with the scope of a number of regulation making powers that have been included in the Bills, as well as a number of the penalties and fee arrangements. Specific responses to each of the concerns raised by the Committee are provided in the Attachment to this letter.

You will see that Government has endeavoured to ensure that there is adequate flexibility in the new arrangements to ensure the smooth transition to a national credit regime. This flexibility is necessary to address the inevitable concerns of industry and consumers at a time of regulatory change. I believe that the current Bills achieve the appropriate regulatory balance.

I am sure that both you and your Committee will continue to work with the Government in order to achieve this important national law reform.

Yours sincerely

CHRIS BOWEN

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Attachment

NATIONAL CONSUMER CREDIT PROTECTION BILL 2009

'Henry VIII' clauses – paragraphs 14(3)(b) and 15(5)(b)

Clauses 14 and 15 of the Credit Bill address the application of the Credit Bill to partnerships and trusts with two or more trustees. The sections determine, in relation to the partners in the partnership or the multiple trustees, first, who is required to comply with obligations under the Credit Bill, and, second, who bears liability for any contravention of the Credit Bill.

Paragraphs 14(3)(b) and 15(5)(b) enable regulations to be made that can exclude or modify the obligations on partners in the partnership or the multiple trustees. It is considered that a power of this type is appropriate to allow for a flexible application of the Credit Bill to partnerships or trustees. While no regulations are proposed at this time, it is envisaged that the most likely future use of the power would be to address situations where a modification or change is necessary so that a partnership or trust can operate as a lender or a credit service provider. In particular, it is noted that trusts are used extensively in securitisation processes, and that it is desirable to be able to change these requirements through the regulations where necessary to accommodate variations in existing structures.

'Henry VIII' clause – clause 28

Clause 28 allows regulations to prescribe a later date for commencement of Division 2, that is, the prohibition on engaging in credit activities without a licence.

Assuming passage of the Credit Bill in 2009, it is expected that Division 2 will commence on 1 July 2011. The power to defer commencement of this provision to a later date by regulation is included out of abundance of caution, that unforseen events may require licensing to be delayed, possibly at relatively short notice. Given the consequences of not being able to delay licensing (persons who lend would be committing an offence) it is considered desirable to allow for a regulation making power.

'Henry VIII' clause – clause 110

Clause 110 contains a broad regulation making power, to allow for exemptions from licensing provisions and credit activities, or to omit, or modify or vary provisions. This arrangement will facilitate a flexible approach to the application of the licensing requirements and reflects the Government's decision to adopt a broad definition of 'engaging in credit activities' and exclude activities that should not be subject to licensing requirements.

This broad approach may capture activities that should not be regulated and this will need to be addressed through appropriate exemptions. The draft

National Consumer Credit Protection Regulations 2009 contain draft exemptions identified in the consultation process.

'Henry VIII' clauses – subclauses 123(5) and 134(5)

Subclauses 123(5) and 124(5) give a power to make regulations that may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer (notwithstanding that the credit contract would otherwise be unsuitable).

The requirement on lenders and brokers to assess suitability is a new obligation, and is seen as a key element by the government. While no regulations are proposed at this time it is envisaged that the most likely future use of the power would be to accommodate changes in product design or delivery where it is unnecessary to impose the existing unsuitability requirements.

'Henry VIII' clause – clause 326

Clause 326 provides that regulations may modify the law in Division 2 of Part 7-1, determining the liability of persons for conduct of their agents. No regulations are proposed at this time.

The power to make regulations is restricted to modifying the relevant law, that is, it is not possible to exclude the application of these provisions. The inclusion of this power will enable the existing law to be modified where this is necessary to give clarity as to liability in a particular context or to achieve a policy objective (for example, to make clear that a principal may be liable or not liable for particular conduct of their agent).

'Henry VIII' clauses – subclauses 333(2) and (3)

The Commonwealth does not propose at this time that regulations will be made under subclauses 333(2) of the Credit Bill. The reason for including this regulation making power is that regulations will allow for the modification of the general rule in clause 333 will only be created if and when this is considered appropriate.

This regulation making power is consistent with section 1101H of the *Corporations Act 2001* (Corporations Act).

'Henry VIII' clauses – Schedule 1, paragraph 45(2)(d)

This provision, including the regulation making power, is replicated from the State Code. No regulations were made by the States and the Commonwealth does not propose any at this time.

Any regulation made under these provisions would be a legislative instrument subject to disallowance by Parliament.

Strict liability – various clauses

Subclauses 258(3), 274(5), 284(5), 300(2) and 319(4)

Certain offences in the Credit Bill carry strict liability as they do not require a 'fault' element to be proved and are procedural in their application. The application of strict liability to these provisions will significantly enhance the ability of the Australian Securities and Investments Commission (ASIC) to administer the enforcement regime. This is because infringement notices can be issued for contraventions of strict liability offences. ASIC may issue an infringement notice to address one off or irregular instances of non-compliance. The availability of civil or criminal penalties should deter repeated non-compliance.

Paragraph 4.17 of the Explanatory Memorandum to the Credit Bill notes that the overall structure of the sanctions regime reflects considerations of the *Review of Sanctions in Corporate Law* (Treasury, 2007), and the *Commonwealth Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Attorney General's Department, 2007) (Commonwealth Guide). The use of strict liability offences in the Credit Bill is included in this sanctions regime and is used having regard to the criteria regarding strict liability as set out in the Commonwealth Guide. This criteria states that such offences should be properly justified having regard to the level of the penalty units by which the offence is punishable, the likelihood that the effectiveness of the enforcement regime will be significantly enhanced, and the legitimacy of the grounds for penalising persons who's conduct lacks fault.

Generally, the particular strict liability provisions have been replicated from the ASIC Act to ensure that ASIC has consistent enforcement powers in the consumer credit context.

These criteria have been applied to:

- Subclause 258(3): The signing of a record of examination affects its evidentiary use, as a signed record is prima facie evidence of the statements that it records. A failure to comply with a requirement to sign a record of examination can jeopardise the effective use of statements made in examinations in the course of subsequent proceedings. Encouraging compliance with this provision will significantly enhance ASIC's effectiveness as the national regulator. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of a particular scenario without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold indentified by the Commonwealth Guide. This strict liability offence is consistent with an analogous offence in paragraph 24(2)(a) of

the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

- Subclause 274(5): Failure to comply with a requirement from ASIC that a person give all reasonable assistance in connection with a prosecution under section 274 of the Credit Bill can jeopardise ASIC's ability to understand and use material involved in such a prosecution, and inhibit ASIC excising its functions to ensure compliance with the law. Encouraging compliance with this offence will significantly enhance ASIC's effectiveness as the national regulator. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Therefore, there are sound reasons for this offence carrying strict liability. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold indentified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 49(3) of the ASIC Act.

- Subclause 284(5): The ability of ASIC to require persons to appear before an ASIC hearing, give evidence on oath, answer questions, and produce documents are essential elements of ASIC's enforcement functions. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 10 penalty units, below the threshold indentified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 58(4A) of the ASIC Act.

- Subclause 300(2): The orders that ASIC can make under section 300 of the Credit Bill are intended to be used on a short term basis to preserve the status quo and restrain certain dealings. Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is punishable by imprisonment, it carries a penalty level of 25 penalty units, below the threshold indentified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 73(3) of the ASIC Act.

- Subclause 319(4): Attaching strict liability to this offence is consistent with the Credit Bill's tiered approach to sanctions and allows ASIC to act quickly and in response to the magnitude of this offence without the need and time of an application to court. Also, although this offence is

punishable by imprisonment, it carries a penalty level of 50 penalty units, below the threshold indentified by the Commonwealth Guide. This strict liability offence is also consistent with an analogous offence in subsection 91(3A) of the ASIC Act.

Schedule 1, subclauses 33(5), 36(7), 38(9), 51(4), 53(3), 64(6), 65(4), 66(4), 67(3), 68(3), 71(6), 72(4), 73(3), 85(11), 87(4), 88(7), 90(2), 91(3), 94(3), 95(4), 108(4), 109(5), 136(3), 143(3), 145(4), 173(4), 174(4), 175(3), 178(3) and 190(3).

The Uniform Consumer Credit Code (UCCC), as administered by the States, contains criminal offence provisions not drafted in the Commonwealth style. As part of the Council of Australian Governments' (COAG) decision, it was agreed that the UCCC would be replicated and enacted into Commonwealth legislation.

If not identified as strict liability offences, the replicated UCCC offences would have attracted the default 'fault' elements of the Criminal Code. This would have made the offenses operate differently and would have made their enforcement in the Commonwealth context difficult. Changing the operation of these offenses would not meet the policy objectives of the National Credit Code.

Despite some penalty levels being in excess of the penalty level recommended in the Commonwealth Guide, in order to maintain the original policy objectives of the offences in the Commonwealth context, these offences have been indentified as strict liability.

Paragraph 8.25 of the Explanatory Memorandum to the Credit Bill notes that certain offences were identified as strict liability to maintain the same operational effect currently exists in the State jurisdictions, consistent with the policy intention of the provisions.

Wide discretion – inappropriate delegation of legislative power – paragraphs 55(2)(d) and (e)

Concerns have been raised that paragraphs 55(2)(d) and (e) may create uncertainty for persons engaging in credit activities about the standards of conduct expected of them, given that ASIC may take into account any other matter ASIC considers relevant and any matters prescribed by regulations.

The matters that ASIC may consider as relevant under paragraph 55(2)(d) are restricted by the opening words of subsection 55(2) to matters relevant to ASIC's opinion under paragraphs 55(1)(b) and (c), that is, that the licensee is either likely to contravene an obligation under section 47, or that the licensee is not a fit and proper person to engage in credit activities. The standards of conduct are therefore specified elsewhere in the legislation. Further, licensees would be aware of these standards when applying for a licence.

In relation to paragraph 55(2)(e), the draft regulations prescribe one matter to be taken into account, a failure by the licensee to lodge an annual compliance certificate as required by clause 53 of the Credit Bill. The inclusion of this in the regulations is an appropriate way of making public to licence holders matters which may affect a decision in respect of their licence.

Wide delegation of power – clauses 206 and 337

Clause 206 is an equivalent of section 1315 of the Corporations Act which provides that the power to lay charges is a power of ASIC, a delegate of ASIC or a person authorised by the Minister. Delegations within ASIC are made under section 102 of the ASIC Act. The power under section 1315 of the Corporations Act is exercised by senior ASIC staff. It is expected that the same practice would apply to the power in clause 206.

Clause 337 is an equivalent of subsection 1345A(1A) of the Corporations Act under which specified functions and powers of the Minister may be delegated to a member of ASIC or a staff member of ASIC. At this stage, no regulations are proposed to prescribe functions and powers for the purposes of this provision.

Under the Corporations Act, the Ministerial powers that may be delegated to ASIC members and staff members are the powers to consent to a name being available to a company, Australian registrable body or foreign company. This power may be delegated to senior officers of ASIC. Those delegates must have regard to written guidelines issued by the Minister in exercising that power.

Wide discretion – Schedule 1, subclause 171(4)

Subclause 171(4) of the National Credit Code (in Schedule 1) provides that 'ASIC may exclude, from the application of all or any provisions of this Part, a consumer lease specified by ASIC'.

The Committee has noted that this gives ASIC a broad discretion to exclude leases through an exemption power that is not a legislative instrument, and will not be subject to scrutiny.

The intention of subclause 171(4) was to only enable ASIC to exercise an exemption power that was not a legislative instrument, in accordance with section 5 of the *Legislative Instruments Act 2003*, that is, the exemption would be limited to a particular consumer lease rather than applying more broadly. In this context, it is to be contrasted with subclause 171(5) which enables ASIC to exercise an exemption power that is a legislative instrument, in respect of a class of consumer leases.

Incorporating material as in force from time to time – Schedule 1, clause 215

This clause has been included to allow for the incorporation of the Australian Bureau of Statistic's most recent publication entitled *Housing Finance, Australia* in order to maintain the mechanism used by the States and Territories for setting the thresholds for hardship variations and stays of enforcement (Transitional Bill, Schedule 1, subitems 3(5) and 3(6)).

This mechanism has had to be maintained as there are constitutional limitations on the ability of the Commonwealth to increase these thresholds for existing contracts.

NATIONAL CONSUMER CREDIT PROTECTION (FEES) BILL 2009

Imposing a tax by regulation – clause 5

The National Consumer Credit Protection (Fees) Bill 2009 (Fees Bill) enables the imposition of fees, as taxes, for things done under the Credit laws, such as the lodgment of documents, or inclusion of a document in, or inspection of, a register maintained by ASIC.

The Fees Bill defines the matters for which a fee may be charged (chargeable matters) and that the fees relating to these chargeable matters are so imposed as taxes. The regulations prescribe amounts which may be charged for these chargeable matters. Therefore, it is the Fees Bill which imposes the tax on chargeable matters. The regulations do not impose the tax but merely determine the quantum of tax.

The approach taken in the Fees Bill is generally consistent with the *Corporations (Fees) Act 2001* which deals with the imposition of fees under the Corporations Act.

NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2009

'Henry VIII' clauses – subclauses 6(2), (3) and (6)

Subclause 6(2) provides that regulations may prescribe matters of a transitional nature and that the regulations have effect 'despite anything else in this Act'.

Given that the basis of the new national credit law scheme emanates from a referral of State constitutional power and involves transferring law from eight jurisdictions; it is necessary that subclause 6(2) be included in the National

Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) to deal with matters of a transitional nature because:

- it is not possible to consider all of the transitional issues at the time of enactment which emanate from the referral of constitutional power and the transfer of the eight regulatory regimes into one national scheme;
- the need to ensure that any necessary consequential amendments that are inadvertently not provided for in the Credit Bill and the Transitional Bill can be made without the need for the enactment of another Act; and
- the requirement to maintain a comprehensive national law on credit regulation which provides certainty for industry participants and consumers.

Subclauses 6(3) and 6(6) explain the legal effect of the making of these regulations. These subclauses are necessary to ensure that the matters under the regulations achieve their policy intent.

'Henry VIII' clauses – Schedule 1, subitem 15(4)

The effect of subitem 15(1) is that a reference in the new Credit Code to an event, circumstance or thing of a particular kind is not confined to any such event, circumstance or thing happening or arising after the commencement of the Credit Bill, but can also include such an event, circumstance or thing that happened before the commencement, unless the contrary intention is expressed

Subitem 15(4) enables regulations to provide that subitem 15(1) does not apply to a particular reference or class of references in the new Credit Code. The reason for this regulation making power is that there may be references to an event, circumstance or thing of a particular kind before the commencement of the new Credit Code which should not be referenced. For example; it may be necessary to make a regulation to exclude unreasonable conditions imposed by a credit provider in its consent to the mortgagor's assignment or disposal of mortgaged property.

It should be noted that subitem 15(4) is similar to subsection 1404(3) in the Corporations Act.

THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

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

Dear Senator Coonan Helen

Thank you for referring the comments of the Senate Standing Committee for the Scrutiny of Bills on the National Health Security Amendment Bill 2009 (the Bill) that were contained in the Committee's *Alert Digest No. 9 of 2009* and attached to the letter of 13 August 2009 from the Committee's Secretary.

I provide the following responses to the matters raised by the Committee.

Legislative instruments to address emergency disease situations
New section 60A of the Bill enables me, as the Minister, to suspend controls imposed by Division 5, Part 3 of the *National Health Security Act 2007* (the Act) for a specified period, if I am satisfied that there is a threat involving a security sensitive biological agent (SSBA), to the health or safety of people, the economy or the environment. I am able to do so by legislative instrument. New section 60B enables me, by legislative instrument, to vary or revoke the earlier legislative instrument. The legislative instruments would take effect on the day on which the instrument is made or, if the instrument specifies a later day, on that day.

The Committee notes that, because the new provisions would allow instruments to take effect before they are registered on the Federal Register of Legislative Instruments, the legislative instruments could cover important matters without Parliamentary scrutiny. The Committee seeks advice as to how scrutiny of any emergency arrangements is intended to be provided.

My discretion to make the principal legislative instrument to suspend some or all of the provisions in Division 5 is confined by the circumstances in subsection 60A(2). I am required to be satisfied of two principal matters, that:

1. there is a threat involving the SSBA to the health or safety of people, the economy or the environment; and
2. the making of the legislative instrument would help to reduce the threat and maintain adequate controls for the security of all SSBAs.

For example, if the pandemic (H1N1) 2009 had been caused by an SSBA, I may have suspended the requirement for laboratories undertaking testing for the virus from reporting to the National Register on the transfer of samples for a period of three to six months. Such a decision would have taken away an onerous administrative burden which might otherwise have impeded their ability to undertake essential laboratory testing during the pandemic.

In being satisfied of the first matter, I must consider advice from the Commonwealth Chief Medical Officer, the Commonwealth Chief Veterinary Officer and any other person who I believe has scientific or technical knowledge in relation to SSBAs. In being satisfied of the second matter, I must consider advice from the Secretary of the Department of Health and Ageing.

Similarly, in making a legislative instrument to vary or revoke the principal legislative instrument in order to respond to the threat, my discretion to do so is confined by legislative preconditions. Those preconditions include considering further advice from the persons whose advice was considered for the purposes of making the earlier principal instrument.

The Explanatory Memorandum to the Bill explains that the delegation of legislative power is warranted by the extreme nature of a threat posed by an SSBA-related disease outbreak. The legislative instruments will facilitate an appropriate and immediate response to the challenge of safeguarding public health and safety in an emergency disease situation which presents unpredictable scenarios. Because the legislative instrument is a disallowable instrument, it will be subject to Parliamentary tabling and scrutiny processes, albeit that a disallowance would only take effect after the legislative instrument has come into effect.

I am confident that the above process provides the best balance of parliamentary scrutiny in the context of responding appropriately and immediately to an emergency disease situation involving an SSBA.

Cancellation of registration
New section 55A enables an entity to apply for total cancellation of its registration as an entity, or cancellation of its registration for one or more facilities. The Secretary must decide to cancel the registration in accordance with the application or refuse the application. The Secretary may decide to cancel the registration only if he or she is satisfied that the entity or its facility does not handle any SSBA that is on the National Register.

New section 55A was introduced to enable entities to apply for cancellation of their registration if they no longer handle SSBAs. Cancellation of registration means that the entity is no longer required to comply with the regulatory obligations imposed under the Act. Therefore, if registration is cancelled at the entity's request, that entity would not be deprived of any rights or liberties.

In contrast, the Secretary's decision to refuse an application for cancellation is a reviewable decision. This amendment was inserted by item 54 of the Bill. Subsection 81(1) provides that the Secretary must notify the entity as soon as practicable after making a reviewable decision. The Secretary's decision is then subject to internal review and application to the Administrative Appeals Tribunal, as set out in sections 82 and 83 respectively.

I trust that this clarifies the matters the Committee has raised.

Yours sincerely

NICOLA ROXON

18 AUG 2009

SENATOR THE HON JOE LUDWIG

Cabinet Secretary
Special Minister of State
Manager of Government Business in the Senate
Senator for Queensland

Reference no: C09/42976

Senator the Hon Helen Coonan
Senator for New South Wales
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. 9 of 2009* (12 August 2009) concerning the National Security Legislation Monitor Bill 2009 (the Bill). As the Minister responsible for the Bill I would like to respond to the two issues raised in the *Alert Digest* concerning the Bill.

The first issue concerns the regulation-making power to expand the definition of 'law enforcement or security agency' contained in paragraph (l) clause 4 of the Bill. This regulation-making power was included specifically to ensure that any new law enforcement or security agency could be captured under this definition in the future if necessary. The power to make regulations for this would be provided under paragraph 32(a). This power is consistent with many Acts and there is Parliamentary scrutiny of regulations.

The second issue concerns the reporting requirements in clause 29 of the Bill. Clause 29 provides that the Monitor's report relating to the performance of the Monitor's functions under paragraphs 6(1)(a) and (b) must be provided to the Prime Minister, who in turn tables the annual report in Parliament. This ensures that the core functions of the Monitor to review and consider the legislation would be captured in the annual report and open to Parliamentary scrutiny.

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Paragraph 6(c) provides that the Monitor must report on a reference to the Prime Minister if a matter relating to counter-terrorism or national security is referred by the Prime Minister to the Monitor. In the legislation as it stands, the Monitor is not required to report on these references in the annual report. I am pleased to advise the Committee that I am giving this issue serious consideration and will advise the Senate of the outcome of these deliberations in due course.

I thank the Committee for its diligence.

Yours sincerely

JOE LUDWIG

6 September 2009

ASSISTANT TREASURER
SENATOR THE HON NICK SHERRY

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

Dear Senator Coonan

I refer to a letter of 13 August 2009 from Ms Julie Dennett, Secretary, Standing Committee for the Scrutiny of Bills, to the Treasurer regarding the Committee's concerns about two provisions contained in the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009. The letter has been referred to me as I have portfolio responsibility for this matter.

Items 15 and 16 of Schedule 2 to the Bill have been included to ensure continuity in the transfer of responsibility for the regulation of tax agents from the existing state tax agents' boards (the old boards) to the new, national Tax Practitioners Board created by the *Tax Agent Services Act 2009*. Relevantly, item 15 deems things done by, or in relation to, an old board to be things done by, or in relation to, the new board. Similarly, item 16 deems a reference in an instrument to the old board to be a reference to the new board.

Since it is difficult to identify every circumstance where it is appropriate for the new board to be considered to be the old board, these provisions are necessarily phrased in broad terms. To address the *possibility* that this may have an unforseen and inappropriate outcome, these provisions include a ministerial discretion to determine that they do not apply in particular instances.

In relation to the Committee's concerns, this discretion could not be used by the new board (or a minister) to substitute a less favourable decision (with respect to one originally made by the old boards). Significantly, the other provisions in the Bill ensure that existing decisions of the old board (whether they be to register an entity or terminate that entity's registration) continue to apply under the new regulatory regime administered by the new board. The ministerial discretion under items 15 and 16 cannot alter this.

The example provided in the explanatory memorandum highlights a situation where it is appropriate for the new board to be deemed to 'stand in the shoes of' an old board. It notes that item 15 will allow the new board to appeal a decision of the Administrative Appeals Tribunal (AAT) to overturn a previous decision of an old board (that is, it transfers the appeal rights from the old board to the new board).

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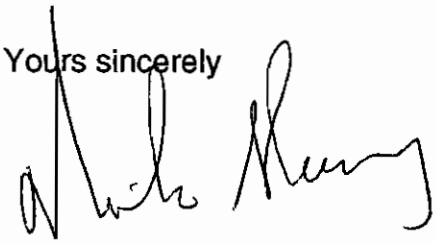
Taking this example, if for instance the ministerial discretion was exercised so that item 15 did not operate in this case, then the only result would be that new board could not appeal the AAT's decision. This would not result in a decision being substituted but, rather, would merely prevent the matter being subject to judicial review.

Thank you for providing me with an opportunity to address the Committee's concerns in relation to this Bill.

Yours sincerely



NICK SHERRY

ASSISTANT TREASURER
SENATOR THE HON NICK SHERRY

RECEIVED
7 SEP 2009
Senate Standing Ctee for the Scrutiny of Bills

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

Dear Senator

Thank you for your letter of 13 August 2009 to the Treasurer concerning Tax Laws Amendment (2009 Measures No. 4) Bill 2009. Your letter has been referred to me as I have portfolio responsibility for this matter.

The Senate Standing Committee for the Scrutiny of Bills has drawn attention to Tax Laws Amendment (2009 Measures No. 4) Bill 2009, and in particular Schedule 2, subitem 26(2). Schedule 2 introduces various provisions that aim to improve the integrity of a group of private philanthropic trust funds currently known as prescribed private funds (PPFs) (to be called private ancillary funds (PAFs) from 1 October 2009). The Senate Committee has raised concerns with item 26 of Schedule 2, which provides transitional arrangements for existing PPFs, seeking advice on how parliamentary scrutiny will be achieved for the transitional arrangements.

Currently, the Governor-General is responsible for prescribing trust funds as PPFs. The date a fund is prescribed is usually backdated to the day that a Treasury minister agrees to recommend prescription to the Governor-General. The Governor-General's prescription is subject to disallowance by either House of Parliament.

However, responsibility for the administration of PPFs is being moved to the Commissioner of Taxation. From 1 October 2009, PPFs will no longer be prescribed by regulation in the *Income Tax Assessment Regulations 1997*. Rather, the Commissioner will be responsible for determining whether a trust fund is a PAF (according to a legislative definition) and determining whether that fund is entitled to be endorsed as a deductible gift recipient (DGR). This will bring the treatment of PAFs into line with other DGRs.

It is possible that on 1 October 2009, there will be a limited number of funds that: have been approved by a Treasury minister for recommendation to the Governor-General that a trust fund be prescribed as a PPF; but have not yet been prescribed in the *Income Tax Assessment Regulations 1997* as a PPF.

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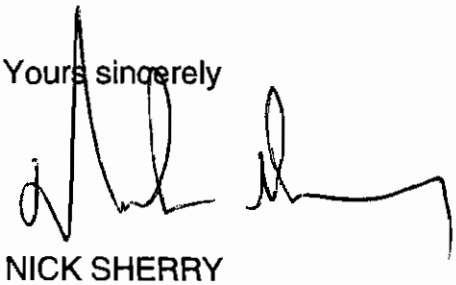
The transitional arrangements include a method of dealing with this group of funds. The Treasurer will be given the power to make a declaration, by way of legislative instrument, after 1 October 2009 that those funds that have been approved by a Treasury minister, but have not yet been prescribed, are taken to be PPFs.

This treatment is consistent with the movement of responsibility for the administration of PPFs to the Commissioner of Taxation. Parliamentary scrutiny will be maintained, as the Minister's declaration will be by way of legislative instrument which is reviewable (and disallowable) by either House of the Parliament. This is consistent with the current prescription mechanism undertaken by the Governor-General.

I trust this information will be of assistance to you.

Yours sincerely



NICK SHERRY

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

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

Dear Senator Helen Coonan

TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL BROADBAND NETWORK MEASURES NO.1) BILL 2009

I refer to the letter from the Secretary of the Standing Committee for the Scrutiny of Bills, dated 13 August 2009 concerning the above Bill.

For your information, the Government introduced the *Telecommunications Legislation Amendment (National Broadband Network Measures – Network Information) Bill 2009* into the House of Representatives on 19 August 2009. This Bill will replace the *Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009* currently before the Senate. The only difference in this Bill is to the definition of the term 'NBN Company', which has been updated to reflect the fact that the company established by the Government has recently changed its name to NBN Co Limited.

My response to the two issues of concern raised in the *Alert Digest No.9 of 2009* in relation to the Bill follows.

Delegation of legislative power – Schedule 1, item 32, new subparagraph 531G(3A)(b)(iii)
I note the Committee's concern about the operation of the regulation-making power in proposed paragraph 531G(3A)(b), specifically the issue of whether there is a time limit on the period during which information can be used, and on the scope of the power to make regulations for a purpose 'ancillary or incidental to' a matter set out in proposed subparagraphs 531G(3A)(b)(i) and (ii).

Period during which information can be used by an entrusted public official

Section 531G relates to the protection and use of information by entrusted public officials. Subsection 531G(1) (as proposed to be amended) would provide that an entrusted public official must not disclose or use protected network information. Subsections 531G(2) and (3A) (as proposed to be amended) would provide exceptions to this general prohibition on disclosure and use.

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Proposed subparagraph 531G(3A)(b), which would provide that an entrusted public official may use protected network information for a purpose specified in the regulations, is subject to a sunset period of 10 years: see proposed subsection 531G(3AC). The Explanatory Memorandum notes on page 33:

Proposed subsection 531G(3AC) would provide that the exception in paragraph 531G(3A)(b) would cease to have effect at the end of the period of 10 years beginning on the day on which this subsection commences. It is appropriate that the power to specify purposes in the regulations for which disclosure to other entrusted public officials would be permitted is time-limited, so that use of the information by entrusted public officials can occur during the roll-out of the NBN, but after the completion of the Implementation Study, for purposes that relate to a broadband telecommunications network.

Any regulations made under subparagraph 531G(3A)(b) ceases to have effect at the end of the period of 10 years beginning on the day on which this subsection commenced. This will mean that after that period, an entrusted public official cannot use the protected network information for purposes that have been specified in the regulations, and that, unless one of the other exceptions under proposed subsection 531G(3A) applies, the entrusted public official would not be permitted to use the information at all.

I note that proposed paragraph 531G(2)(b) operates in the same way with respect to the disclosure by entrusted public officials of protected network information, and is similarly subject to a 10-year sunset period (see proposed subsection 531G(2C)).

Scope of regulation-making power

I am satisfied that the scope of the regulation-making power in proposed paragraph 521G(3A)(b) is sufficiently defined. It is intended that the regulations may only specify purposes that relate to the creation or development of a broadband telecommunications network, the supply of carriage services over such a network, or related matters. In my view the legislation makes it clear that the power to specify a purpose in the regulations is limited, and that a purpose specified must be related to the development of such a network, the supply of services over such a network, or related matters.

I note that any regulations made specifying purposes for which information may be used (under proposed paragraph 531G(3A)(b)) or disclosed (under proposed paragraph 531G(2)(b)) would be subject to disallowance by either House of Parliament, and this provides an avenue for parliamentary scrutiny of the purposes that are specified in any regulations that are eventually made.

Denial of natural justice – Schedule 1, item 39, new subsection 531H(2)
The provision contained in the Bill is identical to the provision contained in the current subsection 531H(2) of the *Telecommunications Act 1997*.

The effect of this provision is that an authorised information officer (being a Commonwealth officer who receives protected network information from carriers and utilities, and who is permitted to disclose the information in certain circumstances) is not required to give a carrier or a utility an opportunity to be heard in relation to a decision to disclose protected network information to the NBN Company or another designated broadband company.

It is important to note that affected carriers and utilities would have been consulted, and would have had the opportunity to express their views, at the outset of the process, when they were initially required to provide the information. The Bill provides that carriers and utilities that are to be required to provide information in accordance with an instrument made by the Minister under subsection 531C must be consulted and will have five business days to make a submission in relation to the draft instrument (see subsection 531C(4)). Carriers and utilities would be aware that information that they may be required to provide will be used to assist the Implementation Study and, subject to further Ministerial approval, may be disclosed to the NBN Company or to another designated broadband company. As noted in the Explanatory Memorandum (page 35), affected carriers and utilities would have the opportunity to comment on the possible subsequent disclosure of that information by an authorised information officer to those companies as part of the initial consultation process that is required by subsection 531C(4).

The Bill is intended to exclude any obligation that may arise under common law rules of natural justice to consult carriers about decisions to disclose the information to the NBN Company or to any other designated broadband company. As was the case when the original provision was included in Part 27A in 2008, this is intended to minimise the potential for legal challenges to the process stalling the planning and roll-out of the National Broadband Network.

This provision would not, however, affect the Courts' ability to examine the making by an authorised information officer of a decision to disclose protected network information to the NBN Company or another designated broadband company.

The Department's contact officer is Mr Philip Mason, Assistant Secretary, National Broadband Network and Fibre Roll-out Regulation. Mr Mason may be contacted on telephone 02 6271 1579 or e-mail at philip.mason@dbcde.gov.au if further information is sought.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

The Hon Alan Griffin MP
Minister for Veterans' Affairs
Federal Member for Bruce

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

Dear Senator Coonan

I refer to the Secretary's letter of 20 August 2009 advising of the Committee's comments relating to the Veterans' Affairs and Other Legislation Amendment (Pension Reform) Bill 2009 (the Bill).

The Committee sought advice as to whether the reasons for the delayed commencement applicable to Schedule 11 could be specifically included in the explanatory memorandum to assist readers and those affected by the legislation.

Schedule 11 contains reforms to the advance payment arrangements for pensions and income support supplement. The reforms provide for increased flexibility in the number and the amount of advances that are payable over a 12 month period. The reforms also provide for increases in the maximum amount of advances that are in line with increases in the pension rates.

The commencement of this measure on 1 July 2010 provides pensioners and my Department with a period of time to adjust to the significant reforms to the payment arrangements for pensioners occurring on 20 September 2009.

The second measure to be implemented on 1 July 2010 is the extension of the option to receive the minimum Pension Supplement on a quarterly basis. This measure is also designed to give veterans' affairs pensioners greater choice and more flexibility to plan and budget effectively.

I have arranged for the attached correction to the explanatory memorandum to be presented as soon as possible.

I trust the information I have provided is of assistance to the Committee.

Yours sincerely

Alan Griffin
ENCL

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2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

VETERANS' AFFAIRS AND OTHER LEGISLATION AMENDMENT (PENSION REFORM) BILL 2009

CORRECTION TO THE EXPLANATORY MEMORANDUM

PAGE 98 – SCHEDULE 11 – ADVANCE PAYMENTS

Last sentence – after the last sentence add: "This commencement date provides pensioners and the Department with a period of time to adjust to the significant reforms to the payment arrangements for pensioners occurring on 20 September 2009. Two measures will be implemented on 1 July 2010: the changes to advance payments and the option to receive the minimum Pension Supplement on a quarterly basis instead of receiving the whole amount fortnightly. Implementing these two measures at the same time will give pensioners greater choice and more flexibility to plan and budget effectively."

(Circulated by the authority of the Minister for Veterans' Affairs, the Honourable Alan Griffin, MP)