SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2010

17 March 2010

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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

FOURTH REPORT OF 2010

The Committee presents its Second 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:

Corporations Amendment (Financial Market Supervision) Bill 2010
Corporations (Fees) Amendment Bill 2010
Healthcare Identifiers Bill 2010
Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010
Tax Laws Amendment (2010 Measures No.1) Bill 2010

Corporations Amendment (Financial Market Supervision) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter received on 10 March 2010. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses of Parliament the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Treasury

Background

Introduced with the Corporations (Fees) Amendment Bill 2010, the bill amends the *Corporations Act 2001* (the Act) to provide for the Australian Securities and Investment Commission (ASIC) to supervise trading on financial markets with a domestic Australian market licence. The bill contains three key measures:

- removes the obligation on Australian market licensees to supervise their markets, replacing it with an obligation to monitor and enforce compliance with the markets' operating rules;
- provides ASIC with the function of supervising domestic Australian market licensees; and
- provides ASIC with additional powers including the power to make rules with respect to trading on such markets and additional powers to enforce such rules.

Delayed commencement
Clause 2

Subclause 2(1) contains the table of commencement information and provides that Schedule 1 commences on a day 'to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months' after Royal Assent then they are repealed. This could lead to a situation in which commencement of the bill is delayed by longer than six months.

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. The explanatory memorandum provides (at 1.13) that:

> The 12 month time period for commencement is necessary, as there is a considerable amount of transitional work to be done in order for ASIC to be capable of performing the supervisory functions, including acquiring the necessary systems. This has the potential to take a significant amount of time and possibly longer than six months but less than a year.

In the circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

Clause 2: Delayed commencement

As you are aware, the Bill's table of commencement states that the Bill will commence on a day 'to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months' of Royal Assent, then the Bill will be repealed.

The explanatory memorandum to the Bill states, at paragraph 1.13, that the 12 month time period for commencement is necessary, as there is a considerable amount of transitional work to be done in order for the Australian Securities and Investments Commission (ASIC) to be capable of performing the supervisory functions, including acquiring the necessary systems. This has the potential to take a significant amount of time and possibly longer than six months but less than a year. It is appropriate that the provisions be repealed if the Bill does not commence within a year, as it is not appropriate to have the obligations on market operators amended without ASIC taking over responsibility for supervision.

The Committee thanks the Minister for this response.

Wide discretion
Insufficient parliamentary scrutiny
Schedule 1, proposed section 798G

The bill provides that ASIC may, by legislative instrument, make rules that deal with a wide range circumstances relating to the activities or conduct of licensed markets and associated people and financial products. A market integrity rule may include a penalty of up to $1 million and ASIC must obtain the written consent of the Minister to the making of the rule, usually before the rule is made except in emergency circumstances.

The explanatory memorandum states (at p. 11) that:

> The regime is designed to be flexible and to allow ASIC to make rules to cover new and emerging issues as the market adapts and innovates, while also recognising that every market is different and needs operating rules tailored to the specifics of that market.
>
> A breach of a market integrity rule will be a breach of a civil penalty provision of the Act, and subject to a pecuniary penalty of up to $1 million. ASIC will set a penalty amount for the breach of a market integrity rule where it is appropriate to do so. This reflects the broad range of matters which the market integrity rules are expected to cover. Some rules will relate to minor and technical or procedural matters and it will be appropriate that a lower penalty level, or no penalty, attach to those rules.

The Committee's preference is usually that matters of such significance (in this instance potentially attracting a penalty of up to $1 million) would be identified in more detail in the primary legislation and be subject to full parliamentary scrutiny.

The Committee acknowledges the exceptional circumstances, the reasons outlined in the explanatory memorandum and the requirement for ministerial consent before a market integrity rule can be made. The Committee also recognises the fact that a rule will be a legislative instrument subject to the scrutiny and disallowance regime provided by the *Legislative Instruments Act 2003* and the fact that the bill appears to

be seeking to formalise in legislation what is a clear policy decision. As a result, the

Committee **leaves to the Senate as a whole** the question of whether it is appropriate for ASIC to have the ability to make market integrity rules.

However, the Committee remains concerned from a scrutiny perspective that the bill does not contain general minimum requirements or a framework for the content of any market integrity rules, such as that each rule must: specify the purpose of the rule; specify to whom the rule applies (individuals and/or bodies corporate, is collective responsibility permitted); detail the conduct the subject of the rule, with each element in separate paragraphs to aid clarity; explain if fault is required or excluded in clear terms; ensure that the penalty, if any, is adequate and appropriate; and detail whether any time limits apply. Therefore, the Committee **seeks the Treasurer's advice** on whether consideration can be given to providing ASIC with more legislative guidance about the content of any market integrity rules.

> *Pending advice from the Treasurer, 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

Schedule 1, proposed section 798G: Parliamentary scrutiny

The Bill provides that ASIC may make market integrity rules. These rules will be legislative instruments which will deal with the activities or conduct of licensed markets, persons in relation to licensed markets and financial products. A breach of a market integrity rule will be a breach of a civil penalty provision and subject to a penalty of up to $1 million.

The Committee has acknowledged the exceptional circumstances, the reasons outlined in the explanatory memorandum and the requirement for ministerial consent before a market integrity rule can be made.

The *Corporations Act 2001* (the Act), which the Bill amends, already makes certain conduct, like insider trading, illegal. The market integrity rules are designed to supplement the Act by filling in the details of conduct required in order to ensure market integrity. For example, the rules specify such things as provisions for continuing education of responsible executives, requirements for keeping records, provisions for automated order processing and numerous other matters.

The market integrity rules are very technical in nature and, as such, are not suitable for greater parliamentary scrutiny. The draft market integrity rules for the Australian Securities Exchange and Sydney Futures Exchange markets are currently out for consultation and are available on the ASIC website: www.asic.gov.au. Together, the drafts of the rules run to 130 pages.

An example of the technical nature of the rules can be seen in rule 5.10.2(d), which allows dealing in Cash Market Products 'where a listed entity acquires assets and as part or full consideration, issues new Cash Market Products (except Loan Securities) to the vendor and the Trading Participant has made a prior firm arrangement with the vendor to place these Cash Market Products as soon as they are issued. The Trading Participant must then ensure that the details of the issue to the vendor are advised to the Market Operator by the listed entity immediately the Cash Market Products are issued'. Due to the extremely technical nature of the rules, the quality of the rules would not be improved by further parliamentary scrutiny than what is already provided for in the Bill. It would also not be desirable to put this level of detail in a statute, since the rules may need to be changed frequently, sometimes at short notice, to accommodate new developments in markets.

A level of scrutiny is already provided for in the Bill. The market integrity rules, as the Committee noted, must be approved by the Minister. Approval will be required in advance, except in the situations covered by subsection 798G(4), designed to deal with emergency situations. They are then lodged before Parliament as legislative instruments.

In addition, it is more appropriate that the ability to make market integrity rules should be given to ASIC, as opposed to the status quo remaining. At present the same sort of rules are set and enforced by market operators, which are independent commercial bodies. Market operators are able to impose substantial penalties for a breach of their rules (up to $1 million in the case of ASX).

Consequently, the Bill provides for far greater parliamentary scrutiny of the market integrity rules than exists under the current arrangements.

The Committee also questions whether the Bill gives too wide a discretion to ASIC and suggests that the Bill should set out 'general minimum requirements or a framework for the content of the market integrity rules, such as that each rules must: specify the purpose of the rule; specify to whom the rule applies (individuals and/or bodies corporate, is collective responsibility permitted); detail the conduct the subject of the rule, with each element in separate paragraphs to aid clarity; explain if fault is required or excluded in clear terms; ensure that the penalty, if any, is adequate and appropriate; and detail whether any time limits apply'. The Committee has sought advice on whether consideration can be given to providing ASIC with more legislative guidance about the content of any market integrity rules.

Given the nature of the rules, attempting to specify such matters in the Bill would be unduly restrictive. For example, some rules are purely definitions, so applying those requirements to these rules would be inappropriate. In addition, the other suggested

requirements are not relevant in the context of the market integrity rules. For example, no individuals can be participants, so rules applying to participants will never apply to individuals. Moreover the nature of markets is that they are constantly changing and evolving. The recent global financial crisis demonstrated the speed with which problems can develop in markets and the unexpected directions from which they can come.

The Government is sympathetic to the desire to have clear rules, easily understood by those affected by them. The draft rules posted on the ASIC website follow the existing framework of rules and so are readily understood by those affected. Endeavours will be made to ensure future rules are equally clear. However, specifying minimum requirements for rules would not help to achieve that aim.

The Committee thanks the Minister for this response, which addresses its concerns. The Committee appreciates the Minister's commitment to ensuring that the existing framework and clarity of market integrity rules is maintained in future rules.

'Henry VIII' clause
Schedule 1, item 14, section 798L and item 34, section 1513

Item 798L provides that regulations may exempt a person or class of persons and financial markets from the operation of proposed Part 7.2A of the bill (*Supervision of financial markets*), or varied its applications as specified in the regulations. This is a 'Henry VIII' clause.

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated 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.

While the Committee does not condone the use of 'Henry VIII' clauses, it notes that explanatory memorandum explicitly states (at p.14) that:

> The Bill provides for regulations to be able to make exemptions from and modify the legislation. Provisions which allow similar exemption and modification are spread throughout the Act. Including such a provision in this new Part is in line with the

construction of the Act and similar provisions applying in respect of existing Parts. This regulation making power is needed to allow the framework to develop to meet innovations in the market. The financial market is by nature fluid and it may be necessary to apply the rules differently to different entities. If it becomes clear that this is necessary, the rules may need to be modified swiftly to ensure the integrity of the market is maintained. The regulation making power will allow the framework to adapt quickly to developments in the market.

Item 1513 will allow regulations to provide for transitional arrangements and the provision specifically states that these 'may modify provisions of this Act.' The explanatory memorandum states (at p.14) that the ability to implement transitional arrangements 'will be important if practical issues arise over the coming months with the transfer of responsibility for supervision from market operators to ASIC.'

The usual scrutiny and disallowance mechanisms will apply to any regulations made under these provisions.

The Committee considers that proposed sections 798L and 1513 may inappropriately delegate legislative powers but, given the detailed reasons stated in the explanatory memorandum, **leaves for the Senate as a whole** the question of whether it does so unduly.

Relevant extract from the response from the Minister

The Bill puts forward two proposed sections which will allow the regulations to vary the Bill. Specifically, proposed section 798L provides that the regulations may exempt a person or class of persons and financial markets from the operation of the proposed Part 7.2A. In addition, item 1513 of the Bill allows the regulations to provide for transitional arrangements including the ability to modify the provisions of the Act.

This Bill reflects the current framework of the Act, which contains numerous Henry VIII provisions and allows rules to be modified by regulations or by ASIC, in order to respond to the complexity and urgency of regulating the operations of markets in a modern global market environment.

The Bill is more conservative in its use of Henry VIII powers than the current Act. Chapter 7 of the Act deals with financial services and markets. Sections 926A, 951B, 992B, 1020F and 1075A currently give ASIC the power to exempt any person or class of persons or any financial product or class of products from any or all the provisions of various parts of Chapter 7, or to declare that those parts apply to them as If specified provisions were omitted, modified or varied. The proposed section 798L reflects these provisions, but requiring the exemption to be by regulations rather than by a declaration from ASIC. Any

new exemptions under the Bill will therefore be subject to greater parliamentary scrutiny than is required for exemptions under those current provisions.

Currently, sections 926B, 951C, 992C, 1020G and 1045A allow exemptions from various parts of Chapter 7 by regulations. Section 1368 of the Act also allows regulations to be made, among other things, providing that Chapter 7 or specified provisions of it have no effect or only a prescribed effect in relation to a specified person or class of persons or no effect in relation to a specified transaction or class of transactions or a specified transaction or class of transactions entered into by a specified person or class of persons. The regulations may also provide that contravention of a prescribed term or condition is an offence. The Bill does not seek to replicate this exemption power.

Furthermore, item 1513 only applies in relation to transitional matters. This is a limited and conservative use of the power to modify by regulations, and will be important if practical issues arise over the coming months concerning the transfer of responsibility for supervision from market operators to ASIC.

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

Review of decisions
Schedule 1, item 24

This item excludes decisions relating to market integrity rules (such as ASIC's decision to make a market integrity rule) from review of the Administrative Appeals Tribunal (AAT). The explanatory memorandum (at p.15) states that:

> It is appropriate that such decisions are not subject to review by the AAT, as the decisions excluded are more akin to policy and rule-making decisions and should not be subject to merit review.

Since the bill appears to be seeking to implement what is a clear policy decision, the Committee **leaves to the Senate as a whole** any further consideration of this issue.

> *In the circumstances, the Committee makes no further comment on this item.*

Relevant extract from the response from the Minister

Schedule 1, item 24: Review of decisions

Item 24 of the Bill excludes decisions concerning the market integrity rules from review of the Administrative Appeals Tribunal (AAT). This includes the decision by ASIC to make a market integrity rule, a decision by the Minister to consent to or not to consent to the making of a market integrity rule and a decision by ASIC in relation to alternatives to civil proceedings.

As the explanatory memorandum states, it is appropriate that such decisions are not subject to review by the AAT, as the decisions which are excluded are more akin to policy and rule-making decisions and should not be subject to merit review.

The Committee thanks the Minister for this response.

Retrospective application
Omission in explanatory memorandum
Schedule 1, item 34, proposed subsection 1512(1)

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.

Proposed section 1512(1) provides that items 2, 5 to 11, 14, 17 and 18 of Schedule 1 'apply in relation to Australian market licences granted before, on or after commencement'. Although the reason for this approach can be inferred from the nature of the legislation the Committee notes that – despite the reference to *Schedule 1, item 34, section 1512* at p. 14 of the explanatory memorandum – there does not appear to be a detailed statement about the justification for proposed section 1512(1). The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by a detailed explanation of the intent and operation of proposed amendments. The Committee **draws to the attention of the Treasurer** the lack of detailed explanation of this item.

> *In the circumstances, the Committee makes no further comment on this provision.*

Relevant extract from the response from the Minister

Schedule 1, item 34: Retrospective application

The Government has decided to transfer the responsibility for the supervision of Australia's domestic licensed financial markets from market operators to ASIC. The Bill gives effect to this decision.

It would clearly be undesirable to have existing markets supervised by themselves, subject to rules they write themselves and not subject to market integrity rules while new markets were supervised under the new regime and were subject to market integrity rules. This would be inequitable and would defeat the aim of the Bill, that ASIC act as a whole-of-market supervisor to ensure the ongoing Integrity of Australia's financial market.

The legislation is not retrospective, as it will apply to all domestic licensed financial markets from the date of commencement of the amending schedule, regardless of the date on which each was licensed. Entities will not have to comply with the market integrity rules before the date of commencement. The amendments made by items 12 and 13 relate to requirements that must be satisfied before a new market licence is issued. It is appropriate that any application which has not been decided when the new regime comes into effect will be decided in terms of its compliance with the new regime, not the previous one.

The Committee thanks the Minister for his detailed response to the issues raised.

Corporations (Fees) Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter received on 10 March 2010. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses of Parliament the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Treasury

Background

Introduced with the Corporations Amendment (Financial Market Supervision) Bill 2010, the bill is a supporting bill which contains amendments regarding chargeable matters in support of the measures in the Corporations Amendment (Financial Market Supervision) Bill 2010. This is required to be in a separate bill for constitutional reasons as a bill imposing taxation.

The bill amends the *Corporations (Fees) Act 2001* to allow a fee to be charged to market operators in respect of market supervision functions which the main Bill vests in the corporate regulator Australian Securities and Investment Commission (ASIC).

Wide delegation
Schedule 1, Items 3 and 4

In accordance with the 1997 Wallis Inquiry recommending that the costs of financial regulation should be borne by those who benefit from it, the *Corporations (Fees) Act 2001* provides that regulations may prescribe fees for defined *chargeable matters*. In relation to these fees, any such regulation can specify either an amount as the fee or a method for calculating the amount of the fee and the fee 'need not bear any relationship' to the cost of the *chargeable matter*.

Similarly, item 4 of this bill seeks to provide that the regulations to the Act may also prescribe fees in relation to ASIC's proposed new role to supervise trading on domestic Australian markets.

However, the existing ability to prescribe fees by regulation authorised by the *Corporations (Fees) Act 2001* is limited by the section 6 caps on the amount or sum of the fees chargeable.

The Committee notes that the effect of item 3 means that there is no limit proposed for the fee or the sum of the fees that will be chargeable under the new section 6A power. The explanatory memorandum (at p.15) acknowledges that the bill places no cap on the amount ASIC can charge and states that this is because the cost to supervise the market will change dramatically in response to the number of market participants and the volume of trades performed. The explanatory memorandum also says (at p. 15) that:

> The formula for calculation of the levy on market operators will be set out in the Regulations and will be consulted upon with industry before being introduced.

The clauses are clearly designed to allow the imposition of fees by regulation of any amount in relation to ASIC's proposed new financial market supervision function. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it is appropriate for the bill to have this effect.

> *In the circumstances, the Committee makes no further comment about this approach.*

Relevant extract from the response from the Minister

Schedule 1, items 3 and 4: Wide delegation in the Fees Bill

The Government's decision to transfer supervisory responsibility to ASIC confers substantial new functions on ASIC.

The Wallis Inquiry, which reported in 1997, made a recommendation that regulatory agencies should collect enough revenue from the financial entities which they regulate to fund themselves. The principle is that, for reasons of equity and efficiency, the costs of financial regulation should be borne by those who benefit from it.

In line with this principle, the Fees Bill provides ASIC with the ability to impose a fee on market operators in relation to the functions it will be performing under the Bill. The Regulations will specify how the fee will be calculated and when it will be imposed.

It is not appropriate that a cap be placed on the amount that ASIC can charge market operators as the amount it will cost to supervise the market, and therefore also the amount it will be necessary for ASIC to recover, will change dramatically as financial markets enter and leave Australia, and as the amount of trades executed on markets in Australia fluctuate in response to market conditions.

The formula for calculation of the levy on market operators will be set out in the Regulations and will be consulted upon with industry before being introduced. It is probable that this formula will need to change swiftly as markets enter and leave Australia. As such, it is appropriate that the formula be set out in the Regulations.

The Committee thanks the Minister for this response.

Healthcare Identifiers Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 11 March 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Health and Ageing

Background

The bill implements a national system for consistently identifying consumers and healthcare providers and to set out clear purposes for which healthcare identifiers can be used. The scheme originated from a February 2006 Council of Australian Governments (COAG) decision, which was reaffirmed in 2008 when COAG agreed to universally allocate a unique identifying number to each individual healthcare recipient in Australia.

On 7 December 2009, COAG signed a *National Partnership Agreement for E-Health*. This Agreement provides a framework for cooperative jurisdictional arrangements and responsibilities for e-health and sets out the objectives and scope for the Healthcare Identifiers Service, as well as relevant governance, legislative, administrative and financial arrangements.

The bill establishes arrangements for operating and maintaining the Healthcare Identifiers Service, including the conferral of functions on the Chief Executive Officer of Medicare Australia. These functions include:

- assigning, collecting and maintaining identifiers for individuals, individual healthcare providers and organisations by using information already held by Medicare Australia for its existing functions;
- collecting information from individuals and other data sources;

- developing and maintaining mechanisms for users to access their own records and correct or update details;
- using and disclosing healthcare identifiers and associated personal information, for the purposes of operating the Healthcare Identifiers Service; and
- disclosing healthcare identifiers for other purposes set out in the Bill.

The bill sets out the permitted purposes for which healthcare identifiers may be used or disclosed and the offences relating to the misuse of healthcare identifiers and penalties for breaches of the legislation. This provides a clear framework to support the proper use and disclosure of healthcare identifiers and ensures that any inappropriate handling of healthcare identifiers can be addressed.

Trespass on personal rights and liberties
Various

Proposed subsection 9(1) provides that the service operator is authorised to assign a number to a healthcare provider or recipient and subsection 9(4) provides that service operator is 'not required to consider' whether the provider or recipient agrees. Another primary aspect of the bill involves outlining the circumstances in which the specified parties are 'authorised to disclose' healthcare identifier information between parties (various proposed sections including 16, 17, 18, 20 and 24).

The explanatory memorandum (at p.4) states that:

> The inclusion of healthcare identifiers in a health records system or a patient's file will not change how and when healthcare providers share information about individuals…

This is framework legislation that restricts itself to establishing a system to assign one healthcare number and to share it in particular circumstances. It is clearly designed, however, to provide the foundation for further legislative and policy development in relation to individual health records. These are areas that have previously given rise to broad community concerns in relation to personal rights including in relation to privacy and the use of data matching; areas that have also been of concern to the Committee. Some of the issues raised are reminiscent of the 2006 'Access Card' project and the 1987 Australia Card legislation debate.

The Committee notes, however, that the bill is seeking to formalise in legislation what is a clear policy decision. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it unduly trespasses on personal rights and liberties.

Relevant extract from the response from the Minister

I am also pleased to advise that an exposure draft of proposed Healthcare Identifiers Regulations and an associated paper are to be released for consultation shortly. I have requested that my Department provide these to the Committee as soon as they are available to assist the Committee in its consideration of the HI Bill.

As the Committee has noted, the establishment of a national approach to developing and implementing healthcare identifiers for individuals and providers is a joint initiative of all Australian Governments. In 2006, the Council of Australian Governments (COAG) agreed to a national approach to identification of patients and providers. This decision was affirmed by COAG in November 2008. The objectives, scope and governance arrangements of the HI Service are set out in the *National Partnership Agreement on E-Health* signed by COAG on 7 December 2009 and the legislative proposals in the HI Bill have been developed in collaboration with state and territory governments, through health ministers.

The Committee thanks the Minister for this response.

Administrative review
Explanatory memorandum
Proposed clauses 9

Clause 9(5) provides that regulations may prescribe requirements for assigning healthcare identifiers 'including providing for review of decisions made under this section.' The explanatory memorandum at page 12 says that, because the decision to assign an identifier is procedural and does not affect the ability to deliver healthcare, the decisions about assigning healthcare identifiers 'will not be subject to administrative review.'

It appears to the Committee on the face of it that assigning a healthcare identifier number is primarily a mechanical process. However, the reference in proposed clause 9(5) to 'providing for review of decisions' implies that the process is not simply mechanical but involves a decision being made.

If it is a purely mechanical process the fact that the assignment of a number is not reviewable is not of concern to the Committee. However, the Committee's attention

is captured by any indication that a decision-making power is not subject to appropriate review. The Committee therefore questions whether this proposed provision has the potential to have an impact on a person's rights and entitlements.

The Committee also notes that, while proposed clause 9(5) refers to the ability for regulations to provide for the review of decisions, the explanatory memorandum states that they 'will not be subject to administrative review.'

The Committee **seeks the Minister's advice** about whether there are circumstances in which a healthcare identifier would not be assigned; whether this would be to the detriment of any person; if so, whether the ability to review the decision should be included in the primary legislation; and whether the explanatory memorandum and proposed clause 9(5) are inconsistent.

Relevant extract from the response from the Minister

Issue 1. Administrative Review; Clause 9(5)

The Committee has asked whether there are circumstances in which a healthcare identifier would not be assigned; whether this would be to the detriment of any person and, if so, whether the ability to review the decision should be included in the primary legislation; and whether the explanatory memorandum and proposed clause 9(5) are inconsistent.

Identifiers will be issued to individual healthcare recipients (IHI), individual healthcare providers (HPI-I) and healthcare provider organisations (HPI-O). The circumstances under which identifiers are assigned to individual healthcare recipients and providers vary. An IHI will be assigned to any individual receiving healthcare in Australia. A healthcare provider may be refused an identifier if they are not within one of the classes of providers to be set out in the regulations. Information relating to the assignment of each type of identifier is set out below.

IHI

As agreed by COAG in November 2008, the IHI is to be universally allocated to all individuals receiving healthcare in Australia.

Individuals will not need to do anything to be allocated an IHI and a decision to assign an IHI is procedural.

For individuals who are enrolled with Medicare Australia or who receive treatment benefits through the Department of Veterans Affairs (DVA), the IHI will be assigned based on information held by those agencies. Those not enrolled with Medicare Australia or not

eligible to receive treatment benefits from DVA can be provided with a temporary (unverified) IHI at the point of care when they seek healthcare and can choose to verify this number through the HI Service. The HI Bill also provides for other data sources who might supply information for assigning identifiers to be specified by the regulations.

HPI-I

As set out in policy principles on healthcare identifiers for registered health practitioners attached to Schedule 1 to the National Partnership Agreement on E-Health (COAG, December 2009), the HPI-I is to be used for professional registration purposes under the National Registration and Accreditation Scheme (NRAS) as well.

Those practitioners registered through NRAS will be assigned an identifier as part of the national professional registration process.

Individual healthcare providers who are not covered by the national registration scheme will need to apply to the HI Service to be issued an HPI-I.

Criteria for the assignment of HPI-Is by the service operator of the HI Service will be set out in regulations under the HI Bill. The exposure draft Healthcare Identifiers Regulations will provide for identifiers to be assigned by the HI Service where:

- an individual healthcare provider can show evidence of their registration by a body set up under law for registering members of a particular health profession, eg any profession registered under state or territory law; or
- where an individual healthcare provider can show evidence that they are a member of a professional association with uniform national membership requirements.

The decision to assign an identifier where these criteria are met will be essentially procedural.

The service operator of the HI Service will determine whether the association a healthcare provider is a member of is a 'professional association with uniform national membership requirements' on the basis of criteria set out in the regulations. The criteria will include that the professional association's members practice in a profession that relates to the delivery of healthcare, it has admission requirements, standards of practice and ethical conduct, maintains a standing in the profession, has sets of rules and regulations and an ability to impose sanctions and the association has uniform national membership arrangements.

This class of professional associations has been included to ensure that any healthcare provider not registered under a state or territory law may still be assigned a healthcare identifier provided that they are involved in the delivery of health services and the association he or she belongs to is credible and appropriate. A list of professional healthcare associations that meet the prescribed criteria will be developed and maintained for the HI Service.

HPI-O

Healthcare provider organisations will apply to the HI Service to be assigned an identifier. The exposure draft regulations will provide that an identifier will be assigned where the organisation provides healthcare and the organisation's staff include:

- an individual healthcare provider with an identifier whose duties involve providing healthcare; and
- persons who are authorised to act on behalf of the organisation in dealings with the HI Service as a responsible officer and organisation maintenance officers.

A decision to assign an identifier where an organisation has these staff is essentially procedural. The requirement that an organisation has the staff described is to provide assurance that the organisation is engaged in providing healthcare and has appropriate administrative arrangements in place for liaison with the HI Service.

Implications of being assigned or not assigned an identifier

The introduction of healthcare identifiers will not change the way individuals currently receive or have access to healthcare services and will not be a requirement for accessing or providing those services.

For healthcare providers, having a provider identifier will allow them to have identifiers for their patients and other providers disclosed to them by the HI Service so that these can be used in communicating and managing health information more reliably and accurately. Most providers between whom health information is communicated would come within one of the nationally registered professions or a state or territory registered profession.

Where a healthcare provider is employed by an organisation that has an HPI-O they may be authorised to access the HI Service by that organisation under clause 17 of the HI Bill. The HI Bill does not restrict the disclosure or use of healthcare identifiers to healthcare providers that have been assigned an identifier. Any healthcare provider can use or disclose a healthcare identifier in communicating or managing health information for the range of purposes set out in clause 24 of the HI Bill.

Healthcare providers who are not professionally registered or a member of a professional association with uniform national membership requirements will be excluded from having a provider identifier. However, given that the IHI is to be universally allocated to all recipients of healthcare in Australia, limiting access to the national database of information about those individuals to those who are members of a profession that is able to demonstrate a suitable level of accountability for the activities of its members is seen as necessary to ensure public confidence in the HI Service.

There is a possible future consequence. Depending on the arrangements that are developed for an electronic health record, the ability for a healthcare provider to provide input to or access that record may be dependent on them having an identifier.

Any necessary changes resulting from design elements of a national electronic health record system would require public consultation and regulatory activity as part of that process. If necessary, provision for review of a decision not to assign an identifier to an individual healthcare provider under the currently proposed arrangements could be included in regulations and other changes made to the HI Bill at that time.

Review of decisions to assign identifiers

As the Committee has noted, the HI Bill provides that regulations may provide for review of decisions about assigning healthcare identifiers.

I support the view that, ordinarily, review of decisions should be provided for in primary legislation. However, in this case the HI Bill provides a framework for the assignment of a healthcare identifier to classes of healthcare providers and healthcare recipients. The regulations prescribe requirements for assigning the identifiers and there are different circumstances for each type of identifier.

While the decisions to assign identifiers are essentially procedural and will not affect the capacity for a provider to deliver healthcare or for a recipient to receive healthcare, in view of .the issues that will be addressed in the regulations, provision has been included to enable appropriate review mechanisms to be included in the regulations.

Clause 9(5) of the HI Bill accepts that review of decisions under the regulations may not be necessary because they are procedural but allows for appropriate accountability mechanisms to be implemented where interests may be affected by those decisions.

The Explanatory Memorandum will be amended to ensure that the intended operation of clause 9(5) is clear,

The Committee thanks the Minister for this detailed response, which addresses its concerns, and acknowledges the Minister's commitment to amend the explanatory memorandum to ensure that the intended operation of clause 9(5) is clear.

Reversal of onus of proof
Item 15(2), 15(3) and 26(2)

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum, take into account the December 2007 *Guide to Framing Commonwealth Offences, Civil Penalties, and Enforcement Powers*, and the explanatory memorandum should describe the reason for the reversal of onus in each instance. Whether the standard of proof is 'legal' (on the balance of probabilities) or 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out) if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

The bill outlines offences for circumstances in which a healthcare identifier is disclosed, but allows defences if the disclosure was appropriate. Items 15(2), 15(3) and 26(2) describe the elements of the defences and the Criminal Code (subsection 13.3(3)) has effect to apply an 'evidential' burden of proof on the defendant. The explanatory memorandum (at pp 15 and 20) repeats the terms of these provisions, but does not provide a justification for placing this initial burden of proof on the defendant. The Committee recognises that there are grounds for taking the approach in the bill as the relevant information is peculiarly within the knowledge of the defendant. However, the Committee prefers that ordinarily policy will take into account the December 2007 *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* and the explanatory memorandum will explain reversals to the onus of proof. The Committee **seeks the Minister's advice** about whether consideration can be given to addressing these matters in the explanatory memorandum.

Relevant extract from the response from the Minister

Issue 2. Reversal of Onus of Proof - clauses15(2), 15(4) and 26(2)

The Committee has asked if the Explanatory Memorandum for the HI Bill could explain why the evidentiary onus of proof has been reversed.

As the Committee has noted, the information relevant to whether a use or disclosure of a healthcare identifier is authorised will be peculiarly within the knowledge of the defendant.

I agree that the Explanatory Memorandum should be amended to explain this.

The Committee thanks the Minister for this response and for her commitment to amend the explanatory memorandum to include information outlining why the evidentiary onus of proof has been reversed.

Wide delegation of power
Part 7, subclause 39(2)

Subclause 39(2) provides that 'the regulations may provide for the imposition of a penalty (of not more than 50 penalty units) for contravention of a regulation.' At page 25 the explanatory memorandum repeats the terms of the subclause, but provides no other information about the proposed approach.

The December 2007 *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth, states at page 14 that:

> The elements of an offence should be stated in the offence provision, not left to be provided for under another instrument, unless appropriate limitations apply.

The Committee notes the clause 33 requirement for the Minister to consult the Ministerial Council before a regulation is made. Although the regulations are subject to the usual disallowance procedures and any contravention regulations must be limited to a maximum of 50 penalty units, the Committee is concerned that there is no justification provided for delegating to regulations the ability to impose penalties. The Committee **seeks the Minister's advice** on the rationale for delegating this 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

Issue 3. Wide delegation of power - clause 39(2)

The Committee has noted the provision in the HI Bill for regulations to provide for the imposition of a penalty of not more than 50 penalty units for contravention of a regulation and asked that the Minister explain the rationale for delegating this power.

Provision for offences to be prescribed by regulations is regarded as necessary to allow differences in the consequences of different situations, for example, imposing a more serious penalty for accessing of the HI Service where a healthcare provider has failed to advise that they have ceased to be a registered professional compared to where their address or contact details may not be up to date.

It would be inappropriate if the HI Bill set out a penalty that applied equally to all breaches of the regulations.

Providing for the regulations to prescribe offences is also intended to enable each circumstance to be treated differently as appropriate and provide flexibility in dealing with different situations. For example, no penalties are proposed to be associated with the provision of information for assignment of identifiers.

The Committee thanks the Minister for this response and draws it to the attention of the Senate. The Committee remains concerned that these provisions may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference, but leaves it to the Senate as a whole as to whether the approach is, in all the circumstances, appropriate.

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Resources and Energy responded to the Committee's comments in a letter dated 15 March 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Resources and Energy

Background

This bill makes minor policy and technical amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

In particular, the bill aims to:

- retain fees raised under the *Offshore Petroleum and Greenhouse Gas (Registration Fees) Act 2006* (the Registration Fees Act) to provide establishment funding for the National Offshore Petroleum Regulator (NOPR);
- augment the functions of the National Offshore Petroleum Safety Authority (NOPSA) to include regulatory oversight of non-OHS structural integrity for facilities, wells and well related equipment;
- clarify how titleholder provisions relating to making applications and requests and giving nominations and notices, and titleholder provisions establishing obligations will apply in relation to multiple titleholders;
- make certain offence provisions applying to titleholders, where the offence consists of a physical element (the doing of or failure to do an act), offences of strict liability;
- clarify that a titleholder's occupational, health and safety (OHS) responsibilities relate only to wells and not to facilities more generally; and

- update listed OHS laws in Section 638 and provide transitional arrangements.

Retrospective application
Schedule 1, Part 6, subsections 8A(4) to (6), 8B(4) to (6), 13A & 13B

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. The Committee considers that the reasons for the retrospectivity should be set out in the relevant explanatory memorandum.

In this case clauses 8A and 8B of the bill seek to establish that the responsibilities associated with a petroleum or greenhouse gas title are derived from the preceding title(s). The explanatory memorandum outlines (at p.12) that this concept is then applied to new clauses 13A and 13B so that 'a titleholder's duty of care in relation to wells will extend not only to wells in respect of which activities are carried out during the term of the current title but also to wells in respect of which activities have been carried out under the authority of any previous title in the series of titles regardless of the identity of the titleholder.' These sections recast existing offences 13A and 13B in Schedule 3 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to correct some uncertainty about their application and to ensure that all conduct that was intended to be dealt with is covered.

These clauses are clearly designed to have retrospective effect, but the Committee is concerned to ensure that the retrospective application does not have a detrimental effect, especially as existing clauses 13A and 13B do 'not cover all aspects…' and are being expanded. Therefore, the Committee **seeks the Minister's advice** on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all the circumstances.

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

Relevant extract from the response from the Minister

In particular, the Committee has asked for my advice on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all circumstances.

Part 6 of the Bill removes an unintended ambiguity that a titleholder's responsibility extends to ensuring that all facilities including ships, platforms etc, are designed to be safe when properly used, and instead clarifies that their responsibility is limited to ensuring wells are safe. However, in order to ensure wells are safe in all circumstances it is necessary to not only reduce risks that may arise from well design but also inter alia construction, maintenance, alteration and ongoing operation of a well. These elements have been expressly outlined in the new clauses.

The amendments in Part 6 also add the concept of a derived title. This is so that responsibility for a well is not disregarded on the basis of a change in title. A clear example of titles changing would be when a petroleum company, which holds an exploration permit, drills a well and discovers petroleum. Following this the company applies for and is granted a petroleum licence. Here the title has changed but the well which discovered petroleum and is the subject of regulation is the same well. Further, if a company acquires an existing title in which wells have been sunk, it has a clear responsibility to ensure those wells function properly and do not fail, whether or not they are being used.

Thus while there is an element of retrospectivity to Part 6 of the Bill, this is to ensure that the titleholder's responsibility is always linked to well safety and not diluted by historical circumstance such as progression from a permit to a licence or through changes in title ownership.

These amendments fulfil the original policy intention to make a titleholder responsible for the occupational health and safety aspects of wells, as the titleholder holds the essential knowledge of the geology of the oil or gas reservoir including pressures in the reservoir and is thus best able to determine where the well should be located and how it should be designed, constructed, maintained and operated in a safe manner.

The Committee thanks the Minister for this response. The additional information provided assists the Committee to understand the justification for the retrospective aspects of these provisions. It would have been useful for some of this information to be included in the explanatory memorandum.

Tax Laws Amendment (2010 Measures No.1) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Assistant Treasurer responded to the Committee's comments in a letter dated 15 March 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Treasury

Background

This bill amends various taxation and superannuation laws to implement a range of improvements to Australia's tax laws.

Schedule 1 amends the *Superannuation Guarantee (Administration) Act 1992* (SGA Act 1992), the *Retirement Savings Accounts Act 1997* (RSA Act 1997), the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993), the *Income Tax Assessment Act 1936* (ITAA 1936) and the *Taxation Administration Act 1953* (TAA 1953) to support the Government's 2008-09 Budget measure to provide a free superannuation clearing house service for small businesses. The measure is designed to reduce the cost and paperwork burden to small businesses of complying with their superannuation obligations.

Schedule 2 amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Income Tax Assessment Act 1936* (ITAA 1936) to protect the deductions of investors in forestry managed investment schemes (MIS) where the four-year holding period rules are failed for reasons genuinely outside the investor's control.

This Schedule also amends the *Taxation Administration Act 1953* (TAA 1953) to maintain the capacity of the Commissioner of Taxation (Commissioner) to apply for civil penalties against the promoters of affected schemes, notwithstanding the amendments to the four-year rules.

Schedule 3 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to allow eligible Australian managed investment trusts (MITs) to make an irrevocable election (that is, choice) to apply the capital gains tax (CGT) provisions as the primary code for the taxation of gains and losses on disposal of certain assets held as passive investments (primarily shares, units and real property). If a MIT is eligible to make an election and it has not done so, then any gains or losses on the disposal of eligible assets (excluding land, an interest in land, or an option to acquire or dispose of such an asset) will be treated on revenue account.

This Schedule also clarifies the taxation treatment of 'carried interest' units in MITs. These units will effectively be treated on revenue account in the hands of the unit holder.

Schedule 4 amends Subdivision 61-J of the *Income Tax Assessment Act 1997* (ITAA 1997) by introducing an income test into the eligibility criteria for the entrepreneurs' tax offset (ETO). The income test will restrict the eligibility of individuals whose income is over a threshold amount of income for ETO purposes ($70,000 if they are single and $120,000 if they have a family).

Schedule 5 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to:

- clarify the operation of certain aspects of the consolidation regime; and
- improve interactions between the consolidation regime and other parts of the law.

Schedule 6 makes miscellaneous amendments to the taxation laws. Most of them are of a minor nature.

Reversal of onus of proof
Explanatory memorandum
Schedule 6, item 104

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and

cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum, take into account the December 2007 *Guide to Framing Commonwealth Offences, Civil Penalties, and Enforcement Powers*, and the explanatory memorandum should describe the reason for the reversal of onus in each instance. Whether the standard of proof is 'legal' (on the balance of probabilities) or 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out) if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

Section 284-75 establishes administrative penalties for specified prohibited conduct (such as making false or misleading statements or failing to lodge a return on time). Item 104(6) outlines a proposed defence to these provisions when it did not involve recklessness or an intentional disregard for a taxation law. Item 104(7) states that a defendant bears an 'evidential' burden in relation to relying on the proposed defence.

The Committee could not locate a statement in the explanatory memorandum explaining item 104 and in particular the justification for placing the burden for this evidential matter on the defendant. Although reasons for the approach are apparent to it, the Committee expects that an explanatory memorandum will address all items in a bill and will explain reversals to the onus of proof. The Committee **seeks the Treasurer's advice** about whether the explanatory memorandum addresses these issues

Relevant extract from the response from the Minister

Item 104 is part of a measure extending the existing administrative penalty for making false or misleading taxation statements to also include statements that do not lead to a tax shortfall (most such statements are currently only dealt with by prosecution for an offence). In extending the penalty, the Government concluded that the recently introduced 'tax agents safe harbour' should also be available to protect taxpayers If a statement is made for them by their tax agent.

That safe harbour is in subsection 284-75(1A) of Schedule 1 to the *Taxation Administration Act* 1953. Subsection (1B) provides that taxpayers who seek to rely on the safe harbour bear the evidential burden of proving that they gave their agent all relevant taxation information.

In extending the safe harbour to cover a wider range of false or misleading tax statements, item 104 does not change the existing evidential burden. It moves subsection (1B) to subsection (7) for the purposes of organising the section in a better order. It does not change the subsection's wording.

The explanatory memorandum does not explain why taxpayers bear an evidential burden because the Bill makes no relevant change to the existing safe harbour rule. The explanatory memorandum to the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 explained the introduction of the safe harbour provision (paragraphs 2.19 to 2.28).

The Committee thanks the Minister for this response.

Senator the Hon Helen Coonan
Chair

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

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

Dear Senator

Thank you for the letter of 24 February 2010 to the Treasurer seeking supplementary information on the Corporations Amendment (Financial Market Supervision) Bill 2010 (the Bill) and the Corporations (Fees) Amendment Bill 2010 (the Fees Bill).

The Treasurer has asked me to respond to you as I have portfolio responsibility for this matter. Below are my responses to your Committee's comments.

Clause 2: Delayed commencement

As you are aware, the Bill's table of commencement states that the Bill will commence on a day 'to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months' of Royal Assent, then the Bill will be repealed.

The explanatory memorandum to the Bill states, at paragraph 1.13, that the 12 month time period for commencement is necessary, as there is a considerable amount of transitional work to be done in order for the Australian Securities and Investments Commission (ASIC) to be capable of performing the supervisory functions, including acquiring the necessary systems. This has the potential to take a significant amount of time and possibly longer than six months but less than a year. It is appropriate that the provisions be repealed if the Bill does not commence within a year, as it is not appropriate to have the obligations on market operators amended without ASIC taking over responsibility for supervision.

Schedule 1, proposed section 798G: Parliamentary scrutiny

The Bill provides that ASIC may make market integrity rules. These rules will be legislative instruments which will deal with the activities or conduct of licensed markets, persons in relation to licensed markets and financial products. A breach of a market integrity rule will be a breach of a civil penalty provision and subject to a penalty of up to $1 million.

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The Committee has acknowledged the exceptional circumstances, the reasons outlined in the explanatory memorandum and the requirement for ministerial consent before a market integrity rule can be made.

The *Corporations Act 2001* (the Act), which the Bill amends, already makes certain conduct, like insider trading, illegal. The market integrity rules are designed to supplement the Act by filling in the details of conduct required in order to ensure market integrity. For example, the rules specify such things as provisions for continuing education of responsible executives, requirements for keeping records, provisions for automated order processing and numerous other matters.

The market integrity rules are very technical in nature and, as such, are not suitable for greater parliamentary scrutiny. The draft market integrity rules for the Australian Securities Exchange and Sydney Futures Exchange markets are currently out for consultation and are available on the ASIC website: www.asic.gov.au. Together, the drafts of the rules run to 130 pages.

An example of the technical nature of the rules can be seen in rule 5.10.2(d), which allows dealing in Cash Market Products 'where a listed entity acquires assets and as part or full consideration, issues new Cash Market Products (except Loan Securities) to the vendor and the Trading Participant has made a prior firm arrangement with the vendor to place these Cash Market Products as soon as they are issued. The Trading Participant must then ensure that the details of the issue to the vendor are advised to the Market Operator by the listed entity immediately the Cash Market Products are issued'. Due to the extremely technical nature of the rules, the quality of the rules would not be improved by further parliamentary scrutiny than what is already provided for in the Bill. It would also not be desirable to put this level of detail in a statute, since the rules may need to be changed frequently, sometimes at short notice, to accommodate new developments in markets.

A level of scrutiny is already provided for in the Bill. The market integrity rules, as the Committee noted, must be approved by the Minister. Approval will be required in advance, except in the situations covered by subsection 798G(4), designed to deal with emergency situations. They are then lodged before Parliament as legislative instruments.

In addition, it is more appropriate that the ability to make market integrity rules should be given to ASIC, as opposed to the status quo remaining. At present the same sort of rules are set and enforced by market operators, which are independent commercial bodies. Market operators are able to impose substantial penalties for a breach of their rules (up to $1 million in the case of ASX).

Consequently, the Bill provides for far greater parliamentary scrutiny of the market integrity rules than exists under the current arrangements.

The Committee also questions whether the Bill gives too wide a discretion to ASIC and suggests that the Bill should set out 'general minimum requirements or a framework for the content of the market integrity rules, such as that each rules must: specify the purpose of the rule; specify to whom the rule applies (individuals and/or bodies corporate, is collective responsibility permitted); detail the conduct the subject of the rule, with each element in separate paragraphs to aid clarity; explain if fault is required or excluded in clear terms; ensure that the penalty, if any, is adequate and appropriate; and detail whether any time limits apply'. The Committee has sought advice on whether

consideration can be given to providing ASIC with more legislative guidance about the content of any market integrity rules.

Given the nature of the rules, attempting to specify such matters in the Bill would be unduly restrictive. For example, some rules are purely definitions, so applying those requirements to these rules would be inappropriate. In addition, the other suggested requirements are not relevant in the context of the market integrity rules. For example, no individuals can be participants, so rules applying to participants will never apply to individuals. Moreover the nature of markets is that they are constantly changing and evolving. The recent global financial crisis demonstrated the speed with which problems can develop in markets and the unexpected directions from which they can come.

The Government is sympathetic to the desire to have clear rules, easily understood by those affected by them. The draft rules posted on the ASIC website follow the existing framework of rules and so are readily understood by those affected. Endeavours will be made to ensure future rules are equally clear. However, specifying minimum requirements for rules would not help to achieve that aim.

Schedule 1, item 14 and item 34: 'Henry VIII' clause

The Bill puts forward two proposed sections which will allow the regulations to vary the Bill. Specifically, proposed section 798L provides that the regulations may exempt a person or class of persons and financial markets from the operation of the proposed Part 7.2A. In addition, item 1513 of the Bill allows the regulations to provide for transitional arrangements including the ability to modify the provisions of the Act.

This Bill reflects the current framework of the Act, which contains numerous Henry VIII provisions and allows rules to be modified by regulations or by ASIC, in order to respond to the complexity and urgency of regulating the operations of markets in a modern global market environment.

The Bill is more conservative in its use of Henry VIII powers than the current Act. Chapter 7 of the Act deals with financial services and markets. Sections 926A, 951B, 992B, 1020F and 1075A currently give ASIC the power to exempt any person or class of persons or any financial product or class of products from any or all the provisions of various parts of Chapter 7, or to declare that those parts apply to them as if specified provisions were omitted, modified or varied. The proposed section 798L reflects these provisions, but requiring the exemption to be by regulations rather than by a declaration from ASIC. Any new exemptions under the Bill will therefore be subject to greater parliamentary scrutiny than is required for exemptions under those current provisions.

Currently, sections 926B, 951C, 992C, 1020G and 1045A allow exemptions from various parts of Chapter 7 by regulations. Section 1368 of the Act also allows regulations to be made, among other things, providing that Chapter 7 or specified provisions of it have no effect or only a prescribed effect in relation to a specified person or class of persons or no effect in relation to a specified transaction or class of transactions or a specified transaction or class of transactions entered into by a specified person or class of persons. The regulations may also provide that contravention of a prescribed term or condition is an offence. The Bill does not seek to replicate this exemption power.

Furthermore, item 1513 only applies in relation to transitional matters. This is a limited and conservative use of the power to modify by regulations, and will be important if practical issues arise over the coming months concerning the transfer of responsibility for supervision from market operators to ASIC.

Schedule 1, item 24: Review of decisions

Item 24 of the Bill excludes decisions concerning the market integrity rules from review of the Administrative Appeals Tribunal (AAT). This includes the decision by ASIC to make a market integrity rule, a decision by the Minister to consent to or not to consent to the making of a market integrity rule and a decision by ASIC in relation to alternatives to civil proceedings.

As the explanatory memorandum states, it is appropriate that such decisions are not subject to review by the AAT, as the decisions which are excluded are more akin to policy and rule-making decisions and should not be subject to merit review.

Schedule 1, item 34: Retrospective application

The Government has decided to transfer the responsibility for the supervision of Australia's domestic licensed financial markets from market operators to ASIC. The Bill gives effect to this decision.

It would clearly be undesirable to have existing markets supervised by themselves, subject to rules they write themselves and not subject to market integrity rules while new markets were supervised under the new regime and were subject to market integrity rules. This would be inequitable and would defeat the aim of the Bill, that ASIC act as a whole-of-market supervisor to ensure the ongoing integrity of Australia's financial market.

The legislation is not retrospective, as it will apply to all domestic licensed financial markets from the date of commencement of the amending schedule, regardless of the date on which each was licensed. Entities will not have to comply with the market integrity rules before the date of commencement.

The amendments made by items 12 and 13 relate to requirements that must be satisfied before a new market licence is issued. It is appropriate that any application which has not been decided when the new regime comes into effect will be decided in terms of its compliance with the new regime, not the previous one.

Schedule 1, items 3 and 4: Wide delegation in the Fees Bill

The Government's decision to transfer supervisory responsibility to ASIC confers substantial new functions on ASIC.

The Wallis Inquiry, which reported in 1997, made a recommendation that regulatory agencies should collect enough revenue from the financial entities which they regulate to fund themselves. The principle is that, for reasons of equity and efficiency, the costs of financial regulation should be borne by those who benefit from it.

In line with this principle, the Fees Bill provides ASIC with the ability to impose a fee on market operators in relation to the functions it will be performing under the Bill. The Regulations will specify how the fee will be calculated and when it will be imposed.

It is not appropriate that a cap be placed on the amount that ASIC can charge market operators as the amount it will cost to supervise the market, and therefore also the amount it will be necessary for ASIC to recover, will change dramatically as financial markets enter and leave Australia, and as the amount of trades executed on markets in Australia fluctuate in response to market conditions.

The formula for calculation of the levy on market operators will be set out in the Regulations and will be consulted upon with industry before being introduced. It is probable that this formula will need to change swiftly as markets enter and leave Australia. As such, it is appropriate that the formula be set out in the Regulations.

Yours sincerely

CHRIS BOWEN

THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

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

Dear Senator Coonan Helen

I refer to the request from the Committee for the Scrutiny of Bills for advice in relation to three issues about the Healthcare Identifiers Bill 2010 (HI Bill) raised in the Committee's *Alert Digest No 2 of 2010* (24 February 2010).

A detailed response on each issue is set out below.

I am also pleased to advise that an exposure draft of proposed Healthcare Identifiers Regulations and an associated paper are to be released for consultation shortly. I have requested that my Department provide these to the Committee as soon as they are available to assist the Committee in its consideration of the HI Bill.

As the Committee has noted, the establishment of a national approach to developing and implementing healthcare identifiers for individuals and providers is a joint initiative of all Australian Governments. In 2006, the Council of Australian Governments (COAG) agreed to a national approach to identification of patients and providers. This decision was affirmed by COAG in November 2008. The objectives, scope and governance arrangements of the HI Service are set out in the *National Partnership Agreement on E-Health* signed by COAG on 7 December 2009 and the legislative proposals in the HI Bill have been developed in collaboration with state and territory governments, through health ministers.

Issue 1. Administrative Review; Clause 9(5)
The Committee has asked whether there are circumstances in which a healthcare identifier would not be assigned; whether this would be to the detriment of any person and, if so, whether the ability to review the decision should be included in the primary legislation; and whether the explanatory memorandum and proposed clause 9(5) are inconsistent.

Identifiers will be issued to individual healthcare recipients (IHI), individual healthcare providers (HPI-I) and healthcare provider organisations (HPI-O).

The circumstances under which identifiers are assigned to individual healthcare recipients and providers vary. An IHI will be assigned to any individual receiving healthcare in Australia. A healthcare provider may be refused an identifier if they are not within one of the classes of providers to be set out in the regulations. Information relating to the assignment of each type

of identifier is set out below.

IHI

As agreed by COAG in November 2008, the IHI is to be universally allocated to all individuals receiving healthcare in Australia.

Individuals will not need to do anything to be allocated an IHI and a decision to assign an IHI is procedural.

For individuals who are enrolled with Medicare Australia or who receive treatment benefits through the Department of Veterans Affairs (DVA), the IHI will be assigned based on information held by those agencies. Those not enrolled with Medicare Australia or not eligible to receive treatment benefits from DVA can be provided with a temporary (unverified) IHI at the point of care when they seek healthcare and can choose to verify this number through the HI Service. The HI Bill also provides for other data sources who might supply information for assigning identifiers to be specified by the regulations.

HPI-I

As set out in policy principles on healthcare identifiers for registered health practitioners attached to Schedule 1 to the *National Partnership Agreement on E-Health (*COAG, December 2009*)*, the HPI-I is to be used for professional registration purposes under the National Registration and Accreditation Scheme (NRAS) as well.

Those practitioners registered through NRAS will be assigned an identifier as part of the national professional registration process.

Individual healthcare providers who are not covered by the national registration scheme will need to apply to the HI Service to be issued an HPI-I.

Criteria for the assignment of HPI-Is by the service operator of the HI Service will be set out in regulations under the HI Bill. The exposure draft Healthcare Identifiers Regulations will provide for identifiers to be assigned by the HI Service where:

- an individual healthcare provider can show evidence of their registration by a body set up under law for registering members of a particular health profession, eg any profession registered under state or territory law; or
- where an individual healthcare provider can show evidence that they are a member of a professional association with uniform national membership requirements.

The decision to assign an identifier where these criteria are met will be essentially procedural.

The service operator of the HI Service will determine whether the association a healthcare provider is a member of is a 'professional association with uniform national membership requirements' on the basis of criteria set out in the regulations. The criteria will include that the professional association's members practice in a profession that relates to the delivery of healthcare, it has admission requirements, standards of practice and ethical conduct, maintains a standing in the profession, has sets of rules and regulations and an ability to impose sanctions and the association has uniform national membership arrangements.

This class of professional associations has been included to ensure that any healthcare provider not registered under a state or territory law may still be assigned a healthcare identifier provided that they are involved in the delivery of health services and the association he or she belongs to is credible and appropriate. A list of professional healthcare associations that meet the prescribed criteria will be developed and maintained for the HI Service.

HPI-O

Healthcare provider organisations will apply to the HI Service to be assigned an identifier. The exposure draft regulations will provide that an identifier will be assigned where the organisation provides healthcare and the organisation's staff include:

- an individual healthcare provider with an identifier whose duties involve providing healthcare; and
- persons who are authorised to act on behalf of the organisation in dealings with the HI Service as a responsible officer and organisation maintenance officers.

A decision to assign an identifier where an organisation has these staff is essentially procedural. The requirement that an organisation has the staff described is to provide assurance that the organisation is engaged in providing healthcare and has appropriate administrative arrangements in place for liaison with the HI Service.

Implications of being assigned or not assigned an identifier

The introduction of healthcare identifiers will not change the way individuals currently receive or have access to healthcare services and will not be a requirement for accessing or providing those services.

For healthcare providers, having a provider identifier will allow them to have identifiers for their patients and other providers disclosed to them by the HI Service so that these can be used in communicating and managing health information more reliably and accurately. Most providers between whom health information is communicated would come within one of the nationally registered professions or a state or territory registered profession.

Where a healthcare provider is employed by an organisation that has an HPI-O they may be authorised to access the HI Service by that organisation under clause 17 of the HI Bill. The HI Bill does not restrict the disclosure or use of healthcare identifiers to healthcare providers that have been assigned an identifier. Any healthcare provider can use or disclose a healthcare identifier in communicating or managing health information for the range of purposes set out in clause 24 of the HI Bill.

Healthcare providers who are not professionally registered or a member of a professional association with uniform national membership requirements will be excluded from having a provider identifier. However, given that the IHI is to be universally allocated to all recipients of healthcare in Australia, limiting access to the national database of information about those individuals to those who are members of a profession that is able to demonstrate a suitable level of accountability for the activities of its members is seen as necessary to ensure public confidence in the HI Service.

There is a possible future consequence. Depending on the arrangements that are developed for an electronic health record, the ability for a healthcare provider to provide input to or

access that record may be dependent on them having an identifier.

Any necessary changes resulting from design elements of a national electronic health record system would require public consultation and regulatory activity as part of that process. If necessary, provision for review of a decision not to assign an identifier to an individual healthcare provider under the currently proposed arrangements could be included in regulations and other changes made to the HI Bill at that time.

Review of decisions to assign identifiers
As the Committee has noted, the HI Bill provides that regulations may provide for review of decisions about assigning healthcare identifiers.

I support the view that, ordinarily, review of decisions should be provided for in primary legislation. However, in this case the HI Bill provides a framework for the assignment of a healthcare identifier to classes of healthcare providers and healthcare recipients. The regulations prescribe requirements for assigning the identifiers and there are different circumstances for each type of identifier.

While the decisions to assign identifiers are essentially procedural and will not affect the capacity for a provider to deliver healthcare or for a recipient to receive healthcare, in view of the issues that will be addressed in the regulations, provision has been included to enable appropriate review mechanisms to be included in the regulations.

Clause 9(5) of the HI Bill accepts that review of decisions under the regulations may not be necessary because they are procedural but allows for appropriate accountability mechanisms to be implemented where interests may be affected by those decisions.

The Explanatory Memorandum will be amended to ensure that the intended operation of clause 9(5) is clear.

Issue 2. Reversal of Onus of Proof – clauses15(2), 15(4) and 26(2)
The Committee has asked if the Explanatory Memorandum for the HI Bill could explain why the evidentiary onus of proof has been reversed.

As the Committee has noted, the information relevant to whether a use or disclosure of a healthcare identifier is authorised will be peculiarly within the knowledge of the defendant.

I agree that the Explanatory Memorandum should be amended to explain this.

Issue 3. Wide delegation of power – clause 39(2)
The Committee has noted the provision in the HI Bill for regulations to provide for the imposition of a penalty of not more than 50 penalty units for contravention of a regulation and asked that the Minister explain the rationale for delegating this power.

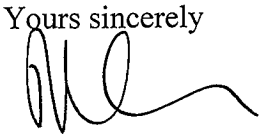
Provision for offences to be prescribed by regulations is regarded as necessary to allow differences in the consequences of different situations, for example, imposing a more serious penalty for accessing of the HI Service where a healthcare provider has failed to advise that they have ceased to be a registered professional compared to where their address or contact

details may not be up to date.

It would be inappropriate if the HI Bill set out a penalty that applied equally to all breaches of the regulations.

Providing for the regulations to prescribe offences is also intended to enable each circumstance to be treated differently as appropriate and provide flexibility in dealing with different situations. For example, no penalties are proposed to be associated with the provision of information for assignment of identifiers.

Yours sincerely



NICOLA ROXON

11 MAR 2010

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

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C10/665

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

15 MAR 2010

Dear Senator Coonan

I am replying to a letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Ms Toni Dawes, dated 24 February 2010. The letter advised that a response from myself has been sought on specific matters raised by the Committee in relation to the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (the Bill), in its publication, *Alert Digest No. 2 of 2010* (24 February 2010).

In particular, the Committee has asked for my advice on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all circumstances.

Part 6 of the Bill removes an unintended ambiguity that a titleholder's responsibility extends to ensuring that all facilities including ships, platforms etc, are designed to be safe when properly used, and instead clarifies that their responsibility is limited to ensuring wells are safe. However, in order to ensure wells are safe in all circumstances it is necessary to not only reduce risks that may arise from well design but also inter alia construction, maintenance, alteration and ongoing operation of a well. These elements have been expressly outlined in the new clauses.

The amendments in Part 6 also add the concept of a derived title. This is so that responsibility for a well is not disregarded on the basis of a change in title. A clear example of titles changing would be when a petroleum company, which holds an exploration permit, drills a well and discovers petroleum. Following this the company applies for and is granted a petroleum licence. Here the title has changed but the well which discovered petroleum and is the subject of regulation is the same well. Further, if a company acquires an existing title in which wells have been sunk, it has a clear responsibility to ensure those wells function properly and do not fail, whether or not they are being used.

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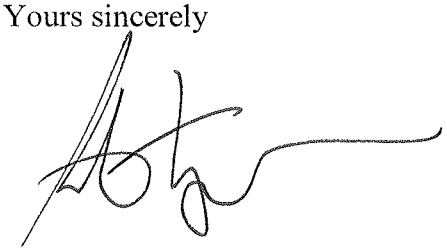
Thus while there is an element of retrospectivity to Part 6 of the Bill, this is to ensure that the titleholder's responsibility is always linked to well safety and not diluted by historical circumstance such as progression from a permit to a licence or through changes in title ownership.

These amendments fulfil the original policy intention to make a titleholder responsible for the occupational health and safety aspects of wells, as the titleholder holds the essential knowledge of the geology of the oil or gas reservoir including pressures in the reservoir and is thus best able to determine where the well should be located and how it should be designed, constructed, maintained and operated in a safe manner.

My adviser and officers of the Department of Resources, Energy and Tourism are available to meet with the Committee's Secretary to discuss any of these matters if required.

Yours sincerely



Martin Ferguson

ASSISTANT TREASURER
SENATOR THE HON NICK SHERRY

ASSISTANT TREASURER
15 MAR 2010

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Senator for New South Wales
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Dear Senator Coonan Helen

Thank you for the letter of 24 February 2010 from the Standing Committee for the Scrutiny of Bills to the Treasurer concerning item 104 of Schedule 6 to the Tax Laws Amendment (2010 Measures No. 1) Bill 2010. This letter has been referred to me as I have portfolio responsibility for this matter.

The letter sought a response to the Committee's comment in the *Alert Digest* that the explanatory memorandum to the Bill did not explain why item 104 imposes an evidential burden on taxpayers.

Item 104 is part of a measure extending the existing administrative penalty for making false or misleading taxation statements to also include statements that do not lead to a tax shortfall (most such statements are currently only dealt with by prosecution for an offence). In extending the penalty, the Government concluded that the recently introduced 'tax agents safe harbour' should also be available to protect taxpayers if a statement is made for them by their tax agent.

That safe harbour is in subsection 284-75(1A) of Schedule 1 to the *Taxation Administration Act 1953*. Subsection (1B) provides that taxpayers who seek to rely on the safe harbour bear the evidential burden of proving that they gave their agent all relevant taxation information.

In extending the safe harbour to cover a wider range of false or misleading tax statements, item 104 does not change the existing evidential burden. It moves subsection (1B) to subsection (7) for the purposes of organising the section in a better order. It does not change the subsection's wording.

The explanatory memorandum does not explain why taxpayers bear an evidential burden because the Bill makes no relevant change to the existing safe harbour rule. The explanatory memorandum to the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 explained the introduction of the safe harbour provision (paragraphs 2.19 to 2.28).

I trust this information will be of assistance to you.

Yours sincerely

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