SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon I 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

THIRTEENTH REPORT OF 2012

The Committee presents its *Thirteenth 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:

Australian Charities and Not-for-profits Commission Bill 2012

Introduced into the House of Representatives on 23 August 2012
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2012*. The Assistant Treasurer responded to the Committee's comments in a letter dated 22 October 2012. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2012 - extract

Background

This bill establishes a new independent statutory office, the Australian Charities and Not-for-profits Commission which will be the Commonwealth regulator for the not-for-profit (NFP) sector. The exposure draft also establishes a new regulatory framework for the NFP sector.

Delegation of legislative power
Clauses 45- 10 and 50-10

These clauses provide, respectively, for the making of governance standards and external conduct standards by regulation. The bill thus sets up a framework for the making of the key accountability and conduct standards for not-for-profit entities, leaving the standards to be developed in regulations. Compliance with these standards is a condition of registration and breach of the standards may lead to enforcement action.

In relation to governance standards, the explanatory memorandum explains that the governance standards are envisaged as being grounded in a flexible system of principles-based regulation. One feature of the system is the capacity for the regulator to prescribe codes of conduct developed by particular groupings of regulated entities, thereby enabling a system of co-regulation with sections of the not-for-profit sector. It also is apparent that the wide range of registered entities is a reason why governance standards may not be applied (by the regulations) in a uniform way. There are, therefore, some sound reasons why setting governance standards in regulations may be necessary to promote the approach to regulation which is taken in the Bill.

On the other hand, it is less clear why the 'external conduct standards' should not be provided for in the primary legislation. These standards will regulate behaviour in relation to matters external to Australia or which are closely related to such matters. The standards will bind *all* registered entities. The explanatory memorandum indicates, at page 64, that these standards are 'expected to be based on the requirements of the Financial Action Task Force's (FATF) Special Recommendation VIII, and help combat the terrorist and criminal activities covered in the FATF recommendation'. The explanatory memorandum also states, at page 65, that these standards will promote transparency and greater confidence in the sector, across the donor community and with the general public that charitable funds sent, and services provided, overseas are reaching legitimate beneficiaries and being used for legitimate purposes'.

The importance of the standards does not, however, explain why they should be developed in regulations rather than the primary legislation. Indeed, the importance of these standards is a strong reason for including them in the primary legislation, unless there are compelling considerations to the contrary. **The Committee therefore seeks the Treasurer's advice as to whether the external conduct standards can be included in the bill rather than leaving the details to delegated legislation.**

> *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.*

Assistant Treasurer's response - extract

Section 50-10

Section 50-10 of the Australian Charities and Not-for-profits Commission Bill 2012 provides for external conduct standards to be made by regulation. The Committee has sought advice on why the external conduct standards are to be developed in regulations rather than the primary legislation.

Providing for the external conduct standards through regulations rather than primary legislation was undertaken for two reasons. Firstly, regulations provide additional flexibility to rapidly address changing circumstances and any unintended consequences that may arise in a regulatory framework. Secondly, providing for external conduct standards through regulations facilitates the maximum time possible for public consultation on these requirements. This decision was taken after consultation with not-for-profit stakeholders.

Ensuring that adequate public consultation is undertaken and that the standards have the flexibility to change in response to changing international circumstances is essential,

particularly given the complexity of the issues that arise in relation to charities undertaking activities overseas and the complex nature of interactions with other Commonwealth laws.

In this context, regulations best facilitate the development of these standards in close cooperation with the NFP sector and key stakeholders and will also allow the ACNC to work with the sector in understanding the external conduct standards and to facilitate a smooth transition through the provision of assistance and guidance.

Committee Response

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

The Committee also notes that one of the reasons given for establishing the external conduct standards through regulation, rather than primary legislation, is to facilitate 'the maximum possible time for public consultation on these requirements'. It is not clear to the Committee that administrative convenience is a substantive justification for including matters in regulation rather than in primary legislation. While the Committee supports maximum public consultation is it desirable that it occurs in a way that ensures that matters appropriate for primary legislation are not implemented by legislative instrument. However, in light of the other reason given for the use of regulation (flexibility to rapidly address changing circumstances and any unintended consequences) the Committee **leaves the question of whether this approach delegates legislative powers inappropriately to the Senate as a whole**.

Alert Digest No. 10 of 2012 - extract

Undue trespass on personal rights and liberties—strict liability
Subclause 100-25(4)

A responsible entity (that is, a person such as a director of a registered entity—see clause 205-30) who has been suspended or removed may commit a number of offences specified in clause 100-25. These offences have the purpose of discouraging such a person (ie the responsible entity) from continuing to participate in or influence the operations of the registered entity in defined circumstances. The offences are offences of strict liability (subclause 100-25(4)). The offences carry maximum penalties of imprisonment for 1 year or 50 penalty units, or both.

The offences are said to ensure that 'responsible entities are strictly liable for their actions that are taken to influence (directly or indirectly through other responsible entities) the whole or a substantial part of the registered entity's business or financial standing (that is, liable regardless of fault)' (see the explanatory memorandum at page 155). This approach is said to be necessary to 'compel responsible entities which have already been removed on the grounds of misconduct to refrain from influencing the activities of the registered entity in order to ensure the registered entity addresses the contravention or case of non-compliance' (see the explanatory memorandum at pages 155 to 156).

Strict liability only applies to the element of the offence requiring that the entity has been either suspended or removed under the relevant provisions in the legislation. **Nevertheless, given that the offence is punishable by imprisonment the Committee seeks the Treasurer's further advice as to why strict liability is appropriate, taking into account the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement* Powers (at pages 23 and 24).**

Furthermore, if the application of strict liability is considered necessary in relation to this element of the offences, the Committee also seeks the Minister's advice as to whether consideration has been given to placing an obligation on the Commissioner to communicate the serious consequences that may flow should a suspended or removed responsible entity continue to be involved in the operations of the registered entity.

> *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.*

Assistant Treasurer's response - extract

Subsection 100-25(4)

These strict liability offences have been established to compel responsible entities which have already been removed on the grounds of misconduct or misbehaviour to refrain from influencing the activities of the registered entity in order to ensure the registered entity addresses the contravention or case of non-compliance.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* acknowledges that strict liability offences are sometimes required, including where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

Under the ACNC regulatory framework the ACNC Commissioner may only remove or suspend a responsible entity in situations that involve serious contraventions or non-compliance. That is, the ACNC Commissioner must meet strict statutory thresholds, including application and necessity clauses, prior to exercising these regulatory powers.

- The 'application clause' constrains the provisions the ACNC Commissioner is able to enforce, and the types of entities the ACNC Commissioner is able to apply enforcement powers toward.

- The 'necessity clause' ensures that the ACNC Commissioner can only use enforcement powers when use of the power is necessary to directly address the contravention.

In relation to Division 100, the necessity test means that the ACNC Commissioner cannot suspend or remove a responsible entity unless this action is necessary in all the circumstances to directly address the contravention or non-compliance, this requires that the Commissioner consider whether education, warnings or another enforcement action may have remedied the problem. As such this action will only be justified in the most serious circumstances. For example, this power would be exercised in circumstances where there is evidence of a history of serious non-compliance and a serious risk of misappropriation of monies donated by the public and intended to be used for charitable purposes.

Given the seriousness of the contraventions or non-compliance that would be required to necessitate the suspension or removal of a responsible entity, it is essential that suspended or removed entities are clearly prohibited from engaging in the management of the entity and that serious consequences attach to a failure to comply with this, without the need for a 'fault' element in order to deter offences and ensure the effectiveness of the regulatory regime.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* also notes that strict liability is considered appropriate where its application is necessary to protect the general revenue. Given the interrelationship with the taxation system, failing to provide the ACNC with the necessary scope to act as an effective regulator in the situations outlined above would create significant tax system integrity issues and give rise to significant revenue risks.

I also note that this provision is based on an existing obligation and associated strict liability offence for disqualified persons to manage corporations which is established by section 206A of the *Corporations Act 2001*.

Under the Bill, if the Commissioner decides to suspend or remove a responsible entity, the Commissioner must give a written notice setting out the decision and giving the reasons for the decision.

I would expect that as a matter of best-practice regulation, and consistent with the principles in the ACNC Taskforce Implementation Report of June 2012, the Commissioner would explain in any such notice the effect of the suspension or removal, namely the prohibition on managing the registered entity, and the consequences of a failure to comply.

However in response to the issues raised by the Committee I propose to amend sections 100-10 and 100-15 of the Bill to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed responsible entity. These amendments will ensure suspended and removed entities understand the consequences of non-compliance in order to prevent them from unknowingly acting in breach of their obligations.

Committee Response

The Committee thanks the Assistant Treasurer for this detailed response. The Committee also thanks the Assistant Treasurer for indicating that the bill will be amended to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed responsible entity. As noted by the Assistant Treasurer, this will ensure that suspended and removed entities are provided with information about the consequences of non-compliance by statutory notice.

The Committee also **requests that the key information is included in the explanatory memorandum**.

Alert Digest No. 10 of 2012 - extract

Undue trespass on personal rights and liberties—strict liability
Subclause 100-70(1) and subclause 100-70(5)

Subclause 100-70(1) provides that if the Commissioner makes a property vesting order to vest the property of a registered entity in an acting responsible entity, that the former trustee or former trustees are required to give the acting responsible entity all books relating to the registered entity's affairs that are in the former trustee's or former trustees' possession, custody or control. Failure to comply with this obligation within 14 days of the Commissioner making the order is an offence of strict liability.

The explanatory memorandum, at page 161, justifies the use of strict liability as being necessary to 'compel former trustee(s) which have already been removed on grounds of misconduct to deal fairly with the trust's property during the handover period'. **Given the**

brevity of this explanation the Committee seeks the Treasurer's further advice as to the justification for the application of strict liability by reference to the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement* Powers (at pages 23 and 24).

Furthermore, if strict liability continues to be considered necessary the Committee also seeks the Minister's advice as to whether consideration has been given to a requirement that the Commissioner specifically notify the former trustee(s) of their order, the obligations which thereby arise on the former trustee(s) and the consequences of a failure to comply.

Subclause 100-70(5) also imposes strict liability offences for the breach of requirements that the former trustee or former trustees provide certain information or an explanation or take specified action in relation to an order vesting property in an acting responsible entity (subclauses 100-70(3) and (4)). In these cases, the required action is specified 'by notice in writing to the former trustee or former trustees' by the 'acting responsible entity' (subclause 100-70(3) and (4)). **The Committee seeks the Treasurer's advice as to the justification for the application of strict liability in these instances by reference to the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement* Powers (at pages 23 to 24). Given the nature of the strict liability offence, the Committee also seeks advice as to whether consideration has been given to requiring that the notice received by the former trustee(s) clearly specifies the consequences of a failure to comply.**

> *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.*

Assistant Treasurer's response - extract

Subsections 100-70(1) and 100-70(5)

The strict liability offences in these subsections compel former trustee(s) which have been removed on grounds of misconduct or misbehaviour to deal fairly with the trust's property during the handover period.

The principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* set out that strict liability offences may be necessary where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

As discussed above the suspension or removal of responsible entities would be undertaken in relation to serious matters and as such the existence of effective enforcement mechanisms and a strong deterrent for these offences is necessary and justified, given the fact that the responsible entities in question would have already been involved in wrongdoing and would have the potential to dissipate or misapply charitable monies and to frustrate the ACNC Commissioner's actions to prevent this.

Furthermore these provisions to prevent suspended or removed trustees from withholding information or frustrating transfers of property are necessary to ensure trustees deal fairly with the trust's property during the handover period. These provisions are based on similar provisions in relation to the trustees of private ancillary funds (see section 426-165 in Schedule 1 to the *Taxation Administration Act 1953* (T AA)) which also impose strict liability offences and are similarly considered necessary in the context of prevention of misapplication of charitable monies and revenue protection.

It is also important to note that the existence of an effective regulatory mechanism to suspend and remove responsible entities is particularly important in the context of the NFP sector, as it allows the Commissioner to take appropriate action against individuals who are responsible for contraventions, rather than penalising or deregistering an otherwise effective charity, where it would inappropriately prevent that organisation from providing vital services to the community.

In response to the issues raised by the Committee, as outlined above, I propose to amend sections 100-1 0 and 100-15 of the Bill to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed trustee. These amendments will ensure suspended and removed trustees understand the consequences of non-compliance in order to prevent them from unknowingly acting in breach of their obligations.

Committee Response

The Committee thanks the Assistant Treasurer for this detailed response. The Committee again thanks the Assistant Treasurer for indicating that the bill will be amended to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed responsible entity. As noted by the Assistant Treasurer, this will ensure that suspended and removed entities are provided with information about the consequences of non-compliance by statutory notice.

The Committee also **requests that the key information is included in the explanatory memorandum**.

Alert Digest No. 10 of 2012 - extract

Adequacy of Merits review
Part 7.2

This Part provides for the review of a number of administrative decisions which affect a particular entity that may be applying for registration under the Bill or relate to the registration or regulation of a particular entity. The review model is as follows. First, an affected entity (ie the entity which has received notice of the administrative decision) may lodge an objection with the Commissioner; second, that entity may either apply to the AAT for review or appeal against the objection decision to a designated court. The model is based on the Part IVC of the *Taxation Administration Act 1953*. The explanatory memorandum states, at page 195, that this approach will ensure 'that whilst decisions of the ACNC Commissioner will be reviewed independently and separately from the processes in the tax law, the way in which the review and appeal process operate will be familiar to those NFP entities that operated prior to the establishment of the ACNC and were previously endorsed by the Commissioner of Taxation'. The approach also means that decisions of the ACNC Commissioner and the Commissioner of Taxation may be reviewed or appealed together where that is appropriate.

The details of this overall approach involve two significant departures from the standard model of merits review applicable under the AAT Act. First, section 27 of the AAT Act, which allows applications to be brought for review by or on behalf of any person or persons whose interests are affected by the decision, is excluded. The explanatory memorandum, at page 203, contains an explanation for excluding the operation of this provision of the AAT Act and limiting the right to apply for review to entities which are directly affected by reviewable decisions (see clause 165-10). The reason provided for this exclusion is that decisions concerning, for example, registration of an entity 'could affect a large segment of the [NFP] sector…including donors and members'.

The conclusion reached is that any broadening of the right to bring an application would 'be an inefficient use of government resources, as well as those of the registered entity' and that indirectly affected persons 'may not have access to private information' relevant to the review of decisions. Although it is accepted that these points raise valid concerns, they are stated at a high level of generality which makes it difficult to assess their significance in this particular merits review context. **For this reason the Committee seeks the Treasurer's further advice as to a fuller explanation of the reasons why the default rule for standing (i.e. who is entitled to seek review) in the AAT is inappropriate.**

The second notable departure from the AAT Act (paragraph 165-40(b)) is that the applicant for review in the AAT 'has the burden of proving that the administrative decision concerned should not have been made or should have been made differently'. The merits review function of the AAT has been described by the Federal Court as being to make the

‘correct or preferable’ decision. To this extent, the AAT is said put itself in the position of the original decision-maker when conducting its review. For this reason the Courts have resisted placing a formal onus or burden of proof on applicants before the AAT (though it has been recognised that a practical responsibility will often fall on applicants to build a persuasive case in relation to certain matters, particularly where facts or evidence are peculiarly within their knowledge).

The explanatory memorandum argues, at page 201, that placing a formal burden of proof on an applicant is appropriate as ‘it is consistent with common law principles that the party bringing a law-suit or claiming that another entity’s decision is wrong must prove that this is indeed the case’. Further, it is said that ‘the facts and evidence relating to these disputes are peculiarly within the knowledge of dissatisfied entities’. However, given that the role of the AAT is merits review, and that this function often involves discretionary decision-making, it is not clear that the common law principles relevant to bringing a law suit are appropriate. Merits review involves administrative decision-making and rules associated with the exercise of judicial powers are not readily transferrable. Where the ACNC Commissioner exercises a discretionary power it is not clear what is required to prove that the decision is wrong or should have been made differently.

In the circumstances the Committee also seeks the Treasurer's further advice as to the justification for the proposed approach to this matter.

> *Pending the Treasurer'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.*

Assistant Treasurer's response - extract

Part 7-2

As the Committee has noted in its report, the review and appeals framework has been modelled very closely on Part IVC of the TAA. This was a deliberate policy decision whereby the existing regime for review and appeals that applies to charities that are currently endorsed by the Commissioner of Taxation will apply in the same way to charities registered by the ACNC under the Bill.

For that reason, the two departures from the *Administrative Appeals Tribunal Act 1975* (AAT Act) that were noted by the Committee in the report directly replicate the departures from the AA T Act that exist currently and apply in Part IVC of the T AA. The specific rationale for each of the departures has been described in the Explanatory Memorandum and the Committee has considered and quoted the relevant parts of the Explanatory Memorandum in their report.

The general reasons for why these departures from the AA T Act are in the Bill are as follows.

- To ensure that the review and appeal framework replicates the existing framework in Part TVC of the TAA.
    - This will help to facilitate the combined hearing of review decisions of the ACNC Commissioner and the Commissioner of Taxation by ensuring that there is a single set of rules governing the hearing process.
- To ensure that there is consistency between the review and appeals framework in the Bill and the T AA for registered entities that were previously endorsed as charities by the ATO so that they are familiar with the new review and appeals framework.
- To avoid potential revenue implications and tax integrity issues.
    - Given the interrelationship between the ACNC Bill and the taxation system, divergence between the review and appeal framework in the Bill and the existing framework in the TAA has the potential to give rise to significant revenue risks.

The specific reasons for the departures from the AA T Act as identified by the Committee are in addition to the general reasons listed above and are as follows.

- The departure from section 27 of the AA T Act was to restrict the scope of entities that could have a decision reviewed to only those entities that are directly affected by the decision.
    - This was done because if section 27 was retained, a large segment of the not-for-profit sector and public (including donors and members) would potentially be able to apply for a review which would be an inefficient use of government resources, as well as those of the registered entity.
    - Instead, by departing from section 27 of the AAT Act, only affected registered entities or responsible entities (those entities directly affected by decisions) will be able to initiate an AA T review providing registered entities with certainty as to their registration and related tax statuses.
    - Despite this, entities indirectly affected by decisions that are unable to initiate AAT reviews, will still have the right to become party to an initiated review which would allow the review to cover important tangential issues of relevance.
- The other departure from the AAT Act, in respect to the burden of proof resting on the applicant to prove the ACNC Commissioner's decision was wrong, was predominantly based on the idea that the true facts of the situation lie uniquely within the knowledge of the entity dissatisfied with the decision.

- The tax system and the new ACNC regulatory framework both rely heavily on self-assessment from charities as a key component of their regulatory system. This is primarily based on a principle of appropriate care, honesty and fairness by those interacting with it. For this reason, the same rationale for the departure from the AA T Act in the T AA applies in the case of the ACNC, namely that the burden of proof most appropriately rests with the applicant because the facts and evidence relating to these disputes are peculiarly within the knowledge of the entity applying for review and therefore only they will know why they are dissatisfied with the decision.

- This departure from the AAT Act is also consistent with common law principles that the party bringing a law-suit or claiming that another entity's decision is wrong must prove that this is indeed the case and this has been explained in detail in the Explanatory Memorandum.

I thank the Committee for bringing these matters to my attention and trust this information will address the concerns of the Committee.

Committee Response

The Committee thanks the Assistant Treasurer for this response, but notes that the response has largely replicated information already available in the explanatory memorandum. While the Committee had been seeking more specific information about the justification for the proposed approach, in the circumstances the Committee **leaves the question of whether this approach may be considered to make rights, liberties or obligations unduly dependent upon non reviewable decisions to the Senate as a whole**.

Law Enforcement Integrity Legislation Amendment Bill 2012

Introduced into the House of Representatives on 19 September 2012
Portfolio: Home Affairs and Justice

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2012*. The Minister responded to the Committee's comments in a letter dated 29 October 2012. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2012 - extract

Background

This bill amends the *Crimes Act 1914*, the *Australian Crime Commission Act 2002*, the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, *the Customs (Administration) Act 1985* and the *Law Enforcement Integrity Commissioner Act 2006*.

Schedule 1 introduces targeted integrity testing for staff members of the Australian Federal Police, Australian Crime Commission and the Australian Customs and Border Protection Service suspected of corrupt conduct. It will also extend the jurisdiction of the Australian Commission for Law Enforcement Integrity to include CrimTrac, AUSTRAC and prescribed staff in the Department of Agriculture, Fisheries and Forestry.

Schedule 2 enables drug and alcohol testing to be conducted on Customs and Border Protection staff, and introduces a range of other powers to support integrity initiatives within Customs and Border Protection.

Delegation of legislative power
Schedule 2, item 16, proposed subsection 4B(5)

This item inserts a new section 4B into the *Customs Administration Act 1985*. The effect of this provision is to empower the CEO to issue orders with which a Customs worker must comply. The powers conferred are said to be similar to those held by the Commissioner of the Australian Federal Police that enable orders 'in relation to professional standards, including in relation to mandatory reporting of misconduct and corruption' (see the explanatory memorandum at page 49). Subsection 4B(5) provides that the orders are not legislative instruments.

The explanatory memorandum suggests that it is possible that some orders may fall within the definition of 'legislative instruments' for the purposes of the *Legislative Instruments Act 2003* (the LIA). The justification given for this substantive exemption from the LIA is that the orders will 'relate to the internal workings of Customs and Border Protection and are aimed in particular at dealing with issues of integrity of the workforce' and thus it is not 'considered appropriate that the orders should be subject to possible disallowance, and sunsetting'. Further, it is explained that the approach is consistent with that taken in the context of the *Australian Federal Police Act 1979* in relation to the operation of the LIA (see the explanatory memorandum at page 50).

Given the explanation provided in the explanatory memorandum **the Committee leaves the appropriateness of exempting such orders from disallowance and sunsetting requirements under the *Legislative Instruments Act 2003* to the Senate as a whole.**

However, the Committee seeks further advice as to whether consideration has been given to the appropriateness of requiring such orders to be tabled in Parliament or alternative requirements to report on the exercise of these significant powers.

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

Minister's response - extract

Schedule 2, item 16, proposed subsection 4B(5) - delegation of legislative power

This item inserts a new section 4B into the Customs Administration Act 1985 (CAA), which will allow the CEO to issue orders with which Customs workers must comply. Proposed subsection 4B(5) provides that these orders are not legislative instruments. The effect of subsection 4B(5) will be to make these orders exempt from the operation of the Legislative Instruments Act 2003, which would otherwise have made these orders subject to sunsetting and possible disallowance.

While the Committee noted that it leaves the appropriateness of exempting such orders from disallowance and sun setting requirements to the Senate as a whole, it has sought further advice as to whether consideration has been given to the appropriateness of requiring CEO's Orders to be tabled in Parliament or alternative requirements to report on the exercise of these significant powers.

I consider that, having regard to the nature of the power to make orders, along with existing provisions in the *Public Service Act 1999* (PS Act) that regulate an agency head's

ability to manage an agency, the Bill contains appropriate safeguards on this power, and an additional requirement to report to Parliament on the exercise of these powers is not necessary.

The scope of the CEO's power to make orders is confined to orders 'with respect to the control of the Australian Customs and Border Protection Service'. For workers that are employees of Customs and Border Protection, enforcement of the obligation to comply with CEO Orders is through the employment relationship. The CEO as the Agency Head under the PS Act has all the all the rights, duties and powers of an employer in respect to APS employees in the agency.

At common law an employee is legally obliged to obey the lawful and reasonable directions of his or her employer. The PS Act reflects this obligation by providing that an APS employee must comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction (s 13(5) PS Act).

A breach of the Code of Conduct can result in a sanction being imposed on an employee under section 15 of the PS Act including, at the highest end, termination of employment.

The effect of these provisions is to ensure that any orders made by the Customs and Border Protection CEO under the proposed section 4B must be both lawful and reasonable. If an order is not lawful and reasonable, non-compliance will not be able to be sanctioned as the employee will not be in breach of Code of Conduct.

The means of enforcing compliance with orders by workers who are not employees of Customs and Border Protection will vary depending on the legal basis on which they perform work for the agency. For workers that are either consultants or contractors to the agency, or sub-contractors or employees of a contractor, the consequences for the worker of failing to comply with an order will be governed by the contractual arrangement between Customs and Border Protection and the contractor. Typically, the contractual arrangement will allow for the agency to require the removal of specified personnel.

For workers who are seconded from other agencies, a failure to comply with an order may result in the cessation of the secondment. Whether the worker's agency or authority takes any further action against the worker is a matter for the agency or authority.

Committee Response

The Committee thanks the Minister for this detailed response.

Alert Digest No. 12 of 2012 - extract

Broad discretionary power
Schedule 2, item 19, proposed section 15A

Proposed section 15A will provide that the Customs CEO may issue a written declaration that a member of staff who has been dismissed has engaged in serious misconduct. The effect of the declaration will be to remove the operation of the *Fair Work Act 2009* (which provides protection where a dismissal was harsh, unjust or unreasonable) in relation to that particular dismissal. Under paragraph 15A(1)(a) such a declaration may only be made if the CEO believes on reasonable grounds that the staff member's conduct or behaviour 'amounts to serious misconduct' and is having, or is likely to have, a damaging effect on the reputation of, or morale in, the Customs Service.

The explanatory memorandum (at page 52) states that a definition of 'serious misconduct' will be inserted in subsection 15A(8). However, subsection 15A(8) does not relate to this matter. **The Committee therefore seeks clarification as to whether it is intended that such a definition be included. If it has been decided not to include such a provision, the Committee seeks the Minister's advice as to why such a definition is not necessary to appropriately confine the breadth of this power which may deprive workers of statutory rights**.

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

Minister's response - extract

Schedule 2, item 19, proposed section 15A - definition of 'serious misconduct'

This item will insert into the CAA a new section 15A, which will provide that the Customs and Border Protection CEO may issue a written declaration that a member of staff who has been dismissed engaged in serious misconduct. The Committee has noted that the explanatory memorandum indicates that a definition of 'serious misconduct' will be inserted in subsection 15A(8), but that proposed section 15A(8) does not appear to include this definition. The Committee has sought clarification on this issue.

The reference in the explanatory memorandum to a definition of 'serious misconduct' in subsection 15A(8) is an error. A definition of 'serious misconduct' is included in the Bill at Schedule 2, item 14, to be inserted into section 3 of the CAA.

'Serious misconduct' is defined in the Bill as:

(i) corruption, a serious abuse of power, or a serious dereliction of duty, by the employee, or
(ii) any other seriously reprehensible act or behaviour by the employee, whether or not acting, or purporting to act in the course of his or her duties as a Customs employee.

It is also important to note that whether the conduct amounts to 'serious misconduct' is only one aspect of the criteria about which the CEO must have a reasonable belief in order to make a declaration of serious misconduct.

The other aspect is that the employee's behaviour must be having, or is likely to have, a damaging effect on:

(i) the professional self-respect or morale of some or all of the members of the staff of the agency, or
(ii) the reputation of the agency with the public, or any section of the public, or with an Australian or overseas government, or with a person or body (however described) to whom the CEO may authorise disclosure of information under section 16 of the *Customs Administration Act 1985*.

Additionally, the explanatory memorandum indicates that the conduct concerned must also 'relate to Customs and Border Protection's law enforcement powers' . The need for a nexus between the conduct and the agency's law enforcement functions is consistent with the policy objective behind this power. This objective is to ensure that employees of the agency who are proven to have engaged in conduct of the necessary character, relating as it does to the agency's law enforcement role, cannot be reinstated to employment within the agency, thereby compromising the work of the agency, ongoing investigations and adversely impacting on the morale of staff.

Committee Response

The Committee thanks the Minister for this detailed response **and requests that the explanatory memorandum be updated to correct the reference to subsection 15A(8).**

Alert Digest No. 12 of 20112 - extract

Delegation of legislative power
Schedule 2, item 21, proposed section 16F

This provision provides for regulations to be made in a number of important areas relating to the conduct of alcohol and drug tests that are authorised under proposed sections 16B, 16C and 16D. The regulations will deal with very important matters, including who may conduct the tests, the handling of samples, and confidentiality of results. As the explanatory memorandum does not deal with the matter, and given the invasive nature of some drug testing, **the Committee seeks the Minister's advice as to why more of the details pertaining to drug and alcohol testing cannot be included in the primary legislation**.

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

Minister's response - extract

Schedule 2, item 21, proposed section 16F - delegation of legislative power

This provision provides for Regulations to be made relating to the conduct of drug and alcohol tests that are authorised under proposed sections 16B, 16C and 160. The Committee seeks my advice as to why these details pertaining to drug and alcohol testing cannot be included in the primary legislation rather than included in Regulations.

In my view it is appropriate for the matters listed in proposed 16F to be dealt with by Regulation. There are many aspects of this type of testing framework that require greater flexibility than can be achieved by embedding in primary legislation. Technology available for conducting drug and alcohol testing is evolving rapidly and prescribing current methods in primary legislation would unduly limit flexibility. I note also that the Australian Federal Police Act 1979, which contains similar provisions for drug and alcohol testing, also leaves these matters to Regulations.

Ultimately, Parliament will have oversight of, and may disallow, Regulations made under proposed 16F.

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

Committee Response

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

Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012

Introduced into the House of Representatives on 12 September 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2012*. The Minister responded to the Committee's comments in a letter dated 11 October 2012. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2012 - extract

Background

This bill provides for amendments to the:

- *Social Security (Administration) Act 1999* to extend the welfare reform trial in the Cape York area until 1 January 2014.
- *Indigenous Education (Targeted Assistance) Act 2000* to increase the Act's legislative appropriation for 2012 and 2013 calendar years.
- operation of the Social Security Appeals Tribunal in the social security, child support, family assistance and paid parental leave jurisdictions.

The bill also makes technical amendments to the 'schoolkids bonus' and other minor clarifications.

Undue Trespass—retrospective application
Schedule 4, subitem 2(1)

This subitem would apply amendments in schedule 4 retrospectively.

The amendments made in schedule 4 are designed to 'undo the effect of the majority's interpretation of the child support legislation in the judgment of the Full Court of the Family Court of Australia in *Child Support Registrar v Farely* [2011] FAMCAFC 207 (*Farley*)' (see the explanatory memorandum at page 51). Prior to this decision the Child Support Registrar had a longstanding policy that had been assumed to be consistent with the legislation. In effect, however, the Full Court held that this policy was not consistent with the legislative scheme.

The policy in question dealt with the situation where a Court had made a declaration (under section 107 of the *Child Support (Assessment) Act 1989*) that the payer of child support was not the parent of one of the children that were covered by a child support assessment for which they were liable, but that the payer remains liable for at least one other child in the assessment. In such circumstances the longstanding policy of the Child Support Registrar can be described as follows:

> [T]he total amount of child support previously paid (including amounts paid for the child that was found to be not theirs) would be applied to their child support liability for any remaining children in the case, and any child support debt for those children. Any excess child support they paid may be recovered from the payee by applying for a court order under the existing child support legislation. (Explanatory memorandum at page 51)

Subsection 107(5) of the *Child Support (Assessment) Act 1989* provides that once a declaration that a child was not the child of the payer has been made the original application for administrative assessment for the child is 'to be taken never to have been accepted by the Registrar'. The effect of the Full Court of the Family Court of Australia's decision in *Farley* is that the payer must take court action to obtain repayment from the payee of the amount that they had paid in relation to the child of which they were not the parent. Further, the Court's interpretation of the legislation means that it is not open to the Registrar to apply such amounts to cover any unpaid amounts in relation to any other child for whom the payer is liable.

The effect of the amendments in schedule 4 would enable the Registrar to continue to administer the legislation according to its existing policy (which the Court held to be inconsistent with the existing legislation).

In justification of applying the amendments retrospectively, the explanatory memorandum states that:

> These amendments are required because the Family Court's decision…changed the way the policy has always operated…The amendments are being applied retrospectively to support the longstanding policy and administration so that previously decided cases are not revisited, which could significantly disadvantage parties who have relied on those decisions in their financial affairs. (Pages 51 and 52)

Given the potential significance of the proposal, this explanation is not sufficiently detailed to enable the committee to adequately consider the appropriateness of retrospective legislation in this instance. Although it may be suggested that those who have relied on the Registrar's existing policy may be disadvantaged were their cases to be revisited, the effect of the retrospective change to the legislative provisions may also operate to the detriment of a party to an assessment for child support. The decision in *Farley* concluded that the policy was unlawful.

The Committee therefore **seeks further information from the Minister relating to the rationale for applying these provisions retrospectively. In particular, the Committee seeks information about:**

- **the nature of the disadvantage that may be occasioned in relation to all parties (including any affected children whether or not they are covered by any order);**
- **the extent of the practical problem (i.e. how many previously decided cases could potentially be revisited);**
- **whether consideration has been given to solutions to the problem that do not involve retrospective legislation (such as compensation for faulty administration); and**
- **how excess child support in these circumstances may be recovered under the existing legislation (for example, it is not clear whether there is a right to recover all such amounts and how the interests of the child might be factored into such proceedings).**

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

The Committee seeks further information about the rationale for retrospectively applying the amendments in Schedule 4 of the Bill - Amendments relating to certain child support declarations. I have addressed the Committee's questions as follows:

The nature of the disadvantage

In the Explanatory Memorandum, one of the justifications provided for the retrospectivity of the amendments is to avoid disadvantage to parties as a result of reviewing previous decisions of the Child Support Registrar in light of the court's decision in *Farley*.

The Committee sought advice on the nature of the disadvantage that may be occasioned in relation to all parties.

If the legislation is not made retrospective, and previous decisions are reviewed applying the court's approach in *Farley*, payers could be significantly disadvantaged as illustrated by the following example which compares the policy approach and the court's approach:

Example:

- The payer was originally liable for two children for an amount of $2700, and had paid $1200, so had an outstanding debt of $1500.

- The payer is subsequently determined to not be the parent of one of the children, and the payer's revised liability for one child is an amount of $1800.

- The policy outcome is as follows: the full amount of $1200 previously paid by the payer is counted in calculating that the payer now has an outstanding debt of $1800 - $1200 = $600. The payee does not have any potential debt.

- The court's approach requires the amount paid to be split into an amount for the child who is to be excluded from the assessment and an amount for the child who is to remain. If a one to one even split of payments for the two children is applied, an amount of $600 previously paid by the payer is disregarded as the amount paid for the excluded child. The payer would then have an outstanding debt of $1800 - ($1200/2) = $1200. Separately, the payee has a potential debt of $1200/2 = $600, which may be recovered by the payer through the court process.

The court's approach essentially requires the paying parent to take court action under section 143 of the *Child Support (Assessment) Act 1989* (Child Support Assessment Act) to obtain repayment from the payee of the amount attributed as being the overpayment for the excluded child, as well as to make further payment to the payee of an equivalent amount attributed as being the underpayment for the other child for whom they remain liable.

In the example above, as per current administration, the payer would owe arrears of $600. If the case is reviewed applying the court's approach, the payer's arrears would be increased from $600 to $1200. The payer may then commence court proceedings under section 143 of the Child Support Assessment Act to recover from the payee the amount of $600 paid for the excluded child. The costs associated with such court proceedings could be detrimental to all parties involved.

The possible detriment to payees as a result of the retrospective change can be illustrated, using the example above, as follows: if the legislation were not retrospective, the payee could seek review of their case and, as explained above, have an additional $600 arrears owed by the payer. If the court then refused to order repayment of amounts paid for the excluded child under section 143, the payee would not have any debt and would have an overall benefit of $600, subject to whether the court makes an order against the payer for the payee's legal costs. However, if the court ordered full repayment under section 143, the payee would have a debt of $600 for the excluded child, which is the same as the additional arrears of $600 from the payer, resulting in no overall benefit and potential legal costs. Accordingly, any benefit that payees may derive from the amendments not being retrospective is subject to the court's discretion under section 143 and payees would have the risk of potential legal costs.

Number of affected cases

The Committee has asked how many previously decided cases are likely to be affected by the retrospective amendments.

The amendments only affect cases where a declaration has been made under section 107 of the Child Support Assessment Act that a payer should not be assessed in respect of one or more children and the payer continues to have an ongoing liability for at least one other child. The Department of Human Services is supplied with a declaration under section 107 of the Child Support Assessment Act for over 100 cases per year. However, data is not readily available on how many of these cases involved at least one remaining child for whom the payer continued to have an ongoing liability.

Solutions other than retrospective legislation

The Committee has asked whether solutions to the problem other than retrospective legislation have been considered, such as compensation for faulty administration.

In these circumstances compensation for faulty administration is not considered appropriate. The policy applied by the Registrar prior to the court's decision in Farley was based on what was considered at the time to be a reasonably arguable interpretation of the relevant legislative provisions and is therefore not considered to be defective administration. This view of the legislation was accepted in the dissenting judgment of Bryant CJ in Farley.

Further, even though the majority judgement in Farley took a different view on how the legislation should be applied, it noted the absence of legislative guidance and the need for legislative amendment to rectify this deficiency.

Retrospective legislation is considered the most appropriate way to rectify the deficiency identified in Farley. The amendments support the longstanding policy that was applied prior to the court's decision as this policy is considered to strike an appropriate balance between the rights of all parties involved.

How excess child support may be recovered under existing legislation

The Committee has asked how excess child support may be recovered under existing legislation. The Committee has also commented that it is not clear whether there is a right to recover all such amounts and how the interests of the child might be factored into such proceedings.

Excess amounts of child support that have been paid may be recovered under section 143 of the Child Support Assessment Act. Section 143 provides that if an amount of child support is paid by a person (the payer) to another person (the payee), and the payer is not liable, or subsequently becomes not-liable, to pay the amount to the payee, the amount may be recovered from the payee in a court having jurisdiction under the Act.

The court has discretion whether to order recovery under section 143, therefore payers may not be able to recover overpaid child support in all cases. Subsection 143(3) requires the Court, in exercising its powers under section 14 3, to take account of the rights of the parties and the child concerned and make such orders as the court considers just and equitable. In addition, if a declaration has been made under section 107 of the Child Support Assessment Act that the payer is not a parent of one or more children in the assessment, subsection 143(3A) requires the court to also consider additional matters listed in subsection 143(3B).

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Committee Response

The Committee thanks the Minister for this detailed response. The Committee notes that the example illustrates possible detriment to payees and payers if the changes are not retrospective. The Committee's view is that although it is possible that the disadvantage from the proposed approach will not always be evenly distributed, it agrees that it is desirable to minimise the need to require court action to recover overpayments. The Committee **requests that the key information provided in the response is included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole**.

Senator the Hon Ian Macdonald
Chair

The Hon David Bradbury MP
Assistant Treasurer
Minister Assisting for Deregulation

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

Dear Senator Ian,

Thank you for your Committee Secretary's letter to the Office of the Treasurer, of 13 September 2012, in relation to the Senate Standing Committee for the Scrutiny of Bills (the Committee) Alert Digest No.10 of 2012. In this report the Committee sought further explanation of certain aspects of provisions of the *Australian Charities and Not-for-profits Commission Bill 2012*. The Treasurer has asked me to respond on his behalf. I have provided the additional information in relation to the matters raised by the Committee below.

Section 50-10

Section 50-10 of the Australian Charities and Not-for-profits Commission Bill 2012 provides for external conduct standards to be made by regulation. The Committee has sought advice on why the external conduct standards are to be developed in regulations rather than the primary legislation.

Providing for the external conduct standards through regulations rather than primary legislation was undertaken for two reasons. Firstly, regulations provide additional flexibility to rapidly address changing circumstances and any unintended consequences that may arise in a regulatory framework. Secondly, providing for external conduct standards through regulations facilitates the maximum time possible for public consultation on these requirements. This decision was taken after consultation with not-for-profit stakeholders.

Ensuring that adequate public consultation is undertaken and that the standards have the flexibility to change in response to changing international circumstances is essential, particularly given the complexity of the issues that arise in relation to charities undertaking activities overseas and the complex nature of interactions with other Commonwealth laws.

In this context, regulations best facilitate the development of these standards in close cooperation with the NFP sector and key stakeholders and will also allow the ACNC to work with the sector in understanding the external conduct standards and to facilitate a smooth transition through the provision of assistance and guidance.

Subsection 100-25(4)

These strict liability offences have been established to compel responsible entities which have already been removed on the grounds of misconduct or misbehaviour to refrain from influencing the

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activities of the registered entity in order to ensure the registered entity addresses the contravention or case of non-compliance.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* acknowledges that strict liability offences are sometimes required, including where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

Under the ACNC regulatory framework the ACNC Commissioner may only remove or suspend a responsible entity in situations that involve serious contraventions or non-compliance. That is, the ACNC Commissioner must meet strict statutory thresholds, including application and necessity clauses, prior to exercising these regulatory powers.

- The 'application clause' constrains the provisions the ACNC Commissioner is able to enforce, and the types of entities the ACNC Commissioner is able to apply enforcement powers toward.

- The 'necessity clause' ensures that the ACNC Commissioner can only use enforcement powers when use of the power is necessary to directly address the contravention.

In relation to Division 100, the necessity test means that the ACNC Commissioner cannot suspend or remove a responsible entity unless this action is necessary in all the circumstances to directly address the contravention or non-compliance, this requires that the Commissioner consider whether education, warnings or another enforcement action may have remedied the problem. As such this action will only be justified in the most serious circumstances. For example, this power would be exercised in circumstances where there is evidence of a history of serious non-compliance and a serious risk of misappropriation of monies donated by the public and intended to be used for charitable purposes.

Given the seriousness of the contraventions or non-compliance that would be required to necessitate the suspension or removal of a responsible entity, it is essential that suspended or removed entities are clearly prohibited from engaging in the management of the entity and that serious consequences attach to a failure to comply with this, without the need for a 'fault' element in order to deter offences and ensure the effectiveness of the regulatory regime.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* also notes that strict liability is considered appropriate where its application is necessary to protect the general revenue. Given the interrelationship with the taxation system, failing to provide the ACNC with the necessary scope to act as an effective regulator in the situations outlined above would create significant tax system integrity issues and give rise to significant revenue risks.

I also note that this provision is based on an existing obligation and associated strict liability offence for disqualified persons to manage corporations which is established by section 206A of the *Corporations Act 2001*.

Under the Bill, if the Commissioner decides to suspend or remove a responsible entity, the Commissioner must give a written notice setting out the decision and giving the reasons for the decision.

I would expect that as a matter of best-practice regulation, and consistent with the principles in the ACNC Taskforce Implementation Report of June 2012, the Commissioner would explain in any

such notice the effect of the suspension or removal, namely the prohibition on managing the registered entity, and the consequences of a failure to comply.

However in response to the issues raised by the Committee I propose to amend sections 100-10 and 100-15 of the Bill to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed responsible entity. These amendments will ensure suspended and removed entities understand the consequences of non-compliance in order to prevent them from unknowingly acting in breach of their obligations.

Subsections 100-70(1) and 100-70(5)

The strict liability offences in these subsections compel former trustee(s) which have been removed on grounds of misconduct or misbehaviour to deal fairly with the trust's property during the handover period.

The principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* set out that strict liability offences may be necessary where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

As discussed above the suspension or removal of responsible entities would be undertaken in relation to serious matters and as such the existence of effective enforcement mechanisms and a strong deterrent for these offences is necessary and justified, given the fact that the responsible entities in question would have already been involved in wrongdoing and would have the potential to dissipate or misapply charitable monies and to frustrate the ACNC Commissioner's actions to prevent this.

Furthermore these provisions to prevent suspended or removed trustees from withholding information or frustrating transfers of property are necessary to ensure trustees deal fairly with the trust's property during the handover period. These provisions are based on similar provisions in relation to the trustees of private ancillary funds (see section 426-165 in Schedule 1 to the *Taxation Administration Act 1953* (TAA)) which also impose strict liability offences and are similarly considered necessary in the context of prevention of misapplication of charitable monies and revenue protection.

It is also important to note that the existence of an effective regulatory mechanism to suspend and remove responsible entities is particularly important in the context of the NFP sector, as it allows the Commissioner to take appropriate action against individuals who are responsible for contraventions, rather than penalising or deregistering an otherwise effective charity, where it would inappropriately prevent that organisation from providing vital services to the community.

In response to the issues raised by the Committee, as outlined above, I propose to amend sections 100-10 and 100-15 of the Bill to ensure that a specific legislative obligation is placed on the Commissioner to include particular information in the notice provided to a suspended or removed trustee. These amendments will ensure suspended and removed trustees understand the consequences of non-compliance in order to prevent them from unknowingly acting in breach of their obligations.

Part 7-2

As the Committee has noted in its report, the review and appeals framework has been modelled very closely on Part IVC of the TAA. This was a deliberate policy decision whereby the existing regime for review and appeals that applies to charities that are currently endorsed by the Commissioner of Taxation will apply in the same way to charities registered by the ACNC under the Bill.

For that reason, the two departures from the *Administrative Appeals Tribunal Act 1975* (AAT Act) that were noted by the Committee in the report directly replicate the departures from the AAT Act that exist currently and apply in Part IVC of the TAA. The specific rationale for each of the departures has been described in the Explanatory Memorandum and the Committee has considered and quoted the relevant parts of the Explanatory Memorandum in their report.

The general reasons for why these departures from the AAT Act are in the Bill are as follows.

- To ensure that the review and appeal framework replicates the existing framework in Part IVC of the TAA.
  - This will help to facilitate the combined hearing of review decisions of the ACNC Commissioner and the Commissioner of Taxation by ensuring that there is a single set of rules governing the hearing process.
- To ensure that there is consistency between the review and appeals framework in the Bill and the TAA for registered entities that were previously endorsed as charities by the ATO so that they are familiar with the new review and appeals framework.
- To avoid potential revenue implications and tax integrity issues.
  - Given the interrelationship between the ACNC Bill and the taxation system, divergence between the review and appeal framework in the Bill and the existing framework in the TAA has the potential to give rise to significant revenue risks.

The specific reasons for the departures from the AAT Act as identified by the Committee are in addition to the general reasons listed above and are as follows.

- The departure from section 27 of the AAT Act was to restrict the scope of entities that could have a decision reviewed to only those entities that are directly affected by the decision.
  - This was done because if section 27 was retained, a large segment of the not-for-profit sector and public (including donors and members) would potentially be able to apply for a review which would be an inefficient use of government resources, as well as those of the registered entity.
  - Instead, by departing from section 27 of the AAT Act, only affected registered entities or responsible entities (those entities directly affected by decisions) will be able to initiate an AAT review providing registered entities with certainty as to their registration and related tax statuses.
  - Despite this, entities indirectly affected by decisions that are unable to initiate AAT reviews, will still have the right to become party to an initiated review which would allow the review to cover important tangential issues of relevance.

- The other departure from the AAT Act, in respect to the burden of proof resting on the applicant to prove the ACNC Commissioner's decision was wrong, was predominantly based on the idea that the true facts of the situation lie uniquely within the knowledge of the entity dissatisfied with the decision.

  - The tax system and the new ACNC regulatory framework both rely heavily on self-assessment from charities as a key component of their regulatory system. This is primarily based on a principle of appropriate care, honesty and fairness by those interacting with it. For this reason, the same rationale for the departure from the AAT Act in the TAA applies in the case of the ACNC, namely that the burden of proof most appropriately rests with the applicant because the facts and evidence relating to these disputes are peculiarly within the knowledge of the entity applying for review and therefore only they will know why they are dissatisfied with the decision.

  - This departure from the AAT Act is also consistent with common law principles that the party bringing a law-suit or claiming that another entity's decision is wrong must prove that this is indeed the case and this has been explained in detail in the Explanatory Memorandum.

I thank the Committee for bringing these matters to my attention and trust this information will address the concerns of the Committee.

Yours sincerely

DAVID BRADBURY

22 OCT 2012

THE HON JASON CLARE MP
Minister for Home Affairs
Minister for Justice

MC12/14750

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

Dear Senator McDonald

I refer to the letter dated 11 October 2012 from Mr Glenn Ryall, on behalf of the Senate Standing Committee for the Scrutiny of Bills, regarding the Law Enforcement Integrity Legislation Amendment Bill 2012. I note that the Committee, in its *Alert Digest No 12 of 2012*, has raised a number of issues in relation to this Bill to which it seeks my response.

Schedule 2, item 16, proposed subsection 4B(5) – delegation of legislative power

This item inserts a new section 4B into the *Customs Administration Act 1985* (CAA), which will allow the CEO to issue orders with which Customs workers must comply. Proposed subsection 4B(5) provides that these orders are not legislative instruments. The effect of subsection 4B(5) will be to make these orders exempt from the operation of the *Legislative Instruments Act 2003*, which would otherwise have made these orders subject to sunsetting and possible disallowance.

While the Committee noted that it leaves the appropriateness of exempting such orders from disallowance and sun setting requirements to the Senate as a whole, it has sought further advice as to whether consideration has been given to the appropriateness of requiring CEO's Orders to be tabled in Parliament or alternative requirements to report on the exercise of these significant powers.

I consider that, having regard to the nature of the power to make orders, along with existing provisions in the *Public Service Act 1999* (PS Act) that regulate an agency head's ability to manage an agency, the Bill contains appropriate safeguards on this power, and an additional requirement to report to Parliament on the exercise of these powers is not necessary.

The scope of the CEO's power to make orders is confined to orders 'with respect to the control of the Australian Customs and Border Protection Service'. For workers that are employees of Customs and Border Protection, enforcement of the obligation to comply with CEO Orders is through the employment relationship. The CEO as the Agency Head under the PS Act has all the all the rights, duties and powers of an employer in respect to APS employees in the agency.

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At common law an employee is legally obliged to obey the lawful and reasonable directions of his or her employer. The PS Act reflects this obligation by providing that an APS employee must comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction (s 13(5) PS Act).

A breach of the Code of Conduct can result in a sanction being imposed on an employee under section 15 of the PS Act including, at the highest end, termination of employment.

The effect of these provisions is to ensure that any orders made by the Customs and Border Protection CEO under the proposed section 4B must be both lawful and reasonable. If an order is not lawful and reasonable, non-compliance will not be able to be sanctioned as the employee will not be in breach of Code of Conduct.

The means of enforcing compliance with orders by workers who are not employees of Customs and Border Protection will vary depending on the legal basis on which they perform work for the agency. For workers that are either consultants or contractors to the agency, or sub-contractors or employees of a contractor, the consequences for the worker of failing to comply with an order will be governed by the contractual arrangement between Customs and Border Protection and the contractor. Typically, the contractual arrangement will allow for the agency to require the removal of specified personnel.

For workers who are seconded from other agencies, a failure to comply with an order may result in the cessation of the secondment. Whether the worker's agency or authority takes any further action against the worker is a matter for the agency or authority.

Schedule 2, item 19, proposed section 15A – definition of 'serious misconduct'

This item will insert into the CAA a new section 15A, which will provide that the Customs and Border Protection CEO may issue a written declaration that a member of staff who has been dismissed engaged in serious misconduct. The Committee has noted that the explanatory memorandum indicates that a definition of 'serious misconduct' will be inserted in subsection 15A(8), but that proposed section 15A(8) does not appear to include this definition. The Committee has sought clarification on this issue.

The reference in the explanatory memorandum to a definition of 'serious misconduct' in subsection 15A(8) is an error. A definition of 'serious misconduct' is included in the Bill at Schedule 2, item 14, to be inserted into section 3 of the CAA.

'Serious misconduct' is defined in the Bill as:

> (i) corruption, a serious abuse of power, or a serious dereliction of duty, by the employee, or
>
> (ii) any other seriously reprehensible act or behaviour by the employee, whether or not acting, or purporting to act in the course of his or her duties as a Customs employee.

It is also important to note that whether the conduct amounts to 'serious misconduct' is only one aspect of the criteria about which the CEO must have a reasonable belief in order to make a declaration of serious misconduct.

The other aspect is that the employee's behaviour must be having, or is likely to have, a damaging effect on:

(i) the professional self-respect or morale of some or all of the members of the staff of the agency, or

(ii) the reputation of the agency with the public, or any section of the public, or with an Australian or overseas government, or with a person or body (however described) to whom the CEO may authorise disclosure of information under section 16 of the *Customs Administration Act 1985*.

Additionally, the explanatory memorandum indicates that the conduct concerned must also 'relate to Customs and Border Protection's law enforcement powers'. The need for a nexus between the conduct and the agency's law enforcement functions is consistent with the policy objective behind this power. This objective is to ensure that employees of the agency who are proven to have engaged in conduct of the necessary character, relating as it does to the agency's law enforcement role, cannot be reinstated to employment within the agency, thereby compromising the work of the agency, ongoing investigations and adversely impacting on the morale of staff.

Schedule 2, item 21, proposed section 16F – delegation of legislative power

This provision provides for Regulations to be made relating to the conduct of drug and alcohol tests that are authorised under proposed sections 16B, 16C and 16D. The Committee seeks my advice as to why these details pertaining to drug and alcohol testing cannot be included in the primary legislation rather than included in Regulations.

In my view it is appropriate for the matters listed in proposed 16F to be dealt with by Regulation. There are many aspects of this type of testing framework that require greater flexibility than can be achieved by embedding in primary legislation. Technology available for conducting drug and alcohol testing is evolving rapidly and prescribing current methods in primary legislation would unduly limit flexibility. I note also that the *Australian Federal Police Act 1979*, which contains similar provisions for drug and alcohol testing, also leaves these matters to Regulations.

Ultimately, Parliament will have oversight of, and may disallow, Regulations made under proposed 16F.

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

The action officer for this matter in the Attorney-General's Department is Cameron Rapmund who can be contacted on (02) 6141 4185.

Yours sincerely

Jason Clare

29 OCT 2012

The Hon Jenny Macklin MP
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Senator the Hon Ian Macdonald
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

Thank you for the letter from the Acting Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee), about the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012*.

The Committee seeks further information about the rationale for retrospectively applying the amendments in Schedule 4 of the Bill - Amendments relating to certain child support declarations. I have addressed the Committee's questions as follows:

The nature of the disadvantage

In the Explanatory Memorandum, one of the justifications provided for the retrospectivity of the amendments is to avoid disadvantage to parties as a result of reviewing previous decisions of the Child Support Registrar in light of the court's decision in *Farley*.

The Committee sought advice on the nature of the disadvantage that may be occasioned in relation to all parties.

If the legislation is not made retrospective, and previous decisions are reviewed applying the court's approach in *Farley*, payers could be significantly disadvantaged as illustrated by the following example which compares the policy approach and the court's approach:

Example:

- The payer was originally liable for two children for an amount of $2700, and had paid $1200, so had an outstanding debt of $1500.
- The payer is subsequently determined to not be the parent of one of the children, and the payer's revised liability for one child is an amount of $1800.

- The policy outcome is as follows: the full amount of $1200 previously paid by the payer is counted in calculating that the payer now has an outstanding debt of $1800 – $1200 = $600. The payee does not have any potential debt.
- The court's approach requires the amount paid to be split into an amount for the child who is to be excluded from the assessment and an amount for the child who is to remain. If a one to one even split of payments for the two children is applied, an amount of $600 previously paid by the payer is disregarded as the amount paid for the excluded child. The payer would then have an outstanding debt of $1800 – ($1200/2) = $1200. Separately, the payee has a potential debt of $1200/2 = $600, which may be recovered by the payer through the court process.

The court's approach essentially requires the paying parent to take court action under section 143 of the *Child Support (Assessment) Act 1989* (Child Support Assessment Act) to obtain repayment from the payee of the amount attributed as being the overpayment for the excluded child, as well as to make further payment to the payee of an equivalent amount attributed as being the underpayment for the other child for whom they remain liable.

In the example above, as per current administration, the payer would owe arrears of $600. If the case is reviewed applying the court's approach, the payer's arrears would be increased from $600 to $1200. The payer may then commence court proceedings under section 143 of the Child Support Assessment Act to recover from the payee the amount of $600 paid for the excluded child. The costs associated with such court proceedings could be detrimental to all parties involved.

The possible detriment to payees as a result of the retrospective change can be illustrated, using the example above, as follows: if the legislation were not retrospective, the payee could seek review of their case and, as explained above, have an additional $600 arrears owed by the payer. If the court then refused to order repayment of amounts paid for the excluded child under section 143, the payee would not have any debt and would have an overall benefit of $600, subject to whether the court makes an order against the payer for the payee's legal costs. However, if the court ordered full repayment under section 143, the payee would have a debt of $600 for the excluded child, which is the same as the additional arrears of $600 from the payer, resulting in no overall benefit and potential legal costs. Accordingly, any benefit that payees may derive from the amendments not being retrospective is subject to the court's discretion under section 143 and payees would have the risk of potential legal costs.

Number of affected cases

The Committee has asked how many previously decided cases are likely to be affected by the retrospective amendments.

The amendments only affect cases where a declaration has been made under section 107 of the Child Support Assessment Act that a payer should not be assessed in respect of one or more children and the payer continues to have an ongoing liability for at least one other child.

The Department of Human Services is supplied with a declaration under section 107 of the Child Support Assessment Act for over 100 cases per year. However, data is not readily available on how many of these cases involved at least one remaining child for whom the payer continued to have an ongoing liability.

Solutions other than retrospective legislation

The Committee has asked whether solutions to the problem other than retrospective legislation have been considered, such as compensation for faulty administration.

In these circumstances compensation for faulty administration is not considered appropriate. The policy applied by the Registrar prior to the court's decision in *Farley* was based on what was considered at the time to be a reasonably arguable interpretation of the relevant legislative provisions and is therefore not considered to be defective administration. This view of the legislation was accepted in the dissenting judgment of Bryant CJ in *Farley*. Further, even though the majority judgement in *Farley* took a different view on how the legislation should be applied, it noted the absence of legislative guidance and the need for legislative amendment to rectify this deficiency.

Retrospective legislation is considered the most appropriate way to rectify the deficiency identified in *Farley*. The amendments support the longstanding policy that was applied prior to the court's decision as this policy is considered to strike an appropriate balance between the rights of all parties involved.

How excess child support may be recovered under existing legislation

The Committee has asked how excess child support may be recovered under existing legislation. The Committee has also commented that it is not clear whether there is a right to recover all such amounts and how the interests of the child might be factored into such proceedings.

Excess amounts of child support that have been paid may be recovered under section 143 of the Child Support Assessment Act. Section 143 provides that if an amount of child support is paid by a person (the payer) to another person (the payee), and the payer is not liable, or subsequently becomes not liable, to pay the amount to the payee, the amount may be recovered from the payee in a court having jurisdiction under the Act.

The court has discretion whether to order recovery under section 143, therefore payers may not be able to recover overpaid child support in all cases. Subsection 143(3) requires the Court, in exercising its powers under section 143, to take account of the rights of the parties and the child concerned and make such orders as the court considers just and equitable. In addition, if a declaration has been made under section 107 of the Child Support Assessment Act that the payer is not a parent of one or more children in the assessment, subsection 143(3A) requires the court to also consider additional matters listed in subsection 143(3B).

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

JENNY MACKLIN MP