SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2014

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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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 2014

The committee presents its *Ninth Report of 2014* 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:

Carbon Farming Initiative Amendment Bill 2014

Introduced into the House of Representatives on 18 June 2014
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 14 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

Background

This bill seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the *National Greenhouse and Energy Reporting Act 2007*, the *Australian National Registry of Emissions Units Act 2011* and the *Clean Energy Regulator Act 2011* to provide for the establishment of the Emissions Reduction Fund.

Minister's general comment

As the Committee notes, the Bill will amend the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act) to provide for the establishment of the Emissions Reduction Fund. The Emissions Reduction Fund is the centrepiece of the Government's Direct Action Plan and will operate by issuing credits for emissions reductions that are measured and verified by approved methods. These credits will be purchased by the Government through a reverse auction and secured by a contract.

The Government consulted extensively on the design of the Emissions Reduction Fund and the Bill reflects the results of this consultation process. The Government considered more than 290 submissions received in response to Terms of Reference and more than 340 submissions in response to a Green Paper. It also consulted on exposure draft legislation.

Consistent with its terms of reference, the Committee has identified several provisions in the Bill that delegate legislative powers. I assure you that it is not the intent of the relevant provisions to subvert Parliamentary scrutiny and I have responded in further detail to each of the Committee's comments below.

Alert Digest No. 7 of 2014 - extract

Delegation of legislative power
Schedule 1, item 14

This item proposes to expand section 308 of the CFI Act to give the Minister a general power to make legislative rules. Under the existing provisions of the Act, there is already a provision enabling regulations to be made under the Act.

There is a general discussion and justification of this amendment in the explanatory memorandum, which also addresses a number of related changes given the new rule-making power. According to the explanatory memorandum (at p. 74):

> The CFI Act provides for regulations to apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The bill will extend this provision to include the legislative rules, to allow the content of regulations to be migrated to legislative rules over time. This will help to alleviate the workload of the Federal Executive Council relating to the making of regulations. The regulations, legislative rules and methodology determinations deal with highly technical matters, often requiring cross-references to Australian or international standards, industry databases, models and methodologies. Including the content of these documents in subordinate legislation would make those instruments unwieldy, by expanding their volume considerably and requiring frequent updating.

The explanation raises a number of scrutiny issues for consideration by the committee. The first relates to the migration of the content of regulations into the content of rules. The second relates to possible uncertainty that may be introduced by the introduction into the legislation of two general powers to make legislative instruments (i.e. which include powers to prescribe matters 'necessary and convenient for carrying out or giving effect' to the Act). The third issue relates to the incorporation of instruments in writing as they exist from time to time.

In relation to the first issue, 'migrating the content of regulations into legislative rules over time' (p. 74), the committee has recently noted that this move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process (*Alert Digest No. 5*; *Fifth report of 2014*). This aspect is also referred to in the explanatory memorandum in the context of reducing the council's workload (outlined above). The use of rules rather than regulations gives rise to scrutiny concerns about the appropriate delegation of legislative power and the opportunity for sufficient parliamentary scrutiny and, as this provision extends the circumstances in which rules will be used, it gives rise to related concerns. **The committee has raised similar issues in relation to a number of provisions in other bills and is awaiting responses**

from the relevant ministers. As the responses may be relevant to the committee's scrutiny of this provision, the committee draws the matter to the attention of Senators, and if necessary, will consider it further pending receipt of the information requested from other ministers.

> *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 and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

Minister's response - extract

Delegation of legislative power
Schedule 1, item 14

The Committee has noted that the migration of regulations into rules may have negative ramifications for the quality and scrutiny of legislative rules.

The provision in the Bill to allow the content of regulations to be migrated to legislative rules over time is aligned with the position of the Office of Parliamentary Counsel (OPC, as detailed in *Drafting Direction No. 3.8 - Subordinate Legislation),* namely that subordinate instruments should be made in the form of legislative instruments other than regulations where possible. This enables the expertise of OPC and the Federal Executive Council to focus on the subordinate legislation that will have the most significant impacts on the community.

I understand OPC has previously provided advice to the Committee on this matter (response to Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014). I have also attached for your information their supplementary advice to me, which provides further elaboration on this matter in relation to the Bill.

In particular, while the use of legislative rules will reduce the Federal Executive Council's workload, it will also enable minor technical details to be revised in a straightforward manner, as appropriate for amendments of this nature. As currently happens when regulations are developed, preparation of legislative rules will involve consultation with other Ministers whose portfolios are affected by any proposed provisions. Matters that the OPC has identified should receive the additional scrutiny of the Federal Executive Council can still be dealt with in regulations rather than legislative rules.

The Committee should also note that legislative rules made under the amended Act will be subject to the same degree of Parliamentary scrutiny as regulations made under the Act.

Legislative rules will be legislative instruments, and will accordingly be governed by the *Legislative Instrument Act 2003* (the Legislative Instruments Act), which deals with matters such as the parliamentary disallowance of legislative instruments.

Committee Response

The committee thanks the Minister for this response and for providing the OPC's supplementary advice about the increased use of rules rather than regulations. As the committee has raised similar issues in relation to a number of bills, it intends deferring consideration of this general issue until the next sitting period.

Alert Digest No. 7 of 2014 - extract

Delegation of legislative power – migrating the content of regulations into legislative rules
Schedule 1, item 14

With regard to the second issue the committee would consider it helpful if the relationship between rules and regulations under the Act could be further explained. Although it is noted in the explanatory memorandum that it is envisaged that at least some of the current content in the regulations will be migrated to the rules, it is unclear how much of the content. Given the possibility of conflict between the rules and regulations **the committee seeks the Minister's advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.**

> *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

Delegation of legislative power - migrating the content of regulations into legislative rules
Schedule 1, item 14

The Committee identified that it may be possible for conflict between the rules and regulations to arise as both are able to deal with the same range of matters.

When legislative rules are made or amended to deal with a particular matter under the Act, any relevant regulations in force under the Act will be amended so that they do not also deal with that matter. Accordingly, the regulations and the legislative rules will deal with discrete and non-overlapping matters and there will be few, if any, opportunities for conflict between the legislative rules and the regulations. If any conflict were to emerge between the legislative rules and the regulations, that conflict would be resolved by the ordinary principles of statutory interpretation, and there is a well-developed body of case law that would assist in this.

I am grateful that the Committee has highlighted the importance of this issue. I will ensure that my Departmental officers and legislative drafters pay particular attention to any potential conflict, and that there is a robust administrative framework in place for managing the development of legislative rules.

Information provided to the Minister from Mr Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel - extract

The second issue raised by the Committee: how the possibility of conflict between the rules and regulations may be avoided or resolved

36 The Bill would result in the regulations and the rules both being able to deal with the same range of matters. The Committee identified that it is therefore possible there could be a conflict between the rules and regulations. The Committee sought advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.

37 The Act, the regulations and the rules will all be administered by your Department. Good administration should be sufficient to ensure that the rules do not conflict with the regulations. We understand that the relevant officers of your Department appreciate the administrative and legislative ambiguity conflict between rules and regulations might introduce and are aware of the need to avoid any such conflict.

38 In existing legislative schemes that provide for regulations and some other kind of instrument to be able to deal with an overlapping range of matters, the issue of possible conflict is addressed in some, but not all, cases.

Committee Response

The committee thanks the Minister for this response and for providing the First Parliamentary Counsel's supplementary advice about this issue. The committee notes the Minister's commitment to ensuring that those involved pay particular attention to any potential conflict and to establishing and maintaining a robust administrative framework for managing the development of legislative rules, which should assist to avoid or minimise conflicts.

However, while principles of statutory interpretation may assist the courts to minimise areas of conflict between rules and regulations (for example, through reading the rules and regulations as part of a legislative scheme), it remains unclear to the committee how principles of statutory interpretation would be applied to resolve direct conflicts between rules and regulations in the absence of a priority rule.

The committee is therefore concerned that the introduction of a general rule-making power in addition to a power to make regulations has the potential to give rise to unnecessary legal uncertainty in particular cases. Unless the principles of statutory interpretation would yield a clear answer to any conflict the committee is not convinced that the problem of legal uncertainty created by conflicts between rules and regulations should be left to the courts to resolve. **In these circumstances, the committee therefore seeks further advice on whether consideration can be given to making it clear in the legislation that in cases of conflicts regulations will prevail.**

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 7 of 2014 - extract

Delegation of legislative power—incorporating material by reference
Insufficient parliamentary scrutiny
Schedule 1, item 14

The third point concerns matters that may be prescribed by regulations or rules and which incorporate material contained in another document 'as in force or existing from time to

time'. The explanatory memorandum (at p. 74) seems to suggest that the regulations, or rules, could include highly technical, complex and changeable matters that will not be included in the subordinate legislation itself.

The incorporation of legislative provisions by reference to other documents raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. It is also possible that relevant information, including standards or industry databases, may not be publicly available or that they are only available if a fee is paid. The committee is concerned that such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms without charge. The explanatory memorandum includes a general justification for the approach (at p. 74), but lacks detail about specific instances. **The committee therefore seeks the Minister's further advice as to:**

- **why it is necessary to rely on material incorporated by reference; and**
- **if the approach is considered necessary, has consideration been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law.**

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 and 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

Delegation of legislative power - incorporating material by reference Schedule 1, item 14

The Act currently permits the creation of regulations that apply, adopt, or incorporate with or without modification, material in existence at a particular time, or from time to time (subsection 304(1) of the Act).

Under the amended Act, the legislative rules will also be able to incorporate material in this manner (item 367 of Schedule 1 to the Bill).

Why it is necessary to rely on material incorporated by reference

The Committee has asked why it is necessary to rely on material incorporated by reference. Material will most often be incorporated by reference in the legislative determinations for estimating emissions reductions from projects, known as 'methods'. Methods set out the rules by which these reductions will be measured and verified. These rules are technical in nature and typically very detailed. They provide instructions on the measurement of different sources of emissions and other variables, and mathematical formula for calculating net reductions in emissions.

Methods established under this Act incorporate two broad categories of material.

Methods may incorporate established standards, methods or guidance materials. For example, a number of existing methods made under the Act refer to methods established under the National Greenhouse and Energy Reporting Scheme. In the future, methods may also incorporate reference to International Standards Organisation (ISO) or Australian standards, which are widely used to establish consistent, fit for purpose processes and services.

Incorporating existing standards and processes, which are already familiar to business, can reduce the costs of applying methods. It also removes the possibility that minor inconsistencies will emerge in methods used for related purposes. Further, this approach reduces the length and complexity of legislation, and simplifies method development as it builds on existing standards where these are available rather than developing new regulatory provisions.

Methods may also incorporate the use of estimation models or calculators. This makes them easier to develop and understand than if the formulas and data underpinning these models or calculators were set out in the method itself. For example, some methods involve the use of the Australian Government's Full Carbon Accounting Model for reforestation.

Draft methods are assessed by an independent expert committee established under the amended Act, known as the Emissions Reduction Assurance Committee. The Emissions Reduction Assurance Committee will assess any tools or calculators which form part of the method. The intended purpose and function of a tool or calculator, and typically the version of the model or calculator, is specified in the method.

As the Committee is also aware, the power to incorporate material by reference is also constrained by principles relating to the sub-delegation of powers and the requirement that a legislative instrument must be within the clear authority in the enabling legislation. Legislative instruments that serve as methodology determinations must meet the requirements in section 106 of the amended Act.

More broadly, incorporating material by reference, especially technical matters such as those detailed above, is a common practice and one to which businesses operating under the Act are accustomed.

As the approach is considered necessary, consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public

The Committee has also asked whether consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public. I agree that it is essential that material incorporated by reference is readily available and thank you for raising this important matter.

Material incorporated into Carbon Farming Initiative methods is published on the Clean Energy Regulator website and, if not, information is provided on how to obtain this material. I will ensure that this approach continues under the Emissions Reduction Fund.

I note that some materials such as ISO standards are widely used and readily available but at a cost. These standards are already incorporated by reference under other climate change Legislation, such as the Renewable Energy (Electricity) Regulations 2001.

Under subsection 304(3) of the Act, if the regulations incorporate material by reference, the Clean Energy Regulator is required to ensure that the text of the matter is published on the Regulator's website. Subsection 304(4) of the Act provides that subsection (3) does not apply if the publication would infringe copyright. Division 2 of Part IX of the *Copyright Act 1968* deals with use of copyright material for the Crown.

Subsection 304(3) of the Act will be amended by the Bill so that it refers also to the legislative rules (item 368 of Schedule 1 of the Bill). This will have the effect of requiring that material incorporated by reference in the regulations and legislative rules is also published on the Clean Energy Regulator's website.

How persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law

The Committee has noted the importance of ensuring persons interested in, or likely to be affected by, any changes to the law are notified or otherwise become aware of these changes.

As indicated above, the Clean Energy Regulator website will have up to date versions of materials incorporated by reference in legislative instruments, or will provide directions for accessing this material.

There are typically well-established arrangements in place for amending materials that are incorporated in methods as they exist from time to time. For example, methods under the

National Greenhouse and Energy Reporting Scheme are in regulations, which are reviewed annually.

The amended Act also provides for the Minister to seek the advice of the independent Emissions Reduction Assurance Committee before varying a method, including a model or calculator incorporated into a method, except when the variation is of a minor nature. Advice from the Emissions Reduction Assurance Committee relevant to a variation of a method determination will be published on the Department's website (www.environment.gov.au), and similarly the revised method will be available through the Clean Energy Regulator website.

Committee Response

The committee thanks the Minister for this detailed response and particularly notes the Minister's advice that the content of rules ('methods') 'are technical in nature and typically very detailed' and the outlined benefits that can arise when material is incorporated in this way. The committee notes the Minister's recognition that it is important that information which forms part of the law is readily available and his commitment to ensuring that relevant material, or information about how to obtain it, is published on the Clean Energy Regulator website.

The committee notes that some material incorporated by reference (including ISO Standards) is only available at a cost and is concerned that this is inconsistent with the fundamental principle that the law be publicly and freely available. The principle is of importance not merely so those regulated by material can know their legal obligations and rights, but also so the law may be subject to informed assessment and evaluation. The committee is aware that issues of copyright can be involved when material is incorporated by reference, but is interested in whether innovative solutions to free public access can be identified. **The committee therefore seeks the Minister's further advice as to whether consideration can be given to approaches that may improve public access to all material incorporated by reference.**

Alert Digest No. 7 of 2014 - extract

Delegation of legislative power
Schedule 1, item 151, proposed new section 60

Item 51 provides for criteria for a 'fit and proper' person test to be prescribed by legislative rules. The Statement of Compatibility (at p. 17) notes the effect of this item but does not

explain why the definition of this significant term is to be dealt with in the rules. As the committee prefers that important matters are included in primary legislation unless a comprehensive justification is provided, **the committee seeks the Minister's advice as to why these matters need to be dealt with in the rules and not 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

Delegation of legislative power - 'fit and proper person' test
Schedule 1, item 151, proposed new section 60

The Committee has noted that item 151 of Schedule l to the Bill amends the Act to introduce a 'fit and proper person' test. Details of this test will be prescribed in the legislative rules. The Committee has indicated that it prefers important matters to be included in primary legislation, unless a comprehensive justification is provided, and has sought advice as to why these matters are dealt with in the legislative rules.

This approach to the ' fit and proper person' test is similar to that which applies under other related legislation. For example, section 11 of the *Renewable Energy (Electricity) Act* 2000 sets out a 'fit and proper person test' which is structured in a similar manner to the amended Act. This approach will be familiar to businesses in the renewable energy sector, and the use of a similar test in the amended Act will allow consistency of approach between related legislation.

As mentioned above, the legislative rules will also continue be subject to Parliamentary scrutiny and disallowance under the Legislative Instruments Act.

I trust that the advice outlined here adequately addresses the issues highlighted by the Committee, and I would be more than happy to provide further information about the Bill's legislative accountability if necessary. My Office will be able to assist with this should you require more detail.

Committee Response

The committee thanks the Minister for this response and notes his advice that the approach is similar to that in related legislation, making it familiar to relevant businesses and allowing 'consistency of approach'. **The committee notes, however, that this does not substantively address whether the delegation is appropriate and the committee therefore restates the principle that important matters, such as these criteria, should be included in primary legislation unless a strong justification is provided. However, in the circumstances the committee draws the matter to the attention of Senators and leaves the question of whether the approach is appropriate to the Senate as a whole.**

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Introduced into the House of Representatives 19 March 2014
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Acting Assistant Treasurer responded to the committee's comments in a letter dated 18 June 2014. Following consideration of this response the committee sought further advice from the Acting Assistant Treasurer. The committee also decided to contact ASIC to seek further information on aspects of its facilitative compliance approach to major policy reforms, such as the FOFA proposals.

The Acting Assistant Treasurer and the Deputy Chairman of ASIC responded to the committee's comments in letters dated 10 July 2014. Copies of the letters are attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to amend Part 7.7A of the *Corporations Act 2001* (in relation to the financial advice industry) to:

- remove the need for clients to renew their ongoing fee arrangement with their financial adviser every two years;
- make the requirement that financial advisers provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- remove paragraph 961B(2)(g) (the 'catch-all' provision) from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- facilitate the provision of scaled advice; and
- provide a targeted exemption for general advice from the ban on conflicted remuneration in certain circumstances.

Retrospective application
Legislation by press release

The explanatory memorandum (at p. 5) indicates that until the amendments proposed by this bill are in place, ASIC has indicated that it will take 'a facilitative approach to the FOFA reforms until mid-2014'. In particular, 'ASIC has indicated that it will not take enforcement action in relation to the specific FOFA provisions that the government is planning to repeal through this Bill and the associated regulations'. The only explanation of this approach is that it is consistent with ASIC's 'stance during the introduction of other major policy reforms' and that 'ASIC's stance does not remove a client's right to take private action against a provider in the event they feel they are disadvantaged'.

The committee has a long-standing concern about the practice of 'legislation by press release', where the government treats proposed legislation as being the law from the time the intention to introduce it is made public. This expectation may mean that persons and officials may face uncertainty as to whether they should act on the basis of the law as it is planned to be enacted or the law as it currently exists. The underlying principle at stake is that it is for the Parliament, not the Executive branch of government, to determine persons' legal rights and obligations. As such the committee is concerned that the regulator has announced that it will not enforce existing legal requirements but will act on the assumption that the bill will be passed in its current form. The committee notes that the bill proposes to remove regulatory requirements and that this may be considered to diminish legal protections currently enjoyed by clients of financial advisers. **The committee therefore seeks the Parliamentary Secretary's advice as to the justification for the proposed approach.**

> *Pending the Parliamentary Secretary'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

In response to the Committee's request for information made in its *Alert Digest No. 5 of 2014*, I refer the Committee to the following media releases made by the Australian Securities and Investments Commission (ASIC): Media Release 12-257 (23 October 2012); Media Release 13-007 (25 January 2013); and Media Release 13-355 (20 December 2013).

I note that ASIC's facilitative compliance approach is consistent with its stance during the introduction of other major policy reforms, such as the national credit laws and Stronger Super. The approach assists industry participants complying with new laws, and is consistent with the requirement - as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) - for ASIC to administer the law effectively and with

minimal procedural requirements. As part of this approach, ASIC has indicated that it will take enforcement action where it sees deliberate breaches of the law or a failure to make reasonable efforts to comply.

I also note that ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* and related legislation. Under its governing statute - the ASIC Act - ASIC performs its day-to-day functions at arm's-length from the executive government. If the Committee wishes further information about ASIC's facilitative compliance approach, it can contact ASIC.

I trust this information will be of assistance to you.

Committee Response

The committee thanks the Minister for this response and reiterates its long-standing concern about the practice of 'legislation by press release', whereby the government, including its statutory agencies, treats proposed legislation as being the law from the time the intention to introduce it is announced publicly.

The committee accepts the Minister's advice that ASIC has taken a facilitative compliance approach in the past, but notes that these appear to have been where major reforms *have already been passed by the Parliament*. For example, on 25 January 2013, ASIC announced that it would 'take a facilitative approach for the first 12 months of the FOFA reforms' that were assented to on 27 June 2012. In relation to this approach, ASIC stated that while it would expect industry participants to make a reasonable effort to comply with the new regime, ASIC would take a measured approach where inadvertent breaches arose or where system changes were underway. ASIC further stated that where deliberate and systemic breaches were found stronger regulatory action would be undertaken (ASIC media release 13-007).

The committee understands that such a facilitative approach may be warranted for a short period after major reforms have been introduced *and passed by the Parliament*. The committee, however, may have scrutiny concerns where a facilitative approach is taken to measures that have not yet passed the Parliament. As noted above, it appears that such an approach is being taken in relation to the amendments proposed by this bill. In this regard, ASIC stated that it will not take enforcement action in relation to the specific FOFA provisions that the government is planning to repeal. For example, ASIC states that it will not take action for breaches of current section 962S of the *Corporations Act 2001*, which requires fee disclosure statements to be provided to retail clients with ongoing fee arrangements entered into before 1 July 2013 (ASIC media release 13-355). While the committee is mindful that ASIC's approach is intended to assist those likely to be affected by the proposal, it remains concerned about the underlying scrutiny principle. **With this scrutiny concern in mind, the committee will contact ASIC to clarify aspects of its facilitative compliance approach to major policy reforms, such as the FOFA proposals.**

(continued)

In addition to the above, in order to assist in the committee's further consideration of the bill, **the committee requests further information from the Minister in relation to the 'time-sensitive amendments' which may be reflected in the Corporations Regulations (see explanatory memorandum, p. 4). In particular, the committee is interested in the nature of the changes that may be made through the regulations, whether the content would be more appropriate for Parliamentary enactment, and how these changes would interact with the provisions in the bill (including if the bill is amended, or not passed, by the Parliament).**

The committee draws this matter to the attention of the Senate Regulations and Ordinances Committee for information in relation to this proposed use of legislative instruments and whether any instruments made would be more suitable for parliamentary enactment.

The committee would also welcome any remarks that the Minister may have in relation to the committee's comments about ASIC's facilitative compliance approach when the legislative proposal is still to be considered by the Parliament (outlined above).

Minister's further response - extract

In response to the Committee's request for further information, I refer the Committee to the *Corporations Amendments (Streamlining Future of Financial Advice) Regulation 2014* (the Regulation), which was registered on 30 June 2014 and commenced on 1 July 2014. I also refer the Committee to the accompanying explanatory statement to the Regulation which identifies the time-sensitive amendments, details of which are provided in Attachment B to the explanatory statement. Implementing these changes through the Regulation provides clarity and certainty for the financial advice industry and for investors seeking financial advice while the changes are considered in detail by the Parliament.

I note that the Committee is also seeking further information from the Australian Securities and Investments Commission (ASIC) regarding its facilitative compliance approach. As I noted in my 18 June 2014 response to the Committee, ASIC's facilitative compliance approach assists industry participants complying with new laws, and is consistent with the requirement - as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) - for ASIC to administer the law effectively and with minimal procedural requirements. This approach is also consistent with ASIC's stance during the introduction of other major policy reforms.

Committee Further Response

The committee thanks the Minister for this response. In relation to ASIC's facilitative compliance approach, the Minister notes that this approach 'assists industry participants complying with new laws, and is consistent with the requirement…for ASIC to administer the law effectively and with minimal procedural requirements'. The committee notes that this does not directly address the committee's specific concern which related to a facilitative approach being taken in relation to legislative *proposals*, as distinct from 'new laws'. **In light of this, the committee retains its scrutiny concerns about this approach when it is applied to legislative proposals (rather than Acts), and draws the matter to the attention of Senators. The committee also comments on this issue in relation to the response received directly from ASIC, discussed below.**

In relation to the issue of whether the content of the Corporations Amendments (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation) is an appropriate delegation of legislative power or would be more appropriate for Parliamentary enactment, the committee notes that the Minister states that 'implementing these changes through the Regulation provides clarity and certainty for the financial advice industry and for investors seeking financial advice while the changes are considered in detail by the Parliament'. In relation to this the committee notes two matters:

- the extent to which the approach promotes certainty and clarity is contingent both on the regulations not being disallowed and on the FOFA amendments being passed in their current form by the Parliament; and
- the committee has strong reservations about using regulations to initially enact changes ultimately intended for primary legislation.

The committee notes that enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.

The Minister's response also does not directly respond to the question about whether or not the particular changes implemented through the Regulation have content that may be considered more appropriate for primary legislation. The committee notes that its consideration of this issue would have benefitted from a more detailed response in this regard because it appears that significant policy changes are being achieved by way of regulations. **For the reasons outlined above the committee remains concerned about the approach taken and draws this matter to the attention of Senators.**

The committee also brings this matter to the attention of the Senate Regulations and Ordinances Committee for information in relation to the justification for the use of delegated legislation and whether any provisions in the Regulation would be more suitable for Parliamentary enactment.

Response from Deputy Chairman of ASIC - extract

As noted by the Acting Assistant Treasurer, ASIC's facilitative compliance approach to the Future of Financial Advice Reforms (FOFA) is consistent with our stance during the introduction of other major policy reforms, such as the national credit laws and Stronger Super. The facilitative approach in relation to these major reforms has been supported by Governments during the initial implementation periods of the relevant reform packages.

ASIC's 12 month facilitative approach to FOFA implementation started when the major aspects of the *Corporations Amendment (Future of Financial Advice) Act 2012* and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* commenced on 1 July 2013.

When the Government announced its proposed amendments to these two FOFA Acts on 20 December 2013, ASIC released 13-355MR *ASIC update on FOFA* in which it said that our facilitative approach to FOFA would remain in place and, as part of that, would not enforce provisions the Government was planning to repeal. The approach we adopted was consistent with, and an integral part of, our already announced facilitative approach to legislation which Parliament had already passed.

Our intention in adopting a short term facilitative approach, both in regards to FOFA and other major policy reforms, is to strike a balance between assisting industry to implement complex and major law reforms as efficiently as possible, while also ensuring that consumer and investor protection is not compromised. It is consistent with the requirement - as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) - for ASIC to administer the law effectively and with minimal procedural requirements. In particular, ASIC took into account the fact that any enforcement action in relation to laws that the Government was proposing to repeal or amend could not be completed in the announced timeframe before amendments were to be enacted and so would deliver no regulatory benefit.

ASIC also took account of the fact that some of the provisions the Government was planning to repeal required significant systems changes and that by not providing the 'no action' position announced in 13-355 ASIC would potentially be requiring industry to spend large sums of money putting in place systems to achieve compliance with requirements that were flagged to change in three months' time. This would not achieve any meaningful investor protection.

It is important to note that the facilitative approach does not impede ASIC from taking regulatory action where we see consumer harm or significant risks in the market. In fact, as part of this approach, ASIC has clearly indicated that it will take enforcement action where it sees harm to consumers, deliberate breaches of the law or a failure to make reasonable efforts to comply. Consistent with this, since the commencement of the FOFA reforms on

1 July 2013 (ie the start of the 12 month facilitative period), ASIC has taken the following actions in the financial advice sector:

- banned nine advisers permanently from providing financial advice, and banned two advisers temporarily,
- entered into enforceable undertakings with two advisers, requiring them to permanently cease providing financial services, and with one adviser temporarily requiring him to cease providing financial services,
- cancelled nine AFS licences for failure to comply with financial services laws,
- suspended one AFS licence,
- accepted enforceable undertakings from four licensees requiring them to improve their compliance procedures,
- imposed additional licence conditions on one AFS licensee,
- entered into public agreements with two AFS licensees requiring them to review and improve their advice provision,
- cancelled two AFS licences at the licensee's request after action by ASIC,
- varied the licence conditions of two AFS licensees at their request following ASIC surveillance, and
- issued and had paid four infringement notices around misleading and deceptive advertising in financial services.

ASIC is currently considering other enforcement actions in relation to breaches of the new FOFA provisions.

ASIC's facilitative approach does not change the law itself or protect industry participants from civil action by investors.

I also note that ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* and related legislation. Under its governing statute - the ASIC Act - ASIC performs its day-to-day functions at arm's-length from the executive government.

I trust this information will be of assistance to you.

Committee Response

The committee thanks the Deputy Chairman for this detailed response. The committee notes that ASIC's facilitative compliance approach is predicated on the need to 'strike a balance between assisting industry to implement complex and major law reforms as efficiently as possible, while also ensuring that consumer and investor protection is not compromised'. ASIC also stated that enforcement of laws that the government proposes to repeal may deliver no regulatory benefit and may impose costs on industry in relation to requirements that could change as a result of the government's proposals. The committee also notes ASIC's statement that its facilitative approach does not impede ASIC from taking regulatory action where it sees consumer harm or significant risks in the market.

While these points are acknowledged, as noted above, **the committee's scrutiny concerns remain in relation to this approach when it is applied to legislative *proposals* (rather than Acts), and draws this issue to the attention of Senators. The committee notes that such an approach may be particularly problematic where proposed amendments or the repeal of provisions do not eventuate.**

Dental Benefits Legislation Amendment Bill 2014

Introduced into the House of Representatives 26 March 2014
Portfolio: Health

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 17 June 2014. The committee sought further information and the Minister responded in a letter dated 14 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to amend the *Health Insurance Act 1973* and the *Dental Benefits Act 2008* to:

- require the Chief Executive Medicare (CEM) to waive certain debts incurred by dentists in relation to the Chronic Disease Dental Scheme (CDDS);
- enable the CEM or their delegate to obtain certain documents from dentists to substantiate the payments of benefits under the Child Dental Benefits Schedule (CDBS);
- delegate ministerial functions and powers;
- amend the definition of 'dental practitioner';
- enable the disclosure of certain protected information; and
- make a technical amendment.

Undue trespass on personal rights and liberties—reversal of onus of proof Schedule 1, item 31, proposed subsection 32D(2)

This proposed subsection provides that a person who would otherwise contravene a civil penalty provision requiring them to comply with a notice (to produce information), will have a defence if they can prove (on the balance of probabilities) that the failure to comply with the notice was brought about through circumstances outside of their control or if they could not be reasonably expected to guard against the failure. Other than noting that the

provisions in Part 3 of Schedule 1 of the bill are generally modelled closely on equivalent powers set out in the *Health Insurance Act 1973*, the explanatory memorandum does not justify placing a legal burden of proof on persons who seek to rely on this defence. While the committee considers whether similar provisions exist in other legislation, whether the approach is appropriate in the current context depends on the specific circumstances of each case so the committee looks for a comprehensive rationale to be provided in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to this provision, as it 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

Reversal of onus of proof – Schedule 1, item 31, proposed subsection 32D(2)

The Committee has sought advice as to the justification on placing the legal burden of proof on persons who seek to rely on the defence proposed in subsection 32D(2).

Section 32C provides that the CEM may require by written notice a person who the CEM reasonably believes has possession, custody or control of documents relevant to ascertaining whether a benefit has been overpaid to produce them to the CEM or Human Services employee, or make a copy available.

Past experience has shown that a significant proportion of practitioners refuse to cooperate with requests for information where there is no power to require that cooperation. Section 32D addresses this issue by establishing a civil penalty that applies to a person who fails to comply with section 32C. The provision is required to encourage parties who might control relevant documents to comply during the auditing of Child Dental Benefit Schedule (CDBS) services.

These compliance powers are required to ensure that the significant Commonwealth funding available through the CDBS is used appropriately.

Subsection 32D(2) provides that it is a defence for a person to contravene subsection 32D(1) if the failure is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure. The reversal of onus of proof is reasonable and necessary in the context of subsection 32D(2) because the dentist alone will have knowledge of the circumstances that might reasonably excuse non-compliance.

Committee Response

The committee thanks the Minister for this response. The committee notes that the response provides an explanation as to why the offence is considered necessary and that it suggests that it is appropriate to place the burden of proof on the defendant as the facts relevant to establishing the defence may be said to be peculiarly within the knowledge of the defendant.

Although the committee has accepted that it may be appropriate to place the burden of proof on defendants in circumstances where the facts relevant to establishing the defence may be said to be peculiarly within the knowledge of the defendant, the default expectation is that the burden of proof placed on a defendant in such circumstances will be an evidential burden, not the higher legal burden. This default position is reflected in the Criminal Code. The default provision reflects the fact that an evidential burden is easier for a defendant to discharge and does not completely displace the prosecutor's burden, and therefore the threat posed to the fundamental common law presumption that a defendant is innocent until proven guilty is lesser than the risk posed by placing the legal burden of proof on a defendant.

Subsection 32D(2) will require defendants to discharge a legal burden of proof. The committee's preference is that provisions placing a legal burden of proof on defendants should be kept to a minimum and it therefore expects explanatory memoranda to provide a detailed justification of why a legal burden is necessary. Such a justification should explain why an evidential burden will not be adequate in the particular circumstances. **The committee therefore requests further information from the Minister in relation to why it is considered necessary to place a legal burden of proof on the defendant, rather than an evidential one.**

Minister's further response - extract

The Committee has sought further advice as to the justification for placing the legal burden of proof on persons who seek to rely on the defence proposed in subsection 32D(2).

Subsections 56A(2), (4) and (6) provide that a benefit overpayment is not recoverable if the relevant person, such as a dental provider, satisfies the Chief Executive Medicare that non-compliance with the requirements set out in the notice was due to circumstances beyond his or her control.

Subsection 32D(1) provides for a civil penalty if the person who receives a notice is not the dental provider or the patient or the person responsible for the account, and the person does

not comply with the notice. This is intended to apply to bodies corporate or other 'practice entities' that may hold records of dental services for a dental provider.

Subsection 32D(2) provides that it is a defence for the practice entity to contravene subsection 32D(1) if the practice entity can prove (on the balance of probabilities) that non-compliance with the notice was due to circumstances outside the practice entity's control or if it could not reasonably be expected to guard against the failure.

A legal burden of proof, rather than an evidential burden, is placed on a practice entity seeking to rely on the defence provided by subsection 32D(2) so that the burden is not potentially a [lesser] burden than the burden placed on a dental provider by subsections 56A(2), (4) and (6) which require the relevant person to satisfy the Chief Executive Medicare.

If an evidential burden was placed rather than a legal burden, then dental providers could establish corporate entities or structure employment arrangements in such a way as to utilise subsection 320(2) to avoid the potential greater burden placed by subsections 56A (2), (4) and (6).

Thank you for bringing the Committee's concerns to my attention and I trust this information is of assistance.

Committee Further Response

The committee thanks the Minister for this further response and notes his advice that the proposed approach seeks to prevent dentists from structuring employment arrangements or using 'practice entities' to avoid higher levels of obligation.

However, it is not fully clear to the committee that the requirements in subsections 56A(2), (4) and (6) are directly equivalent to a legal burden of proof. Although the provisions do provide that a debt will not be due ‘if the person concerned satisfies the Chief Executive Medicare that the person’s non-compliance is due to circumstances beyond the person’s control’, executive decision-making is not constrained by the application of formal rules concerning the burden of proof. It may be that subsections 56A(2), (4) and (6) indicate no more than that the person concerned will be expected (as a practical matter) to persuade the Chief Executive Medicare that non-compliance was beyond their control.

Taking these matters into account, the committee draws the issue to the Senate's attention and 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 provision as it 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

Fair Work (Registered Organisations) Amendment Bill 2014

Introduced into the House of Representatives on 19 June 2014
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 10 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

An identical bill was introduced into the House of Representatives on 14 November 2013 and the committee commented on the bill in *Alert Digest No. 9 of 2013*. The Minister's response to the committee's concerns was then published in its *Fourth Report of 2014*.

Background

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

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;
- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

Trespass on personal rights and liberties—penalties (civil penalties)
Various

One of the clear objectives of the bill is to increase maximum penalties for breaches of civil penalty provisions across the RO Act and to introduce criminal offences for serious breaches of officers' duties as well as in relation to offences associated with the conduct of investigations. At various points in the explanatory material (e.g. the RIS at page 10 and the statement of compatibility at page 5) it is suggested that the approach to obligations and penalties has been 'modelled' on the approach taken under the Corporations legislation. Although the explanatory memorandum does not explain how this is achieved or the extent to which particular amendments are similar to or different from those in the context of corporate regulation, the statement of compatibility does seek to justify the approach at a general level.

In relation to the increase of **civil penalties**, it is noted in the statement of compatibility that:

> (1) the 'maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies';
>
> (2) the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act, such that only 'serious contraventions' of civil penalty provisions will attract the maximum penalty (see item 4 schedule 2 of the bill);
>
> (3) there is no provision for imprisonment for non-payment of a penalty; and
>
> (4) the increases in penalties 'reflect the seriousness of the provisions by reference to the objective of ensuring better financial management of organisations' (at pages 8 and 9).

In light of these matters, the committee leaves the question of whether the increases to civil penalties in the bill are 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.*

Trespass on personal rights and liberties—penalties (new offence provisions)
Various

In the committee's consideration of the previous bill, the committee noted that the statement of compatibility lists the **new offence provisions** which the bill proposes to introduce into the RO Act (at page 8, under the heading 'Right to the presumption of innocence and other guarantees), but unfortunately the explanatory material provided little explanation of the specific proposals included in the bill. The committee therefore sought

clarification from the Minister as to (1) the extent of similarities between these offences and offences under the Corporations Act, (2) whether the penalties are in any instance higher than in relation to offences under the Corporations Act; and (3) particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for 2 years, or both is higher than other similar offences and the justification for the proposed approach.

In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should 'generally be 6 months imprisonment and/or a fine of 30 penalty units'. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act 2002*. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level.

In response to the committee's request for clarification the Minister provided a table which sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. The Minister stated that the relevant provisions of the bill largely replicate the provisions of these Acts. The table is available on pages 26–32 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

The Minister also provided a table which compares the penalties for the proposed offences in the bill and corresponding offences under the Corporations Act and the ASIC Act. The Minister stated that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, the Minister noted that the penalties for strict liability offences under item 223 (relating to the conduct of investigations) have not replicated imprisonment terms but have instead increased the maximum pecuniary penalty to 60 penalty units. The Minister also stated that the penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) is greater than the equivalent ASIC Act penalty (5 penalty units) to 'ensure consistency with other similar offences under the Bill'. The table is available on page 33 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

Finally, the Minister stated that the penalties for the offences proposed by item 228 (proposed subsection 337(1)) are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. The Minister stated that this 'approach is consistent with the Government's policy for the regulation of registered organisations, namely that the penalties and offences under the ASIC Act are appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers.'

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 131).

The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.

In relation to the substantive issues about these provisions, 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.*

Trespass on personal rights and liberties—strict liability
Schedule 2, item 230, proposed section 337AA

Proposed subsections 337AA(1) and (2) provide that certain offences in relation to the conduct of an investigation are strict liability offences. These are offences for:

> (a) failure to comply with a requirement to take an oath or affirmation (subsection 335D(1));
>
> (b) contravention of a requirement that questioning take place in private (subsection 335E(2));
>
> (c) failure to comply with a requirement in relation to a record of a statement made during questioning (paragraph 335G(2)(a));
>
> (d) contravention of conditions on the use of copies of records of statements made during questioning (section 335H); and
>
> (e) failure to comply with a requirement to stop addressing an investigatory or questioning an attendee (subsection 335F(2)).

In justification of the use of strict liability, the statement of compatibility argues that:

1. each offence relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation;
2. there is a defence of reasonable excuse (though the evidential burden of proving this is placed on the defendant), and
3. the offences are 'regulatory in nature' and not punishable by a term of imprisonment.

The maximum penalty (60 penalty units) is the maximum recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences.

Although the points made in the statement of compatibility are noted and the defence of reasonable excuse does ameliorate the severity of strict liability (point 2 above), the committee notes that the vagueness of this defence may make it difficult for a defendant to

establish (this is also identified in the *Guide to Framing Commonwealth Offences*). In addition, given that the offences occur within the context of an investigator questioning a person (point 1 above) it is not clear why a requirement to prove fault would undermine the enforcement of the obligations (e.g. why strict liability is necessary).

In its consideration of the previous bill, the committee therefore sought a more detailed explanation from the Minister as to why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration had been given to placing a requirement (where relevant) on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The Minister stated in his response to the committee that the proposed strict liability offences replicate offences relating to enforcement of identical obligations under the ASIC Act (see item 230, proposed section 337AA of the Bill and sections 21, 22, 23, 24, 26 and 63 of the ASIC Act). The Minister noted that it is the government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the Registered Organisations Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing Commonwealth Offences* (p.24), the Minister stated that it is worthwhile to note that:

- the offence is not punishable by imprisonment and the fine does not exceed 60 penalty units; and
- taking into account the similarities between the regulation of the corporate governance of companies and registered organisations, strict liability is appropriate as it is necessary to ensure the integrity of the regulatory framework for registered organisations.

In relation to whether consideration had been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence the Minister stated that the manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, the Minister expects that the RO Commission will develop materials, such as guidelines, standard forms and educational material to deal with its approach to investigations, similar to the approach currently taken by ASIC.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the Minister's expectation that the RO Commission will develop materials, such as guidelines, standard forms and education materials to deal with its approach to investigations. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 133). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

In relation to the substantive issues about these provisions, 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.*

Trespass on personal rights and liberties—reversal of onus of proof Schedule 2, items 229, proposed subsections 337(2) to (4) and 230, proposed subsection 337AB(2)

The proposed subsection provides for a 'reasonable excuse' defence in relation to 'obstructing a person' in the exercise of a number of powers of investigation. The use of a defence shifts the burden of proof from the prosecution to the defence, and as noted above, the vagueness of the 'reasonable excuse' defence may make it unclear what a person must prove to rely on this defence. The explanatory material does not include a justification for placing an evidential burden of proof.

Similarly, defences proposed by item 229 (proposed subsections 337(2)-(4)) which relate to offences for failing to adequately comply with a notice to produce or attend do not explain the justification for placing an evidential burden of proof on the defendant.

The committee therefore sought the Minister's advice as to the justification for reversing the onus of proof for these provisions. In the Minister's response he noted that proposed subsections 337(2)–(4) and 337AB(2) replicate subsections 63(5)–(8) of the ASIC Act and that this aligns with the government's policy for the regulation of registered organisations (which is to ensure that the defences to the offences are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof). In this respect the Minister noted that the *Guide to Framing Commonwealth Offences* (at p. 51) provides that an evidential burden of proof should generally apply to a defence.

The Minister stated that it is appropriate that the matters in proposed subsections 337(2)–(4) be included as offence-specific defences, rather than elements of the offence, as these matters are both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

Further, the Minister stated that it is important that the committee have regard to the fact that these new offences (including proposed section 337AC, addressed below) are central to the investigative framework of the RO Commission. In this regard the Minister suggested that:

> …recent investigations of the Fair Work Commission (FWC) into financial misconduct within certain registered organisations have demonstrated that the

existing regulatory framework is not sufficient. Having an investigatory body with powers to prevent unnecessary frustrations of its legitimate functions as an investigator is central to remedying the insufficient framework and restoring the confidence of members that the management of registered organisations is sufficiently accountable and transparent and that their membership contributions are being used for proper purposes.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 135). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

In relation to the substantive issues about these provisions, 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.

Trespass on personal rights and liberties—reversal of onus of proof
Schedule 2, item 230, proposed subsection 337AC(2)

The subsection provides for a defence for a contravention of the offence of concealing documents relevant to an investigation if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. In addition to placing the burden onto the defendant, a justification for placing the higher standard of a *legal* burden of proof was not located in the explanatory material. The committee therefore sought the Minister's advice as to the justification for these matters.

The Minister noted in his response to the committee that, in accordance with the government's policy, section 337AC replicates section 67 of the ASIC Act, which provides for a defence in identical terms to subsection 337AC(2) and a legal burden of proof. The Minister stated that the offence in proposed subsection 337AC(1) is very important in terms of the integrity of the investigations framework under the bill, which is central to the bill's objectives and that the maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

The Minister further stated that it is appropriate that the matter referred to in proposed subsection 337AC(2) be included as an offence-specific defence with a legal burden of proof rather than an element of the offence as it is both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 136). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

In relation to the substantive issues about these provisions, 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.*

Trespass on personal rights and liberties—privilege against self-incrimination Schedule 2, item 230, proposed section 337AD

Subsection 337AD(1) provides that for the purposes of powers conferred under Part 4, Chapter 11 (as proposed to be amended), it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record that doing so might tend to incriminate a person or make them liable to a penalty.

This abrogation of the important common law privilege against self-incrimination is justified on the basis that it pursues the objective of ensuring that offences under the RO Act can be properly investigated and that the limitation on the privilege is proportionate and reasonable to this objective because a *use* and *derivative use* immunity is provided for. It is noted however, that these immunities will only be applicable if a person 'claims that the information, producing the document, or signing the record might tend to incriminate the person or make the person liable to a penalty' (proposed subsection 337AD(2)).

This justification in the explanatory memorandum does little more than assert the importance of the objective of enforcing the legislation. The committee notes that it does not normally take the view that the inclusion of a *use* and *derivative use* immunity mean that no further justification for abrogation of the privilege is required. In addition, the requirement that a person 'claim' the privilege before responding to a request for information, a document or record is unusual and is not explained or justified in the explanatory memorandum or statement of compatibility. The committee therefore sought the Minister's further advice as to the justification for the proposed approach.

The Minister noted in his response to the committee that, in accordance with the government's policy, proposed new section 337AD closely follows the privilege against self-incrimination in section 68 of the ASIC Act. The Minister stated that the proposed abrogation is necessary in order to ensure the RO Commissioner has all available evidence

to enforce obligations under the RO Act. If the RO Commissioner is constrained in their ability to collect evidence, the entire regulatory scheme may be undermined.

In relation to the inclusion of a use immunity but not a derivative use immunity in proposed section 337AD the Minister stated that:

> The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (ASC) (now ASIC) were amended to remove derivative use immunity. The explanatory memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 [at p. 1] provides that derivative use immunity placed:
>
> *…an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity…*

The Minister stated that the government believes that the absence of a derivative use immunity, in relation to the information-gathering powers of the RO Commission, is reasonable and necessary for the effective prosecution of matters under the RO Act.

In response to the committee's question about the requirement that a person 'claim' the privilege before responding to a request for information the Minister stated that:

> Following section 68 of the ASIC Act, the requirement to claim the privilege is procedurally important as it allows the RO Commissioner to obtain all information relevant to an investigation while still protecting the person the subject of the relevant notice against the 'admissibility' of the information provided pursuant to the notice in evidence in proceedings against the person under proposed subsection 337AD(3).
>
> Generally, concerns about the requirement to claim an immunity focus on the assertion that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. There are, however, important safeguards which limit this risk. Proposed new subsection 335(3) provides that a person required to attend the RO Commission for questioning must be provided with a notice prior to the giving of information that:
>
> - provides information about the 'general nature of the matters to which the investigation relates' (subsection 335(3)(a)); and
> - informs the person that they may be accompanied by another person who may, but does not have to be, a lawyer (subsection 335(3)(b)); and
> - sets out the 'effect of section 337AD' (subsection 335(3)(c)).
>
> As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will know that they have the right to claim use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the safeguards outlined by the Minister, but stated that it remains concerned about the requirement to claim the privilege or lose the ability to rely on it. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 139). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

In relation to the substantive issues about these provisions, the committee draws this provision to the attention of Senators (particularly the requirement to claim the privilege or lose the ability to rely on it) and 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 provision, as it 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.*

Trespass on personal rights and liberties—rules of evidence
Schedule 2, item 230, proposed section 337AF-337AK

These provisions establish rules relating to the admissibility of, and weight to be given, to specified evidence. The explanatory memorandum essentially restates the terms of the provisions and does not provide information as to the justification for the provisions or comparative information about their effect. In the committee's consideration of the previous bill the committee was particularly interested in whether the provisions are designed to broaden the scope of admissible evidence against a defendant and, if so, the rationale for the proposed approach. The committee therefore sought the Minister's advice as to the effect of, and rationale for, these provisions.

In response to the committee's request the Minister stated that these provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation (see *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301). The Minister further contended that, similar to the ASIC Act, it is not intended that these provisions will render evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding had proposed new Division 7 not been enacted (item 230, proposed section 337AL, which reflects section 83 of the ASIC Act).

The Minister's response explained that the proposed new sections 337AF and 337AG provide a means for the admissibility of statements made on oath or affirmation by an attendee in an examination pursuant to paragraph 335(2)(c) of the Act. These provisions are facilitative and supplement the means available to adduce evidence of statements made at an examination as original evidence to prove the fact contained in the statement or to prove another fact in issue in the proceedings.

In relation to proposed section 337AF, the Minister stated that the section provides for the admissibility in evidence of statements made by an attendee in an examination pursuant to paragraph 335(2)(c) where the proceedings are against the attendee. The response pointed out that the admissibility of the statement in evidence is subject to the limitations in proposed paragraphs 337AF(1)(a)–(d), which protect the attendee against:

- self-incrimination;
- irrelevance;
- the statement being misleading by virtue of associated evidence not having been tendered; and
- the statement disclosing a matter in respect of which the person could claim legal professional privilege.

With regard to proposed section 337AG, the Minister's response restated that the explanation in the explanatory memorandum that the proposed section provides that if evidence by a person (defined as the 'absent witness') of a matter would be admissible in a proceeding, a statement that the absent witness made in an examination during an investigation that tends to establish that matter is admissible if it appears that the absent witness is unable to attend as a witness for the reasons set out in proposed subparagraphs 337AG(1)(a)(i)–(iii). The Minister added that such evidence will not be admissible if the party seeking to tender the evidence of the statement fails to call the absent witness as required by another party and the court is not satisfied of one of the matters in proposed subparagraphs 337AG(1)(a)(i)–(iii).

The response to the committee's concerns over proposed sections 337AH-337AJ again restated the information provided in the explanatory memorandum. The Minister explained that the proposed section 337AH provides for the weight a court is to give to evidence of a statement admitted under proposed section 337AG, and proposed section 337AJ provides for a pre-trial procedure for determining objections to the admissibility of statements made on oath or affirmation during an investigation.

In relation to proposed section 337AK the Minister expanded on the explanation provided in the explanatory memorandum by stating that the proposed section facilitates admission into evidence of copies or extracts from documents relating to the affairs of an organisation as if the copy was the original document or the extract was the relevant part of the original document. The response argued that the proposed provision, which is based on section 80 of the ASIC Act, is important as where it is convenient to copy and return or take extracts from documents produced pursuant to a request made under paragraph 335(2)(b) of the RO Act, this can be done without difficulties relating to the admissibility of the copy or extract.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 141). **The committee notes that this information is not in the explanatory memorandum to**

the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.

In relation to the substantive issues about these provisions, 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 provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Minister's response - extract

As the Committee would be aware, the Bill is identical to the Fair Work (Registered Organisations) Amendment Bill 2013, in respect of which I provided a detailed response to a similar request from the Committee. This response was published in the Committee's Fourth Report of 2014.

In response to your specific requests, I can inform the Committee that the Australian Government does not intend to make amendments to the Explanatory Memorandum to the Bill at this time.

This Bill implements a policy released by the Coalition in May 2012 and has the broad support of the Australian people, in particular members of registered organisations. I maintain that this Bill should be progressed through the Parliament as quickly as possible.

Committee Response

The committee thanks the Minister for this response.

The committee is disappointed that the Minister is not taking the opportunity to ensure that important information is included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.

Student Identifiers Bill 2014

Introduced into the House of Representatives 27 March 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 28 May 2014. The committee sought further information and the Minister responded in a letter dated 14 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

This bill is substantially similar to a bill introduced in the previous Parliament. The committee commented on the bill in its *Alert Digest No. 5 of 2013*.

Background

This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015 by:

- providing for how the student identifier may be assigned, collected, used and disclosed;
- providing for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken;
- establishing the Student Identifiers Registrar to administer the scheme; and
- providing for the functions, powers, appointment and terms and conditions of the registrar.

Undue trespass on personal rights and liberties—privacy
Various provisions

As recognised in the statement of compatibility, the bill may impact on privacy interests of persons in a number of ways. **In general, the committee leaves the question of whether limitations on privacy are reasonable for achieving the bill's policy objectives to the Senate as a whole. However, the committee is interested to better understand whether further protections of individual privacy have been considered or might be considered in relation to clauses 18 and 25 of the bill (see below).**

Delegation of legislative power
Parliamentary scrutiny
Clauses 18 and 25

Clauses 18 and 25 enable the use of disclosure information (that will include personal information) if the use of the information is for the purposes of research and, among other things, that the disclosure 'meets the requirements specified by the Ministerial Council'.

When the committee considered the predecessor to this bill, it expressed concern that the protocols relied upon to adequately protect privacy interests would not be subject to parliamentary scrutiny. The committee requested a more detailed explanation from the Minister as to why the approach was necessary and considered appropriate (see *Alert Digest No. 5 of 2013*, pp 88–89).

The explanatory memorandum accompanying this bill contains a fuller explanation of the Ministerial Council requirements and indicates that these requirements will ensure the integrity of the scheme and provide a further layer of protection of individual privacy. The statement of compatibility (at p. 7) states that research related use and disclosures will 'ultimately be for the benefit of students and the wider community'. More particularly, it is argued in the explanatory memorandum (at pp 45–46) that:

> Strict protocols governing research will be developed in conjunction with all states and territories through the Ministerial Council, to ensure that the integrity of the scheme is maintained. It is expected that the protocols could require research proposals to demonstrate, for example, that the information is reasonably necessary for the proposed research, or the compilation or analysis of statistics, and that these are is in the public interest; provide an assurance that, if the information could reasonably be expected to identify individuals, the information will not be published in generally available publications. The protocols are also expected to provide for an appropriate process to examine and approve disclosures for research purposes on the basis that the public interest in the research substantially outweighs the public interest in the protection of privacy.
>
> The strict protocols governing disclosure of student identifiers for research purposes reflect an appropriate balance between providing a high level of privacy protection for individuals regarding the collection, use and disclosure of student identifiers, and allowing sufficient flexibility to accommodate the wide range of legitimate requests for access to student identifiers by researchers

It remains unclear why protocols designed to protect privacy in relation to research related use and disclosure could not be included in the primary legislation. Further, although it may be accepted that these protocols may have these beneficial outcomes, it is a matter of concern that they are not subject to any form of parliamentary accountability as they are not described as legislative instruments.

The committee thanks the Assistant Minister for providing further information in relation to the Ministerial Council requirements in the explanatory memorandum,

however the committee remains concerned that the protocols may not adequately protect privacy interests given that they will not be subject to parliamentary scrutiny. The committee therefore requests a more detailed explanation from the Assistant Minister as to why this approach is considered appropriate. It is noted that if the protocols cannot be subjected to parliamentary scrutiny that consideration could be given to whether the bill could at least require the involvement of the Information Commissioner in the development of the protocols or review of the protocols. (Under clause 24 of the bill the Information Commissioner is given additional functions.)

> *Pending the Assistant 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 and they may also 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

The matter about which the Committee is seeking a more detailed explanation relates to clauses 18 and 25 of the Bill that enable the use or disclosure of the student identifier and personal information for research related purposes, where the use or disclosure meets the requirements specified by the Ministerial Council. The Committee has noted the Explanatory Memorandum (EM) accompanying the Bill, which states that strict protocols governing research will be developed and sets out the requirements that research proposals could be expected to meet under those protocols. However, the Committee remains concerned that the protocols may not adequately protect privacy interest as they will not be subject to parliamentary scrutiny. The Committee goes on to suggest that the Bill should require the involvement of the Information Commissioner in the development or review of the protocols.

As the Committee may be aware, the Office of the Australian Information Commissioner (OAIC) has welcomed the approach to privacy protection adopted in the Bill, and noted that its provisions reflect the security and access principles in the Privacy Act. I can also assure the Committee that as clause 24 of the Bill confers additional functions on the Information Commissioner, the development of the protocols governing the release of information for research purposes will be undertaken with the advice of, and in consultation with, the Information Commissioner. The Committee may be interested to learn that my Department and the Office of the Australian Information Commissioner have signed a Memorandum of Understanding specifically to ensure that the design and implementation of the student identifiers scheme takes into account privacy implications and to support the independent regulatory privacy oversight of the scheme.

I would also like to point out that the student identifier protections in the Bill will operate in conjunction with, and are not intended to displace, existing privacy regimes.

In summary, the Bill provides general privacy protections as well as requiring the research protocols to be agreed jointly by all state and territory ministers and the Commonwealth minister the protocols, as noted in the EM to the Bill, will be based on a rigorous public interest test and will be developed with the involvement of the Australian Information Commissioner, who will also be responsible for investigating any breaches of the protocols that interfere with privacy. Therefore, while there is no direct parliamentary scrutiny of the research protocols, I submit that the arrangements outlined above provide appropriate safeguards for the privacy interests of individuals.

Committee Response

The committee thanks the Minister for this detailed response and notes the advice that the Office of the Australian Information Commissioner (OAIC) has welcomed the approach to privacy protection adopted in the bill. The committee also notes that the department and the OAIC have signed a MOU and, as the bill confers additional functions on the Information Commissioner, the development of the protocols governing the release of information for research purposes is intended to be undertaken with the advice of, and in consultation with, the Information Commissioner.

The committee is aware of the government's Budget decision to disband the OAIC by 1 January 2015. Given the department's close engagement with the OAIC, and the fact that the bill confers additional functions on the Information Commissioner, **the committee requests advice as to the impact of the disbandment of the OAIC on the operation of the bill and, in particular, the consideration of privacy implications in the design, implementation and oversight of the student identifiers scheme.**

Minister's further response - extract

The *Australian Information Commissioner Act 2010* (IC Act) establishes the OAIC and three information officers, one of which is the Information Commissioner. The Information Commissioner has various functions under the *Privacy Act 1988.* In addition to these functions, Sections 23 and 24 of the *Student Identifiers Act 2014* confers further functions upon the Information Commissioner. When the position of the Information Commissioner is abolished through statutory amendment to the IC Act, there will need to be transitional provisions which will reflect these changes with regards to references to the Information Commissioner in the *Student Identifiers Act 2014.* In any case, I would expect that the

Privacy Act 1988 will continue to operate alongside the privacy provisions in the *Student Identifiers Act 2014.*

Committee Further Response

The committee thanks the Minister for this further response. The committee notes the Minister's acknowledgment that when the position of the Information Commissioner is abolished, there will need to be transitional provisions which will reflect these changes with regards to references to the Information Commissioner in the *Student Identifiers Act 2014*. The committee also notes the Minister's expectation that the *Privacy Act 1988* will continue to operate alongside the privacy provisions in the *Student Identifiers Act 2014*.

The committee notes that without knowing the content of the transitional provisions referred to above it is not able to determine what impact (if any) that the disbandment of the OAIC will have on the operation of the student identifiers scheme and, in particular, the consideration of privacy implications in the design, implementation and oversight of the scheme. The committee therefore will reconsider this matter when the transitional provisions are introduced into the Parliament.

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Introduced into the House of Representatives on 14 November 2013
Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 18 December 2013. The Minister then provided a further response dated 8 July 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill provides for the following amendments to:

- clarify consistency between the regime and the United Nations Convention on the Law of the Sea (UNCLOS);
- enable domestic submarine cables to be brought within the scope of the regime by regulation;
- provide a structured consultation process between the Australian Communications and Media Authority (ACMA) and the Attorney-General's Department on submarine cable installation permit applications;
- streamline the submarine cable installation permit process by removing the requirement to obtain multiple permits, tightening permit application processing timeframes and reducing unnecessary duplication with the *Environment Protection and Biodiversity Act 1999*; and
- enhance the operation of Schedule 3A by ensuring the protection zone declaration, revocation and variation processes are administratively more efficient.

Exclusion of merits review rights
Items 85 to 88

These items have the effect of excluding the availability of reconsideration by the ACMA (internal review) and merits review by the AAT, where one of the grounds for the ACMA decision refusing a permit includes security or where it concerns a security related permit

condition. The justification for the approach points to ‘the inherent importance and sensitivity of security’ concerns in the context of the legislation and the fact that a person would continue to have a right to seek judicial review (see the explanatory memorandum at page 57). The statement of compatibility states that the exclusion of administrative review of these decisions is ‘considered necessary for protecting Australia’s national security interests’.

However, it is not clear why *internal* review would compromise national security interests and neither the statement of compatibility nor explanatory memorandum explain in any detail how precisely *merits review* procedures will in all (or some cases) compromise such interests or consider whether the exclusion of review rights is justified in all cases.

The committee therefore seeks the Minister's advice as the justification for the proposed approach.

> *Pending the Minister's reply, the committee draws Senators’ attention to the provisions, as they may be considered to 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

Specifically, the Committee has sought advice as to the justification for the proposal under the Bill to exclude: the availability of reconsideration by the Australian Communications and Media Authority (ACMA) and merits review where one of the grounds for the ACMA's decision to refuse a permit includes security or where the ACMA specifies or varies a permit condition relating to security.

The ACMA regulates telecommunications, broadcasting, radiocommunications and the internet. It is responsible for regulating and enforcing the submarine cable protection regime set out in Schedule 3A to the *Telecommunications Act 1997*.

Matters of national security fall within the portfolio of the Attorney-General. The ACMA's powers and functions do not generally extend to dealing with or considering national security matters and it does not have legislative authority or any particular expertise in this area.

In recognition of the significance of submarine cables as critical infrastructure for Australia, the Bill would require the ACMA to consult the Secretary of the Attorney-General's Department on submarine cable installation permit applications. This already takes place on an informal basis and the Bill seeks to improve certainty and transparency for all stakeholders by formalising these arrangements. During the consultation period on a submarine cable permit application, the Secretary of the Attorney-General's Department

may make submission(s) on an application which the ACMA must consider when granting a permit. The submission could include a recommendation that security-related permit condition(s) be imposed.

Where during the consultation process, the Attorney-General's portfolio identifies significant security risks or significant concerns which cannot be mitigated through the imposition by the ACMA of security-related conditions on a proposed permit, the Attorney-General would need to form a view as to whether issuing the proposed permit would be prejudicial to one or more of the grounds of 'security' described in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). If so, the Attorney-General could, in consultation with the Prime Minister and the Minister for Communications, direct the ACMA not to issue a permit. The basis on which the Attorney-General may direct the ACMA to not issue a permit would be drawn from the definition of 'security' in the Bill, which is the same as the definition in the ASIO Act.

Ordinarily, a decision to grant a submarine cable installation permit and/or impose any conditions on a permit is a matter for the ACMA. In these circumstances, where an application is refused by the ACMA on non-security related grounds, it remains appropriate for the ACMA to review the merits of its own decisions, and for the decision to be subject to merit reviews by the Administrative Appeals Tribunal (AAT). The Bill makes provision for this under the *Telecommunications Act 1997.*

However, where a permit application raises security issues, the ACMA would be relying on the advice of the Attorney-General and the Attorney-General's Department. Given the ACMA's decisions in these circumstances would be made in reliance on this expert advice, it would not be practical for the ACMA to review the merits of the advice it is given. As such, a decision by the ACMA to refuse a permit on a security ground or to specify or vary a permit condition relating to security should not be open to reconsideration by the ACMA or merits review under the *Telecommunications Act 1997.*

As the Committee would appreciate, security (in particular national security) forms a well-accepted category of exclusions of merits review under Commonwealth law, such as the *Telecommunications (Interception and Access) Act 1979* and the ASIO Act.

Merits review is not entirely excluded where the ACMA refuses to issue a permit on a security ground following direction by the Attorney-General. A security assessment by the Australian Security Intelligence Organisation (ASIO) would form the basis of consideration by the Attorney-General whether to exercise his or her power to direct the ACMA to not grant a permit. That is, the Attorney-General would only exercise the power where an adverse or qualified security assessment is issued by ASIO in respect of the Attorney-General's power. An applicant who is the subject of an adverse or qualified security assessment would have a right to apply for merits review of that assessment from the AAT under Division 4 of Part IV of the ASIO Act.

The proposed provisions are based on the existing carrier licence application process under the *Telecommunications Act 1997*, particularly sections 56A and 58A. If the Bill is enacted, the proposed provisions will have the same administrative review rights as apply in respect of those existing and analogous sections 56A and 58A.

Committee Response

The committee thanks the Minister for this timely and detailed response. The committee notes that an ASIO assessment would form the basis of the Attorney-General's consideration about whether or not to exercise the relevant power and that an applicant would have some right to apply for merits review. **The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Minister's further response - extract

The Committee had requested more information about the proposed merits review procedures under the Bill, including justification for the proposed exclusion of reconsideration by the Australian Communications and Media Authority (ACMA). The Committee also requested justification for the exclusion of merits review where one of the grounds for the ACMA's refusal of a permit includes security or where the ACMA specifies or varies a permit condition relating to security.

This information was provided to the Committee in my letter of 18 November 2013, and I thank the Committee for its subsequent response in its First Report of 2014.

The information requested by the Committee was included in the seconding reading speech for the Bill in the Senate on 15 May 2014. This ensures that the key information is recorded in *Hansard.* I have attached a copy of the *Hansard* record of the second reading speech for your information.

Committee Further Response

The committee thanks the Minister for this response and for including the information requested by the committee in the Parliamentary Secretary's second reading speech in the Senate. The committee welcomes the fact that this information will be available as extrinsic material to assist understanding of the bill. The committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill. **Therefore the committee's general preference is that such material be included in the explanatory memorandum itself, which may be more readily accessible to people with an interest in the bill. Nevertheless, the committee reiterates its thanks to the Minister for making this information publicly available through the Parliamentary Secretary's second reading speech.**

Senator Helen Polley
Chair

The Hon Greg Hunt MP

Minister for the Environment

MC14-013639

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for the letter of 26 June 2014 setting out the Senate Scrutiny of Bills Committee's (the Committee) comments on the Carbon Farming Initiative Amendment Bill 2014 (the Bill).

As the Committee notes, the Bill will amend the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act) to provide for the establishment of the Emissions Reduction Fund. The Emissions Reduction Fund is the centrepiece of the Government's Direct Action Plan and will operate by issuing credits for emissions reductions that are measured and verified by approved methods. These credits will be purchased by the Government through a reverse auction and secured by a contract.

The Government consulted extensively on the design of the Emissions Reduction Fund and the Bill reflects the results of this consultation process. The Government considered more than 290 submissions received in response to Terms of Reference and more than 340 submissions in response to a Green Paper. It also consulted on exposure draft legislation.

Consistent with its terms of reference, the Committee has identified several provisions in the Bill that delegate legislative powers. I assure you that it is not the intent of the relevant provisions to subvert Parliamentary scrutiny and I have responded in further detail to each of the Committee's comments below.

Delegation of legislative power – migrating the content of regulations into legislative rules Schedule 1, item 14

The Committee has noted that the migration of regulations into rules may have negative ramifications for the quality and scrutiny of legislative rules.

The provision in the Bill to allow the content of regulations to be migrated to legislative rules over time is aligned with the position of the Office of Parliamentary Counsel (OPC, as detailed in *Drafting Direction No.3.8 – Subordinate Legislation*), namely that subordinate instruments should be made in the form of legislative instruments other than regulations where possible. This enables the expertise of OPC and the Federal Executive Council to focus on the subordinate legislation that will have the most significant impacts on the community.

I understand OPC has previously provided advice to the Committee on this matter (response to Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014). I have also attached for your information their supplementary advice to me, which provides further elaboration on this matter in relation to the Bill.

In particular, while the use of legislative rules will reduce the Federal Executive Council's workload, it will also enable minor technical details to be revised in a straightforward manner, as appropriate for amendments of this nature. As currently happens when regulations are developed, preparation of legislative rules will involve consultation with other Ministers whose portfolios are affected by any proposed provisions. Matters that the OPC has identified should receive the additional scrutiny of the Federal Executive Council can still be dealt with in regulations rather than legislative rules.

The Committee should also note that legislative rules made under the amended Act will be subject to the same degree of Parliamentary scrutiny as regulations made under the Act. Legislative rules will be legislative instruments, and will accordingly be governed by the *Legislative Instrument Act 2003* (the Legislative Instruments Act), which deals with matters such as the parliamentary disallowance of legislative instruments.

Delegation of legislative power – relationship between rules and regulations under the Act
Schedule 1, item 14

The Committee identified that it may be possible for conflict between the rules and regulations to arise as both are able to deal with the same range of matters.

When legislative rules are made or amended to deal with a particular matter under the Act, any relevant regulations in force under the Act will be amended so that they do not also deal with that matter. Accordingly, the regulations and the legislative rules will deal with discrete and non-overlapping matters, and there will be few, if any, opportunities for conflict between the legislative rules and the regulations. If any conflict were to emerge between the legislative rules and the regulations, that conflict would be resolved by the ordinary principles of statutory interpretation, and there is a well-developed body of case law that would assist in this.

I am grateful that the Committee has highlighted the importance of this issue. I will ensure that my Departmental officers and legislative drafters pay particular attention to any potential conflict, and that there is a robust administrative framework in place for managing the development of legislative rules.

Delegation of legislative power – incorporating material by reference
Schedule 1, item 14

The Act currently permits the creation of regulations that apply, adopt, or incorporate with or without modification, material in existence at a particular time, or from time to time (subsection 304(1) of the Act).

Under the amended Act, the legislative rules will also be able to incorporate material in this manner (item 367 of Schedule 1 to the Bill).

Why it is necessary to rely on material incorporated by reference

The Committee has asked why it is necessary to rely on material incorporated by reference.

Material will most often be incorporated by reference in the legislative determinations for estimating emissions reductions from projects, known as 'methods'. Methods set out the rules by which these reductions will be measured and verified. These rules are technical in nature and typically very detailed. They provide instructions on the measurement of different sources of emissions and other variables, and mathematical formula for calculating net reductions in emissions.

Methods established under this Act incorporate two broad categories of material.

Methods may incorporate established standards, methods or guidance materials. For example, a number of existing methods made under the Act refer to methods established under the National Greenhouse and Energy Reporting Scheme. In the future, methods may also incorporate reference to International Standards Organisation (ISO) or Australian standards, which are widely used to establish consistent, fit for purpose processes and services.

Incorporating existing standards and processes, which are already familiar to business, can reduce the costs of applying methods. It also removes the possibility that minor inconsistencies will emerge in methods used for related purposes. Further, this approach reduces the length and complexity of legislation, and simplifies method development as it builds on existing standards where these are available rather than developing new regulatory provisions.

Methods may also incorporate the use of estimation models or calculators. This makes them easier to develop and understand than if the formulas and data underpinning these models or calculators were set out in the method itself. For example, some methods involve the use of the Australian Government's Full Carbon Accounting Model for reforestation.

Draft methods are assessed by an independent expert committee established under the amended Act, known as the Emissions Reduction Assurance Committee. The Emissions Reduction Assurance Committee will assess any tools or calculators which form part of the method. The intended purpose and function of a tool or calculator, and typically the version of the model or calculator, is specified in the method.

As the Committee is also aware, the power to incorporate material by reference is also constrained by principles relating to the sub-delegation of powers and the requirement that a legislative instrument must be within the clear authority in the enabling legislation. Legislative instruments that serve as methodology determinations must meet the requirements in section 106 of the amended Act.

More broadly, incorporating material by reference, especially technical matters such as those detailed above, is a common practice and one which businesses operating under the Act are accustomed.

As the approach is considered necessary, consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public

The Committee has also asked whether consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public. I agree that it is essential that material incorporated by reference is readily available and thank you for raising this important matter.

Material incorporated into Carbon Farming Initiative methods is published on the Clean Energy Regulator website and, if not, information is provided on how to obtain this material. I will ensure that this approach continues under the Emissions Reduction Fund.

I note that some materials such as ISO standards are widely used and readily available but at a cost. These standards are already incorporated by reference under other climate change legislation, such as the Renewable Energy (Electricity) Regulations 2001.

Under subsection 304(3) of the Act, if the regulations incorporate material by reference, the Clean Energy Regulator is required to ensure that the text of the matter is published on the Regulator's website. Subsection 304(4) of the Act provides that subsection (3) does not apply if the publication would infringe copyright. Division 2 of Part IX of the *Copyright Act 1968* deals with use of copyright material for the Crown.

Subsection 304(3) of the Act will be amended by the Bill so that it refers also to the legislative rules (item 368 of Schedule 1 of the Bill). This will have the effect of requiring that material incorporated by reference in the regulations and legislative rules is also published on the Clean Energy Regulator's website.

How persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law

The Committee has noted the importance of ensuring persons interested in, or likely to be affected by, any changes to the law are notified or otherwise become aware of these changes.

As indicated above, the Clean Energy Regulator website will have up to date versions of materials incorporated by reference in legislative instruments, or will provide directions for accessing this material.

There are typically well-established arrangements in place for amending materials that are incorporated in methods as they exist from time to time. For example, methods under the National Greenhouse and Energy Reporting Scheme are in regulations, which are reviewed annually.

The amended Act also provides for the Minister to seek the advice of the independent Emissions Reduction Assurance Committee before varying a method, including a model or calculator incorporated into a method, except when the variation is of a minor nature. Advice from the Emissions Reduction Assurance Committee relevant to a variation of a method determination will be published on the Department's website (www.environment.gov.au), and similarly the revised method will be available through the Clean Energy Regulator website.

Delegation of legislative power – 'fit and proper person' test
Schedule 1, item 151, proposed new section 60

The Committee has noted that item 151 of Schedule 1 to the Bill amends the Act to introduce a 'fit and proper person' test. Details of this test will be prescribed in the legislative rules. The Committee has indicated that it prefers important matters to be included in primary legislation, unless a comprehensive justification is provided, and has sought advice as to why these matters are dealt with in the legislative rules.

This approach to the 'fit and proper person' test is similar to that which applies under other related legislation. For example, section 11 of the *Renewable Energy (Electricity) Act* 2000 sets out a 'fit and proper person test' which is structured in a similar manner to the amended Act. This approach will be familiar to businesses in the renewable energy sector, and the use of a similar test in the amended Act will allow consistency of approach between related legislation.

As mentioned above, the legislative rules will also continue be subject to Parliamentary scrutiny and disallowance under the Legislative Instruments Act.

I trust that the advice outlined here adequately addresses the issues highlighted by the Committee, and I would be more than happy to provide further information about the Bill's legislative accountability if necessary. My Office will be able to assist with this should you require more detail.

Yours sincerely

Greg Hunt

Enc: Letter from the Office of Parliamentary Counsel regarding delegation of legislative power

Australian Government
Office of Parliamentary Counsel

Our ref:
Your ref:
Our ref:
Your ref:

The Hon. Greg Hunt MP
Minister for the Environment
Parliament House
CANBERRA ACT 2600

Dear Minister

Carbon Farming Initiative Amendment Bill 2014—Request for information from Senate Standing Committee for the Scrutiny of Bills

Background

1 In Alert Digest No. 7 of 2014, the Senate Standing Committee for the Scrutiny of Bills asked you for information on three issues relating to item 14 of Schedule 1 to the Carbon Farming Initiative Amendment Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) in relation to the first and second issues.

2 Item 14 proposes to add a new section 308, which is a general rule-making power, at the end of the *Carbon Credits (Carbon Farming Initiative) Act 2011*. The proposed new section is as follows:

308 Legislative rules

> The Minister may, by legislative instrument, make rules (***legislative rules***) prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by the legislative rules; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The proposed general rule-making power would be in addition to existing general regulation-making power in section 307. Various other items in the Bill contain amendments of provisions that currently allow matters to be dealt with in regulations. The amendments would allow the matters to be dealt with either in regulations or rules.

4 The Committee's comments on the general rule-making power were as follows:

Delegation of legislative power
Schedule 1, item 14

This item proposes to expand section 308 of the CFI Act to give the Minister a general power to make legislative rules. Under the existing provisions of the Act, there is already a provision enabling regulations to be made under the Act.

There is a general discussion and justification of this amendment in the explanatory memorandum, which also addresses a number of related changes given the new rule-making power. According to the explanatory memorandum (at p. 74):

> The CFI Act provides for regulations to apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The bill will extend this provision to include the legislative rules, to allow the content of regulations to be migrated to legislative rules over time. This will help to alleviate the workload of the Federal Executive Council relating to the making of regulations. The regulations, legislative rules and methodology determinations deal with highly technical matters, often requiring cross-references to Australian or international standards, industry databases, models and methodologies. Including the content of these documents in subordinate legislation would make those instruments unwieldy, by expanding their volume considerably and requiring frequent updating.

The explanation raises a number of scrutiny issues for consideration by the committee. The first relates to the migration of the content of regulations into the content of rules. The second relates to possible uncertainty that may be introduced by the introduction into the legislation of two general powers to make legislative instruments (i.e. which include powers to prescribe matters 'necessary and convenient for carrying out or giving effect' to the Act). The third issue relates to the incorporation of instruments in writing as they exist from time to time.

In relation to the first issue, 'migrating the content of regulations into legislative rules over time' (p. 74), the committee has recently noted that this move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process (*Alert Digest No. 5*; *Fifth report of 2014*). This aspect is also referred to in the explanatory memorandum in the context of reducing the council's workload (outlined above). The use of rules rather than regulations gives rise to scrutiny concerns about the appropriate delegation of legislative power and the opportunity for sufficient parliamentary scrutiny and, as this provision extends the circumstances in which rules will be used, it gives rise to related concerns. **The committee has raised similar issues in relation to a number of provisions in other bills and is awaiting responses from the relevant ministers. As the responses may be relevant to the committee's scrutiny of this provision, the committee draws the matter to the attention of Senators, and if necessary, will consider it further pending receipt of the information requested from other ministers.**

> *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 and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

With regard to the second issue the committee would consider it helpful if the relationship between rules and regulations under the Act could be further explained. Although it is noted in the explanatory memorandum that it is envisaged that at least some of the current content

in the regulations will be migrated to the rules, it is unclear how much of the content. Given the possibility of conflict between the rules and regulations **the committee seeks the Minister's advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.**

Prescribing of matters by legislative rules

5 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).

The first issue raised by the Committee: ramifications for the quality and scrutiny of legislative rules

6 The information set out in the following paragraphs supplements the information previously provided to the Committee in a letter from me (the OPC Farm Household Support letter) responding to concerns raised by the Committee in Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014. Extracts of my letter were set out in the Committee's Fifth Report of 2014. Similar supplementary information has already been provided to the Senate Standing Committee on Regulations and Ordinances.

1. OPC's drafting functions

(a) OPC's drafting functions generally

7 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

8 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

9 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

10 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the

freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

11 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

12 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

13 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

14 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

15 *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

16 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

17 I am also required to govern OPC in a way that promotes proper use and management of public resources for which I am responsible (see section 15 of the *Public Governance, Performance and Accountability Act 2013*), including resources allocated for the drafting of subordinate legislation.

18 I consider that DD3.8 is an appropriate response to this responsibility in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

19 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

20 As mentioned in the OPC Farm Household Support letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

21 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies" . The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

22 In my view, the Council's statement is still accurate today.

23 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

24 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will

therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

25 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

26 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

27 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

(d) Proliferation of number and kinds of legislative instruments

28 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

29 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

30 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

31 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

32 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

33 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

34 In response to the material in OPC Farm Household Support letter the Committee has stated, in its Fifth Report of 2014:

> From the information available to the committee it appears that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process. It may also negatively impact on the standard to which important legislative instruments are drafted with flow-through impact on the ability of Parliament (and the public in general) to effectively scrutinise such instruments.

35 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

The second issue raised by the Committee: how the possibility of conflict between the rules and regulations may be avoided or resolved

36 The Bill would result in the regulations and the rules both being able to deal with the same range of matters. The Committee identified that it is therefore possible there could be a conflict between the rules and regulations. The Committee sought advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.

37 The Act, the regulations and the rules will all be administered by your Department. Good administration should be sufficient to ensure that the rules do not conflict with the regulations. We understand that the relevant officers of your Department appreciate the administrative and legislative ambiguity conflict between rules and regulations might introduce and are aware of the need to avoid any such conflict.

38 In existing legislative schemes that provide for regulations and some other kind of instrument to be able to deal with an overlapping range of matters, the issue of possible conflict is addressed in some, but not all, cases.

Conclusion

39 I would be happy to provide further information if that would be of assistance.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
7 July 2014

Minister for Finance
Acting Assistant Treasurer

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

On 26 June 2014, Ms Toni Dawes, Committee Secretary, wrote on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 with a request for further information in relation to the "time-sensitive amendments" that may be reflected in the Corporations Regulations.

In response to the Committee's request for further information, I refer the Committee to the *Corporations Amendments (Streamlining Future of Financial Advice) Regulation 2014* (the Regulation), which was registered on 30 June 2014 and commenced on 1 July 2014. I also refer the Committee to the accompanying explanatory statement to the Regulation which identifies the time-sensitive amendments, details of which are provided in Attachment B to the explanatory statement. Implementing these changes through the Regulation provides clarity and certainty for the financial advice industry and for investors seeking financial advice while the changes are considered in detail by the Parliament.

I note that the Committee is also seeking further information from the Australian Securities and Investments Commission (ASIC) regarding its facilitative compliance approach. As I noted in my 18 June 2014 response to the Committee, ASIC's facilitative compliance approach assists industry participants complying with new laws, and is consistent with the requirement – as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) – for ASIC to administer the law effectively and with minimal procedural requirements. This approach is also consistent with ASIC's stance during the introduction of other major policy reforms.

I trust this information will be of assistance to you.

Kind regards

MATHIAS CORMANN

10 July 2014

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ASIC
Australian Securities & Investments Commission

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10 July 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your letter of 26 June 2014 addressed to ASIC's Chairman Greg Medcraft. Mr Medcraft has requested I respond on his behalf.

As noted by the Acting Assistant Treasurer, ASIC's facilitative compliance approach to the Future of Financial Advice Reforms (FOFA) is consistent with our stance during the introduction of other major policy reforms, such as the national credit laws and Stronger Super. The facilitative approach in relation to these major reforms has been supported by Governments during the initial implementation periods of the relevant reform packages.

ASIC's 12 month facilitative approach to FOFA implementation started when the major aspects of the *Corporations Amendment (Future of Financial Advice) Act 2012* and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* commenced on 1 July 2013.

When the Government announced its proposed amendments to these two FOFA Acts on 20 December 2013, ASIC released 13-355MR *ASIC update on FOFA* in which it said that our facilitative approach to FOFA would remain in place and, as part of that, would not enforce provisions the Government was planning to repeal. The approach we adopted was consistent with, and an integral part of, our already announced facilitative approach to legislation which Parliament had already passed.

Our intention in adopting a short term facilitative approach, both in regards to FOFA and other major policy reforms, is to strike a balance between assisting industry to implement complex and major law reforms as efficiently as possible, while also ensuring that consumer and investor protection is not compromised. It is consistent with the requirement - as set out in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) - for ASIC to administer the law effectively and with minimal procedural requirements. In particular, ASIC took into account the fact that any enforcement action in relation to laws that the Government was proposing to repeal or amend could not be completed in the announced timeframe before amendments were to be enacted and so would deliver no regulatory benefit.

ASIC also took account of the fact that some of the provisions the Government was planning to repeal required significant systems changes and that by not providing the 'no action' position announced in 13-355 ASIC would potentially be requiring industry to spend large sums of money putting in place systems to achieve compliance with requirements that were

flagged to change in three months' time. This would not achieve any meaningful investor protection.

It is important to note that the facilitative approach does not impede ASIC from taking regulatory action where we see consumer harm or significant risks in the market. In fact, as part of this approach, ASIC has clearly indicated that it will take enforcement action where it sees harm to consumers, deliberate breaches of the law or a failure to make reasonable efforts to comply. Consistent with this, since the commencement of the FOFA reforms on 1 July 2013 (ie the start of the 12 month facilitative period), ASIC has taken the following actions in the financial advice sector:

- banned nine advisers permanently from providing financial advice, and banned two advisers temporarily,
- entered into enforceable undertakings with two advisers, requiring them to permanently cease providing financial services, and with one adviser temporarily requiring him to cease providing financial services,
- cancelled nine AFS licences for failure to comply with financial services laws'
- suspended one AFS licence,
- accepted enforceable undertakings from four licensees requiring them to improve their compliance procedures,
- imposed additional licence conditions on one AFS licensee,
- entered into public agreements with two AFS licensees requiring them to review and improve their advice provision,
- cancelled two AFS licences at the licensee's request after action by ASIC,
- varied the licence conditions of two AFS licensees at their request following ASIC surveillance, and
- issued and had paid four infringement notices around misleading and deceptive advertising in financial services.

ASIC is currently considering other enforcement actions in relation to breaches of the new FOFA provisions.

ASIC's facilitative approach does not change the law itself or protect industry participants from civil action by investors.

I also note that ASIC is an independent statutory authority responsible for the administration of the *Corporations Act 2001* and related legislation. Under its governing statute - the ASIC Act - ASIC performs its day-to-day functions at arm's-length from the executive government.

I trust this information will be of assistance to you.

Yours sincerely

Peter Kell
Deputy Chairman

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-008317

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 26 June 2014 on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) regarding the Dental Benefits Legislation Bill 2014.

The Committee has sought further advice as to the justification for placing the legal burden of proof on persons who seek to rely on the defence proposed in subsection 32D(2).

Subsections 56A(2), (4) and (6) provide that a benefit overpayment is not recoverable if the relevant person, such as a dental provider, satisfies the Chief Executive Medicare that non-compliance with the requirements set out in the notice was due to circumstances beyond his or her control.

Subsection 32D(1) provides for a civil penalty if the person who receives a notice is not the dental provider or the patient or the person responsible for the account, and the person does not comply with the notice. This is intended to apply to bodies corporate or other 'practice entities' that may hold records of dental services for a dental provider.

Subsection 32D(2) provides that it is a defence for the practice entity to contravene subsection 32D(1) if the practice entity can prove (on the balance of probabilities) that non-compliance with the notice was due to circumstances outside the practice entity's control or if it could not reasonably be expected to guard against the failure.

A legal burden of proof, rather than an evidential burden, is placed on a practice entity seeking to rely on the defence provided by subsection 32D(2) so that the burden is not potentially a lessor burden than the burden placed on a dental provider by subsections 56A(2), (4) and (6) which require the relevant person to satisfy the Chief Executive Medicare.

If an evidential burden was placed rather than a legal burden, then dental providers could establish corporate entities or structure employment arrangements in such a way as to utilise subsection 32D(2) to avoid the potential greater burden placed by subsections 56A (2), (4) and (6).

Thank you for bringing the Committee's concerns to my attention and I trust this information is of assistance.

Yours sincerely

PETER DUTTON 14/7/14

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

10 JUL 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Helen,

Thank you for the letter of 26 June 2014 from the secretariat of the Standing Committee for the Scrutiny of Bills, requesting information about issues identified in relation to the Fair Work (Registered Organisations) Amendment Bill 2014 (the Bill).

As the Committee would be aware, the Bill is identical to the Fair Work (Registered Organisations) Amendment Bill 2013, in respect of which I provided a detailed response to a similar request from the Committee. This response was published in the Committee's Fourth Report of 2014.

In response to your specific requests, I can inform the Committee that the Australian Government does not intend to make amendments to the Explanatory Memorandum to the Bill at this time.

This Bill implements a policy released by the Coalition in May 2012 and has the broad support of the Australian people, in particular members of registered organisations. I maintain that this Bill should be progressed through the Parliament as quickly as possible.

Please feel free to contact me should the Committee seek further information. The contact officer in my office is Mr Josh Manuatu on (02) 6277 7320 or at josh.manuatu@employment.gov.au.

Yours sincerely

ERIC ABETZ

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Our Ref MC14-006791

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

PO BOX 6022
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14 JUL 2014

MC14-001871

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

Helen

Dear Senator Polley

Thank you for your letter of 19 June 2014 concerning the request by the Senate Standing Committee for the Scrutiny of Bills for information about how the disbandment of the Office of Australian Information Commissioner (OAIC) will impact on the consideration of privacy issues arising from the operation of the Student Identifiers Bill 2014 (the Bill).

The *Australian Information Commissioner Act 2010* (IC Act) establishes the OAIC and three information officers, one of which is the Information Commissioner. The Information Commissioner has various functions under the *Privacy Act 1988.* In addition to these functions, Sections 23 and 24 of the *Student Identifiers Act 2014* confers further functions upon the Information Commissioner. When the position of the Information Commissioner is abolished through statutory amendment to the IC Act, there will need to be transitional provisions which will reflect these changes with regards to references to the Information Commissioner in the *Student Identifiers Act 2014*. In any case, I would expect that the *Privacy Act 1988* will continue to operate alongside the privacy provisions in the *Student Identifiers Act 2014.*

Yours sincerely

Ian Macfarlane

Phone: (02) 6277 7070 Fax: (02) 6273 3662

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

8 JUL 2014

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Dear Senator Polley

I refer to the Standing Committee for the Scrutiny of Bills' report on the Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013 (the Bill) on 4 December 2013.

The Committee had requested more information about the proposed merits review procedures under the Bill, including justification for the proposed exclusion of reconsideration by the Australian Communications and Media Authority (ACMA). The Committee also requested justification for the exclusion of merits review where one of the grounds for the ACMA's refusal of a permit includes security or where the ACMA specifies or varies a permit condition relating to security.

This information was provided to the Committee in my letter of 18 November 2013, and I thank the Committee for its subsequent response in its First Report of 2014.

The information requested by the Committee was included in the seconding reading speech for the Bill in the Senate on 15 May 2014. This ensures that the key information is recorded in *Hansard.* I have attached a copy of the *Hansard* record of the second reading speech for your information.

Yours sincerely

Malcolm Turnbull

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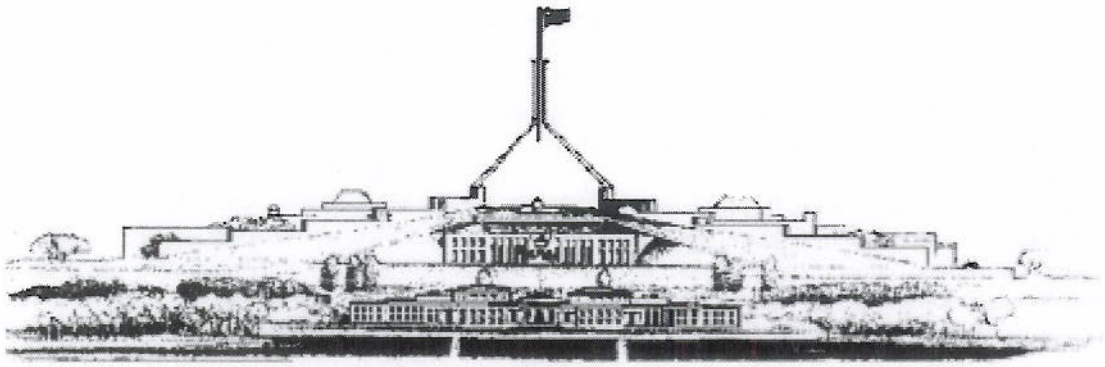
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

BILLS

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Second Reading

SPEECH

Thursday, 15 May 2014

BY AUTHORITY OF THE SENATE

SPEECH

Date Thursday, 15 May 2014
Page 2749
Questioner
Speaker Ryan, Sen Scott

Source Senate
Proof No
Responder
Question No.

Senator RYAN (Victoria—Parliamentary Secretary to the Minister for Education) (13:14): I have some brief comments on this bill. The bill will improve the operation of the submarine cable protection regime and ensure Australia's regime continues to be a best practice regime. The bill will ensure consistency with the United Nations Convention on the Law of the Sea, will enable domestic submarine cables to be protected, will streamline the submarine cable installation permit process and will otherwise enhance the operation of the regime through administrative and technical amendments.

In recognition of the significance of submarine cables as critical infrastructure for Australia, the bill requires the ACMA to consult the Secretary of the Attorney-General's Department on submarine cable installation permit applications. This already takes place on an informal basis and the bill seeks to improve certainty and transparency for all stakeholders by formalising these arrangements.

Items 2, 3, 51, 54, 85, 86, 87 and 88 in the current explanatory memorandum cover the issue of merits review under the bill. The Senate Standing Committee for the Scrutiny of Bills has asked for more information about the proposed merits review procedures. The government thanks the committee for its response. These additional points now follow. This ensures the key information is recorded in *Hansard*.

During the consultation period, the Secretary of the Attorney-General's Department may make a submission on an application, which the ACMA must consider. The submission could include a recommendation that security-related permit conditions be imposed.

Where the Attorney-General's portfolio identifies significant security risks or concerns which cannot be mitigated through the imposition by the ACMA of security-related conditions on a proposed permit, the Attorney-General would need to form a view as to whether issuing the proposed permit would be prejudicial to one or more of the grounds of 'security' described in the Australian Security Intelligence Organisation Act 1979, or the ASIO Act. If so, the Attorney-General could, in consultation with the Prime Minister and the Minister for Communications, direct the ACMA not to issue a permit.

Generally, a decision by the ACMA to refuse an application or to impose conditions on a permit is open to reconsideration by the ACMA and merits review by the AAT. This is because a decision to grant a permit or impose conditions on a permit is a decision for the ACMA.

However, the ACMA's powers and functions do not extend to dealing with or considering security matters. Matters of national security fall within the Attorney-General's portfolio. Thus, a decision by the ACMA to refuse a permit on a security ground or to specify or vary a permit condition relating to security would not be open to reconsideration by the ACMA or merits review. This is because the ACMA's decision would be made in reliance on the advice of the Attorney-General and the Attorney-General's Department. It would not be practical for the ACMA to review the merits of the advice it is given.

Accordingly, where the ACMA refuses a permit on a security ground, merits review would be available, but under the ASIO Act. An ASIO assessment would form the basis of the Attorney-General's consideration about whether or not to exercise the relevant power. The Attorney-General would only exercise the power to direct the ACMA to not grant a permit where an adverse or qualified security assessment is issued by ASIO. An applicant who is the subject of an adverse or qualified security assessment would have a right to apply for merits review of that assessment from the AAT under the ASIO Act.

I commend the bill to the Senate.

Question agreed to.

Bill read a second time.