



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

TENTH REPORT
OF
2012

12 September 2012

ISSN 0729-6258

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 R Siewert
Senator the Hon L Thorp

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 2012

The Committee presents its Tenth 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:

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Fair Work (Registered Organisations) Amendment Bill 2012

Introduced into the House of Representatives on 31 May 2012

Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter received on 22 August 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties under the RO Act;
- enhance the investigative powers available to Fair Work Australia under the RO Act; and
- require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

Abrogation of the privilege against self-incrimination

Reversal of onus

Schedule 1, item 29

Proposed subsection 337AA(1) sets out a range of civil penalty provisions in relation to the obligation on a person to comply with a requirement made under proposed subsection 335A(2) (for the purpose of gathering further information). Proposed subsection 335(4) provides for a reasonable excuse defence, however, an evidential burden is placed on the defendant (proposed subsection 335(5)). The explanatory memorandum does not address the appropriateness of this reversal of the onus of proof, especially in light of the fact that defendants may not be clear as to what circumstances constitute a reasonable excuse.

Similarly, the explanatory memorandum, at page 15, merely repeats the effect of proposed subsections 335(6) and 335(7) in relation to the abrogation of the privilege against self-incrimination. Even where the abrogation of the privilege is subject to a derivative use immunity the Committee expects to see a strong justification provided by the explanatory memorandum. **The Committee therefore seeks the Minister's advice as to the justification for this proposed reversal of onus and abrogation of the privilege against self-incrimination.**

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

Section 337AA of the Bill provides that a person must comply with a requirement to give information, produce documents and attend before the General Manager of Fair Work Australia (FWA) or a delegate, unless he or she can demonstrate under subsection 337AA(4) that he or she has a reasonable excuse for not doing so. Subsection 337AA(6) provides that a person is not excused from providing information, producing a document or answering a question on the ground that doing so might tend to incriminate the person or expose them to a penalty.

The Committee has sought advice relating to the abrogation of the privilege against self-incrimination in subsection 337AA(6). Importantly, the drafting of this provision mirrors both section 713 of the *Fair Work Act 2009*, and existing section 337 of the *Fair Work (Registered Organisations) Act 2009* (RO Act). I note that *Alerts Digest No. 14 of 2008* considered the abrogation of the privilege against self-incrimination in subsection 713(1) of the Fair Work Bill 2008, which provides that a person is not excused from producing a record or document as directed by the Fair Work Ombudsman, on the grounds that doing so might tend to incriminate the person or expose the person to a penalty. At page 8 of the *Alerts Digest*, the Committee noted that it did not 'see the privilege as absolute' and recognised that 'the public benefit in obtaining information may outweigh the harm to civil rights'. The Committee considered that the inclusion of the derivative use immunity provision in subsection 713(2) of the Fair Work Bill, which provides that information gathered under section 713 is inadmissible in criminal proceedings against the individual, struck a reasonable balance between the competing interests of obtaining information and protecting individual's rights.

This is consistent with the Committee's consideration of the issue of the privilege against self-incrimination in relation to the Workplace Relations (Registration and Accountability of Organisations) Bill 2002. At page 35 of *Alerts Digest No.8 of 2002*, the Committee stated that subsection 337(4) of the Bill (later known as the RO Act) abrogated the

privilege against self-incrimination, but again noted that 'the Committee has previously been prepared to accept that provisions which provide use and derivative use immunity strike a reasonable balance between the competing interests of obtaining information and protection individual's rights'. Subsection 337(5) of that Bill limited the circumstances in which information given under the provisions could be used against the person in criminal proceedings.

Section 337AA of the Bill provides for a similar derivative use immunity safeguard. Subsection 337AA(7) of the Bill provides that information obtained as a result of the requirement to give information, produce documents or answer questions is not admissible against the person in criminal or civil proceedings, other than those that arise from subsections 337AA(2) or (3) of the Bill. This approach mirrors existing section 337(5) of the RO Act, and will have the effect of extending these provisions to cover third parties as well as designated officials. It is appropriate that the provisions have been drafted in a manner that is consistent with the existing provisions of the RO Act as well as other sources of workplace relations legislation, and similarly achieves an appropriate balance between the public interest and the protection of an individual's rights.

The Committee has requested that I provide a justification for the placing the onus of proof in subsection 337AA(5) of the Bill on the individual seeking the benefit of the exemption. It is the Australian Government's view that it is appropriate that the individual seeking to rely on the defence in subsection 337(4) bears the onus to demonstrate that the excuse is a reasonable excuse. Subitem 13.3(3) of the Schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to the matter.

Committee Response

The Committee thanks the Minister for this detailed response in relation to the provisions relating to self-incrimination and **requests that the key information is included in the explanatory memorandum.**

In relation to the reversal of onus, the Committee remains concerned about an approach that does not provide guidance to a defendant as to what circumstances may constitute a reasonable excuse (e.g. examples could be provided without limiting the scope of the provision). **The Committee therefore requests that further consideration be given to this matter and that relevant information be included in the explanatory memorandum.**

Alert Digest No. 6 of 2012 - extract

Delegation of legislative powers

Schedule 1, item 36, proposed subsection 343(3A)

This item inserts a new subsection enabling the General Manager's information gathering functions or powers to be delegated to an SES employee or class of employees prescribed by the regulations or to 'any other person or body the General Manager (GM) is satisfied has substantial or significant experience or knowledge in at least one of' a number of listed fields.

The explanatory memorandum states, at page 16, that a 'range of safeguards are included in the bill to ensure accountability where the inquiry or investigation function is delegated, e.g. while the delegate of the GM will be able to obtain information in the same way as the GM...a notice to produce documents or attend to provide information will only be able to be issued by the GM or an SES Officer'. In addition, the power to delegate to 'any person' is limited by the requirement that the GM be satisfied that the person has substantial or significant experience or knowledge. However, this is a subjective rather than objective requirement. Given the significance of the power **the Committee seeks the Minister's advice as to what other accountability mechanisms are included in relation to the delegation of this power and whether there is scope to strengthen or extend these safeguards (for example, by including reporting on the exercise of the power to the Parliament).**

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 regarding the accountability mechanisms provided for in relation to the delegation of the powers of the General Manager of FWA under subsection 343A(3) of the Bill. New paragraph 343A(3)(3A) provides that the General Manager may delegate her functions or powers to a member of the staff of FWA who is an SES employee or acting SES employee, or a person with substantial or significant experience or knowledge in accounting, auditing, financial reporting, the conduct of compliance reports or investigations; or another field as prescribed by the regulations. This supplements the existing ability of the General Manager to delegate functions provided for in section 343A of the RO Act.

It is important to note that, under these provisions, while a delegate is able to obtain information in the same way as the General Manager, a notice to produce documents or attend to provide information will only be able to be issued by the General Manager or an SES officer. In addition, the General Manager will retain the power to disclose information, determine whether a contravention has occurred and what commensurate action should be taken in relation to that contravention, and the final decision-making power provided for in section 336 of the *Fair Work (Registered Organisations) Act 2009*. Further, subsection 343A(4) of the RO Act provides that a delegate must comply with any directions of the General Manager. The effect of this provision is that the General Manager is expected to exercise appropriate oversight of any delegate exercising powers under these provisions. The Government is of the view that these safeguards are sufficient, and strike an appropriate balance between strengthening the investigative powers of FWA by allowing them to utilise the expertise of other people and bodies and maintaining appropriate oversight of those investigations.

Finally, the Committee has asked whether there is scope to strengthen the accountability mechanisms under subsection 343A(3) of the Bill. As the Government considers the range of safeguards to be appropriate, it is yet to consider whether further strengthening of these provisions will be necessary, but has not ruled out future amendments should they prove to be required.

I trust that this information is helpful.

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.**

Fisheries Legislation Amendment Bill (No.1) 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Agriculture, Fisheries and Forestry

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2012*. The Minister responded to the Committee's comments in a letter dated 3 September 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 8 of 2012 - extract

Background

This bill amends the *Fisheries Management Act 1991* (FM Act) and the *Fisheries Administration Act 1991* to:

- introduce electronic monitoring (e-monitoring) to Australian boats that are authorised to fish under concessions and scientific permits granted by the Commonwealth; and
- make several minor amendments to the FM Act to clarify and make provisions consistent.

Merits Review

Item 5, proposed section 40B

This item inserts provisions which will empower the AFMA to make section 40A directions to classes of concession and permit holders (which are legislative instruments) and, also, section 40B directions to 'specific concession or permit holders' (which are not legislative instruments). The explanatory memorandum indicates that merits review (under section 165 of the FM Act) will not be available in relation to either category of directions.

Although it may be thought that merits review is not appropriate in relation to decisions of a legislative character, it is not clear why directions which are tailored to a specific concession or permit holder should not be reviewable decisions. The explanatory memorandum indicates, at page 9, that merits review is inappropriate in relation to these decisions as it would compromise the 'flexibility that is required to impose necessary obligations, which might range from an obligation about installing e-monitoring equipment, to an obligation about specific technical requirements for the operation of equipment, the handling of data, or the provision of data to AFMA'.

Merits review, however, is often made available in contexts where decision-makers need to approach particular circumstances with flexibility, having regard to the circumstances of particular cases. As such the Committee is of the view that the justification provided for not excluding merits review in relation to section 40B directions needs further elaboration. **The Committee therefore seeks the Minister's further advice on this issue.**

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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Minister's response - extract

The Bill will provide the Australian Fisheries Management Authority (AFMA) with express powers to give two types of directions about e-monitoring to fishing concession and scientific permit holders. The first type is for classes of concession or scientific permit holders where the monitoring requirements that apply to them are the same. And the second type is for a single concession holder to incorporate different, more specific or additional requirements. You asked for advice about why directions of the second type are not subject to merits review.

AFMA advises that the primary purpose of an individual direction will be to supplement obligations that apply to them under a class direction. For example, directions would be given to a class of fishers on a fishery-by-fishery basis requiring them to install e-monitoring equipment and specifying requirements about how and when the equipment is to be operated and how data captured by the equipment is to be provided to AFMA. In addition, directions could be given to an individual fisher in that class specifying more detailed requirements; for instance, the configuration of a particular boat might make it necessary to give a direction about the position of cameras on the boat. Alternatively, the fishing equipment on the boat might be different to the standard type of equipment covered in the class direction. For example, there might be a class requirement to install sensors on automated long-lining equipment that can count the number of hooks being deployed, but this would have to be adjusted for boats where long lines are hand-baited. There would be many variations of these examples where specific, often technical, requirements will be the subject of a direction given to an individual fisher.

Given that class directions are legislative instruments and not subject to merits review, it would be inconsistent to provide for merits review of individual directions that supplement them. In addition, and as explained in the explanatory memorandum to the Bill, the need for flexibility and the anticipated technical nature of individual directions means that merits review is not appropriate.

Thank you again for bringing the committee's concerns to my attention.

Committee Response

The Committee thanks the Minister for this detailed response. The Committee understands the reasoning provided in relation to treating those subject to directions consistently in relation to the availability of merits review, but **remains concerned about the approach because it is the making of individual directions that can give rise to circumstances that are appropriate for merits review and this will not be available. However, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Maritime Legislation Amendment Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2012*. The Minister responded to the Committee's comments in a letter dated 22 August 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 8 of 2012 - extract

Background

This bill amends the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to implement amendments to the Annexes to the International Convention for the Prevention of Pollution from Ships which were adopted by the Marine Environment Protection Committee of the International Maritime Organization on 15 July 2011.

The Bill also:

- clarifies the application of Federal jurisdiction in the parts of the territorial sea that lie between Australian baselines and 3 nautical miles out to sea from those baselines; and
- repeals *the Stevedoring Levy (Imposition) Act 1998* and the *Stevedoring Levy (Collection) Act 1998*.

Undue trespass— strict liability

Item 62, proposed section 26FEW

This item introduces provisions which make it an offence of strict liability for a ship energy efficiency management plan (SEEMP) not to be carried. The offence is directed at both the owner and master of a ship. The explanatory memorandum states at page 33 that 'such persons have a shared responsibility and both can be expected to be fully aware of the requirements of the legislation...and the requirement to carry a ship energy efficiency management plan. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the PPS Act and in other maritime legislation such as the Navigation Act'. In shipping law it is the case that offence provisions have traditionally applied to the master and owner of the ship. The Committee therefore makes no further comment on this issue.

The offence of not carrying a SEEMP is one of strict liability. This approach is justified on the basis that there 'are difficulties in proving that the ship energy efficiency management plan is not on board but it will be very easy for a defendant to show that it is on board' (see the explanatory memorandum at page 33). The explanatory memorandum also indicates that the approach taken is consistent with the Committee's sixth report of 2002, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and, also, *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

However, the penalty for the offence (200 units) is set a higher level than that recommended for strict liability offences for individuals (60 penalty units). The explanatory memorandum states that the penalty is set a 'the same level as the existing penalties for equivalent (strict liability) offences under the PPS Act. **In these circumstances, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

1. Undue trespass - strict liability
Item 62, proposed section 26FEW

The Senate Committee questioned the penalty offence (200 units) is set at a higher level than recommended for strict liability offences for individuals (60 penalty units).

It is appropriate that strict liability apply to this offence with a significant penalty of 200 penalty units as it will discourage careless non-compliance as well as intentional or reckless breaches of the requirement to carry a Ship Energy Efficiency Management Plan (SEEMP) on board a vessel. The effectiveness of the regulatory regime given domestic effect in Australia by the Protection of the Sea (PPS) Acts may be undermined if the offences are not offences of strict liability with significant penalties. The maximum penalty of 200 penalty units is consistent with penalties for similar offences in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1993* and is designed to provide increased environmental protection in Australian waters. It should be noted that, as provided in section 4D of the *Crimes Act 1914*, the penalty of 200 penalty units is a maximum penalty, which is designed for the worst cases; the court dealing with the offence will have a discretion to impose a lower penalty and will have regard to the circumstances of the offence when determining the penalty.

Committee Response

The Committee thanks the Minister for this additional information.

Alert Digest No. 8 of 2012 - extract

Reversal of onus of proof

Various

As noted in the Statement of Compatibility with Human Rights (at page 16 of the explanatory memorandum) ‘there are numerous provisions throughout the Bill which provide defences for existing strict liability provisions and which have a reverse burden of proof (placing the burden of proof on a defendant)’. **The Committee seeks advice as to whether the approach taken in relation to each of these provisions is consistent with the principles set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

2. Reversal of onus of proof

Various

The Senate Committee questioned the defences for existing strict liability provisions and which have a reverse burden of proof (placing the burden of proof on a defendant).

The provisions concerned provide specific defences for strict liability provisions. The effect of providing these defences is to mitigate the strictness of the strict liability provisions. The facts necessary to establish these defences are likely to be within the knowledge of the defendant or persons associated with the defendant (that is, the ship's master or owner or another person in control of aspects of the operation of the ship). It is therefore reasonable, and consistent with the approach adopted in other regulatory legislation, and the offences have been drafted in accordance with principles set out in *The*

Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers and the Criminal Code.

Subsection 13.3(6) of the Criminal Code indicates that the "evidential burden" in relation to a matter is merely a burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case requires). As indicated by subsection 13.1 (2) of the Criminal Code, the prosecution bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof; further, as indicated by subsection 13.1(1) of the Criminal Code, the prosecution bears the legal burden of proving every element of the offence with which the defendant has been charged.

Committee Response

The Committee thanks the Minister for this response. The Committee notes that Minister's explanation that the offences (including the proposed new defences) have been drafted in accordance with principles in *The Guide* and that relevant information is likely to be within the knowledge of the defendant or persons associated with the defendant. **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Military Court of Australia Bill 2012

Introduced into the House of Representatives on 21 June 2012
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2012*. The Attorney-General responded to the Committee's comments in a letter received on 10 September 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 7 of 2012 - extract

Background

This bill establishes the Military Court of Australia (Military Court) under Chapter III of the Constitution and provides for, among other things, the structure, jurisdiction, practice and procedure of the court. Amendments to the *Defence Force Discipline Act 1982* and a number of other Acts that are consequential to the establishment of the Military Court are included in the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012.

The Military Court will be a superior court of record comprising judicial officers who, by reason of their experience or training, have an understanding of the nature of service in the ADF. The bill allows judicial officers in the Military Court to hold dual commissions in other federal courts on the same terms and conditions and, consistent with the Constitution, provides tenure for judicial officers to the age of 70. The bill requires appointments to the Military Court to be made in consultation with the Minister for Defence.

Like other federal courts, the Chief Justice of the Military Court will have direct responsibility for the administration of the Court. The bill provides for the Registrar of the Federal Court to assist the Chief Justice in the management of the administrative affairs of the Military Court.

Delegation of Legislative Power – 'Henry VIII clause' Subclause 182(3)

This clause enables the regulations to modify or adapt provisions of the *Legislative Instruments Act 2003* in their application to the Military Court (other than the provisions of Part 5 of that Act or any other provision whose modifications or adaptation would affect the operation of that Part). This subclause thus enables delegated legislation to modify or adapt the operation of a statute and the explanatory memorandum does not contain an

explanation as to why this is necessary. **The Committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.**

Pending the Attorney-General'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.

Attorney-General's response - extract

The Committee has sought my advice as to the justification for the proposed approach to subclause 182(3) of the Bill as it enables delegated legislation to modify or adapt the operation of a statute and the explanatory memorandum does not contain an explanation as to why this is necessary.

Subclause 182(3) of the Bill is part of the broader application of the *Legislative Instruments Act 2003* to the Military Court Rules, and is consistent with provisions applying for other federal courts. Subclause 182(3) largely mirrors section 59A of the *Federal Court of Australia Act 1976*, paragraph 125(baa) of the *Family Law Act 1975* and subsection 120(4) of the *Federal Magistrates Act 1999*. These provisions were inserted into these Acts by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*. The Explanatory Memorandum to the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* stated that the regulation making power in relation to other federal courts was inserted:

'so that the application of the 2003 Act to the rules of court may be modified except in relation to the application of Part 5 of that Act. That is, the regulations cannot alter the way in which the parliamentary scrutiny provisions of the 2003 Act apply to rules of court but the regulations may make other modifications. '

Consistently with the approach for other federal courts, subclause 179(3) of the Bill provides that, with the exception of certain provisions, the *Legislative Instruments Act 2003* will apply to the Military Court Rules. The provisions of the *Legislative Instruments Act 2003* that will not apply to the Military Court Rules are sections 5, 6 and 7 (definition of legislative instrument), sections 10 and 11 (Attorney-General may certify whether an instrument is a legislative instrument or not), and section 16 (measures to achieve high drafting standards for legislative instruments). Subclause 179(4) of the Bill provides that the Office of Parliamentary Counsel may provide assistance in the drafting of the Rules if the Chief Justice so desires. The Military Court Rules will be required to be lodged on the Federal Register of Legislative Instrument; will be subject to consultation requirements; and will be subject to disallowance and sunseting.

As the Parliament has delegated similar powers in relation to all other federal courts, I do not consider that the Bill delegates legislative powers inappropriately.

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

Committee Response

The Committee thanks the Attorney-General for this response and **requests that the key information is included in the explanatory memorandum.**

Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Introduced into the House of Representatives on 23 May 2012
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Attorney-General responded to the Committee's comments in a letter received on 22 August 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill amends the *Privacy Act 1988* and various other Acts in response to the Australian Law Reform Commission's report number 108, *For Your Information: Australian Privacy Law and Practice*.

Schedule 1 amends the *Privacy Act 1988* to create the Australian Privacy Principles (AAPs) applying to both Commonwealth agencies and private sector organisations.

Schedule 2 amends the credit reporting provisions in the *Privacy Act 1988*.

Schedule 3 amends the *Privacy Act 1988* by replacing the provisions dealing with privacy codes and the Credit Reporting Code of Conduct with a new Part IIIB which deals with codes or practice under the AAPs and a code of practice concerning credit reporting.

Schedule 4 amends the *Privacy Act 1988* to clarify the functions and powers of the Information Commissioner and related matters including provisions on interferences with privacy.

Schedule 5 amends various other Acts that are consequential to the amendments in Schedules 1 to 4 of the bill.

Schedule 6 contains amendments to address transitional issues relating to the commencement of the new provisions.

Delegation of legislative power
Schedule 1, item 81, proposed subsection 16A(2)

This proposed subsection allows the Commissioner to make rules, by legislative instrument, relating to the collection, use or disclosure of personal information that apply for the purposes of enabling the exception relating to missing persons. The explanatory memorandum indicates, at page 68, a number of matters which the Commissioner's rules should address. The Committee prefers that important matters are included in primary legislation whenever this is appropriate and **the Committee therefore seeks the Attorney-General's advice as whether consideration has been given to including such matters in the legislation.**

Pending the Attorney-General'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

Proposed subsection 16A(2) of the Bill permits the Information Commissioner (the Commissioner) to make rules, by legislative instrument, relating to the collection, use or disclosure of personal information in the context of locating missing persons. Page 68 of the explanatory memorandum of the Bill includes a list of matters which the Commissioner's rules should address. The Committee has sought my advice on whether consideration was given to including those matters in the Bill.

The rules made by the Commissioner will consist of detailed matters relating to the procedures and protocols used by agencies that are more appropriately dealt with in subordinate legislation. It is desirable that these more detailed matters be included in a legislative instrument rather than the Act because this will enable a more flexible response to the wide variety of circumstances in which this issue may arise (eg natural disasters, child abductions).

Further, under section 17 of the *Legislative Instruments Act 2003*, before a rule-maker makes a legislative instrument, that person must be satisfied that any consultation that is considered by him or her to be appropriate and that is reasonably practicable to undertake, has been undertaken. As a legislative instrument, the rules will also be subject to Parliamentary disallowance, and so subject to extensive consultation and to Parliamentary scrutiny.

The list of matters which the Commissioner's rules should address set out at page 68 of the explanatory memorandum is non-exhaustive and intended to be indicative only. They have been included to assist understanding of the Bill and not to have any substantive effect.

It can be expected that any rules made by the Commissioner will reflect the Australian Privacy Principles and the *Privacy Act* 1988 generally. For example, APP 6 regulates the use and disclosure of an individual's personal information, including in circumstances where the individual's consent cannot be obtained (such as when the person is missing). This is reflected in the second dot point on page 68 of the explanatory memorandum. Similarly, clause 16A of the Bill provides for various 'permitted general situations' in which the collection, use or disclosure of personal information may be permitted. One such situation reflected in the fourth dot point on page 68-is where there is a serious threat to the life, health or safety of any individual, or to public health or safety. It is therefore unnecessary to repeat the matters listed in the explanatory memorandum in the Bill.

I trust this information will be of assistance to the Committee.

Committee Response

The Committee thanks the Attorney-General for this response and **requests that the key information is included in the explanatory memorandum.**

Senator the Hon Ian Macdonald
Chair



RECEIVED

22 AUG 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

**MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

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

17 AUG 2012

Ian
Dear Senator

I refer to correspondence from Ms Toni Dawes, Committee Secretary of the Senate Scrutiny of Bills Committee, dated 21 June 2012 regarding the issues raised in *Alert Digest No.6 of 2012* about the Fair Work (Registered Organisations) Amendment Bill 2012 (the Bill).

Section 337AA of the Bill provides that a person must comply with a requirement to give information, produce documents and attend before the General Manager of Fair Work Australia (FWA) or a delegate, unless he or she can demonstrate under subsection 337AA(4) that he or she has a reasonable excuse for not doing so. Subsection 337AA(6) provides that a person is not excused from providing information, producing a document or answering a question on the ground that doing so might tend to incriminate the person or expose them to a penalty.

The Committee has sought advice relating to the abrogation of the privilege against self-incrimination in subsection 337AA(6). Importantly, the drafting of this provision mirrors both section 713 of the *Fair Work Act 2009*, and existing section 337 of the *Fair Work (Registered Organisations) Act 2009* (RO Act). I note that *Alerts Digest No. 14 of 2008* considered the abrogation of the privilege against self-incrimination in subsection 713(1) of the *Fair Work Bill 2008*, which provides that a person is not excused from producing a record or document as directed by the Fair Work Ombudsman, on the grounds that doing so might tend to incriminate the person or expose the person to a penalty. At page 8 of the *Alerts Digest*, the Committee noted that it did not 'see the privilege as absolute' and recognised that 'the public benefit in obtaining information may outweigh the harm to civil rights'. The Committee considered that the inclusion of the derivative use immunity provision in subsection 713(2) of the *Fair Work Bill*, which provides that information gathered under section 713 is inadmissible in criminal proceedings against the individual, struck a reasonable balance between the competing interests of obtaining information and protecting individual's rights.

This is consistent with the Committee's consideration of the issue of the privilege against self-incrimination in relation to the Workplace Relations (Registration and Accountability of Organisations) Bill 2002. At page 35 of *Alerts Digest No. 8 of 2002*, the Committee stated that subsection 337(4) of the Bill (later known as the RO Act) abrogated the privilege

against self-incrimination, but again noted that 'the Committee has previously been prepared to accept that provisions which provide use and derivative use immunity strike a reasonable balance between the competing interests of obtaining information and protection individual's rights'. Subsection 337(5) of that Bill limited the circumstances in which information given under the provisions could be used against the person in criminal proceedings.

Section 337AA of the Bill provides for a similar derivative use immunity safeguard. Subsection 337AA(7) of the Bill provides that information obtained as a result of the requirement to give information, produce documents or answer questions is not admissible against the person in criminal or civil proceedings, other than those that arise from subsections 337AA(2) or (3) of the Bill. This approach mirrors existing section 337(5) of the RO Act, and will have the effect of extending these provisions to cover third parties as well as designated officials. It is appropriate that the provisions have been drafted in a manner that is consistent with the existing provisions of the RO Act as well as other sources of workplace relations legislation, and similarly achieves an appropriate balance between the public interest and the protection of an individual's rights.

The Committee has requested that I provide a justification for the placing the onus of proof in subsection 337AA(5) of the Bill on the individual seeking the benefit of the exemption. It is the Australian Government's view that it is appropriate that the individual seeking to rely on the defence in subsection 337(4) bears the onus to demonstrate that the excuse is a reasonable excuse. Subitem 13.3(3) of the Schedule to the *Criminal Code Act 1995* provides that a defendant who wishes to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to the matter.

The Committee has also sought my advice regarding the accountability mechanisms provided for in relation to the delegation of the powers of the General Manager of FWA under subsection 343A(3) of the Bill. New paragraph 343A(3)(3A) provides that the General Manager may delegate her functions or powers to a member of the staff of FWA who is an SES employee or acting SES employee, or a person with substantial or significant experience or knowledge in accounting, auditing, financial reporting, the conduct of compliance reports or investigations; or another field as prescribed by the regulations. This supplements the existing ability of the General Manager to delegate functions provided for in section 343A of the RO Act.

It is important to note that, under these provisions, while a delegate is able to obtain information in the same way as the General Manager, a notice to produce documents or attend to provide information will only be able to be issued by the General Manager or an SES officer. In addition, the General Manager will retain the power to disclose information, determine whether a contravention has occurred and what commensurate action should be taken in relation to that contravention, and the final decision-making power provided for in section 336 of the *Fair Work (Registered Organisations) Act 2009*. Further, subsection 343A(4) of the RO Act provides that a delegate must comply with any directions of the General Manager. The effect of this provision is that the General Manager is expected to exercise appropriate oversight of any delegate exercising powers under these provisions. The Government is of the view that these safeguards are sufficient, and strike an appropriate balance between strengthening the investigative powers of FWA by allowing them to utilise the expertise of other people and bodies and maintaining appropriate oversight of those investigations.

Finally, the Committee has asked whether there is scope to strengthen the accountability mechanisms under subsection 343A(3) of the Bill. As the Government considers the range of safeguards to be appropriate, it is yet to consider whether further strengthening of these provisions will be necessary, but has not ruled out future amendments should they prove to be required.

I trust that this information is helpful.

Regards



BILL SHORTEN



Senator the Hon. Joe Ludwig

**Minister for Agriculture, Fisheries and Forestry
Senator for Queensland**

REF: MNMC2012-05850

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

Dear Senator Macdonald

Thank you for your letter of 16 August 2012 about the availability of merits review for directions made under the Fisheries Legislation Amendment Bill (No. 1) 2012.


The Bill will provide the Australian Fisheries Management Authority (AFMA) with express powers to give two types of directions about e-monitoring to fishing concession and scientific permit holders. The first type is for classes of concession or scientific permit holders where the monitoring requirements that apply to them are the same, and the second type is for a single concession holder to incorporate different, more specific or additional requirements. You asked for advice about why directions of the second type are not subject to merits review.

AFMA advises that the primary purpose of an individual direction will be to supplement obligations that apply to them under a class direction. For example, directions would be given to a class of fishers on a fishery-by-fishery basis requiring them to install e-monitoring equipment and specifying requirements about how and when the equipment is to be operated and how data captured by the equipment is to be provided to AFMA. In addition, directions could be given to an individual fisher in that class specifying more detailed requirements; for instance, the configuration of a particular boat might make it necessary to give a direction about the position of cameras on the boat. Alternatively, the fishing equipment on the boat might be different to the standard type of equipment covered in the class direction. For example, there might be a class requirement to install sensors on automated long-lining equipment that can count the number of hooks being deployed, but this would have to be adjusted for boats where long lines are hand-baited. There would be many variations of these examples where specific, often technical, requirements will be the subject of a direction given to an individual fisher.

Given that class directions are legislative instruments and not subject to merits review, it would be inconsistent to provide for merits review of individual directions that supplement them. In addition, and as explained in the explanatory memorandum to the Bill, the need for flexibility and the anticipated technical nature of individual directions means that merits review is not appropriate.

Thank you again for bringing the committee's concerns to my attention.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joe Ludwig', is written over the printed name.

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

3 September 2012



The Hon Anthony Albanese MP

Minister for Infrastructure and Transport
Leader of the House

Reference: 04047-2012

The Hon Ian MacDonald
Chair
Australian Senate
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

22 AUG 2012

Dear Senator MacDonald

Ian,

Thank you for correspondence dated 16 August 2012, concerning the Senate Standing Committee for the Scrutiny of Bills Alert Digest No.8 of 2012 (15 August 2012) comments on the Maritime Legislation Amendment Bill 2012 (the Bill).

I have provided responses to the matters you have sought my advice on for the Bill in Attachment A of this letter.

A copy of responses will be emailed to the Committee Secretariat at <scrutiny.sen@aph.gov.au> as requested.

I trust this information will address the Committee's concerns.

Yours sincerely


ANTHONY ALBANESE

Senate Standing Committee for the Scrutiny of Bills Alert Digest No.8 of 2012

Maritime Legislation Amendment Bill 2012

1. Undue trespass – strict liability
Item 62, proposed section 26FEW

The Senate Committee questioned the penalty offence (200 units) is set at a higher level than recommended for strict liability offences for individuals (60 penalty units).

It is appropriate that strict liability apply to this offence with a significant penalty of 200 penalty units as it will discourage careless non-compliance as well as intentional or reckless breaches of the requirement to carry a Ship Energy Efficiency Management Plan (SEEMP) on board a vessel. The effectiveness of the regulatory regime given domestic effect in Australia by the Protection of the Sea (PPS) Acts may be undermined if the offences are not offences of strict liability with significant penalties. The maximum penalty of 200 penalty units is consistent with penalties for similar offences in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1993* and is designed to provide increased environmental protection in Australian waters. It should be noted that, as provided in section 4D of the *Crimes Act 1914*, the penalty of 200 penalty units is a maximum penalty, which is designed for the worst cases; the court dealing with the offence will have a discretion to impose a lower penalty and will have regard to the circumstances of the offence when determining the penalty.

2. Reversal of onus of proof
Various

The Senate Committee questioned the defences for existing strict liability provisions and which have a reverse burden of proof (placing the burden of proof on a defendant).

The provisions concerned provide specific defences for strict liability provisions. The effect of providing these defences is to mitigate the strictness of the strict liability provisions. The facts necessary to establish these defences are likely to be within the knowledge of the defendant or persons associated with the defendant (that is, the ship's master or owner or another person in control of aspects of the operation of the ship). It is therefore reasonable, and consistent with the approach adopted in other regulatory legislation, and the offences have been drafted in accordance with principles set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Criminal Code.

Subsection 13.3(6) of the Criminal Code indicates that the "evidential burden" in relation to a matter is merely a burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case requires). As indicated by subsection 13.1(2) of the Criminal Code, the prosecution bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof; further, as indicated by subsection 13.1(1) of the Criminal Code, the prosecution bears the legal burden of proving every element of the offence with which the defendant has been charged.



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

12/9828

Senator the Hon Ian McDonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator McDonald

I thank the Senate Scrutiny of Bills Committee for drawing to my attention comments contained in the Committee's *Alert Digest No. 7 of 2012* (27 June 2012) concerning the Military Court of Australia Bill 2012.

The Committee has sought my advice as to the justification for the proposed approach to subclause 182(3) of the Bill as it enables delegated legislation to modify or adapt the operation of a statute and the explanatory memorandum does not contain an explanation as to why this is necessary.

Subclause 182(3) of the Bill is part of the broader application of the *Legislative Instruments Act 2003* to the Military Court Rules, and is consistent with provisions applying for other federal courts. Subclause 182(3) largely mirrors section 59A of the *Federal Court of Australia Act 1976*, paragraph 125(baa) of the *Family Law Act 1975* and subsection 120(4) of the *Federal Magistrates Act 1999*. These provisions were inserted into these Acts by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*. The Explanatory Memorandum to the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* stated that the regulation making power in relation to other federal courts was inserted:

‘so that the application of the 2003 Act to the rules of court may be modified except in relation to the application of Part 5 of that Act. That is, the regulations cannot alter the way in which the parliamentary scrutiny provisions of the 2003 Act apply to rules of court but the regulations may make other modifications.’

Consistently with the approach for other federal courts, subclause 179(3) of the Bill provides that, with the exception of certain provisions, the *Legislative Instruments Act 2003* will apply to the Military Court Rules. The provisions of the *Legislative Instruments Act 2003* that will not apply to the Military Court Rules are sections 5, 6 and 7 (definition of legislative instrument), sections 10 and 11 (Attorney-General may certify whether an instrument is a

legislative instrument or not), and section 16 (measures to achieve high drafting standards for legislative instruments). Subclause 179(4) of the Bill provides that the Office of Parliamentary Counsel may provide assistance in the drafting of the Rules if the Chief Justice so desires. The Military Court Rules will be required to be lodged on the Federal Register of Legislative Instrument; will be subject to consultation requirements; and will be subject to disallowance and sunseting.

As the Parliament has delegated similar powers in relation to all other federal courts, I do not consider that the Bill delegates legislative powers inappropriately.

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

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'N' followed by a long, sweeping horizontal line that ends in a small loop.

NICOLA ROXON



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

12/12452

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

Dear Senator Macdonald 

I refer to the Senate Standing Committee on the Scrutiny of Bills Alert Digest No. 6 of 2012. I am writing in response to the question at page 80 concerning the delegation of legislative power under the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the Bill).

Proposed subsection 16A(2) of the Bill permits the Information Commissioner (the Commissioner) to make rules, by legislative instrument, relating to the collection, use or disclosure of personal information in the context of locating missing persons. Page 68 of the explanatory memorandum of the Bill includes a list of matters which the Commissioner's rules should address. The Committee has sought my advice on whether consideration was given to including those matters in the Bill.

The rules made by the Commissioner will consist of detailed matters relating to the procedures and protocols used by agencies that are more appropriately dealt with in subordinate legislation. It is desirable that these more detailed matters be included in a legislative instrument rather than the Act because this will enable a more flexible response to the wide variety of circumstances in which this issue may arise (eg natural disasters, child abductions).

Further, under section 17 of the *Legislative Instruments Act 2003*, before a rule-maker makes a legislative instrument, that person must be satisfied that any consultation that is considered by him or her to be appropriate and that is reasonably practicable to undertake, has been undertaken. As a legislative instrument, the rules will also be subject to Parliamentary disallowance, and so subject to extensive consultation and to Parliamentary scrutiny.

The list of matters which the Commissioner's rules should address set out at page 68 of the explanatory memorandum is non-exhaustive and intended to be indicative only. They have been included to assist understanding of the Bill and not to have any substantive effect.

It can be expected that any rules made by the Commissioner will reflect the Australian Privacy Principles and the *Privacy Act 1988* generally. For example, APP 6 regulates the use and disclosure of an individual's personal information, including in circumstances where the individual's consent cannot be obtained (such as when the person is missing). This is reflected in the second dot point on page 68 of the explanatory memorandum. Similarly, clause 16A of the Bill provides for various 'permitted general situations' in which the collection, use or disclosure of personal information may be permitted. One such situation—reflected in the fourth dot point on page 68—is where there is a serious threat to the life, health or safety of any individual, or to public health or safety. It is therefore unnecessary to repeat the matters listed in the explanatory memorandum in the Bill.

I trust this information will be of assistance to the Committee.

Yours sincerely



NICOLA ROXON