SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2012

9 May 2012

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (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

FIFTH REPORT OF 2012

The Committee presents its Fifth 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:

Corporations Legislation Amendment (Audit Enhancement) Bill 2012

Introduced into the House of Representatives on 29 February 2012
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2012*. The Treasurer responded to the Committee's comments in a letter dated on 30 April 2012. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2012 - extract

Background

The bill amends the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2004* to:

- provide for directors of a listed company or listed registered scheme to extend the five year auditor rotation period for up to two years if specified criteria are met;
- introduce a requirement for audit firms to publish an annual transparency report if they conduct audits of ten or more Australian listed companies, listed registered schemes, authorised deposit-taking institutions or insurances companies;
- remove the auditor independence function from the Financial Reporting Council and replace it with a role to provide the Minister and professional accounting bodies strategic policy advice and reports in relation to the quality of audits conducted by Australian auditors;
- provide ASIC with the power to issue public audit deficiency reports on individual audit firms; and
- allow ASIC to communicate directly with an audited body in specified circumstances.

Inappropriate delegation of legislative power
Item 18, Schedule 1, Part 2, subsection 332B(1)

The information to be included in an annual transparency report must contain information to be prescribed by the regulations. The explanatory memorandum sets out a long list of the sort of information that will be required. However, the Committee generally prefers

that important matters be dealt with in primary legislation. No explanation is given as to why delegated legislation is appropriate for these provision. Without further information it appears to the Committee that at least some of these requirements could be dealt with in primary legislation. **The Committee therefore seeks the Treasurer's advice as to the justification for the proposed approach**.

> *Pending the Treasurer'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.*

Treasurer's response - extract

Thank you for your letter of 15 March 2012 concerning the Corporations Legislation Amendment (Audit Enhancement) Bi112012 (the Bill). The Senate Scrutiny of Bills Committee has raised two concerns about provisions in the Bill relating to annual transparency reports.

Firstly, the Committee is concerned that the Bill inappropriately delegates legislative power by providing that the information that must be included in an annual transparency report will be prescribed in the Regulations. The reason that this approach has been taken is because this information is a matter of a detailed technical nature. Including the information in the Regulations allows it to be dealt with more efficiently. It also ensures that if practical concerns are raised with the requirements following implementation these concerns can be addressed quickly.

I note that the Bill permits information to be omitted from the transparency report where its disclosure is likely to cause unreasonable prejudice to the auditor, despite that it may be required by the Regulations.

Committee Response

The Committee thanks the Treasurer for this response.

Alert Digest No. 3 of 2012 - extract

Trespass on personal rights and liberties, collective responsibility and reversal of burden of proof
Item 18, Schedule 1, Part 2, section 332G

This provision provides that an offence that would otherwise be committed by a firm in relation to an annual transparency report is taken to have been committed by each member of the firm. The explanatory memorandum states at page 33 that this is designed to impose 'a form of collective liability…to encourage a 'culture of compliance' across the whole firm'. Subsection 332G(4) provides for exceptions, namely, if the member of the firm does not know of the circumstances that constitute the contravention concerned or knows of the circumstances but takes reasonable steps to correct the contravention as soon as possible. The *Note* to this subsection states that in relation to these exceptions the defendant bears an evidential onus of proof.

In the Committee's view the imposition of collective responsibility should be strictly justified. In addition, the necessity to impose an evidential burden on defendants to establish the exceptions is not addressed in the explanatory memorandum. Although the question of whether steps have been taken to correct a contravention about which a person has knowledge is matter which is peculiarly within the knowledge of the defendant, it is less clear that it is appropriate to require that the defendant bear an evidential burden in relation to the question of whether or not they know of the circumstances that constitute a contravention of the provision concerned. Although the defendant's lack of knowledge of a matter may obviously be said to be something peculiarly within their knowledge, it may not always be apparent what evidence may readily be available to demonstrate a lack of knowledge by the defendant.

The Committee therefore seeks the Treasurer's advice as to the justification for the imposition of collective responsibility and for the imposition of an evidential burden on defendants.

> *Pending the Treasurer'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.*

Treasurer's response - extract

Secondly, the Committee is concerned that the Bill trespasses on personal rights and liberties by imposing collective responsibility for offences relating to annual transparency reports and imposing the burden of proof on defendants to demonstrate that they were not aware that the offence occurred. The imposition of collective responsibility is designed to encourage a 'culture of compliance' across the whole firm. This will ensure that each member of the firm is aware of the firm's responsibilities and takes responsibility for the firm's compliance with the transparency report provisions.

The offence provisions were drafted so that a member of a firm does not commit an offence if they are not aware that the contravention occurred or they have taken reasonable steps to correct the contravention. The burden of proof is placed on defendants because it would be extremely difficult for the prosecution to prove a defendant's knowledge of a contravention and this would act as a disincentive to compliance. The burden of proof on the defendant is lower than that on the prosecution. Section 13.3(3) of the *Criminal Code* provides for standards of proof required from the prosecution and defendants.

An evidential burden of proof imposed on a defendant requires only evidence that suggests a reasonable possibility that a matter exists or does not exist. In contrast, the legal burden of proof on the prosecution to disprove any matter in which a defendant has; discharged an evidential burden of proof must be beyond reasonable doubt.

The imposition of an evidential burden of proof on the defendant is consistent with other offence provisions in the *Corporations Act 2001*.

I trust this information will be of assistance to you.

Committee Response

The Committee thanks the Treasurer for this response, but retains a continuing concern about the reversal of the onus of proof inherent in the proposed imposition of collective responsibility. **The Committee leaves the question of whether the proposed collective responsibility provisions are appropriate to the consideration of the Senate as whole.**

Defence Trade Controls Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Defence

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter received 7 February 2012. A further response from the Minister dated 26 March 2012 was received in response to the Committee's comments in the *First Report.* A copy of the letter is attached to this report.

Alert Digest No. 14 of 2011 - extract

Background

This bill implements the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation.* The bill also amends Australia's controls over activities involving defence and dual-use goods, and related technology and services. The explanatory memorandum contains a Regulation Impact Statement.

Delegation of legislative power
Clause 10

Clause 10 of the bill creates offences concerning the provision or supply of defence services in relation to the Defence and Strategic Goods List. The penalties (imprisonment for 10 years or 2500 units or both) are said to be consistent with 'the penalty in the *Customs Act 1901* for exporting goods listed in the DSGL without authorisation.' Subclauses 10(3)-(7) establish a number of defences to the offences. One of the subclauses (subclause 10(7)) provides that the offences do not apply in circumstances prescribed by the regulations. The explanatory memorandum states that the Government intends to propose regulations to cover a number of circumstances, but does not indicate why these matters cannot appropriately be dealt with in the primary legislation. As the Committee prefers that important matters are included in primary legislation as much as possible, the Committee's **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

1. Clause 10 of the DTC Bill- Delegation of legislative power – justification for the approach that a number of exceptions to offences are to be covered in the regulations.

Clause 10 of the Bill creates primary offences concerning the supply of technology, and provision of defence services relating to technology, where the technology is listed on the Defence and Strategic Goods List. Subclauses 10(3), 10(4) and 10(5) of the Bill contain exceptions to the offences. The Bill has been drafted to allow additional circumstances in which the offence provisions will not apply to be prescribed in regulations.

These additional exceptions have been included in the draft regulations at regulations 11, 12 and 13. The draft regulations have been released for public consultation. A copy of the regulations and the Explanatory Statement are enclosed for your reference.

I note that it is Commonwealth criminal law policy that the content of an offence, including exceptions, be contained wholly within the primary legislation, unless appropriate limitations apply. In respect of clause 10, the exceptions to the offences contained in the regulations are clearly defined and circumscribed in the Bill.

In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11 (2) of the draft regulations, which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In

addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

Committee Response in the First Report

The Committee thanks the Minister for this detailed response and **requests that the key information is included in the explanatory memorandum.**

Alert Digest No. 14 of 2011 - extract

Wide discretion
Clauses 11, 14 and 16

Clause 11 of the Bill confers a wide discretionary power on the Minister to grant or refuse a permit to supply technology or provide services related to DSGL goods. Subclause 11(4) provides that the Minister may give the person a permit if satisfied that the 'activity would not prejudice the security, defence or international relations of Australia'. The explanatory memorandum at page 48 outlines a list of possible criteria as permissible considerations, but these are not reflected in the bill.

Clauses 14 and 16 also include a requirement for the Minister to consider whether the relevant activities will 'prejudice the security, defence or international relations of Australia'.

Although it is accepted that the nature of the decisions may necessitate the breadth of the discretionary powers provided in the bill, the Committee **seeks the Minster's advice as to whether consideration has been given to including the criteria listed as permissible considerations on pages 48 and 54 of the explanatory memorandum in the legislation to provide some guidance for the exercise of the power**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

Minister's response - extract

2. Clauses 11, 14 and 16 of the DTC Bill - Discretion – whether consideration has been given to including the possible criteria listed as permissible considerations in the Explanatory Memorandum in the legislation to provide some guidance for the exercise of the power.

Australia's export control regime operates to ensure that defence and dual use goods are exported responsibly and that Australia meets its obligations under the major arms and dual use export control regimes of which Australia is a member.

Australia's legislative framework governing export control provides mechanisms that apply a necessary degree of scrutiny to proposed exports to assist in ensuring that the defence, security and international relations of Australia are not compromised.

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses II and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are

necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including Regulation BE of the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Preventions of Proliferation) Act 1995.*

Committee Response in the First Report

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

Alert Digest No. 14 of 2011 - extract

Reversal of onus
Clause 31

Clause 31 introduces a number of offences with substantial penalties. These penalties are justified as being consistent with penalties for similar offences in other Commonwealth legislation (see the explanatory memorandum at page 67).

Subclause 31(7) provides that the regulations may prescribe exceptions in relation to the offences and defendants bear an evidential burden of proof in relation to these exceptions. The explanatory memorandum states at page 68 that:

> …where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge'.

However, it is difficult to evaluate whether it is appropriate for a defendant to bear the evidential burden of proof without knowing the nature of the exceptions to be prescribed in the regulation. The Committee therefore **seeks further information from the Minister about the exceptions and whether they can be outlined in the primary legislation.**

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

3. Clause 31 of the DTC Bill- Reversal of onus - further information about the exceptions to the offences in clause 31 that will be proscribed in the regulations and whether those exceptions can be outlined in the primary legislation.

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and

- in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.

These two provisions include a level of detail that should not be included in the primary legislation and for this reason these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

Committee Response in the First Report

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

Minister's response to the Committee's comments in the First Report - extract

I write in response to the First Report of 2012 by the Senate Standing Committee for the Scrutiny of Bills. In relation to the Defence Trade Controls Bill (the DTC Bill) the Committee requested that key information be included in the Explanatory Memorandum. I agree to your proposed changes.

As you may be aware the Senate Standing Committee on Foreign Affairs Defence and Trade is also considering the DTC Bill and is due to report to the Senate on 12 April 2012. I propose to delay making your requested amendments to the Explanatory Memorandum until it becomes apparent whether there will be any further amendments to the DTC Bill and its Explanatory Memorandum resulting from the consideration by the Senate Standing Committee on Foreign Affairs Defence and Trade.

Please advise whether you have any concerns with this intended course of action. I have copied this letter to the Senate Standing Committee on Foreign Affairs, Defence and Trade for their information.

Committee Response

The Committee thanks the Minister for this response. The Committee has no concern with the proposed approach.

Marriage Equality Amendment Bill 2012

Introduced into the House of Representatives on 13 February 2012
By: Mr Bandt and Mr Wilkie

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2012*. Mr Bandt responded to the Committee's comments in a letter dated on 3 May 2012. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2012 - extract

Background

This bill amends the *Marriage Act 1961* to ensure that all people, regardless of their sex, sexual orientation or gender identity have the opportunity to marry.

Inappropriate delegation of legislative power
Schedule 1, subitem 9(1)

Subitem 9(1) of Schedule 1 enables regulations to be made which amend 'Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act'. This enables regulations to amend Acts of the Parliament. **The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum and the Committee therefore seeks the Private Members' rationale for the proposed approach.**

> *Pending the Private Members' 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.*

Private Member's response - extract

The Committee has indicated that it has concerns with sub-item 9(1) of Schedule 1 of the Bill that enables regulations to amend "Acts (other than the Marriage Act 1961) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act."

I thank the Committee for the opportunity to respond.

The rationale for the inclusion of such a power is primarily to help with efficiency. There are likely to be a large number of references in other legislation that would require minor amendment upon passage of the Marriage Equality Amendment Bill 2012. The required amendments would simply update the statute books to reflect the policy in the Bill; given this it was considered pragmatic to provide a mechanism to facilitate the process in a timely manner.

The proposed regulation making power was included as an administrative tool to help with the smooth implementation of the Bill's policy – it is not designed or intended to be an inappropriately delegated legislative power.

Committee Response

The Committee thanks the Private Member for this response and **requests that the key information be included in the explanatory memorandum.**

Public Service Amendment Bill 2012

Introduced into the House of Representatives on 1 March 2012
Portfolio: Prime Minister

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2012*. The Minister responded to the Committee's comments in a letter dated on 21 March 2012. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2012 - extract

Background

This bill amends the *Public Service Act 1999* by:

- revising the Australian Public Service (APS) Values, clarify the roles and responsibilities of Secretaries and amending their employment arrangements, and establishing APS leadership groups;
- revising and clarifying the roles and functions of the Public Service Commissioner; and
- amending the day-to-day workforce management of the APS through a range of operational amendments.

The bill also provides for consequential and transitional provisions which:

- validate actions and decisions taken before commencement;
- cover aspects of the transition to the new employment framework; and
- make consequential amendments to other legislation where appropriate.

Inappropriate delegation of legislative power
Item 70, Schedule 1, subsection 72E(1)

Proposed subsection 72E(1) provides that the regulations may authorise the use or disclosure of personal information. Disclosures thereby authorised would mean that they would be authorised by law for the purposes of the *Privacy Act 1988*. Given that the disclosure of personal information raises privacy concerns and the explanatory

memorandum does not address the issue **the Committee seeks the Prime Minister's advice as to why the primary legislation cannot deal with the issue**.

> *Pending the Prime 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

Item 70, Schedule 1, subsection 72E

The Commonwealth is the employer of Australian Public Service (APS) employees. Under the *Public* Service *Act* 1999 (PS Act) each agency head has, on behalf of the Commonwealth, all the rights, duties and powers of the employer. Consistent with these provisions, the *Privacy Act* 1988 (Privacy Act) treats each agency as a separate body. The PS Act and the Bill aim to provide for the effective management of employees and the use and disclosure of their personal information within this framework.

Section 76 of the PS Act currently provides that regulations can authorise the 'disclosure', in specific circumstances, of personal information (within the meaning of the Privacy Act). Public Service Regulation 9.2 details the circumstances in which personal information may be disclosed.

Proposed section 72E of the amended Act largely replicates section 76 of the PS Act which is proposed for repeal (item 71, Schedule 1). It also broadens the regulation-making provision to encompass regulations authorising the 'use' as well as the 'disclosure' of personal information in specific circumstances. A note to proposed section 72E states that the Privacy Act and the *Freedom* of *Information Act 1982* have rules about the use and disclosure of personal information.

While the use and disclosure of personal information by agency heads are serious matters, the proposed approach of setting out the circumstances where it may be appropriate to use or disclose the personal information of employees in the Public Service Regulations is consistent with the current provisions (Public Service Regulation 9.2).

The proposed approach is also consistent with the outline in the explanatory memorandum of the PS Act which made clear that the new Act sought to remedy deficiencies in the 1922 Act, including that Act's excessively complex and fragmented nature (paragraphs 8 and 9). The explanatory memorandum also referred to the support of the then Joint Committee of Public Accounts for a new Public Service Act which was simple, modern and in a more accessible format (paragraph 17).

Having use and disclosure of information matters provided for in regulations would also allow them to be amended more easily by the Parliament. The management of employee performance and interpersonal workplace relationships has become increasingly complex over recent years and it is difficult to anticipate every situation where it may be desirable to use and disclose the personal information of employees. The proposed regulations will seek to deal with known circumstances and the proposed approach will continue to provide the flexibility to deal with unforeseen needs more effectively than if these provisions were in the primary legislation.

Any regulation made under proposed section 72E would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* (LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

Committee Response

The Committee thanks the Special Minister of State for this detailed response and **requests that the key information is included in the explanatory memorandum.**

Alert Digest No. 3 of 2012 - extract

Inappropriate delegation of legislative power
Items 75, 76 and 79

These items contain notes that the disallowance and sunsetting provisions of the legislative instruments do not apply to the legislative instruments which are referred to. As the explanatory memorandum does not address why this is appropriate **the Committee seeks the Prime Minister's advice as to the justification for the proposed approach.**

> *Pending the Prime 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

Items 75, 76 and 79

As a consequence of the LI Act, the Prime Minister's Public Service Directions (PM's Directions), made in accordance with section 21 of the PS Act, the Public Service Classification Rules (Classification Rules), made in accordance with section 23 of the PS Act, and determinations made by the Public Service Minister under subsection 24(3) of the PS Act are all legislative instruments for the purposes of the LI Act.

Under the LI Act, these instruments are required to be registered on the Federal Register of Legislative Instruments and this has replaced the need to gazette the above instruments-see subsection 56(1) of the LI Act which provides that the registration requirement replaces the need to gazette such instruments, even if the relevant enabling legislation (in this case the PS Act) requires gazettal.

The main aim of items 75, 76, 78 and 79 of the Public Service Amendment Bill 2012 is to replace the obsolete references to the need to gazette these three instruments (and in the case of item 76, to provide that the Public Service Commissioner, rather than the Public Service Minister, may make rules about the classifications of Australian Public Service employees).

In addition, it is proposed that a note be included in each of the relevant provisions which makes clear that the three instruments in question are not subject to the disallowance and sunsetting provisions of the LI Act. This is because the PM's Directions, Classification Rules and section 24(3) determinations are all currently exempt from the disallowance and sunsetting provisions of the LI Act (and have been since the introduction of the LI Act)-see items 32 and 33 of the table in subsection 44(2) of the LI Act (in relation to disallowance), and items 37 and 38 of the table in subsection 54(2) of the LI Act (in relation to sunsetting).

The inclusion of these notes in the PS Act is simply intended to clarify the current situation by including cross references to the relevant provisions of the LI Act.

Please let me know if this letter requires clarification or the Committee would like further information.

Committee Response

The Committee thanks the Special Minister of State for this detailed response and **requests that the key information is included in the explanatory memorandum.**

Senator the Hon Ian Macdonald
Chair

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TREASURER

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

30 APR 2012

Dear Senator Fifield

Thank you for your letter of 15 March 2012 concerning the Corporations Legislation Amendment (Audit Enhancement) Bill 2012 (the Bill). The Senate Scrutiny of Bills Committee has raised two concerns about provisions in the Bill relating to annual transparency reports.

Firstly, the Committee is concerned that the Bill inappropriately delegates legislative power by providing that the information that must be included in an annual transparency report will be prescribed in the Regulations. The reason that this approach has been taken is because this information is a matter of a detailed technical nature. Including the information in the Regulations allows it to be dealt with more efficiently. It also ensures that if practical concerns are raised with the requirements following implementation, these concerns can be addressed quickly.

I note that the Bill permits information to be omitted from the transparency report where its disclosure is likely to cause unreasonable prejudice to the auditor, despite that it may be required by the Regulations.

Secondly, the Committee is concerned that the Bill trespasses on personal rights and liberties by imposing collective responsibility for offences relating to annual transparency reports and imposing the burden of proof on defendants to demonstrate that they were not aware that the offence occurred. The imposition of collective responsibility is designed to encourage a 'culture of compliance' across the whole firm. This will ensure that each member of the firm is aware of the firm's responsibilities and takes responsibility for the firm's compliance with the transparency report provisions.

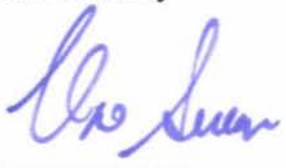
The offence provisions were drafted so that a member of a firm does not commit an offence if they are not aware that the contravention occurred or they have taken reasonable steps to correct the contravention. The burden of proof is placed on defendants because it would be extremely difficult for the prosecution to prove a defendant's knowledge of a contravention and this would act as a disincentive to compliance. The burden of proof on the defendant is lower than that on the prosecution. Section 13.3(3) of the *Criminal Code* provides for standards of proof required from the prosecution and defendants.

An evidential burden of proof imposed on a defendant requires only evidence that suggests a reasonable possibility that a matter exists or does not exist. In contrast, the legal burden of proof on the prosecution to disprove any matter in which a defendant has discharged an evidential burden of proof must be beyond reasonable doubt.

The imposition of an evidential burden of proof on the defendant is consistent with other offence provisions in the *Corporations Act 2001*.

I trust this information will be of assistance to you.

Yours sincerely



WAYNE SWAN

Stephen Smith MP
Minister for Defence

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

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

26 MAR 2012

Mitch

Dear Senator

I write in response to the First Report of 2012 by the Senate Standing Committee for the Scrutiny of Bills. In relation to the Defence Trade Controls Bill (the DTC Bill), the Committee requested that key information be included in the Explanatory Memorandum. I agree to your proposed changes.

As you may be aware, the Senate Standing Committee on Foreign Affairs, Defence and Trade is also considering the DTC Bill and is due to report to the Senate on 12 April 2012. I propose to delay making your requested amendments to the Explanatory Memorandum until it becomes apparent whether there will be any further amendments to the DTC Bill and its Explanatory Memorandum, resulting from the consideration by the Senate Standing Committee on Foreign Affairs, Defence and Trade.

Please advise whether you have any concerns with this intended course of action.

I have copied this letter to the Senate Standing Committee on Foreign Affairs, Defence and Trade for their information.

Yours sincerely
Best Wishes

Stephen Smith

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7800 Fax: (02) 6273 4118

ADAM BANDT MP
MELBOURNE

Senator Mitch Fifield
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

3 May 2012

Dear Senator Fifield

Marriage Equality Amendment Bill 2012

I refer to your letter regarding the Marriage Equality Amendment Bill 2012 which I introduced into the House of Representatives on 13 February 2012.

The Committee has indicated that it has concerns with sub-item 9(1) of Schedule 1 of the Bill that enables regulations to amend "Acts (other than the Marriage Act 1961) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act."

I thank the Committee for the opportunity to respond.

The rationale for the inclusion of such a power is primarily to help with efficiency. There are likely to be a large number of references in other legislation that would require minor amendment upon passage of the Marriage Equality Amendment Bill 2012. The required amendments would simply update the statute books to reflect the policy in the Bill; given this it was considered pragmatic to provide a mechanism to facilitate the process in a timely manner.

The proposed regulation making power was included as an administrative tool to help with the smooth implementation of the Bill's policy – it is not designed or intended to be an inappropriately delegated legislative power.

Yours Sincerely,

Adam Bandt MP

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HON GARY GRAY AO MP

Special Minister of State
Minister for the Public Service and Integrity

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23 MAR 2012
Senate Standing C'ttee
for the Scrutiny
of Bills

REF: GA12/081

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

Dear Senator Fifield

I am responding to the Committee's letter of 15 March 2012 seeking a response to the issues identified in the *Alert Digest No 3 of 2012* concerning the Public Service Amendment Bill 2012 (the Bill).

Item 70, Schedule 1, subsection 72E

The Commonwealth is the employer of Australian Public Service (APS) employees. Under the *Public Service Act 1999* (PS Act) each agency head has, on behalf of the Commonwealth, all the rights, duties and powers of the employer. Consistent with these provisions, the *Privacy Act 1988* (Privacy Act) treats each agency as a separate body. The PS Act and the Bill aim to provide for the effective management of employees and the use and disclosure of their personal information within this framework.

Section 76 of the PS Act currently provides that regulations can authorise the 'disclosure', in specific circumstances, of personal information (within the meaning of the Privacy Act). Public Service Regulation 9.2 details the circumstances in which personal information may be disclosed.

Proposed section 72E of the amended Act largely replicates section 76 of the PS Act which is proposed for repeal (item 71, Schedule 1). It also broadens the regulation-making provision to encompass regulations authorising the 'use' as well as the 'disclosure' of personal information in specific circumstances. A note to proposed section 72E states that the Privacy Act and the *Freedom of Information Act 1982* have rules about the use and disclosure of personal information.

While the use and disclosure of personal information by agency heads are serious matters, the proposed approach of setting out the circumstances where it may be appropriate to use or disclose the personal information of employees in the Public Service Regulations is consistent with the current provisions (Public Service Regulation 9.2).

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The proposed approach is also consistent with the outline in the explanatory memorandum of the PS Act which made clear that the new Act sought to remedy deficiencies in the 1922 Act, including that Act's excessively complex and fragmented nature (paragraphs 8 and 9). The explanatory memorandum also referred to the support of the then Joint Committee of Public Accounts for a new Public Service Act which was simple, modern and in a more accessible format (paragraph 17).

Having use and disclosure of information matters provided for in regulations would also allow them to be amended more easily by the Parliament. The management of employee performance and interpersonal workplace relationships has become increasingly complex over recent years and it is difficult to anticipate every situation where it may be desirable to use and disclose the personal information of employees. The proposed regulations will seek to deal with known circumstances and the proposed approach will continue to provide the flexibility to deal with unforeseen needs more effectively than if these provisions were in the primary legislation.

Any regulation made under proposed section 72E would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* (LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

Items 75, 76 and 79

As a consequence of the LI Act, the Prime Minister's Public Service Directions (PM's Directions), made in accordance with section 21 of the PS Act, the Public Service Classification Rules (Classification Rules), made in accordance with section 23 of the PS Act, and determinations made by the Public Service Minister under subsection 24(3) of the PS Act are all legislative instruments for the purposes of the LI Act.

Under the LI Act, these instruments are required to be registered on the Federal Register of Legislative Instruments and this has replaced the need to gazette the above instruments—see subsection 56(1) of the LI Act which provides that the registration requirement replaces the need to gazette such instruments, even if the relevant enabling legislation (in this case the PS Act) requires gazettal.

The main aim of items 75, 76, 78 and 79 of the Public Service Amendment Bill 2012 is to replace the obsolete references to the need to gazette these three instruments (and in the case of item 76, to provide that the Public Service Commissioner, rather than the Public Service Minister, may make rules about the classifications of Australian Public Service employees).

In addition, it is proposed that a note be included in each of the relevant provisions which makes clear that the three instruments in question are not subject to the disallowance and sunsetting provisions of the LI Act. This is because the PM's Directions, Classification Rules and section 24(3) determinations are all currently exempt from the disallowance and sunsetting provisions of the LI Act (and have been since the introduction of the LI Act)—see items 32 and 33 of the table in subsection 44(2) of the LI Act (in relation to

disallowance), and items 37 and 38 of the table in subsection 54(2) of the LI Act (in relation to sunsetting).

The inclusion of these notes in the PS Act is simply intended to clarify the current situation by including cross references to the relevant provisions of the LI Act.

Please let me know if this letter requires clarification or the Committee would like further information.

Yours sincerely

GARY GRAY

21 MAR 2012