SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2012

14 March 2012

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2012

The Committee presents its Third Report of 2012 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:

Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012

Introduced into the House of Representatives on 15 February 2012
Portfolio: Justice

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2012*. The Minister responded to the Committee's comments in a letter dated on 13 March 2012. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2012 - extract

Background

This bill amends the *Classification (Publications, Films and Computer Games) Act 1995* to introduce an R 18+ (Restricted) category for computer games and makes a consequential amendment to the *Broadcasting Services Act 1992* to recognise the introduction of an R18+ category for computer games.

Delayed Commencement
Clause 2

The bill will not commence until January 2013 (clause 2). 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. In this case, no explanation is provided in the explanatory memorandum for the delay. The Committee can understand that there are reasons that the beginning of a new calendar year is an appropriate date for commencement, **but given the possibility of delayed commencement seeks the Minister's advice about the justification for the proposed approach.**

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

Minister's response - extract

Delayed Commencement: Clause 2

The Committee has sought my advice about the rationale for a delayed commencement date.

The National Classification Scheme is a cooperative scheme between the Commonwealth, States and Territories. The States and Territories are responsible for the enforcement of laws governing the availability of computer games, including those classified R 18+.

The delayed commencement date of 1 January 2013 was an amendment specifically requested by States and Territories following circulation by the Commonwealth of the exposure draft of the Classification (Publication, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012.

The delayed commencement date will allow the States and Territories to amend their respective classification enforcement legislation to recognise and regulate the availability of R 18+ computer games, by 1 January 2013.

It is vital that access to R 18+ computer games is appropriately regulated prior to commencement, to ensure protections are in place to prevent children from accessing material that is intended to be restricted to adults. This can only occur if all jurisdictions have had the opportunity to pass complementary legislation, once the Commonwealth legislation has passed.

Committee Response

The Committee thanks the Minister for this response and notes that it would have been useful for the key points to have been included in the explanatory memorandum.

Alert Digest No. 2 of 2012 - extract

Statement of compatibility with Human Rights

The Committee notes that comments about statements of compatibility will primarily be the responsibility of the Parliamentary Joint Committee on Human Rights when that committee is established. However, some issues relating to human rights also fall within the Scrutiny Committee's terms of reference.

In light of the above, the Committee therefore notes that it does not agree with the statements on page 2 of the explanatory memorandum that 'This Bill does not engage any of the applicable rights or freedoms' and '...it does not raise any human rights issues.' It appears to the Committee that a classification system that restricts access to forms of speech and expression inevitably engages the right to free speech. However, the Committee notes that the restrictions are arguably proportionate and makes no further comment on this occasion.

Minister's response - extract

Statement of Compatibility with Human Rights

The Statement of Compatibility will be revised following the Committee's comments, and a correction to the EM will be tabled.

This Bill engages the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights.

The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right to freedom of expression carries with it special responsibilities. It is not an absolute right and under Article 19(3) it may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Any limitations must be prescribed by legislation, necessary to achieve the desired purpose, and proportionate to the need on which the limitation is predicated.

As the Committee points out, a system of Government classification such as the National Classification Scheme can act to limit the freedom of expression. The National Classification Scheme is designed to provide consumers with information about

publications, films and computer games, to allow them to make informed decisions about appropriate entertainment material for themselves and their children. The Scheme is based on the following principles:

a. adults should be able to read, hear and see what they want
b. minors should be protected from material likely to harm or disturb them
c. everyone should be protected from exposure to unsolicited material that they find offensive, and
d. the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.

While the consequence of a classification scheme may be that some material would be refused classification altogether and that people under the age of 18 years may not be able to view particular material, the National Classification Scheme is a reasonable, necessary and proportionate limitation on the right to freedom of expression for the purposes of protecting minors against the potential harm caused by age-inappropriate material.

Thank you for allowing me the opportunity to address the Committee's concerns.

Committee Response

The Committee thanks the Minister for this detailed response and for his commitment to amend the Statement of Compatibility.

Crimes Legislation Amendment (Powers and Offences) Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Justice

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated on 28 February 2012. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2012 - extract

Background

This bill amends a range of key Commonwealth law enforcement legislation relating to the effective investigation and enforcement of Commonwealth laws.

Schedule 1 implements recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (Crimes Act) Review (the DNA Review) governing the collection and use of DNA forensic material in Part 1D of the Crimes Act.

Schedule 2 amends the *Australian Crime Commission Act 2002* (ACC Act) in relation to ways in which the Australian Crime Commission (ACC) can share and disclose information and material in its possession to combat serious and organised crime.

Schedule 3 also makes amendments to the ACC Act that introduce rules about the use, sharing and retention of things seized under the ACC Act.

Schedule 4 amends the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) regarding the ability of the Australian Commission for Law Enforcement Integrity (ACLEI) to investigate corruption. Other amendments to the LEIC Act amend the operation of provisions relating to arrest warrants, search warrants, and notices to produce and summon, and provide consistency between non-disclosure regimes in the *Privacy Act 1988* and the LEIC Act.

Schedule 5 includes amendments to Part 9.1 of the Criminal Code relating to illicit substances and quantities that are temporarily prescribed in the *Criminal Code Regulations 2002* so that they will remain subject to Commonwealth serious drug offences in the longer term. Amendments will be made to the Customs Act relating to the powers of the

Australian Customs and Border Protection Service regarding its role in seizing illicit substances unlawfully entering Australia.

Schedule 6 amends the *Proceeds of Crime Act 2002* and the DPP Act to allow a court to restrict publication of certain matters to prevent prejudice to the administration of justice and enable Australian Federal Police employees and secondees to become 'authorised officers'.

Schedule 7 amends Part 1B of the Crimes Act to implement recommendations arising out of the *Australian Law Reform Commissions 2006 Report: Same Crime, Same Time: Sentencing of Federal Offenders*. The amendments will ensure that all parole decisions are able to be made at the Attorney-General's discretion and that adequate parole, licence and supervision periods are applied to federal offenders as required.

Schedule 8 amends section 15A of the *Crimes Act* to enable State and Territory fine enforcement agencies to take non-judicial enforcement action to enforce Commonwealth fines without first obtaining a court order, and to make related amendments to the *Crimes Act*.

Trespass on personal rights and liberties
Schedule 2, item 28

In recognition of the importance of public-private partnerships in combating organised crime, item 28 makes express provision for the dissemination of information outside government. The ACC Act currently makes no express provision for the dissemination of information outside of government other than through public meetings and bulletins issued by the Board. Building on a number of reviews, which examined the question of the sharing of information between government agencies and the private sector, proposed section 59AB will set out the circumstances in which the ACC can share information with the private sector.

Proposed subsection 59AB(1) provides that the ACC can share information with a body corporate prescribed in regulations, or within a prescribed class of bodies. The explanatory memorandum lists as examples of classes of bodies that will be able to be prescribed: banks, financial institutions, telecommunications companies, internet service providers, insurance companies, or companies in a specified location of type of location (eg ports and airports).

The circumstances in which disclosure of information is allowed and the limitations and accountability mechanisms which are associated with disclosure to private bodies are detailed in the explanatory memorandum at pages 57 to 64. It is noted that proposed paragraph 59AB(2)(a) limits sharing information unless the CEO of the ACC considers it necessary for preventing or detecting criminal offences (or activities which might constitute criminal offences) or for facilitating the collection of criminal information and intelligence. The explanatory memorandum notes at page 61 that sharing information for

these purposes is consistent with the National Privacy Principles. Although the committee understands the rationale for the proposed approach, in light of the importance of the right to privacy and the significance of sharing personal information with the private sector the committee **seeks the Minister's advice as to whether the provisions could be limited to apply only to more serious offences, such as those attracting a minimum period of imprisonment (for example, 12 months).**

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

Attorney-General's response - extract

Schedule 2, item 27 - disclosure of 'ACC information' to private sector bodies

The Committee has raised concerns with proposed amendments contained in this item which would provide the ACC with the ability to disclose information to private sector bodies. As noted by the Committee, when the information sought to be shared by the ACC contains 'personal information' (as defined by the *Privacy Act 1988*), the information can only be shared in a limited range of circumstances. These include where it is necessary to share the information to prevent criminal offences or activities which might constitute criminal offences, or to detect or collect intelligence in relation to criminal offences or activities which might constitute criminal offences. The Committee has suggested that this safeguard be extended by requiring that information only be shared when the criminal offence in question is a more serious offence, such as one punishable by 12 months imprisonment or more.

The ACC's powers to conduct operations and investigations are limited to serious and organised crime, as defined in section 4 of the *Australian Crime Commission Act 2002*. Under this definition an offence must meet a range of criteria to be considered serious and organised crime, including that it involves two or more offenders and substantial planning, and that it involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques.

This restriction on the ACC's ability to conduct operations means that any information which the ACC seeks to share with the private sector will relate to serious and organised crime. However, it may not always be the case that the information relates to an identifiable serious offence. There may, for example, be circumstances where the CEO wishes to share information that relates to a pattern of suspicious activity which might tend to suggest one of a range of criminal offences is occurring or is about to occur. The addition of a requirement that the CEO be satisfied that the information relates to an

offence punishable by at least 12 months imprisonment before sharing that information would limit the ability to share information of this nature.

It is anticipated that when the ACC shares information with private industry it will most often be general information relating to current threats and vulnerabilities to assist industry in protecting businesses and consumers against serious and organised crime. Information of this nature would not contain personal information, However there will arise occasions where it will be necessary that information shared includes personal information, I note that in addition to limiting the purposes for which personal information can be shared, the Bill also requires that the ACC CEO, when sharing personal information, to impose conditions on how the recipient handles that information. Criminal offences apply for non-compliance with these conditions. These elements of the Bill provide strong safeguards to protect against the inappropriate disclosure of this information.

Committee Response

The Committee thanks the Attorney-General for this detailed response, which argues that it is inappropriate to limit sharing information to offences attracting a minimum period of imprisonment. In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 1 of 2012 - extract

Retrospective operation
Schedule 8, items 5 and 7

Item 5 of Schedule 8 gives the amendment made by item 4 retrospective operation. Item 4 clarifies that if a court makes an order imposing a penalty for failure to pay a fine, then a person or authority other than a court may take action to enforce the penalty without making a further application to a court under the relevant provision of the Crimes Act. The explanatory memorandum states at page 154 that: 'This retrospective application is considered necessary because the amendment made by Item 4 merely clarifies the operation of the existing law, and does not modify any person's accrued rights under the law'.

Related to this, item 7 confers retrospective authority on persons who previously enforced Commonwealth fines through non-judicial enforcement actions without a court order. The scope of this amendment is limited to 'a bare conferral of authority for the actions taken,

and does not extend to treating an invalid action as a valid action' (see the explanatory memorandum at page 155).

The committee leaves to the consideration of the Senate as a whole the question of whether the approach proposed in these items is appropriate.

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

Attorney-General's response - extract

Schedule 8 - enforcement of fines

Item 5

A self executing order occurs where a court imposes a fine on an offender, but at the same time makes an order that another penalty be imposed on the offender if arrangements have not been made to pay the fine by a certain date. For example, a court may impose a fine on a federal offender, but at the same time order that the offender be imprisoned for a period of time if he or she does not pay the fine.

State and territory fine enforcement agencies raised concerns about whether they had to return to court to enforce a Commonwealth fine if a court imposed a self executing order. The Commonwealth's view was that a self executing court order, regardless of whether it imposes a judicial penalty or any other penalty, does not require any further application to court before enforcing it.

However, to remove any doubt, Item 4 will clarify that state or territory laws can be applied to enforce the alternative penalty against federal offenders, in the manner set out in the court order, regardless of whether the penalty imposed in the original court order was a judicial penalty (set out in subsection 15A(1AB) of the Crimes Act) or a non judicial penalty. There is no need for the state or territory fine enforcement agency to return to court for a further order to enforce the other penalty, even if that penalty is set out in subsection 15A(1AB) of the Crimes Act.

Item 5 provides that the amendments in Item 4 will apply to self executing orders made before, on or after the commencement date. The element of retrospectivity in relation to past and existing orders is considered appropriate because these amendments merely clarify the operation of existing law and do not change the law.

Item 7

The amendments provide retrospective authority for past actions taken by state and territory fine enforcement agencies to enforce or recover Commonwealth fines by way of garnishment of a debt, wage or salary, a charge or caveat on property, and seizure or forfeiture of property (or similar penalties) without first applying for a court order.

The Parliament may retrospectively confer such authority so as to remove lack of authority as a ground on which past actions could be successfully challenged. This means that offenders will be required to comply with the terms of actions previously taken by state and territory fine enforcement agencies to enforce fines through property-related measures, such as garnishment of a debt, wage or salary, a charge or caveat on property, and seizure or forfeiture of property, without first obtaining a court order.

However, the scope of retrospectivity is limited to a bare conferral of authority for the actions taken, and does not extend to treating an invalid action as a valid action.

It would still be possible for an affected person to challenge a past fine enforcement action on the basis there had been some other defect in the process, other than a basic lack of authority on the part of the state or territory fine enforcement agency.

I thank the Committee for its consideration of this Bill and I trust that the information I have provided will assist any further consideration.

Committee Response

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

Additional Comment

The Committee sought an additional comment from the Attorney-General in *Alert Digest No.2 of 2012* to the bill. The Attorney-General responded in a letter dated 13 March 2012. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2012 - extract

Retrospective effect
Schedule 12(12)

Subsection 12(2) of Schedule 7 relates to amendments that will affect parole. It provides that the amendments apply in relation to a person for whom a non-parole period has been

fixed, whether *before*, at or after the commencement of the Schedule, but do not apply in relation to a person for whom a parole order has been made under the current provisions.

Importantly, this means that persons who were sentenced and for whom a non-parole period was fixed prior to the amendments will, nevertheless, have parole decisions made and maximum supervision periods calculated in accordance with the new provisions. Under the amendments prisoners may face later release dates and longer supervision periods than would have been applicable under the existing provisions. For example, the amendments mean that if a person is serving a federal sentence of less than 10 years for which a non-parole period has been fixed, they will no longer be granted 'automatic parole' at the expiration of the non-parole period, but the Attorney-General will have discretion to refuse release on parole at the end of their non-parole period.

Overall, the amendments are justified in the explanatory memorandum at page 149 on the basis that they will prevent persons being released inappropriately on parole (for example, sex offenders and terrorism offenders) and to better align the system with 'the concept of truth in sentencing'.

It may be argued that the proposed amendments are not technically retrospective as they operate on antecedent circumstances (the setting of a non-parole period at sentencing) in prescribing for the future how parole decisions will be made and how supervision periods will be calculated. However, the Law Council of Australia has argued that the provisions do effectively provide for the retrospective operation of these amendments (see page 2 of the council's February 2012 supplementary submission to the House of Representative's committee inquiry into the bill).

The Scrutiny Committee is concerned about whether, from a scrutiny perspective, the application provision proposed in subsection 12(2) unfairly or unduly affects rights or interests by applying to past facts and circumstances. The distinction between legislation which has a prior effect on past events (and is therefore a straightforward example of retrospectivity) and that which bases future action on past events (and is not technically retrospective) is not always easy to draw in practice.

In sentencing offenders and setting non-parole periods, sentencing courts set terms of imprisonment on the basis of assumptions as to how parole decisions would be made and the likely supervision periods that would be applicable. It seems to the Committee that this is even more clearly the case when a statutory provision removes discretion and requires a particular parole decision to be made, such as where the statute requires that a parole decision is 'automatic'. In the current circumstances it seems that the proposed amendments will mean that some federal offenders will suffer harsher penalties than those expected when they were sentenced. The result may be considered similar, in practical effect, to retrospectively increasing a penalty after a person has been sentenced.

Although some comments in the explanatory memorandum provide a general justification for the application of these amendments, the explanatory memorandum does not address the rationale for applying the amendments to past facts and circumstances. **In light of the**

likely potential detriment to some federal offenders, the Committee requests the Minister's advice as to the justification for applying the provisions to persons who were sentenced before the schedule commences.

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

Minister's response - extract

As noted by the Committee, subsection 12(2) will apply to a federal offender for whom a non-parole period has been fixed, whether before, at or after the commencement of Schedule 7, but does not apply to federal offenders for whom a parole order has been made under the current section 19AL of the *Crimes Act* 1914. This will make all federal parole decisions discretionary from the time that the amendments commence (whether or not the person is serving a sentence less, or greater, than 10 years). Any federal offender who is eligible for release on parole but for whom a parole order has not been made at the commencement of the amendments:

- may be refused release on parole at the end of their non-parole period
- will have a parole period that extends to the end of their sentence (other than for people serving life sentences, in which case the parole period must be at least five yean;), and
- may be supervised until the end of their sentence.

The Committee has raised concerns with the potential retrospective effect of subsection 12(2). In particular it is concerned that the amendments may result in federal offenders facing later release dates and longer supervision periods than would have been applicable under the existing provisions.

Removal of automatic parole for federal offenders serving a sentence of under 10 years

If the amendments did not apply to federal offenders already sentenced, and for whom a parole order has not been made, I would be required (for potentially up to 10 years until all current federal offenders have served their sentences) to release federal offenders on parole, even when they are not considered suitable for release. I should note that most are considered suitable for release. However, where the federal offender is not regarded by the State or Territory corrective services as suitable for release, I would have no choice but to release the offender, against the advice of the State or Territory which is responsible for the supervision of the offender on parole. This situation has arisen in the past and is the reason that I have brought these proposed amendments before Parliament. In this situation, if the

offender re-offends, there is a real risk to community safety. This is particularly evident in child pornography and child sex tourism offences.

Most federal offenders use their time in custody as opportunity to address their offending behavior. They comply with prison rules and participate in rehabilitation programs. Federal offenders who behave in this manner can be expected to be released at the end of their non-parole period. However, I do not believe that federal offenders who have made no effort to address their offending, have continually refused to comply with prison rules and/or participate in rehabilitation programs, should be automatically released. Community safety must be prioritised.

Removal of legislative maximums for parole and supervision periods

The current legislative maximum parole and supervision periods mean that in many cases, the sentence imposed by the court is not fully enforced. This is contrary to the concept of truth in sentencing and does not reflect the penalty determined by the court to be appropriate.

For example, if a federal offender receives a sentence of 25 years with a non-parole period of 12 years, their parole period would end five years after their release from prison, or the last day of the sentence, whichever occurs first. Accordingly, the offender would only serve 17 years of the 25 year sentence imposed by the court. Should the offender commit a further offence in the remaining eight years of the sentence, they would not be required to serve their remaining sentence (as would be the case if they were still on parole).

In relation to supervision periods, issues of community safety are again raised. For example, under the current arrangements, a federal offender who has been determined to still require ongoing supervision beyond the current legislative maximum of three years cannot be subject to any longer period of supervision or obligations even though they are still serving a sentence set by the court.

Additionally, if the amendments were not applied to all federal offenders for whom a parole order has not been made at commencement, this would result in two systems of parole operating simultaneously. This would create another element of complexity in the parole process and result in disparity between federal offenders.

I thank the Committee for its consideration of this Bill.

Committee Response

The Committee thanks the Minister for this detailed response, but remains concerned about the retrospective effect given to the amendments. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Financial Framework Legislation Amendment Bill (No.1) 2012

Introduced into the House of Representatives on 16 February 2012
Portfolio: Finance and Deregulation

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2012*. The Minister responded to the Committee's comments in a letter dated on 13 March 2012. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2012 - extract

Background

This bill amends the following:

- the *Auditor-General Act 1997* to clarify that the Auditor-General may accept an appointment under the *Corporations Act 2001* as the auditor of any company that the Commonwealth controls;

- the *Commonwealth Authorities and Companies Act 1997* to:

  - ensure that directors of Commonwealth authorities and wholly-owned Commonwealth companies prepare budget estimates as directed by the Finance Minister, rather than the responsible Minister; and

  - ensure that directors of Commonwealth authorities and wholly-owned Commonwealth companies notify their responsible Minister of any decisions regarding certain significant events.

- the *Financial Framework Legislation Amendment Act 2010* to replace references to 'at common law and in equity' and 'at common law or in equity' with the phrase 'under the general law'; and

- the *Financial Management and Accountability Act 1997* to:

  - clarify the commencement date for determinations for Special Accounts, and ensure that certain determinations may commence on a day specified in the determination;

- focus the operation of drawing rights on payments and remove the penalty relating to drawing rights;

- insert a new whole-of-Government provision to enable the Finance Minister to set-off, in whole or part, an amount owing to the Commonwealth by a person with an amount owing by the Commonwealth to the same person; and

- increase certain limits which the Finance Minister may delegate to officials, in relation to the making of certain legislative instruments.

The bill also repeals the *Appropriation (Development Bank) Act 1975* and the *Car Dealership Financing Guarantee Appropriation Act 2009.*

Retrospective application
Schedule 3, items 1 and 2

Items 1 and 2 in Schedule 3 relate to the *Financial Framework Legislation Amendment Act 2010*, and seek to amend two misdescribed provisions. The amendments would commence retrospectively so that the corrections would take effect from 1 March 2011 when the misdescriptions became law. The explanatory memorandum states at page 5 that:

> ...this retrospective commencement of these items would not affect any entrenched or fundamental rights, but would serve to correct that minor misdescription in the FFLA 2010.

The details of the proposed changes are set out in the explanatory memorandum at page 15. However, it is not clear from the explanation whether an assurance is being given that the changes will not result in any detriment. As such, **the Committee seeks the Minister's further advice as to whether the changes could possibly cause detriment to any person**.

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

Minister's response - extract

I refer to the letter sent to my office on 1 March 2012 from the Committee Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee), drawing my attention to comments contained in the Committee's *Alert Digest No.2 of 2012* (29 February 2012) concerning the *Financial Framework Legislation Amendment Bill (No.1) 2012* (the Bill). Specifically, page 21 of the Alert Digest notes that, while the Explanatory Memorandum to the Bill states that the retrospective commencement of items

1 and 2 of Schedule 3 of the Bill *would* not affect any entrenched or fundamental rights [emphasis added], the Committee requires further advice on whether the proposed changes *could* possibly cause detriment to any person [emphasis added].

Items 1 and 2 of Schedule 3 of the Bill would amend 2 misdescribed provisions at items 7 and 8 of Schedule 5 of the *Financial Framework Legislation Amendment Act 2010* (FFLA Act), which sought to amend section 27A of the *Commonwealth Authorities and Companies Act* 1997 (CAC Act) to replace references to "at common law and in equity" and "at common law or in equity" with the phrase "under the general law" (Section 5 of the CAC Act defines "general law" as meaning "the principles and rules of the common law and equity"). Items 7 and 8 were misdescribed and transposed the placement of the words "and" and "or". Consequently, items 7 and 8 became law but did not amend section 27A of the CAC Act as intended.

Items 1 and 2 of Schedule 3 of the Bill would commence retrospectively from 1 March 2011 (that is, when misdescribed items 7 and 8 of Schedule 5 of the FFLA Act became law). The retrospective commencement of items 1 and 2 of Schedule 3 of the Bill would not cause detriment to any person, as, substantively, the connection to common law and equity are retained within the meaning of general law. Accordingly, I consider that that the changes will not result in any detriment.

I note, also, that the Hon. Richard Marles, MP, Parliamentary Secretary for Pacific Island Affairs, spoke on this matter on 1 March 2012 in the House of Representatives, and advised the Parliament that the changes could not possibly cause detriment to any person.

I am grateful to the Committee for pointing out that, in future, any description in the Explanatory Memorandum of any provisions that would apply retrospectively should clarify whether that the proposed changes could possibly cause detriment to any person.

Committee Response

The Committee thanks the Minister for this detailed response and the assurance that the change will not result in any detriment. The Committee also notes the Minister's acknowledgement that information relating to whether or not provisions with retrospective impact could cause detriment to any person should be included in explanatory memoranda.

Insurance Contracts Amendment Bill 2011

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Minister responded to the Committee's comments in a letter received on 13 March 2012. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2012 - extract

Background

This bill amends the *Insurance Contracts Act 1984* to:

- provide a legislative framework so that regulations can be made to establish a standard definition of flood for home building, home contents, small business and strata title insurance policies; and

- require insurance providers to provide a key facts sheet in relation to home building and home contents insurance policies.

Delegation of legislative power
Schedule 1, item 1

The purpose of this bill is to implement a number of proposals contained in the Government's consultation paper *Reforming flood insurance: Clearing the waters*. The bill seeks to provide for greater consumer clarity in relation to insurance contracts by providing for a standard definition of the meaning of 'flood' and specifying what sort of events are covered. The bill also would impose an obligation on insurers to give consumers a Key Facts Sheet (KFS), a document outlining the key information in relation to home building and contents policies.

From a scrutiny perspective the issue that arises is the bill's reliance on delegated legislation to achieve these objectives. Item 1 of Schedule 1 proposes to insert a new section 37A into the *Insurance Contracts Act 1984*. This section provides that the new definition of flood will apply in relation to contracts which are prescribed in the regulations (after a two year transition period so as to minimise compliance costs for insurers).

The explanatory memorandum at page 10 makes it clear that the two key types of insurance contract which will be covered are those relating to home building and home contents, and that the regulations will prescribe these contracts. Further, other contracts that directly impact consumer, namely, those covering small business and strata titles, will also be prescribed.

The committee's expectation is that important information will be included in primary legislation whenever possible. As the explanatory memorandum does not suggest that there may be other categories of contracts in relation to which it may be desirable to extend the coverage of the definition of flood, **the Committee seeks the Minister's advice as to why it is not possible for these matters to be dealt with in the primary legislation.**

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

Minister's response - extract

The Committee has sought my advice on why it is not possible for the prescribed contracts to which the new standard definition of flood provisions apply to be contained in the primary legislation.

To provide consistency with the location of the standard cover regime and to remove the potential for unintended consequences for insurers and insureds alike, prescribed contracts to which the new standard definition of flood provisions are to be located in the *Insurance Contracts Regulations* 1985 (lCR) and not the *Insurance Contracts Act* 1984 (lCA).

The ICA currently has a standard cover regime which covers standard contracts for motor vehicle, home building, home contents, sickness and accident, consumer credit and travel insurance. While the standard cover regime is triggered through application of section 35 of the primary legislation, the prescribed contracts to which the standard cover regime applies are contained in the ICR. Locating the prescribed contracts to which the new standard definition of flood will apply in the primary legislation would not be consistent with the ICA.

Small business and strata title bodies corporate insurance contracts are not prescribed contracts to which the standard cover regime applies. Insurers issuing insurance contracts to which the standard cover regime does not apply are required, in accordance with section 37 of the primary legislation, to notify insureds of any unusual terms that are not usually included in contracts of insurance that provide similar insurance cover if they wish to rely these terms at a future time. Insurance contracts to which section 37 applies are not specifically defined in regulations or primary legislation. Endeavouring to define these

contracts in primary legislation would be significantly more complex than defining these contracts in the regulations and may result in unintended consequences for insurers and insureds alike.

Committee Response

The Committee thanks the Minister for this response and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 1 of 2012 - extract

Delegation of legislative power
Schedule 1, section 37B

Schedule 1 also proposes a new section 37B, which provides that the 'regulations must define the meaning of flood'. The explanatory memorandum at page 10 states that the definition is expected to be consistent with the wording proposed in the Government's consultation paper (which is described), but that the precise wording will be subject to consultation. However, it is unclear why the definition cannot be included in the primary legislation or why the consultation could not precede enactment of the new law. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

The Committee has also sought my advice on why the standard definition of flood cannot be included in the primary legislation or why the consultation could not precede enactment of the new law.

To ensure that the policy intent of the new standard definition of flood can be achieved in a simple and effective way and to safeguard against the potential for the standard definition of flood applying inappropriately, the wording of the standard definition of flood will be

consulted on prior to the wording of the standard definition of flood being contained in regulation.

The new standard definition of flood provision will only apply to home building, home contents, small business and strata title bodies corporate insurance policies. Other insurance policies to which the standard cover regime (section 35 contracts) applies and those not covered by the standard cover regime (section 37 contracts) are not required to apply the new provisions.

The ability to restrict the wording of the standard definition of flood to those prescribed contracts to which the standard definition of flood provisions will apply may have unintended consequences if it is contained in primary legislation. Due to the current structure of the ICA it was not certain how .the standard definition of flood would impact other contracts to which section 37 applies or how the wording of the standard definition of flood would apply in respect to the standard cover regime contracts.

On 22 December 2012 the Government released exposure draft regulations containing wording for the standard definition of flood (consistent with consultation paper *"Reforming flood insurance: Clearing the waters").* Nine submissions were received in response to the exposure draft regulations. While the submissions broadly supported the proposed regulations, a number of small technical issues have been raised. Treasury is currently working through these issues with a view of finalising the regulations shortly. The wording of the standard definition of flood will be consistent with the wording provided in the draft regulations with some minor technical refinements.

Committee Response

The Committee thanks the Minister for this detailed response and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 1 of 2012 - extract

Delegation of legislative power
Schedule 2

Schedule 2 of the bill introduces amendments which impose an obligation on insurers to produce a key fact sheet (the contents and requirements of which will be prescribed by regulations—see proposed section 33B). The explanatory memorandum at page 14 states that the content, format and provision requirements for the KFS will 'be determined in

regulations after extensive public consultation to ensure appropriate consumer and industry outcomes can be achieved'. The information that should be provided in such a document may be appropriately revised in light of experience and industry and consumer feedback. In addition, the KFS does not alter in any way obligations of the parties to an insurance contract.

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

Minister's response - extract

In relation to Schedule 2 of the Bill I note the Alert digest states that the obligation on insurers to produce a key fact sheet and its contents will be prescribed by regulations. As stated in the explanatory memorandum, the content, format and provision requirements for the Key Facts Sheet (KFS) will be determined in regulations after extensive public consultation. In this regard, on 29 February 2012 the Government released a discussion paper seeking public feedback on the content format and provision of the KFS. Submissions on the discussion paper close on 23 March 2012.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 1 of 2012 - extract

Reversal of onus
Subsection 33C(3)

Proposed subsection 33C(3) enables exceptions to be prescribed by regulations to the offence of failing to provide a lawful Key Fact Sheet where that is required. The note to this provision states that the defendant bears an evidential burden in relation to establishing that an exception prescribed in the regulations can be made out. The explanatory memorandum at page 18 states that this approach is justified as the matters that will be prescribed are within insurers' knowledge and or their control. The explanatory memorandum lists three circumstances where it may be considered that an exemption to the KFS requirement is warranted (and may be prescribed in the regulations) at pages 17 to 18. The justification given for placing an evidential burden on the defendant is consistent

with the suggested exceptions. However, as the power to prescribe exceptions is not limited to circumstances about which the defendant will have knowledge or will relate to matters under their control, **the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Minister's response - extract

Finally, the Alert digest raises the point that exceptions to the provision of a KFS may be prescribed by regulations and that there will be an offence for failing to provide a lawful KFS where it is required. The Alert digest notes that the relevant provision states that the defendant bears an evidential burden in relation to establishing that an exception prescribed in the regulations can be made out.

The situations where exceptions to the provision of a KFS may be provided were outlined in the explanatory memorandum to the Bill. It is recognised that the power to prescribe exceptions is not limited to circumstances about which insurers will have knowledge or will relate to matters under their control. However, any exceptions (outside those noted in the explanatory memorandum) will only be provided where it is appropriate to do so and after extensive consultation with both industry and consumer groups has been undertaken.

Committee Response

The Committee thanks the Minister for this additional information.

Senator Mitch Fifield
Chair

THE HON JASON CLARE MP
Minister for Justice

11/21964 MC12/02015

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA

Dear Senator Fifield

I refer to your letter of 1 March 2012 addressed to my Senior Adviser. I am writing in response to the issues concerning the Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 identified by the Standing Committee for the Scrutiny of Bills in Alert Digest No.2 of 2012 (29 February 2012).

Delayed Commencement: Clause 2

The Committee has sought my advice about the rationale for a delayed commencement date.

The National Classification Scheme is a cooperative scheme between the Commonwealth, States and Territories. The States and Territories are responsible for the enforcement of laws governing the availability of computer games, including those classified R 18+.

The delayed commencement date of 1 January 2013 was an amendment specifically requested by States and Territories following circulation by the Commonwealth of the exposure draft of the Classification (Publication, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012.

The delayed commencement date will allow the States and Territories to amend their respective classification enforcement legislation to recognise and regulate the availability of R 18+ computer games, by 1 January 2013.

It is vital that access to R 18+ computer games is appropriately regulated prior to commencement, to ensure protections are in place to prevent children from accessing material that is intended to be restricted to adults. This can only occur if all jurisdictions have had the opportunity to pass complementary legislation, once the Commonwealth legislation has passed.

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Statement of Compatibility with Human Rights

The Statement of Compatibility will be revised following the Committee's comments, and a correction to the EM will be tabled.

This Bill engages the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights.

The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right to freedom of expression carries with it special responsibilities. It is not an absolute right and under Article 19(3) it may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Any limitations must be prescribed by legislation, necessary to achieve the desired purpose, and proportionate to the need on which the limitation is predicated.

As the Committee points out, a system of Government classification such as the National Classification Scheme can act to limit the freedom of expression. The National Classification Scheme is designed to provide consumers with information about publications, films and computer games, to allow them to make informed decisions about appropriate entertainment material for themselves and their children. The Scheme is based on the following principles:

a. adults should be able to read, hear and see what they want
b. minors should be protected from material likely to harm or disturb them
c. everyone should be protected from exposure to unsolicited material that they find offensive, and
d. the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.

While the consequence of a classification scheme may be that some material would be refused classification altogether and that people under the age of 18 years may not be able to view particular material, the National Classification Scheme is a reasonable, necessary and proportionate limitation on the right to freedom of expression for the purposes of protecting minors against the potential harm caused by age-inappropriate material.

Thank you for allowing me the opportunity to address the Committee's concerns.

Yours sincerely

Jason Clare

Jason Clare

THE HON NICOLA ROXON MP
ATTORNEY-GENERAL

28 FEB 2012

AG-MC12/01238; 11/20978

RECEIVED
29 FEB 2012
Senate Standing C'ttee
for the Scrutiny
of Bills

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Mitch

I refer to the letter dated 9 February 2012 from Ms Toni Dawes, on behalf of the Senate Scrutiny of Bills Committee, regarding the Crimes Legislation Amendment (Powers and Offences) Bill 2011. I note that the Committee, in its *Alert Digest No 1 of 2012*, has raised two issues in relation to this Bill to which it seeks a response.

Schedule 2, item 27 – disclosure of 'ACC information' to private sector bodies

The Committee has raised concerns with proposed amendments contained in this item which would provide the ACC with the ability to disclose information to private sector bodies. As noted by the Committee, when the information sought to be shared by the ACC contains 'personal information' (as defined by the *Privacy Act 1988*), the information can only be shared in a limited range of circumstances. These include where it is necessary to share the information to prevent criminal offences or activities which might constitute criminal offences, or to detect or collect intelligence in relation to criminal offences or activities which might constitute criminal offences. The Committee has suggested that this safeguard be extended by requiring that information only be shared when the criminal offence in question is a more serious offence, such as one punishable by 12 months imprisonment or more.

The ACC's powers to conduct operations and investigations are limited to serious and organised crime, as defined in section 4 of the *Australian Crime Commission Act 2002*. Under this definition an offence must meet a range of criteria to be considered serious and organised crime, including that it involves two or more offenders and substantial planning, and that it involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques.

This restriction on the ACC's ability to conduct operations means that any information which the ACC seeks to share with the private sector will relate to serious and organised crime. However, it may not always be the case that the information relates to an identifiable serious offence. There may, for example, be circumstances where the CEO wishes to share information that relates to a pattern of suspicious activity which might tend to suggest one of a range of criminal offences is occurring or is about to occur. The addition of a requirement that the CEO be satisfied that the information relates to an offence punishable by at least 12 months imprisonment before sharing that information would limit the ability to share information of this nature.

It is anticipated that when the ACC shares information with private industry it will most often be general information relating to current threats and vulnerabilities to assist industry in protecting businesses and consumers against serious and organised crime. Information of this nature would not contain personal information. However there will arise occasions where it will be necessary that information shared includes personal information. I note that in addition to limiting the purposes for which personal information can be shared, the Bill also requires that the ACC CEO, when sharing personal information, to impose conditions on how the recipient handles that information. Criminal offences apply for non-compliance with these conditions. These elements of the Bill provide strong safeguards to protect against the inappropriate disclosure of this information.

Schedule 8 – enforcement of fines

Item 5

A self executing order occurs where a court imposes a fine on an offender, but at the same time makes an order that another penalty be imposed on the offender if arrangements have not been made to pay the fine by a certain date. For example, a court may impose a fine on a federal offender, but at the same time order that the offender be imprisoned for a period of time if he or she does not pay the fine.

State and territory fine enforcement agencies raised concerns about whether they had to return to court to enforce a Commonwealth fine if a court imposed a self executing order. The Commonwealth's view was that a self executing court order, regardless of whether it imposes a judicial penalty or any other penalty, does not require any further application to court before enforcing it.

However, to remove any doubt, Item 4 will clarify that state or territory laws can be applied to enforce the alternative penalty against federal offenders, in the manner set out in the court order, regardless of whether the penalty imposed in the original court order was a judicial penalty (set out in subsection 15A(1AB) of the Crimes Act) or a non judicial penalty. There is no need for the state or territory fine enforcement agency to return to court for a further order to enforce the other penalty, even if that penalty is set out in subsection 15A(1AB) of the Crimes Act.

Item 5 provides that the amendments in Item 4 will apply to self executing orders made before, on or after the commencement date. The element of retrospectivity in relation to past and existing orders is considered appropriate because these amendments merely clarify the operation of existing law and do not change the law.

Item 7

The amendments provide retrospective authority for past actions taken by state and territory fine enforcement agencies to enforce or recover Commonwealth fines by way of garnishment of a debt, wage or salary, a charge or caveat on property, and seizure or forfeiture of property (or similar penalties) without first applying for a court order.

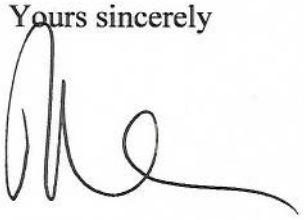
The Parliament may retrospectively confer such authority so as to remove lack of authority as a ground on which past actions could be successfully challenged. This means that offenders will be required to comply with the terms of actions previously taken by state and territory fine enforcement agencies to enforce fines through property-related measures, such as garnishment of a debt, wage or salary, a charge or caveat on property, and seizure or forfeiture of property, without first obtaining a court order.

However, the scope of retrospectivity is limited to a bare conferral of authority for the actions taken, and does not extend to treating an invalid action as a valid action.

It would still be possible for an affected person to challenge a past fine enforcement action on the basis there had been some other defect in the process, other than a basic lack of authority on the part of the state or territory fine enforcement agency.

I thank the Committee for its consideration of this Bill and I trust that the information I have provided will assist any further consideration.

Yours sincerely



NICOLA ROXON

THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT

11/25245

13 MAR 2012

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fifield Mitch

I refer to the letter dated 1 March 2012 from Ms Toni Dawes, on behalf of the Senate Scrutiny of Bills Committee, regarding the Crimes Legislation Amendment (Powers and Offences) Bill 2011. I note that the Committee, in its *Alert Digest No 2 of 2012*, has raised a further issue in relation to subsection 12(2) of Schedule 7 of this Bill to which it seeks a response.

As noted by the Committee, subsection 12(2) will apply to a federal offender for whom a non-parole period has been fixed, whether before, at or after the commencement of Schedule 7, but does not apply to federal offenders for whom a parole order has been made under the current section 19AL of the *Crimes Act 1914*. This will make all federal parole decisions discretionary from the time that the amendments commence (whether or not the person is serving a sentence less, or greater, than 10 years). Any federal offender who is eligible for release on parole but for whom a parole order has not been made at the commencement of the amendments:

- may be refused release on parole at the end of their non-parole period
- will have a parole period that extends to the end of their sentence (other than for people serving life sentences, in which case the parole period must be at least five years), and
- may be supervised until the end of their sentence.

The Committee has raised concerns with the potential retrospective effect of subsection 12(2). In particular, it is concerned that the amendments may result in federal offenders facing later release dates and longer supervision periods than would have been applicable under the existing provisions.

Removal of automatic parole for federal offenders serving a sentence of under 10 years

If the amendments did not apply to federal offenders already sentenced, and for whom a parole order has not been made, I would be required (for potentially up to 10 years until all

current federal offenders have served their sentences) to release federal offenders on parole, even when they are not considered suitable for release. I should note that most are considered suitable for release. However, where the federal offender is not regarded by the State or Territory corrective services as suitable for release, I would have no choice but to release the offender, against the advice of the State or Territory which is responsible for the supervision of the offender on parole. This situation has arisen in the past and is the reason that I have brought these proposed amendments before Parliament. In this situation, if the offender re-offends, there is a real risk to community safety. This is particularly evident in child pornography and child sex tourism offences.

Most federal offenders use their time in custody as opportunity to address their offending behavior. They comply with prison rules and participate in rehabilitation programs. Federal offenders who behave in this manner can be expected to be released at the end of their non-parole period. However, I do not believe that federal offenders who have made no effort to address their offending, have continually refused to comply with prison rules, and/or participate in rehabilitation programs, should be automatically released. Community safety must be prioritised.

Removal of legislative maximums for parole and supervision periods

The current legislative maximum parole and supervision periods mean that, in many cases, the sentence imposed by the court is not fully enforced. This is contrary to the concept of truth in sentencing and does not reflect the penalty determined by the court to be appropriate.

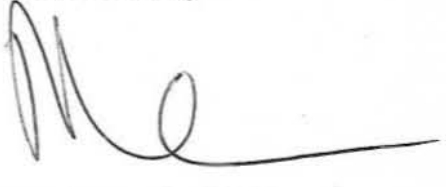
For example, if a federal offender receives a sentence of 25 years with a non-parole period of 12 years, their parole period would end five years after their release from prison, or the last day of the sentence, whichever occurs first. Accordingly, the offender would only serve 17 years of the 25 year sentence imposed by the court. Should the offender commit a further offence in the remaining eight years of the sentence, they would not be required to serve their remaining sentence (as would be the case if they were still on parole).

In relation to supervision periods, issues of community safety are again raised. For example, under the current arrangements, a federal offender who has been determined to still require ongoing supervision beyond the current legislative maximum of three years cannot be subject to any longer period of supervision or obligations even though they are still serving a sentence set by the court.

Additionally, if the amendments were not applied to all federal offenders for whom a parole order has not been made at commencement, this would result in two systems of parole operating simultaneously. This would create another element of complexity in the parole process and result in disparity between federal offenders.

I thank the Committee for its consideration of this Bill.

Yours sincerely



NICOLA ROXON

SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation

REF: C12/651

13 MAR 2012

Senator Mitch Fifield
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Mitch

I refer to the letter sent to my office on 1 March 2012 from the Committee Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee), drawing my attention to comments contained in the Committee's *Alert Digest No.2 of 2012* (29 February 2012) concerning the *Financial Framework Legislation Amendment Bill (No. 1) 2012* (the Bill). Specifically, page 21 of the Alert Digest notes that, while the Explanatory Memorandum to the Bill states that the retrospective commencement of items 1 and 2 of Schedule 3 of the Bill *would* not affect any entrenched or fundamental rights [emphasis added], the Committee requires further advice on whether the proposed changes *could* possibly cause detriment to any person [emphasis added].

Items 1 and 2 of Schedule 3 of the Bill would amend 2 misdescribed provisions at items 7 and 8 of Schedule 5 of the *Financial Framework Legislation Amendment Act 2010* (FFLA Act), which sought to amend section 27A of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to replace references to "at common law and in equity" and "at common law or in equity" with the phrase "under the general law" (Section 5 of the CAC Act defines "general law" as meaning "the principles and rules of the common law and equity"). Items 7 and 8 were misdescribed and transposed the placement of the words "and" and "or". Consequently, items 7 and 8 became law but did not amend section 27A of the CAC Act as intended.

Items 1 and 2 of Schedule 3 of the Bill would commence retrospectively from 1 March 2011 (that is, when misdescribed items 7 and 8 of Schedule 5 of the FFLA Act became law). The retrospective commencement of items 1 and 2 of Schedule 3 of the Bill would not cause detriment to any person, as, substantively, the connection to common law and equity are retained within the meaning of general law. Accordingly, I consider that that the changes will not result in any detriment.

I note, also, that the Hon. Richard Marles, MP, Parliamentary Secretary for Pacific Island Affairs, spoke on this matter on 1 March 2012 in the House of Representatives, and advised the Parliament that the changes could not possibly cause detriment to any person.

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I am grateful to the Committee for pointing out that, in future, any description in the Explanatory Memorandum of any provisions that would apply retrospectively should clarify whether that the proposed changes could possibly cause detriment to any person.

The relevant contact officer on this matter is Mr Paul Levi, Acting Assistant Secretary, Legislative Review Branch, Department of Finance and Deregulation, who may be contacted on (02) 6215 3657.

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

Yours sincerely

Penny Wong

THE HON BILL SHORTEN MP
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Ms Toni Dawes
Committee Secretary
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your letter of 9 February 2012 to the Deputy Prime Minister concerning the *Insurance Contracts Amendment Bill 2011*. Your letter has been referred to me as I have portfolio responsibility for this matter.

I would like to thank the Scrutiny of Bills Committee (the Committee) for the opportunity to address the concerns raised in the Committee's Alert Digest No.1 of 2012 (Alert digest) in relation to the Insurance Contracts Amendment Bill 2011 (the Bill).

The Committee has sought my advice on why it is not possible for the prescribed contracts to which the new standard definition of flood provisions apply to be contained in the primary legislation.

To provide consistency with the location of the standard cover regime and to remove the potential for unintended consequences for insurers and insureds alike, prescribed contracts to which the new standard definition of flood provisions are to be located in the *Insurance Contracts Regulations 1985* (ICR) and not the *Insurance Contracts Act 1984* (ICA).

The ICA currently has a standard cover regime which covers standard contracts for motor vehicle, home building, home contents, sickness and accident, consumer credit and travel insurance. While the standard cover regime is triggered through application of section 35 of the primary legislation, the prescribed contracts to which the standard cover regime applies are contained in the ICR. Locating the prescribed contracts to which the new standard definition of flood will apply in the primary legislation would not be consistent with the ICA.

Small business and strata title bodies corporate insurance contracts are not prescribed contracts to which the standard cover regime applies. Insurers issuing insurance contracts to which the standard cover regime does not apply are required, in accordance with section 37 of the primary legislation, to notify insureds of any unusual terms that are not usually included in contracts of insurance that provide similar insurance cover if they wish to rely these terms at a future time. Insurance contracts to which section 37 applies are not specifically defined in regulations or primary legislation. Endeavouring to define these contracts in primary legislation would be significantly more complex than defining these contracts in the regulations and may result in unintended consequences for insurers and insureds alike.

The Committee has also sought my advice on why the standard definition of flood cannot be included in the primary legislation or why the consultation could not precede enactment of the new law.

To ensure that the policy intent of the new standard definition of flood can be achieved in a simple and effective way and to safeguard against the potential for the standard definition of flood applying inappropriately, the wording of the standard definition of flood will be consulted on prior to the wording of the standard definition of flood being contained in regulation.

The new standard definition of flood provision will only apply to home building, home contents, small business and strata title bodies corporate insurance policies. Other insurance policies to which the standard cover regime (section 35 contracts) applies and those not covered by the standard cover regime (section 37 contracts) are not required to apply the new provisions.

The ability to restrict the wording of the standard definition of flood to those prescribed contracts to which the standard definition of flood provisions will apply may have unintended consequences if it is contained in primary legislation. Due to the current structure of the ICA it was not certain how the standard definition of flood would impact other contracts to which section 37 applies or how the wording of the standard definition of flood would apply in respect to the standard cover regime contracts.

On 22 December 2012 the Government released exposure draft regulations containing wording for the standard definition of flood (consistent with consultation paper "*Reforming flood insurance: Clearing the waters*"). Nine submissions were received in response to the exposure draft regulations. While the submissions broadly supported the proposed regulations, a number of small technical issues have been raised. Treasury is currently working through these issues with a view of finalising the regulations shortly. The wording of the standard definition of flood will be consistent with the wording provided in the draft regulations with some minor technical refinements.

In relation to Schedule 2 of the Bill I note the Alert digest states that the obligation on insurers to produce a key fact sheet and its contents will be prescribed by regulations. As stated in the explanatory memorandum, the content, format and provision requirements for the Key Facts Sheet (KFS) will be determined in regulations after extensive public consultation. In this regard, on 29 February 2012 the Government released a discussion paper seeking public feedback on the content format and provision of the KFS. Submissions on the discussion paper close on 23 March 2012.

Finally, the Alert digest raises the point that exceptions to the provision of a KFS may be prescribed by regulations and that there will be an offence for failing to provide a lawful KFS where it is required. The Alert digest notes that the relevant provision states that the defendant bears an evidential burden in relation to establishing that an exception prescribed in the regulations can be made out.

The situations where exceptions to the provision of a KFS may be provided were outlined in the explanatory memorandum to the Bill. It is recognised that the power to prescribe exceptions is not limited to circumstances about which insurers will have knowledge or will relate to matters under their control. However, any exceptions (outside those noted in the explanatory memorandum) will only be provided where it is appropriate to do so and after extensive consultation with both industry and consumer groups has been undertaken.

Yours sincerely

Bill Shorten

BILL SHORTEN