



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FOURTH REPORT
OF
2014

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2014

The committee presents its *Fourth Report of 2014* to the Senate.

The committee draws the attention of the Senate to responsiveness to requests for information and clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Building and Construction (Consequential and Transitional Provisions) Bill 2013	89
Building and Construction Industry (Improving Productivity) Bill 2013	93
Fair Work (Registered Organisations) Amendment Bill 2013	127

Responsiveness to requests for further information

The committee recently resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process, whereby the committee frequently writes to the minister, member or senator who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the Government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness from 12 November 2013 to 26 March 2014

Summary: as at 26 March there are no overdue Ministerial responses.

Bill	Portfolio	Correspondence	
		Due	Received
Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013	Employment	17/1/14	18/3/14
Building and Construction Industry (Improving Productivity) Bill 2013	Employment	17/1/14	18/1/14
Clean Energy Legislation (Carbon Tax Repeal) Bill 2013	Environment	3/2/14	19/12/13
Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014	Justice	11/4/14	*
Environment Legislation Amendment Bill 2013	Environment	19/12/13	10/2/14
Fair Work (Registered Organisations) Amendment Bill 2013	Employment	17/1/14	18/3/14
Farm Household Support (Consequential and Transitional Provisions) Bill 2014	Agriculture	11/4/14	*

Bill	Portfolio	Correspondence	
		Due	Received
Farm Household Support Bill 2014	Agriculture	11/4/14	*
Grape and Wine Legislation Amendment (Australian Grape and Wine Authority) Bill 2013	Agriculture	19/12/13	12/12/13
Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013	Immigration and Border Protection	17/1/14	29/1/14
Migration Amendment Bill 2013 <i>Further response required</i>	Immigration and Border Protection	26/2/14 11/4/14	11/3/14 *
Quarantine charges (Collection) Bill 2014	Agriculture	11/4/14	*
Quarantine Charges (Imposition-Customs) Bill 2014	Agriculture	11/4/14	*
Quarantine Charges (Imposition-Excise) Bill 2014	Agriculture	11/4/14	*
Quarantine Charges (Imposition-General) Bill 2014	Agriculture	11/4/14	*
Social Services and Other Legislation Amendment Bill 2013	Social Services	19/12/13	11/2/14
Telecommunication Legislation Amendment (Submarine Cable Protection) Bill 2013	Communications	19/12/13	18/12/13
Telecommunications Legislation Amendment (Consumer Protection) Bill 2013	Communications	19/12/13	12/2/14
Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013	Veterans' Affairs	26/2/14	4/3/14

* not yet received

Members/Senators responsiveness from 12 November 2013 to 26 March 2014

Bill	Member/Senator	Correspondence Received
Criminal Code Amendment (Harming Australians) Bill 2013	Senator Xenophon	*
Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	Senator Xenophon	*
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013	Senator Farrell	*
Great Barrier Reef Legislation Amendment Bill 2013	Senator Waters	*
Live Animal Export Prohibition (Ending Cruelty) Bill 2014	Mr Wilkie	*
Marriage Equality Amendment Bill 2013	Senator Hanson-Young	11/3/14

* not yet received

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 9 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2014. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2013 - extract

Background

This bill provides for the following amendments in relation to the re-establishment of the Australian Building and Construction Commission:

- repeals the *Fair Work (Building Industry) Act 2012*;
- makes minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and
- makes transitional provisions for:
 - changes of names of institutions and offices;
 - preserving the appointments of senior position holders;
 - preserving the employment entitlements of staff of affected organisations;
 - preserving the confidentiality of certain information;
 - the timing of reports;
 - preserving the existing safety accreditation scheme;
 - preserving examination notices and their effect;
 - legal proceedings; and
 - other related matters.

Exclusion of judicial review rights

Part 2, schedule 1, item 2

This item has the effect that decisions made under the *Building and Construction Industry (Improving Productivity) Act 2013* will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). No rationale is provided in the explanatory memorandum, though it is noted that the predecessor legislation (which is repealed when this bill commences) was also excluded. The explanatory memorandum also notes that decisions made under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* are excluded from review under the ADJR Act.

The committee continues its practice of expecting a justification for excluding the operation of the ADJR Act. The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act*) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.

The committee also notes that the Administrative Review Council recently concluded that the current exemption of Australian Building and Construction Commission decisions from the application of the ADJR Act should be removed: *Federal Judicial Review in Australia*, Report No. 50 (2012) at 205.

While it is likely that judicial review under other sources of jurisdiction would be available, in light of the recent ARC view referred to above and as the ADJR Act is beneficial legislation for the reasons outlined above, the committee seeks the Minister's detailed explanation as to why these decisions should not be reviewable under the ADJR Act.

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

Exclusion of judicial review rights

Part 2, schedule 1, item 2

The Committee has requested a justification as to why the operation of the *Administrative Decisions (Judicial Review) Act 1977* has been excluded by the Bill.

The *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* makes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. Effectively, this amendment maintains the current approach of exempting certain legislation from the ambit of the *Administrative Decisions (Judicial Review) Act 1977*. As stated in the explanatory memorandum, the exemption was applicable to the Bill's predecessors, the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*. A similar exemption also exists for the *Fair Work Act 2009* and the *Road Safety Remuneration Act 2012* in relation to decisions of the Fair Work Commission and Fair Work Ombudsman.

Decisions that would be made under the Bill are regulatory in nature and involve monitoring and investigation functions and the bringing of court proceedings. For example:

- where an inspector reasonably believes that a person has contravened a civil remedy provision the inspector may decide to accept a written undertaking from the person (clause 98);
- inspectors are able to issue compliance notices where the inspector reasonably believes that a person has contravened a particular provision (clause 99);
- inspectors make decisions to enter premises, and to request certain documents in connection with an investigation (clause nos 72,74 and 77); and
- the Australian Building and Construction (ABC) Commissioner may issue an examination notice where it is reasonably believed that a person has information or documents relevant to an investigation (clause 61).

An exemption is necessary to ensure that investigation activities and legal proceedings are not significantly undermined. In certain circumstances a statement of reasons (as would be required by section 13 of the *Administrative Decisions (Judicial Review) Act 1977*) may prejudice or unduly delay investigations. For example, if a person is entitled to request reasons for a decision to enter premises it is likely that investigations would be prejudiced and persons may have opportunity to conceal their unlawful conduct or dispose of relevant documents while the decision is reviewed.

The *Administrative Decisions (Judicial Review) Act 1977* has not been amended to provide appropriate exclusions from the requirement to provide reasons where requested, and it is considered that the existing exemptions from the *Administrative Decisions (Judicial Review) Act 1977* need to be retained until that occurs. Without appropriate exemptions in the *Administrative Decisions (Judicial Review) Act 1977* there is potential for investigations and court proceedings to be unreasonably hindered.

The Government considers that the requirements in relation to the court proceedings for pleadings, filing of evidence and discovery provide sufficient protections for parties and

should not be interfered with, undermined or replicated by requiring a statement of reasons to be produced at the investigation stage.

There are specific provisions for review built into the Bill where such review is appropriate. For example, where a person is issued with a compliance notice they may seek a review of that decision in a relevant court (clause 100). Decisions regarding the issuing of examination notices will be subject to oversight by the Commonwealth Ombudsman.

To provide an additional layer of oversight pursuant to the judicial review of administrative decisions is unnecessary, is likely to delay and hinder the operations of the ABCC and will create unnecessary costs and delays. There is already appropriate oversight built into the specific legislation based on previous analogous legislation.

Committee Response

The committee thanks the Minister for this response and requests that the key information be included in the explanatory memorandum. The committee, however, remains concerned about the exclusion of review under the ADJR Act. Two matters may be noted about the difficulties mentioned by the Minister in relation to the requirement to give reasons under section 13 of the ADJR Act. First, it is open to the Parliament to include particular decisions where an obligation to give reasons is considered inappropriate in Schedule 2 of the ADJR Act, the result of which would be the exclusion of the reasons obligation without also excluding judicial review. Furthermore, it is unclear why the section 13 reasons requirement ‘may prejudice or unduly delay investigations’. Under the ADJR Act, where a request for reasons is made, the person who made the decision must provide reasons as ‘soon as practicable’ and in any event within 28 days of receiving the request. There is no suggestion that reasons must be provided prior to the implementation of a decision (such as, for example, a decision to enter premises). **The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Building and Construction Industry (Improving Productivity) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 9 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2014. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2013 - extract

Background

This bill seeks to:

- replace the Office of the Fair Work Building Industry Inspectorate by re-establishing the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments dealing with:
 - self-incrimination;
 - protection of liability against officials;
 - admissible records and documents, protection and disclosure of information; and
 - powers of the Commissioner in certain proceedings, and jurisdiction of courts.

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of *authorised applicant*

Clause 5 sets out a number of definitions of terms used throughout the Bill. The explanatory memorandum indicates that many of the definitions replicate those contained in predecessor bills (the BCII Act and the FW(BI) Act). The term ‘authorised applicant’, however, appears to be a new term. The purpose of the term is to indicate who is entitled to seek an order relating to a contravention of a civil remedy provision. Such persons include:

- (a) the ABC Commissioner or any other inspector; or
- (b) a person affected by the contravention; or
- (c) a person prescribed by the rules for the purposes of this paragraph.

The explanatory memorandum does not indicate why it is necessary for further ‘authorised applicants’ (in addition to the persons identified in paragraphs (a) and (b)) to be prescribed by regulations. Given the breadth of persons covered by paragraph (b) of the definition (ie ‘a person affected’) it is unclear why such a power is necessary.

In the absence of an explanation it is not possible to address the appropriateness of this definitional matter being dealt with in the regulations as opposed to the primary Act. **Given that broadening the category of ‘authorised applicants’ affects who may seek enforcement action under the legislation (a matter of considerable importance) the committee seeks the Minister’s advice as to the justification for the proposed approach.**

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

Minister’s response - extract

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of authorised applicant

The Committee has sought advice as to the justification of the necessity for further ‘authorised applicants’ to be able to be prescribed by rules.

Clause 5 of the Bill defines the term ‘authorised applicant’, which provides the basis for determining who may seek an order relating to an alleged contravention of a civil remedy

provision. For the purposes of the Bill, an authorised applicant may be the ABC Commissioner or any other inspector, a person affected by the contravention, or a person prescribed by the rules (which may also provide that a person is prescribed only in relation to circumstances specified in the rules). This definition is based on the definition of ‘eligible person’ that was used for the same purpose in the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996*.

The ability to broaden the category of authorised applicants will ensure that the legislation adapts, if necessary, to changing industry conditions or to take advantage of administrative efficiencies so that persons best placed to take action regarding a breach of a provision of the Bill (because for example of particular knowledge/expertise) are able to pursue remedies for that breach. For example, prescribing another appropriate regulatory body as an authorised applicant may be appropriate if it is better placed to undertake enforcement activities in relation to particular alleged contraventions.

Finally, any rules that are made to prescribe a person as an ‘eligible person’ will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any broadening of the category.

Committee Response

The committee thanks the Minister for this response and notes that extensions to the definition of ‘authorised applicants’ will be subject to disallowance. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power

Clause 6

Clause 6 defines the meaning of ‘building work’. As the explanatory memorandum notes, at page 5, the ‘definition is integral’ as it determines the scope of the bill's application. The bill re-establishes a regulator with strong enforcement powers,

including examination powers, and increases existing penalties. Given this, it is regrettable that subclause 6(4) which allows rules to be made to include additional activities within the definition of building work (subclause 6(5) allows for the exclusion of activities) is only briefly explained. The explanatory memorandum states that rules ‘will be made where it is not clear whether or not a particular activity falls within the definition of building work’ (see page 7). **In light of the significance of extending the operation of the legislation, the committee seeks the Minister's more detailed explanation as to why this approach is appropriate.**

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

Minister's response - extract

Delegation of legislative power Clause 6

The Committee has sought a more detailed explanation as to why it is appropriate for rules to be made to include additional activities within the definition of ‘building work’.

As highlighted by the Committee, the definition of ‘building work’ is integral to the operation of the Bill as it determines the scope of the Bill's application. While the definition contained in the Bill is appropriate and adapted for current practices and arrangements in the building and construction industry, it is important that there is sufficient flexibility to ensure that activities that are clearly intended to fall within the scope of the legislation are not inadvertently excluded for reasons of form and not substance. The definition of ‘building work’ in both of the Bill's predecessors (the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*) contained the same ability to prescribe activities as ‘building work’ by regulation. An equivalent rule making power is also provided that would allow certain activities to be excluded from the definition of ‘building work’.

Building industry participants have supported the use of this rule making power as a mechanism to ensure that an appropriate boundary is set around the scope of the Bill, in particular in relation to the coverage of supply and transport activities and off-site prefabrication activities.¹ The ability to include or exclude activities by rules recognises the

¹ Australian Industry Group submission to the Senate Education and Employment Legislation Committee, p. 5.

evolving nature of the industry, for example changes in technology that result in new work practices.

The approach has been to make the definition as clear as possible, in order to give clear guidance to participants in the industry, with the necessary flexibility to deal with any unintended consequences being addressed through the rule making power. Any rules that are made to adapt the definition of 'building work' will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any extension of this definition.

Committee Response

The committee thanks the Minister for this response. The committee notes the examples provided where it may be appropriate for rules to be made to include additional activities within the definition of 'building work' and that any rules will be subject to disallowance.

The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—reversal of onus Subclause 7(4)

Clause 7 defines the meaning of 'industrial action'. Subclause 7(2) excludes from this definition, in paragraph (c), action by an employee if:

- (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
- (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform.

Subclause 7(4) provides that (for the purposes of paragraph 2(c)) a person who seeks to rely on that paragraph has the burden of proving that the paragraph applies. The

justification for reversing the onus of proof is dealt with in the statement of compatibility at pages 54 and 55:

This restriction serves the legitimate purpose of ensuring that the exception only applies in situations where the worker genuinely takes action based on a reasonable concern about the imminent risk to his or her health or safety. In proving this, the employee will not be required to demonstrate that there was in fact an imminent risk to his or her health or safety, just that they reasonably held that concern. The employee will also be required to demonstrate that they did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was safe and appropriate. The wording of this provision restricts the type of work that the employer can require the employee to undertake to work that is 'appropriate'. This ensures that an employee is not required to undertake tasks for which they are not reasonably able to perform [sic]. Overall, it is considered that the approach taken by the Bill is a reasonable and proportional limitation on [the right to just and favourable work conditions] that is based on the approach taken by the Fair Work Act with modifications to take into account considerations that are unique to the building and construction industry.

Although the Fair Work Act includes this exception, it does not appear to similarly reverse the onus of proof. In addition, although the statement of compatibility states that this modification of approach takes into account considerations unique to the building and construction industry, **the committee seeks the Minister's elaboration of why these circumstances justify placing a legal burden of proof on the employee.**

In addition, two particular aspects appear to be worthy of further explanation. First, it is not clear from the explanatory materials why a legal, as opposed to an evidential burden, is thought justified. Second, although it may be accepted that whether action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety is a matter that is peculiarly within the knowledge of the employee (as per the *Guide to Framing Commonwealth Offences*), it not clear why this is also the case in relation to whether or not the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform' (paragraph 7(2)(c)(ii)). **The committee therefore also seeks the Minister's more detailed explanation as to these matters.**

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

Minister's response - extract

Trespass on personal rights and liberties—reversal of onus Subclause 7(4)

The Committee has sought further information on a number of issues relating to the exclusion of action based on a reasonable concern about an imminent risk to health and safety from the definition of 'industrial action'.

Firstly, the Committee has sought the Minister's elaboration on why a person seeking to rely on this exclusion from the definition of 'industrial action' has the burden of proving that the paragraph applies. This approach was first adopted in the *Building and Construction Industry Improvement Act 2005*, and was also incorporated into the *Workplace Relations Act 1996*. The right of an employee to take action (such as ceasing work) based on a reasonable concern about an imminent risk to his or her health or safety is a critical element in ensuring that workers are able to protect their health and safety at work without falling afoul of the relevant restrictions on the taking of industrial action. However, this right is, unfortunately, the subject of repeated and deliberate abuse by certain building industry unions. The building and construction industry has had the benefit of specific scrutiny by the Cole Royal Commission. That Royal Commission found evidence of systemic misuse of occupational health and safety issues to advance industrial objectives, noting that:

Misuse of non-existent occupational health and safety issues for industrial purposes is rife in the building and construction industry. Genuine occupational health and safety hazards are also rife. When industrial action is taken allegedly because of occupational health and safety concern by workers or unions, the onus of establishing the legitimacy of the concerns should be on those taking that action on that basis. Individual workers know when occupational health and safety issues are, and are not, justified. The onus should therefore be on workers to establish that occupational health and safety concern justified industrial action, and that they did not unreasonably refuse their employer's direction to perform other safe available work.²

The misuse of health and safety concerns undermines the existing framework around the taking of industrial action in the building and construction industry and recklessly politicises health and safety concerns in a way that jeopardises safety standards in the industry. To combat this, it is appropriate to require parties who seek to rely on their reasonable concern about an imminent risk to their health and safety to be required to bear the burden of proving that concern in situations where there is doubt about the genuineness

² *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 73.

of the concern. This will discourage the misuse of this right while ensuring that parties who take action based on a reasonable concern are not disadvantaged.

The Committee has also sought a more detailed explanation as to why a legal burden is placed on employees by clause 7(4), rather than an evidential burden. It would undermine the effectiveness of the prohibition on unlawful industrial action if an employee seeking to rely on the exception held an evidential burden rather than a legal one. This is because the relevant employee is the party best placed to establish the reasonableness of their concern. Furthermore, it is appropriate that this is a legal burden of proof as it relates to matters that are both peculiarly within the knowledge of the defendant and which would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

As outlined in the Statement of Compatibility with Human Rights, the employee is not required to demonstrate that there was in fact an imminent risk to his or her safety, but that they reasonably held that concern. In this case, an employee will be required to prove that they held such a concern on the balance of probabilities and were acting in good faith. This is an appropriate standard to require given the serious and ongoing misuse of the exception in the industry.

Finally, the Committee has sought a more detailed explanation as to why employees will also be required to demonstrate that they did not unreasonably refuse to perform other available work that is safe and appropriate when seeking to rely on the exception. The Cole Royal Commission expressly recommended that the reverse onus also apply to this aspect of the exception, for the same reasons as outlined above.

Committee Response

The committee thanks the Minister for this response and notes the findings of the Cole Royal Commission highlighted by the Minister. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power

Subclause 11(2)

This clause allows the rules to extend the application of the Act in relation to the exclusive economic zone and waters above the continental shelf. The explanatory memorandum repeats the effect of the provision, but does not address whether the use of delegated legislation for this purpose is appropriate. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

Delegation of legislative power

Subclause 11(2)

The Committee has sought advice as to the justification for the rule making power contained in clause 11(2) that allows for the extension of the Bill to the exclusive economic zone or the waters above the continental shelf.

The ability to extend the operation of the Bill in these zones through rules is unremarkable and mirrors section 33 of the *Fair Work Act 2009*. The ability to extend the coverage of the Bill in these areas is necessary in light of the ongoing evolution in the way that building work is undertaken in these areas. This will ensure that the Bill is able to be adapted to meet these changing circumstances. Any rules that are made to extend the coverage of the Bill will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight.

Committee Response

The committee thanks the Minister for this response and notes that the provision mirrors a provision in the *Fair Work Act 2009*. **The committee requests that the key information 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.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any rules made under the power would be more suitable for parliamentary enactment.

Alert Digest No. 9 of 2013 - extract

Undue dependence upon insufficiently defined powers

Delegation of legislative power

Paragraphs 19(1)(d) and 40(1)(c)

This paragraph empowers the ABC Commissioner to delegate all or any of his or her powers and functions under the Act (other than his or her functions or powers as an inspector) to: 'a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph'. The committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to 'a person', given that there are no limits set on the sorts of powers that might be delegated or on the categories of people to whom the powers may be delegated.

The same issue also arises in relation to clause 40(1)(c) in relation to the Federal Safety Commissioner.

The committee therefore seeks the Minister's advice as to why, given that paragraphs 19(1)(a)-(c) already allow for delegations to a Deputy ABC Commissioner, an inspector and an SES employee or acting SES employee the proposed broader power of delegation is necessary and, if it is necessary, why limits cannot be imposed and or required by the primary legislation. The committee also seeks the Minister's advice as to the justification for the approach in paragraph 40(1)(c) relating to the Federal Safety Commissioner.

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

Minister's response - extract

Undue dependence upon insufficiently defined powers

Delegation of legislative power

Paragraphs 19(1)(d) and 40(1)(c)

The Committee has sought advice as to why it is necessary to allow delegation of the ABC Commissioner and Federal Safety Commissioner's powers and functions to 'a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph'.

Both the ABC Commissioner and the Federal Safety Commissioner have a wide range of powers and functions. The ability to delegate specific powers and functions to other persons is an important tool in allowing them to manage these obligations and ensure that they are able to effectively and efficiently manage the workload that comes with these positions.

In the majority of cases, powers will be delegated to officers who are specifically listed in clauses 19 and 40, however the nature of the work that is undertaken by the respective Commissioners means that, in some cases, the most appropriate person to exercise the power or function may not fall within that specific list (because particular knowledge or expertise may be required). In these situations it may be necessary for the ABC Commissioner or Federal Safety Commissioner to delegate to persons with the appropriate skills and knowledge.

A range of safeguards are included in the Bill to ensure that any delegations by the ABC Commissioner and the Federal Safety Commissioner are transparent and able to be scrutinised by both Parliament and any other interested party:

- Rules that are made to prescribe a person for these purposes will be subject to disallowance by both Houses of Parliament, which will ensure that there is an appropriate degree of Parliamentary oversight.
- When delegating powers and functions, the Bill requires that Commissioners must publish details of the delegation as soon as practicable after the delegation takes place. All delegations may be subject to directions regarding how the delegate is able to exercise the powers or functions with which they have been vested, and if these directions are of general application they are taken to be a legislative instrument and therefore subject to oversight by Parliament.
- The ABC Commissioner is only able to delegate his or her power to issue examination notices to either a Deputy ABC Commissioner or, if no Deputy

Commissioner has been appointed, to a Senior Executive Service (SES) employee or acting SES employee.

Committee Response

The committee thanks the Minister for this response and notes the safeguards highlighted by the Minister which are designed to ensure that any delegations by the ABC Commissioner and the Federal Safety Commissioner are transparent and able to be scrutinised by Parliament. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

Broad discretionary power

Subclause 21(3)

This subclause empowers the Minister to appoint a person as a Commissioner subject only to his or her satisfaction that the person (a) has 'suitable qualifications or experience' and (b) is of 'good character'. **The committee notes that it may be desirable to indicate with more detail the nature of suitable qualifications or experience, but in the circumstances leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Minister's response - extract

Broad discretionary power

Subclause 21(3)

The Committee has stated that it may be desirable to indicate with more detail the nature of suitable qualifications or experience for the appointment of a person as ABC Commissioner, but has left the question of whether the proposed approach is appropriate to the Senate as a whole.

The approach taken to the appointment of the ABC Commissioner mirrors the equivalent provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* and is the same approach taken to the appointment of the Fair Work Ombudsman under the *Fair Work Act 2009*. The appointment is also subject to the Australian Government Merit and Transparency Policy that is administered by the Australian Public Service Commission.

Committee Response

The committee thanks the Minister for the additional information provided and notes that the appointment of a person as ABC Commissioner is subject to the Australian Government Merit and Transparency Policy administered by the Australian Public Service Commission.

Alert Digest No. 9 of 2013 - extract

Merits review – provision of reasons

Clause 28

This clause provides for the Minister to terminate the appointment of a Commissioner in specified circumstances. The provision does not include a requirement for the provision of reasons and the explanatory memorandum does not address this point. **Particularly in light of the exclusion of application for review under the ADJR Act, the committee seeks the Minister's advice as to whether consideration has been given to including a requirement in the bill that reasons be given if the appointment of a Commissioner is terminated.**

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

Merits review – provision of reasons

Clause 28

The Committee has stated that the provision relating to the termination of the ABC Commissioner's appointment does not specifically provide for the provision of reasons in the event of termination and has sought advice as to whether consideration has been given to including such a requirement in the Bill.

Clause 28 of the Bill mirrors the provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* which also do not include a requirement that the Minister provide reasons if he or she terminates the appointment of a Commissioner. Other comparable legislation, including the *Safe Work Australia Act 2008* and the *Asbestos Safety and Eradication Agency Act 2013* also do not require the provision of reasons in such circumstances. This does not prevent the Minister providing the ABC Commissioner with reasons for the termination of the appointment, consistent with principles of procedural fairness.

Termination of the Commissioner's appointment can only be undertaken by the Minister in a very limited range of circumstances, which are clearly set out in the Bill. Where the grounds for termination can be clearly described (such as in the case of bankruptcy or absence from duty) the Minister must terminate the Commissioner's appointment. In relation to misbehaviour or physical or mental incapacity, the Minister 'may' terminate the Commissioner's appointment. This will ensure that the Minister has sufficient flexibility to consider all the relevant circumstances before terminating a Commissioner's appointment on these grounds.

Committee Response

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

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power—determination of important matters by regulation
Clause 43

This clause provides for an accreditation scheme for Commonwealth building work to be established by the rules. There is very little detail about the scheme (which limits access to Commonwealth building work) set out in the primary legislation and the explanatory memorandum does not explain the appropriateness of this approach. **The committee therefore seeks the Minister's advice as to whether consideration has been given to including the important elements relating to the scheme in the primary legislation.**

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

Minister's response - extract

Delegation of legislative power—determination of important matters by regulation
Clause 43

The Committee has sought advice as to whether consideration has been given to including more elements relating to the work, health and safety (WHS) accreditation scheme in the primary legislation, noting that most aspects of the scheme are established by legislative instrument.

The WHS accreditation scheme provides that, subject to certain financial thresholds, only builders who are accredited under the scheme can perform building work that is funded directly or indirectly by the Commonwealth. The specifics of the scheme, such as the relevant financial thresholds and the criteria that must be met for accreditation, are currently provided for in the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*. It is intended that this instrument will be preserved as rules made under clause 43 of the Bill following the passage of the Bill. It is not uncommon for these types of schemes to be contained in subordinate legislation as it allows flexibility to deal with changing circumstances in the building and construction industry and changes that may occur in the health and safety environment or legislative framework. The most recent

amendment to the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*, for example, amended the application of the scheme to make provision for joint ventures where one of the parties carries out work outside Australia and is therefore unable to meet the full requirements of the scheme. This flexibility ensures that the scheme is able to be adapted to meet changing circumstances and Commonwealth government procurement imperatives while continuing to ensure that only builders with a strong commitment to health and safety are able to enter into contracts for building work funded by the Commonwealth. It is noted that the rules are subject to disallowance by both Houses of Parliament. This ensures that there is an appropriate degree of Parliamentary oversight of any extension of the scheme.

Committee Response

The committee thanks the Minister for this response. The committee notes that it is intended that the current Fair Work (Building Industry—Accreditation Scheme) Regulations 2005 will be preserved as rules made under clause 43 of the bill and that the rules are subject to disallowance by both Houses of the Parliament. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Penalties

Clause 49

This clause provides that Division 9 of Part 3-3 of the FW Act (payment relating to periods of industrial action) applies to industrial action relating to building work with modifications. One of the modifications is that if the person contravenes a civil remedy provision specified in the FW Act for payments relating to periods of industrial action and the person is a body corporate, the pecuniary penalty must not be more than 1000 penalty units. As noted in the explanatory memorandum, the maximum penalty under the FW Act is 60 penalty units. Although the explanatory memorandum argues, in general terms, that higher penalties are appropriate in the building industry context (at pages 2 and 3), there is no explanation for the large difference in penalties proposed by this particular clause. **The committee therefore seeks the Minister's explanation of 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Penalties

Clause 81

Similarly, the substantial civil penalties provided for in subclause 81(2) are not specifically justified in the documents supporting the bill. The provision of information about similar penalties in other Commonwealth legislation would allow the committee to better assess the appropriateness of increasing these penalties as proposed. **The committee therefore requests the Minister's advice as to similar penalties in other Commonwealth legislation for the purpose of assessing whether the proposed approach is appropriate.**

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

Minister's response - extract

Penalties

Clause 49 and Clause 81

The Committee has sought an explanation of the proposed approach to penalty levels in the Bill.

In relation to clause 49 of the Bill, the Committee notes that the penalties in the provision are significantly higher than the equivalent provision of the *Fair Work Act 2009*. This approach was explicitly recommended by the Cole Royal Commission, which considered the issue of strike pay at some length. In particular, the Cole Royal Commission noted that the then existing prohibitions on the claiming, payment and acceptance of strike pay were being widely disregarded in the industry.³ The Royal Commission found that '*head contractors, in particular, are willing to succumb to the financial demands of unions to buy industrial peace. This can include agreeing to substantial increases in wages and salaries, paying strike pay or numerous other contributions or donations that are demanded.*'⁴ The Royal Commission considered this stemmed from a willingness by union officials to flout their own obligations under the *Workplace Relations Act 1996* to not seek or accept strike

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 236.

⁴ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 206.

pay. In reaching this conclusion, the Royal Commission had regard to statements made by Mr Joe McDonald, the then former Assistant Secretary of the Construction, Forestry, Mining and Energy Union Western Australian Branch, who was quoted as saying in relation to strike pay that *'Every time there's been a strike, I've asked for it'* and that he did not *'pay regard to the law in relation to [taking] a shilling from the ruling class and paying it to the workers'*.⁵

In formulating its recommendations, the Cole Royal Commission found that 'widespread disregard for the laws of the Commonwealth Parliament should not be tolerated. The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it.'⁶ Given the apparent willingness of unions to demand strike pay despite the long standing prohibitions that have been contained in various iterations of the Commonwealth's workplace relations legislation it is vital that significant penalties be adopted in order to provide an effective deterrent. It is on this basis that the penalties for contraventions of the strike pay laws contained in the Fair Work Act 2009 have been increased.

In relation to clause 81 of the Bill, the Committee has requested advice as to similar penalties in other Commonwealth legislation to assist in assessing whether the proposed approach is appropriate.

The Government's intention is to restore penalties to the levels set by the *Building and Construction Industry Improvement Act 2005* because the implementation of the *Fair Work (Building Industry) Act 2012* has in its view demonstrated that lower penalties are inadequate in achieving real change in the industry. The government consider that the economic and industrial performance of the building and construction industry improved while the ABCC existed. During its period administering the industry specific laws and penalties, the ABCC provided economic benefits for consumers, higher levels of productivity and fewer days lost to industrial action. Finally, it is important to note that the penalties represent the maximum penalty that may be imposed and not a fixed or average penalty.

Comparable penalties are found in the *Competition and Consumer Act 2010*, which provides for a maximum pecuniary penalty of \$750,000 for conduct by a body corporate that breaches the secondary boycott provisions of that Act. A \$500,000 penalty applies to individuals. Similarly, penalties in the *Australian Securities and Investment Commission Act 2001* can be as high as \$1.7 million for conduct by a body corporate and \$340,000 for an individual.

⁵ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 25.

⁶ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 237.

Committee Response

The committee thanks the Minister for this response. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—reversal of onus Clause 57

As noted in the explanatory memorandum, this clause reverses the onus of proof applicable to civil proceedings for a contravention of clause 47 (unlawful picketing prohibited) and Part 2 of Chapter 6 of the bill, which contains a number of civil penalty provisions. The fullest justification for this approach is given in the statement of compatibility (at pages 55 and 56), which states:

Chapter 6 is based on the General Protections in Part 3-1 of Chapter 3 of the Fair Work Act and those provisions also require the person to lead evidence regarding their intent. Like section 361 of the FW Act, this clause provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. A reverse onus is necessary in this context because the reasons for the person's action are a matter peculiarly known to them.

This presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.

Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in

practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach.**

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

Minister's response - extract

Trespass on personal rights and liberties—reversal of onus Clause 57

The Committee has sought further advice as to the justification for, and fairness of, the reversal of the onus of proof in relation to contraventions of clause 47 of the Bill (relating to unlawful picketing) and Part 2 of Chapter 6 of the Bill (coercion and discrimination).

As noted in the extract from the Statement of Compatibility with Human Rights that is quoted by the Committee, Chapter 6 of the Bill is modelled on Part 3-1 of Chapter 3 of the *Fair Work Act 2009*. The presumption has been included because, in the absence of a presumption relating to the reasons for which certain actions are taken, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. This presumption has also been extended to the prohibition on unlawful picketing that is contained in clause 47 of the Bill as picketing action is only prohibited if it is motivated by purposes listed in the provision or is otherwise unlawful. As with the prohibitions in Chapter 6, it would be extremely difficult, if not impossible, for a complainant to establish a person's motivation for the purposes of clause 47.

The presumption set out in clause 57 of the Bill applies unless the person proves otherwise on the balance of probabilities. As noted in the recent case of *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, displacing a presumption such as the one contained in clause 57 of the Bill only requires a search for the relevant person's 'real or actual intents' but does not extend to displacing an attributed intent derived from presumptions of a different kind.⁷ In practice, when doing this a person will be free to produce relevant evidence that demonstrates their actual intent when undertaking the action in question. In the case of unlawful picketing, for example, it would be open to a person who had engaged in picketing action to present evidence of their motivation for engaging in that behaviour. Clearly the evidence will vary depending on the nature of the matter but could take the form of documentary evidence such as email

⁷ *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160 at paragraph 84.

correspondence, or testimony from other parties engaged in the picketing activity directed at demonstrating that the activity resulted from an alternative motivation.

Committee Response

The committee thanks the Minister for this response and notes the examples provided by the Minister of evidence that may be able to be produced by a person to demonstrate their actual intent when undertaking the action in question. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Insufficiently defined administrative powers—broad delegation of powers Paragraphs 66(1)(c) and 68(1)(c)

Paragraph 66(1)(c) provides that the ABC Commissioner may, by written instrument, appoint as an Australian Building and Construction Inspector ‘a consultant engaged by the ABC Commissioner under section 32’. The Commissioner, under paragraphs 66(1)(a) and 66(1)(b) can also appoint a person who is an employee of the Commonwealth or who holds an office or appointment under a law of the Commonwealth and persons who are employees of a State or Territory or who holds an office or appointment under a State or Territory law. Subclause 66(2) provides that a person can only be appointed under paragraph (1)(c) if the ABC Commissioner is ‘satisfied that the person is an appropriate person to be appointed as an inspector’.

Regrettably the explanatory memorandum merely repeats the effect of these provisions and does not explain the necessity to extend the class of persons who may be appointed as inspectors beyond government employees or office-holders. The same issue arises in relation to the appointment of Federal Safety Officers under paragraph 68(1)(c).

The committee therefore requests the Minister's advice as to the justification for the approach proposed in these paragraphs.

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

Minister's response - extract

**Insufficiently defined administrative powers—broad delegation of powers
Paragraphs 66(1)(c) and 68(1)(c)**

The Committee has sought advice as to the justification for the ability of the ABC Commissioner and the Federal Safety Commissioner to appoint consultants as ABC Inspectors and Federal Safety Officers respectively.

The ability of the ABC Commissioner and the Federal Safety Officer to appoint consultants is an important tool to allow them to engage persons with relevant experience or expertise on an ad hoc basis. This is particularly vital given the wide variety of building work that will fall within the scope of the Bill which will require specialised knowledge to regulate appropriately. To effectively support the work of the ABC Commissioner, it may be necessary to allow such consultants to exercise the power and functions of either ABC Inspectors or Federal Safety Officers. The Federal Safety Commissioner, for example, makes extensive use of consultants due to the specialist skills required of Federal Safety Officers, such as relevant lead or principal auditor certifications, familiarity with relevant Australian Standards and the ability to assess applications across all Australian jurisdictions.

There are limitations in place to ensure that consultants are only engaged where necessary and appropriate. As noted by the Committee, both the ABC Commissioner and the Federal Safety Commissioner must be satisfied that the consultant in question is ‘an appropriate person to be appointed as an inspector’ before they are able to make such an appointment. Consultants may only be engaged under clause 32 and clause 42 where they have suitable qualifications and experience to assist the ABC Commissioner and Federal Safety Commissioner respectively. If appointed as inspectors, consultants must comply with any direction issued by the ABC Commissioner and the Federal Safety Commissioner respectively.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

Clause 70 provides the purposes for which an inspector may exercise their ‘compliance powers’ in relation to a building matter. Paragraph 70(1)(c) provides that these purposes include ‘purposes of a provision of the rules that confer functions or powers on inspectors’. Compliance powers include a number of significant coercive powers, such as the power to enter premises, to interview any person, and to require the production of records or documents (see, generally, clauses 72 to 79).

The terms of paragraph 70(1)(c) have the result that the scope of application for these coercive compliance powers is not wholly contained in the parent (primary) legislation. Given the principle that coercive powers should be limited to contexts in which they are clearly warranted in the public interest, it is desirable they be specified within primary legislation. As the matter is not addressed in the explanatory memorandum **the committee seeks the Minister's advice as to why it is not possible to comprehensively provide the purposes for which these powers may be exercised in the primary legislation.**

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

Minister's response - extract

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

The Committee has sought advice as to why it is not possible to comprehensively provide the purposes for which inspectors may exercise their compliance power in the primary legislation.

The ability to expand the range of circumstances in which inspectors may exercise compliance powers has been included so that the prescribed functions and powers may be adapted to reflect changing circumstances in the building and construction industry. The

industry is dynamic and new unforeseen regulatory challenges may arise which require a swift response.

A rule that seeks to add new purposes for which ABC Inspectors and Federal Safety Officers can exercise compliance powers will be a legislative instrument and therefore subject to disallowance by Parliament. Further, this kind of provision is not unusual. Section 706 of the *Fair Work Act 2009* includes an identical ability to expand the range of circumstances in which inspectors can exercise compliance powers.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information 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.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any rules made under the power would be more suitable for parliamentary enactment.

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant

Clause 72

Clause 72 confers powers on authorised officers to enter premises for compliance purposes. Although there is a provision which provides that an officer must not enter a part of premises used for residential purposes unless the officer reasonably believes that the work is being performed on that part of the premises, the powers clearly cover both business and residential premises. Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at page 76) states that:

Legislation should only authorise entry to premises by consent or under a warrant. Any departure from this general rule requires compelling justification.

Although Commonwealth legislation does in some cases depart from this principle, the committee's view is that such departures should be few and thoroughly justified. The *Guide* (at pages 85 and 86) sets out a number of categories of circumstances in which entry without consent or a warrant has been authorised in Commonwealth legislation. One such category relates to 'licensed premises' and this may be thought to be relevant in this context. However, it is not clear that this category of exception is appropriately applied and, in any event, the *Guide* clearly indicates that it is relevant only for entry into non-residential premises.

The committee has accepted that 'situations of emergency, serious danger to public health, or where national security is involved' (Report 4/2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation*, paras 1.36 and 1.44) may justify the authorisation of entry without consent or warrant. Whether or not this power is justified on this basis would, however, require strong justification.

Further, even if such justification were provided, the committee may see fit to ask whether there has been consideration of the appropriateness of further accountability measures. For example, the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given that the persons who exercise them need not be trained law enforcement officers, is not addressed in the explanatory memorandum.

The only justification for the approach is contained within the statement of compatibility, where the limitation of the powers to instances in which inspectors hold a specified reasonable belief is given emphasis (at page 61). It is also argued that the powers are modelled on the powers granted to Fair Work Inspectors under the *Fair Work Act*, though the 'modifications to reflect additional powers that were granted to inspectors under the BCII Act' are left unelaborated.

It appears that the explanatory materials do not contain a compelling justification for departure from the general principle stated in the *Guide* and supported by the committee that authorised entry to premises be founded upon consent or a warrant. **The committee therefore seeks the Minister's detailed justification of the need for this approach in light of the principles stated in the *Guide* and with reference to the fact that the powers do authorise entry into residential premises. The committee also seeks the Minister's advice as to whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given the persons who exercise them need not be trained law enforcement officers.**

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

Minister's response - extract

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant

Clause 72

The Committee has sought a justification of the need for the approach taken to the power of authorised inspectors to enter premises under the Bill, particularly whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements and requirements that guidelines for the implementation of these powers be developed.

The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the *Fair Work Act 2009*, with some minor amendments to reflect the approach taken in the *Building and Construction Industry Improvement Act 2005*. The approach in the Bill is accordingly consistent with a long history of inspector powers in industrial legislation. Similar powers are found in other industrial legislation such as the *Work Health and Safety Act 2011*.

The *Guide to Framing Commonwealth Offences* quotes the Committee as stating that entry without consent or judicial warrant should only be allowed in a very limited range of circumstances. It is the Government's view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, this would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore, resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

In relation to senior executive authorisation for the exercise of the powers, such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. The unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

Finally, the Committee has sought views on whether consideration has been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of employment of Fair Work Building Industry Inspectors. As such, ABC inspectors will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such guidelines. Where the ABC Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The ABC Commissioner will also be able to adopt administrative guidelines to inform ABC inspectors on the use of their powers and exercise of their functions. Any such document would be designed to provide practical, up-to-date advice to ABC inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

Committee Response

The committee thanks the Minister for this response. The committee, however, retains its concern about these entry powers. The Minister emphasises the importance of the efficient and effective resolution of investigations and claims to justify entry without consent or warrant. It is not clear to the committee why these concerns are of greater relevance in the industrial relations context than other regulatory contexts in which these powers are not available. As such, the committee is not persuaded that a compelling justification has been established for the proposed powers. **In light of the committee's view, the committee seeks the Minister's further advice as to whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of these powers.**

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—definition of offence, ‘reasonable excuse’

Subclauses 76(3), 77(3) and 99(8)

Subclauses 76(3) and 77(3) provide for civil penalties for failing to comply with a request to a person to provide, respectively, their name and address and a record or document. Subclause 76(4) and subclause 77(4) provide that those provisions do not apply if the ‘person has a reasonable excuse’. As what constitutes a reasonable excuse is open ended it will often be unclear to a person what they need to establish to rely on this defence (see the *Guide to Framing Commonwealth Offences* at page 52). The explanatory memorandum merely repeats the terms of the subclauses and does not provide any guidance.

The same issue also arises in relation to subclause 99(8) in relation to compliance notices. **The committee seeks the Minister's advice as to the justification for the approach proposed in these subclauses.**

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

Minister's response - extract

Trespass on personal rights and liberties—definition of offence, ‘reasonable excuse’

Subclauses 76(3), 77(3) and 99(8)

The Committee has sought advice as to the justification for the use of the defence of ‘reasonable excuse’ in relation to failure to comply with a request to a person to provide their name and address, a record or document or a compliance notice.

The *Guide to Framing Commonwealth Offences* notes that the defence of ‘reasonable excuse’ should not be applied unless it is not possible to design more specific defences. In the cases highlighted by the Committee it would be impossible to list specific defences given the broad range of circumstances that could justify a person’s failure to comply with the request from the inspector or the compliance notice. In this way the wide array of factors that may constitute a ‘reasonable excuse’ provides an important safeguard to

individuals. The term ‘reasonable excuse’ is used in the comparable provisions of the *Fair Work Act 2009* and its predecessor, the *Workplace Relations Act 1996*. The long-standing use of the term ‘reasonable excuse’ in comparable contexts and the case law that has developed in the area will assist both individuals and the regulator regarding the scope of this term.

What is a reasonable excuse will depend on all the circumstances. For example, in the case of a person failing to comply with a request to provide their name and address, a person may have a reasonable excuse if he or she could not understand or respond to the request due to a disability. In the case of a failure to produce a record or document a reasonable excuse in such an instance would be where the documents to be produced were previously removed by the police or another regulatory authority. Finally, in the case of a failure to comply with a compliance notice that has been issued under the Bill, a reasonable excuse could be if the person did not receive the compliance notice and was not aware of its existence.

Committee Response

The committee thanks the Minister for this response and notes the additional information and examples of what may constitute a ‘reasonable excuse’ provided by the Minister. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—reversal of onus Clause 93

Clause 93 provides that if a person wishes to rely on a defence to a civil remedy provision, that person bears an evidential onus of proof in relation to the matters relevant to establishing the defence. No discussion of this approach is contained in the explanatory memorandum. **Having regard to the significant penalties established by the Act and the relevant principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the committee seeks the Minister's advice as to the justification for the reversal of onus proposed in this provision.**

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

Minister's response - extract

**Trespass on personal rights and liberties—reversal of onus
Clause 93**

The Committee has sought advice as to the justification for the reversal of onus proposed in clause 93.

Clause 93 is a model provision that is taken from clause 99 of the Regulatory Powers (Standard Provisions) Bill 2013. The explanatory memorandum to the Bill explains that this clause means that if a person wishes to rely on a defence they bear the evidential onus of proving that defence. This is a general statement of how the evidential burden will apply in relation to the Bill and does not act to reverse the onus of proof itself. The reasons for reversing the onus of proof in clauses 7 and 57 are discussed above.

Committee Response

The committee thanks the Minister for this response.

Alert Digest No. 9 of 2013 - extract

**Trespass on personal rights and liberties—self-incrimination
Clauses 102 and 104**

Clause 102(1) abrogates the common law privilege against self-incrimination. It provides that a person is not excused from giving information, producing a record or document or answering a question under an examination notice (clause 61) or when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1) on the grounds that to do so would incriminate the person or otherwise expose the person to a penalty or other liability.

Subclause 102(2) does provide for a *use* and *derivative use* immunity in relation to information given under an examination notice, subject to common exceptions to such an indemnity in relation to proceedings for offences for providing false information and the obstruction of Commonwealth officials under the Criminal Code. This means that any information or documents provided cannot be used in subsequent proceedings against the person who provided them (the *use* immunity) and that the information or documents provided by a person cannot be used to investigate unlawful conduct by the person who provided them (the *derivative use* immunity).

However, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1), is subject only to *use* and *derivative use* immunities in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded from the immunities).

The statement of compatibility states that the abrogation of the privilege was ‘considered necessary by the Royal Commission [into the building and construction industry which reported in 2003] on the grounds that the [regulator] would otherwise not be able to adequately perform its functions due to the closed culture of the industry’. It is further argued that the serious consequences of abrogation are ameliorated by the existence of the *use* and *derivative use* immunity. The committee notes that the report relied upon to justify the necessity of the approach based on factual claims about the ‘closed culture of the industry’ was written 10 years ago.

A similar issue arises in relation to section 104 in relation to the admissibility of certain records and documents.

Given (1) the significance of the this issue, and (2) the fact that neither the statement of compatibility nor the explanatory memoranda explains why, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), under a notice under subclause 77(1), or documents referred to in subclauses 104(a) and 104(b), are subject only to use/derivative use immunity in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded), the committee seeks the Minister's advice as to:

- 1. a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary; and**
- 2. why the use and derivative use immunities in relation to information provided when an authorised officer enters premises under paragraph 74(1)(d) or under a notice under subclause 77(1), and documents referred to in subclauses 104(a) and 104(b) are limited to criminal proceedings.**

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

Minister's response - extract

Trespass on personal rights and liberties—self-incrimination Clauses 102 and 104

The Committee has sought a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary.

The construction industry provides many jobs for workers in small business, large enterprises and contractors. It is critical to a productive, prosperous and internationally competitive Australia. The Coalition Government recognises the importance of an industry that is vital to job creation and which is essential to Australia's economic and social well-being.

The establishment of the ABCC in 2005 provided a genuinely strong watchdog for the building and construction industry. The ABCC was responsible for decreased lawlessness in the industry and significant productivity gains that benefitted every Australian and the Australian economy as a whole.

As highlighted by the Committee, the Cole Royal Commission considered that the abrogation of the privilege against self-incrimination was necessary on the grounds that the regulator would otherwise not be able to adequately perform its functions due to the closed culture of the industry. It is evident that the findings of the Cole Royal Commission are as relevant today as they were at the time of their initial publication with a culture of silence remaining prevalent in the building and construction industry.

The privilege against self-incrimination is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to perform their compliance functions, including monitoring compliance with the Bill and other designated building laws. The production of documents will be a key method of allowing inspectors to effectively investigate whether the Bill or a designated building law is being complied with and to collect evidence to bring enforcement proceedings. It means that all relevant information is available to them. If the ABCC is constrained in its ability to collect evidence, the entire regulatory scheme may be undermined. Finally, the approach adopted in the Bill is also consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.

The Committee has also sought information on why the use and derivative use immunities in relation to these provisions are limited to criminal proceedings for information obtained when an authorised officer enters premises under paragraph 74(1)(d), under a notice under

subclause 77(1), or from documents referred to in subclauses 104(a) and 104(b). The application of use and derivative use immunity in relation to criminal proceedings recognises the severe consequences that can flow from a criminal prosecution and act to encourage parties to comply with requests for information without fear of criminal sanction. Application of the immunities to civil proceedings, however, would severely undermine the ability of the regulator to take enforcement action for breaches of the Bill. It would prevent the use of information that has been provided to inspectors during the course of their investigations—as well as any information, document or thing obtained as a direct or indirect consequence of the use of these powers—from being used in civil proceedings against the individual who provided information or had custody of or access to the document at the time. The extension of the immunities to civil proceedings may also create an incentive for individuals to refuse any cooperation with the regulator unless information has been formally requested by an inspector under Division 3 of Part 3 of the Bill. This is consistent with the approach taken in the *Fair Work Act 2009* which also provides that a record or document obtained under the comparable paragraphs are not admissible in evidence against the individual in criminal (but not civil) proceedings.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided including the Minister's statement that the approach adopted in the bill is consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*. **The committee requests that the key information be included in the explanatory memorandum, draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—inappropriate delegation of legislative power Subclause 120(3)

This clause enables rules to be made for the purposes of subsection 6(4) or 6(5) (relating to the meaning of building work) or subsection 10(2) (relating to the extension of the Act to Christmas Island and Cocos (Keeling) Islands) to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days. This appears to enable the rules to take effect retrospectively. The explanatory memorandum

merely repeats the terms of the subclause. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Minister's response - extract

Trespass on personal rights and liberties—inappropriate delegation of legislative power Subclause 120(3)

The committee has sought advice as to the justification for the rule making power in clause 120 that provides for certain rules to take effect from the commencement of the subsection for which the rules are to be made if those rules are made within 120 days.

This provision was included to allow for modification to the operation of the Bill in order to prevent unforeseen difficulties that may arise in the early stages of implementing the Bill. The time limit on the use of this provision will ensure that its use will be limited. Any such rules will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any rules that seek to have retrospective effect.

Committee Response

The committee thanks the Minister for his response, but notes its concern that the provision allows rules to be made retrospectively. The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any retrospective commencement could trespass unduly on personal rights and liberties.

Fair Work (Registered Organisations) Amendment Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No.9 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2014. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2013 - extract

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.

Minister's general comment

The Government's policy

The Committee raised a number of concerns with the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) related to proposed offence provisions that have been based on provisions of the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). As explained in the Statement of Compatibility with Human Rights which accompanied the Bill, many of the provisions of the Bill are based on the regulation of companies under the Corporations Act and the ASIC Act.

In particular, the proposed Registered Organisations Commissioner (RO Commissioner) has been given a range of information gathering powers which, along with the new offence provisions, are designed to ensure compliance with the framework. These powers and new offence provisions replicate, with minor modification, powers and offences under the ASIC Act. It is the Government's position that to ensure that the new Registered Organisations Commission (RO Commission) can effectively investigate breaches or potential breaches of the RO Act, it is necessary for the relevant ASIC Act offences to be replicated so that the RO Commission has enforcement tools that are appropriate and sufficient to carry out its functions.

The Government accepts that registered organisations are not corporations and that these organisations should not be directly covered by the Corporations Act or ASIC Act. It is the Government's position that each provision of the Bill that replicates a Corporations Act or ASIC Act provision is necessary and appropriate to establish a regulatory framework sufficient to meet the Government's policy objectives.

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—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 7 and 8).

In light of these matters, the committee leaves the question of whether the increases to civil penalties in the bill may be appropriate to the consideration of the Senate as a whole.

The statement of compatibility lists (at page 8, under the heading ‘Right to the presumption of innocence and other guarantees’) the **new offence provisions** which the bill proposes to introduce into the RO Act, but unfortunately the explanatory material provides little explanation of the specific proposals included in the bill. **The committee therefore seeks clarification 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.

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

Minister's response - extract

Trespass on personal rights and liberties – penalties various

The Committee has requested clarification with respect to three matters relating to penalties proposed under the Bill. They are:

1. The extent of similarities between offences introduced by the Bill and offences under the Corporations Act; and
2. Whether the penalties are in any instance higher than in relation to offences under the Corporations Act
3. Whether the increased penalty in proposed item 228 is higher than other similar offences and the justification for the proposed approach.

With respect to the first matter, the table at Appendix A sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. While the Alert Digest only refers to offences under the Corporations Act the table shows that most new offences under the Bill come from the ASIC Act. The relevant provisions of the Bill largely replicate provisions of these Acts.

With respect to the second matter, the table at Appendix B compares the penalties for the proposed offences in the Bill and corresponding offences under the Corporations Act and the ASIC Act. The table makes clear that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, 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 penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) are greater than the equivalent ASIC Act penalty (5 penalty units) to ensure consistency with other similar offences under the Bill.

Finally, in relation to the third matter, the penalties for the offences proposed in item 226 and 227 at item 228, proposed subsection 337(1), are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. 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.

Committee Response

The committee thanks the Minister for his detailed response, requests that the key information 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.

Alert Digest No. 9 of 2013 - extract

**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.

It can also be noted that 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).

The committee therefore seeks the Minister's advice as to a more detailed explanation of why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration has 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.

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

Minister's response - extract

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

The Committee has requested a more detailed explanation of why strict liability is required to secure adequate enforcement of the obligations in Schedule 2, item 230, proposed section 337AA.

In accordance with the Government's policy, 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). It is the Government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing Commonwealth Offences* (p.24), 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.

The Committee has also sought advice as to whether, if the strict liability offences are to be maintained, consideration has been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, I expect 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.⁸

Committee Response

The committee thanks the Minister for this response and particularly notes the Minister's expectation 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. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

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.

⁸ In this regard, I refer the Committee to the ASIC website:
<https://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Investigations%20and%20enforcement>

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 seeks the Minister's advice as to the justification for reversing the onus of proof for these provisions.

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

Minister's response - extract

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

As noted by the Committee, the use of a defence in proposed subsections 337(2) to (4) and 337AB(2) (items 229 and 230) shifts the burden of proof from the prosecution to the defence. The Committee has sought advice as to the justification for reversing the onus of proof for these provisions.

Proposed subsections 337(2) to (4) and 337AB(2) replicate subsections 63(5)–(8) of the ASIC Act. In accordance with the Government's policy for the regulation of registered organisations, these amendments ensure that the defences to the offences referred to in those provisions are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof. In this respect I note that the *Guide to Framing Commonwealth Offences* provides that an evidential burden of proof should generally apply to a defence.⁹

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.

It is also important the Committee have regard to the fact that these new offences (including proposed section 337AC, addressed below) are central to the investigative

⁹ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 Edition, Attorney-General's Department, Commonwealth Government, p 51.

framework of the RO Commission. The 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.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information 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.**

Alert Digest No. 9 of 2013 - extract

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 seeks the Minister's advice as to the justification for these matters.**

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

Minister's response - extract

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

The Committee has also sought advice as to the justification for the reversal of proof and the higher standard of a legal burden of proof in item 230 (proposed subsection 337AC(2)) of the Bill. 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 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. The maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

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.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. **The committee draws the provision to the attention of Senators, requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Alert Digest No. 9 of 2013 - extract

**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 means 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 seeks the Minister's further advice as to the justification for the proposed approach.**

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

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

The Committee has sought further justification for the abrogation of the privilege against self-incrimination in item 230, proposed section 337AD of the Bill. 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 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.

The inclusion of a use immunity but not a derivative use immunity in proposed section 337AD is also important. 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 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...¹⁰

Similarly, 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.

The Committee has also sought information in relation to why a person must 'claim' the privilege. 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.

¹⁰ Corporations Legislation (Evidence) Amendment Bill 1992, explanatory memorandum p 1.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided. **In particular, the committee notes the safeguards outlined by the Minister, but remains concerned about the requirement to claim the privilege or lose the ability to rely on it. The committee draws this requirement to the attention of Senators, requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to 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.

Alert Digest No. 9 of 2013 - extract

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 particular the committee is 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 seeks the Minister's further advice as to the effect of, and rationale for, these provisions.**

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

Minister's response - extract

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

The Committee has sought advice as to the effect of, and rationale for, the provisions of item 230, proposed sections 337AF–337AK, and specifically whether these provisions are designed to broaden the scope of admissible evidence against a defendant.

These provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation.¹¹ Importantly, as with 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).

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.

Proposed section 337AF 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. Importantly, 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.

Proposed section 337AG 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

¹¹ *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301.

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). However, 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).

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.

Proposed section 337AK 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. This 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.

Committee Response

The committee thanks the Minister for this response and notes the additional information provided, particularly the information about limitations on the admissibility of statements made by an attendee in an examination. **The committee draws this matter to the attention of Senators, requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Senator Helen Polley
Chair



**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**

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

Dear Senator Polley

Thank you for the Committee's letter of 12 December 2013 seeking my advice about issues raised in the Senate Scrutiny of Bills Committee's *Alert Digest No. 9 of 2013* in relation to the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, the Building and Construction Industry (Improving Productivity) Bill 2013 and the Fair Work (Registered Organisations) Amendment Bill 2013.

On 11 February 2014 I wrote to you to inform the Committee that a comprehensive response to the request for further advice would be forthcoming. I am pleased to now provide that response, and I apologise for the delay in doing so.

The Government considers both of these Bills a high priority. They seek to deliver on two key election commitments of the Coalition Government. The reestablishment of the Australian Building and Construction Commission was a publicly stated election commitment at the 2010 and 2013 elections and was repeatedly emphasised as a key policy initiative. The Coalition announced its intention to establish a Registered Organisations Commission in April 2012 – well before the 2013 election.

I strongly contend that these Bills have strong support in the community and should be progressed through the Parliament as a matter of the highest priority. This need has become more pressing in light of the numerous recent reports alleging multiple examples of serious corrupt conduct in relation to the building industry and certain officers of certain unions in that industry. In this context, the Government is strongly of the view that any continued frustration of these reforms by opposition parties no longer has any credible basis.

Overview of the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and the Building and Construction Industry (Improving Productivity) Bill 2013

The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and the Building and Construction Industry (Improving Productivity) Bill 2013 fulfil the Government's election commitment to re-establish the Australian Building and Construction Commission (ABCC), a genuinely strong and independent watchdog that will maintain the rule of law to protect workers and constructors and improve productivity on building sites and construction projects, whether onshore or

offshore. The ABCC will be underpinned by a strong and effective Building Code to ensure that taxpayers get value for money on taxpayer-funded projects.

For many years the building and construction sector has provided the worst examples of industrial relations lawlessness. This behaviour resulted in the establishment of a Royal Commission into the Building and Construction Industry in 2001 that was presided over by the Honourable Terence Cole QC (the Cole Royal Commission).

The final report of the Cole Royal Commission in 2003 provided compelling evidence of the need for reform in this industry. Central to its findings was industry lawlessness that was manifested through unlawful and inappropriate conduct, and a disregard for Commonwealth and state revenue statutes. The Royal Commissioner stated that his findings that “*demonstrated an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of Australia’s economy. They mark the industry as singular*”¹. Recent media reports highlighting the ongoing presence of organised crime and corrupt conduct in the industry clearly demonstrate that the findings of the Cole Royal Commission are as relevant today as they were when the Royal Commissioner presented his final report to the Governor-General in February 2003. In order to assist the Committee, I have provided a list of recent reports of unlawful conduct in the sector that further justify the need for the ABCC at Attachment A.

The ongoing lawlessness in the building and construction sector provides important context for the measures in the Bills. A truly independent regulator with strong and effective powers is essential to deal with the closed culture of the industry that has resulted in bribery, extortion and standover tactics becoming commonplace. To the extent that the Bills engage fundamental rights and freedoms, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the Bills.

A detailed response to the questions posed by the Committee on these Bills is at Attachment B.

Overview of the Fair Work (Registered Organisations) Amendment Bill 2013

Registered organisations play an important role in Australian workplaces and the economy and their members invest a great deal of trust and money in them. Recent examples of financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework under relevant workplace laws has been spectacularly inadequate in deterring inappropriate conduct and holding wrongdoers to account. The existing regulatory regime has badly let down members of many registered organisations, who cannot be confident that the management of their organisations is sufficiently accountable and that their membership contributions are being used for proper purposes.

The Fair Work (Registered Organisations) Amendment Bill 2013 (the RO Bill) will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to ensure registered organisations and their officers will have similar fiduciary and statutory responsibilities to those of companies and their directors, as set out in the *Corporations Act 2001* (Corporations Act).

The RO Bill will also amend the RO Act to ensure that the regulation of registered organisations is overseen by a dedicated and independent regulatory body. The proposed Registered Organisations Commission (RO Commission), to be headed by the Registered Organisations Commissioner (RO Commissioner), will assume the investigations, enforcement and advice functions currently performed by the Fair Work Commission.

In order to ensure that the RO Commissioner has sufficient power to monitor compliance with the RO Act, the Commissioner’s proposed investigation and information gathering powers in the RO Bill have been modelled on those in the *Australian Securities and Investments Commission Act 2001*

¹ *Royal Commission into the Building and Construction Industry* (2003), Volume 1, Page 6

(ASIC Act). These powers will enable to Commissioner to efficiently and effectively undertake its compliance functions.

A detailed response to the questions posed by the Committee on this Bill is at Attachment C.

I trust that this comprehensive response assists the Committee in its deliberations. Please feel free to contact me should the Committee seek further information. The contact officer in my office is Mr Josh Manuatu who can be contacted on (02) 6277 7320 or josh.manuatu@employment.gov.au.

Yours sincerely



ERIC ABETZ

Unlawful Conduct in the Building and Construction Industry

The building industry is a critical sector of the Australian economy, making a significant contribution to gross domestic product and having a multiplier effect on activity in other industries. It is vital to job creation and essential to Australia's competitiveness and economic and social well-being. The industry provides many jobs for workers in small business and in large enterprises and generates significant work for independent contractors.

In recent years, the industry has experienced an increase in unlawful behaviour including unlawful pickets and blockades and in response the Government has introduced legislation to re-establish the Australian Building and Construction Commission, a genuinely strong and independent watchdog that will maintain the rule of law to protect workers and contractors and improve productivity on building sites.

Examples of unlawful conduct

Consent order and statement of agreed facts and admissions, Brookfield Multiplex FSH Contractor Pty Limited v Joseph McDonald and others (WAD44/2013)

- On 10 March 2014, Justice North restrained CFMEU Construction and General Division WA Branch Assistant Secretary Joe McDonald from entering the premises of four names Brookfield Multiplex companies, in addition to related entities, in the Federal Court of Australia.
- The consent orders declared that the union, Mr McDonald and the branch's other assistant secretary, Graham Pallot, had breached s348 of the Fair Work Act when they coerced Brookfield Multiplex — the head contractor on the Fiona Stanley Hospital project in Perth — to force subcontractor G&N Formwork to pay for the 24/7 accident cover for a worker who fell off his motorbike and went into a coma
- The orders also declared that Mr McDonald, Mr Pallot and the union had breached s417(1)(a) by organising industrial action at the site.
- Mr McDonald was also liable under s550(2)(a), (b) and (c) as an accessory to the CFMEU's breach of s417(1)(a).
- Justice North ordered the union to pay \$250,000 in damages to Brookfield Multiplex.
- He also indicated that the parties had agreed, subject to the court's approval, on a penalty range of \$9,000 to \$10,500 for Mr McDonald, \$3,000 to \$4,500 for Mr Pallot, and \$45,000 to \$52,000 for the union.

Consent order and statement of agreed facts and admissions, Brookfield Engineering and Infrastructure v Joseph McDonald and others (WAD170/2013)

- On 10 March 2013, Justice North of the Federal Court of Australia made similar findings to his earlier order of the same day about Joe McDonald's activity at Brookfield Multiplex Engineering and Infrastructure's Mundaring water treatment plant project, accepting the parties' agreed statement of facts that said he organised a strike in March 2013 to coerce the company to stop work on the site and continue paying the workforce until it investigated a water tanker crash.
- Organiser Vinnie Molina and the union had also engaged in the same unlawful conduct, he found, and Mr McDonald and Mr Molina were liable as accessories under s550(1)(a).
- He ordered the CFMEU to pay \$250,000 in compensation for those contraventions.
- The parties agreed that, subject to court approval, Mr McDonald would be fined \$18,000 to \$21,000 for the Mundaring contraventions, Molina \$6000 to \$9000 and the union \$90,000 to \$105,000.

Director of the Fair Work Building Industry Inspectorate v Myles & Ors

- On 28 February 2014, the now Builders Labourers Federation Assistant Secretary Kane Pearson and official Joseph Myles were each penalised \$4950, another official Shane Treadaway was fined \$2200 and the CFMEU was penalised \$26 400 for their conduct at a \$350 million Laing office and retail building project at 123 Albert Street, Brisbane.
- The officials entered the site to investigate alleged safety concerns. In handing down the liability decision on 20 December 2013, Judge Burnett of the Federal Circuit court of Australia said: “Plainly, these experienced industrial organisers were more interested in grandstanding by engaging in provocative behaviour in the presence of workers on the site, notwithstanding their presence onsite purportedly being in respect of safety issues. Undoubtedly their behaviour was directed more to recruitment and membership retention than any other object.”
- The Court found that Mr Pearson acted in an improper manner by being rude and offensive, including by swearing at and insulting a site foreman, “you’re a d***head, I’m not dealing with you I want to talk to the [project manager]” and by calling the site foreman a “f***wit”, “deadbeat” or “d***head”.
- Mr Pearson was also found to have intentionally hindered or obstructed or acted in an improper manner by causing the disruption to the work scheduled to take place at the site, soliciting business, and contributed in a substantial way to the disruption on the site by imploring workers to down tools.
- When Mr Myles was reminded about protective clothing he should have been wearing, he replied: “I don’t have to answer to you, you f***ing little grub”. Mr Myles said to workers, urging them not to return to work: “One in all in, we’re not going back to work.”
- Mr Treadaway walked around the site with an EFTPOS machine.
- When delivering his penalty judgment, Judge Burnett said words to the effect that the union’s lack of corrective action showed a gross failure of corporate governance and that if a large company did this, there would be gross public outcry.

Director of the Fair Work Building Industry Inspectorate v Joseph McDonald, the CFMEU and the CFMEUW

- On 20 December 2013, the CFMEU, its official Joseph McDonald and the CFMEUW, were penalised a total \$193,600 for their role in unlawful industrial action at Citic Pacific’s Sino Iron Ore Pilbara site. The proceedings were instigated by the Director of Fair Work Building and Construction (FWBC), Mr Nigel Hadgkiss.
- Mr McDonald, the CFMEU’s Assistant Secretary attended and entered the site on 21 February 2012. On multiple occasions an industrial relations consultant asked Mr McDonald to leave the site because he did not have a right of entry permit or permission to be there. Mr McDonald ignored requests to leave the site and at one time responded, “I haven’t had one for seven years and that hasn’t f***ing stopped me”.
- He addressed an unauthorised meeting of 87 site employees and after his speech 77 workers walked off the job. The workers were reportedly concerned about moves by subcontractors to lengthen shifts, and claims that Chinese workers were being paid less than their Australian counterparts.
- In the penalty decision handed down in the Federal Court of Australia in Perth, Justice Barker said: “Mr McDonald’s conduct involves a calculated and careless attitude to the law governing the employment of persons by employers. It was calculated to cause disruption to employers carrying out building and construction work on the site and it was careless in that McDonald was aware of the legal consequences of his actions and pursued them nonetheless”.

- In a statement issued after the judgment, the FWBC Director said, "Since 2005, Mr McDonald and the CFMEU have been collectively penalised more than \$1 million for action Mr McDonald has been involved in. This does not include legal costs Mr McDonald and the CFMEU have been ordered to pay".

Brookfield Multiplex FSH Contractor Pty Ltd v McDonald

- On 17 December 2013, CFMEU official Joseph McDonald was fined \$40,000 for breaching an order issued in February 2013 forbidding him from coming within 100 metres of Brookfield Multiplex's Fiona Stanley Hospital site in Murdoch, Western Australia.
- The contempt penalty followed a \$50,000 Federal Court fine issued in September 2012 to Mr McDonald for breaching orders not to take industrial action against Diploma Construction.
- Justice Gilmour said Mr McDonald had demonstrated a "pattern of indifference" to court orders and stated, "McDonald seems to have learned nothing following the imposition of penalties in *Diploma*".
- Referring to the earlier fines, Justice Gilmour described Mr McDonald's "careless attitude to his obligations to the Court" and failure to abide by the injunctions as "significant manifestations" of his contempt.
- Mr McDonald responded by saying, "the CFMEU is a militant union and our members expect me to fight for them. I will continue to fight to bring important matters to the attention of the public and to resolve issues for our members. I will not apologise for the work I do".

Cozadinos v CFMEU

- On 21 November 2013 the CFMEU was fined \$20,000 and agreed to pay the applicant's legal costs in the sum of \$42,500 after they were found to have attempted to coerce Bendigo Scaffolding to enter into an enterprise bargaining agreement with the union and to ensure all of its employees were members of the CFMEU if they wished to commence work on a Becon Construction site.
- In handing down the penalty Justice Tracey stated, "(The CFMEU) has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious. It involved a successful attempt, on the part of the CFMEU, using threats, to prevent a company, which was otherwise able and willing to do so, to perform work without first entering into an enterprise bargaining agreement with it and unless all of the company's employees were members of the union."

Grocon

- In August 2012, the CFMEU dispute and blockade of the Myer Emporium site resulted in violence in the streets of Melbourne, with militant protestors intimidating the community and confrontations between picketers and police, including attacks on police horses. The dispute also disrupted three other Grocon sites in Melbourne (including the Comprehensive Cancer Centre project in Parkville).
- Grocon's employees were not involved in the dispute or blockade and its subcontractors were unwilling to enter the site because of fears for their personal safety and other potential repercussions. The blockade resulted in serious disruptions to the community and employees were unable to enter or leave the site without the presence of a contingent of police. The blockade was not lifted until 7 September 2012.

Grocon & Ors v CFMEU & Ors

- On 24 May 2013, the Supreme Court found the CFMEU guilty on all five charges of contempt of court orders following proceedings initiated by Grocon. The judgment on penalties is pending.

Fair Work Building and Construction initiated action in the Federal Court to recover damages incurred by Grocon's subcontractors. Boral initiated proceedings in the Supreme Court against the CFMEU for defying court orders by blocking Boral's access to sites in an attempt to pressure it not to deal with Grocon.

- Court evidence, submitted by a witness of the events and which Justice Cavanough noted he was satisfied beyond reasonable doubt to have occurred, states CFMEU official John Setka was, "running and directing his people in and around the police line". The same witness also saw "the police horses getting pushed backwards as a largish group of people surged towards them".
- CFMEU official John Setka was also cited in evidence as calling Grocon workers who refused to join the blockade as "rats and "dogs". He allegedly said to a crowd of Grocon staff and employees standing on the north east corner of Swanston Street, "You f\$%cking dogs. You should be over with us".

Little Creatures

- In November 2012, the Little Creatures brewery site in Geelong experienced a violent dispute where picketers were accused in court documents of making throat-cutting gestures, threats to stomp heads in, workers being told they were dead, and motor vehicles were kicked and damaged. On social media, a threat was also made to boycott a local store for providing food to the workers on site. The picket line was led by Mr Tim Gooden of the Victorian Trades Hall Council. 'Community activists' and members of various unions were also present at the picket.
- Workers required the assistance of police to enter the site and to be escorted off the site. On 16 November 2012, despite Supreme Court Orders, the front gates of the site were padlocked shut by protestors and some damage was reportedly done to the site. Picket activity ceased on 17 November 2012.

City West Water

- In February 2013, the \$40 million City West Water project in Werribee experienced a dispute in which protestors threatened people with 'Columbian neckties'. The dispute became so heated that workers had to be flown in by helicopter and the protestors had to eventually be dispersed by the Police.
- Central to the dispute were four Filipino workers hired on 457 visas to work on the site by one of the subcontractors. Protestors argued that the work should be done by locals and that these labourers were working in unsafe conditions.
- Fair Work Building and Construction (FWBC) initiated proceedings in the Federal Court of Australia seeking an injunction against union involvement in the picket line. On 14 February 2013 Justice Marshall granted an interlocutory injunction ordering the AMWU and their organiser Tony Mavromatis be restrained from preventing or hindering access to the project until the matter was settled by the court.
- In evidence submitted to the court on 14 February 2014 the AMWU was accused of breaching s355(a) of the *Fair Work Act 2009* by attempting to coerce the contractor to sack the Filipino workers and replace them with 'locals'. The parties agreed to settle the matter on the basis that the AMWU agreed to pay \$62,000 compensation to the contractor in charge of the site with no admission of wrongdoing by the AMWU. The matter was subsequently discontinued by the FWBC.

Queensland Childrens Hospital

- The \$1.4b Queensland Childrens Hospital project in Brisbane was affected by unprotected industrial action since February 2012, which escalated from 6 August 2012. A picket line was in place at the site until work resumed. The CFMEU did not claim responsibility for organising the picket; instead, it was referred to as a 'community picket'.

- The dispute resulted in delays to the project and work did not resume on the site until 3 October 2012. The key issues in the longstanding dispute were job security, site rates and Abigroup's non-union agreement.
- The dispute was reported to have cost Abigroup \$300,000 a day, or more than \$16 million over the duration of the dispute, as a result of delays caused by the picketing.

Lend Lease Adelaide

- The Fair Work Commission found that visits by CFMEU officials to four Lend Lease sites on 30 October 2013 in Adelaide "constituted a planned and resource intensive series of visits involving intimidatory tactics in breach of right of entry requirements" and found that officials – at the union's direction - engaged in "serious, deliberate and sustained misuse of entry rights" at several South Australian projects.
- The Fair Work Commission also found that a CFMEU official had threatened unprotected industrial action at the Tonsley Park Flinders University building site unless Lend Lease moved a CFMEU flag to a more prominent position.
- In response Senior Deputy President Matthew O'Callaghan instigated a review under s508 (*FWA may restrict rights if organisation or official has misused rights*) of the *Fair Work Act 2009* of entry by South Australian and interstate CFMEU officials at four of the company's projects in Adelaide. The review has been suspended pending the hearing of union appeals.

John Holland Brisbane

- John Holland and the CFMEU are in dispute at the projects at Gallipoli Barracks and Creative Industries Precinct at QUT Kelvin Grove over the employer's refusal to enter into a union agreement.
- On 9 November 2013, the Federal Court issued an interlocutory injunction binding the CFMEU and four of its organisers from engaging in industrial action.
- That injunction continues to be disobeyed by most subcontractors, although some electrical trades and plumbing trades are still working. There appears to be an informal picket line at the gates of each site. It is understood that none of the subcontractors' workers are willing to cross the lines.
- Fair Work Building and Construction has commenced an investigation in relation to alleged breaches of a Fair Work Commission order issued on 29 October 2013 to stop unprotected industrial action at the Gallipoli Barracks site.

John Holland Melbourne

- In February 2009 a dispute emerged when John Holland refused to recognise a wage deal struck by the CFMEU and AMWU with labour hire company Civil Pacific Services, a subcontractor on the Westgate Bridge project in Melbourne. The agreement contained an hourly wage rate of \$36.97, nearly \$10 an hour more than the one negotiated by John Holland with the AWU, the union that had site coverage.
- In a bid to force John Holland to negotiate, the CFMEU and AMWU set up a picket on 6 February 2009, which began what ended up being a three month long industrial dispute. On 27 February 2009 Civil Pacific Services then withdrew from its contract with John Holland.
- Holland responded by seeking a series of Federal Court injunctions demanding the action cease so work on the project by the remaining contractors could continue unhampered. The Court granted an initial injunction on February 6, charging the CFMEU and AMWU with coercing Civil Pacific Services and John Holland into making an agreement and ordering industrial action to end. The strikers defied the order.

- The regulator at the time, the Australian Building and Construction Commission (ABCC), brought charges against the unions and the workers involving 100 breaches of the *Building and Construction Industry Act 2005* and the *Trade Practices Act 1974*. During the dispute, ABCC inspectors followed strikers, took photos and made recordings of picketers.
- On 30 April 2009 picketing was suspended and negotiations commenced between the unions and John Holland. On 17 May 2009 an agreement was reached such that the unions agreed to a no-strike clause to be included in the agreement in return for shared coverage of the site with the AWU.
- The clause stated the unions would not “threaten, organise, encourage, procure or engage in any industrial action” including picketing and protests or actions to discourage people from working on John Holland construction company projects. The agreement included a provision that should the clause be breached, the unions would be liable to pay thousands of dollars to a charity organisation (up to \$400,000 for the AMWU and up to \$250,000 for the CFMEU).
- On 28 July 2010 the Federal Court of Australia issued fines totalling \$1.3 million against the CFMEU and AMWU and several union officials for their role in the dispute.
- In evidence submitted to the court by Gary Marshall the General Superintendent, Southern Region, John Holland he stated:
 - *“Based on my experience in the civil construction industry, it is a well known and well accepted position within this industry that given the industrial strength of the CFMEU, if a sub-contractor that works in civil construction or any person that works in civil construction were to cross a CFMEU supported or endorsed picket line, the CFMEU would take steps to ensure that such sub-contractor or person did not in the future work in the civil construction industry.”*
- Video evidence considered by Justice Jessup, included footage showing CFMEU representative Gareth Stephenson addressing protestors by way of a megaphone during which he said:
 - *“Ok, it looks like we’ve got 250 of ‘em and ah, I think they’re expecting similar numbers today but this time we’ve got them outnumbered and I can tell you we’ve got around 100 people at the foot of the Westgate Bridge who are protesting there so we’ve got people all over the place including around the corner...[rest of sentence inaudible]...and there’s also 150 riot police around the corner. Now, um, rather oddly, the police have asked us what our intentions are. Um, now I think it’s pretty plain, we’re expecting that they’re going to try and get a bus load of scabs down here and through that gate into the compound down there and uh, we’re going to try and stop ‘em....”*
- In presiding over the case, Justice Jessup, noted that the conduct of the protestors at the project head office was “*manifestly intended to intimidate*”. He also noted that conduct at the head office by the picketers “*included the application of direct physical force to prevent vehicles leaving the project head office and wilful damage to property. It was characterised by a readiness – indeed, a conspicuous intent – to overwhelm the attempts of the police to secure the passage of these vehicles and to deny the ability of fellow workers to engage in their lawful occupations*”.

Bikie Gangs and Criminal Links

- *The Age* reported on 22 May 2013 that three members of the outlawed Comanchero bikie club were involved in a suspected standover attempt to recover a disputed debt with the private company of Master Builders Australia Federal Vice President, Mr Trevor Evans. The attempt occurred in Mr Evan’s private home and was caught on closed circuit television.

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

Exclusion of judicial review rights

Part 2, schedule 1, item 2

The Committee has requested a justification as to why the operation of the *Administrative Decisions (Judicial Review) Act 1977* has been excluded by the Bill.

The *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* makes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. Effectively, this amendment maintains the current approach of exempting certain legislation from the ambit of the *Administrative Decisions (Judicial Review) Act 1977*. As stated in the explanatory memorandum, the exemption was applicable to the Bill's predecessors, the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*. A similar exemption also exists for the *Fair Work Act 2009* and the *Road Safety Remuneration Act 2012* in relation to decisions of the Fair Work Commission and Fair Work Ombudsman.

Decisions that would be made under the Bill are regulatory in nature and involve monitoring and investigation functions and the bringing of court proceedings. For example:

- where an inspector reasonably believes that a person has contravened a civil remedy provision the inspector may decide to accept a written undertaking from the person (clause 98);
- inspectors are able to issue compliance notices where the inspector reasonably believes that a person has contravened a particular provision (clause 99);
- inspectors make decisions to enter premises, and to request certain documents in connection with an investigation (clause nos 72,74 and 77); and
- the Australian Building and Construction (ABC) Commissioner may issue an examination notice where it is reasonably believed that a person has information or documents relevant to an investigation (clause 61).

An exemption is necessary to ensure that investigation activities and legal proceedings are not significantly undermined. In certain circumstances a statement of reasons (as would be required by section 13 of the *Administrative Decisions (Judicial Review) Act 1977*) may prejudice or unduly delay investigations. For example, if a person is entitled to request reasons for a decision to enter premises it is likely that investigations would be prejudiced and persons may have opportunity to conceal their unlawful conduct or dispose of relevant documents while the decision is reviewed.

The *Administrative Decisions (Judicial Review) Act 1977* has not been amended to provide appropriate exclusions from the requirement to provide reasons where requested, and it is considered that the existing exemptions from the *Administrative Decisions (Judicial Review) Act 1977* need to be retained until that occurs. Without appropriate exemptions in the *Administrative Decisions (Judicial Review) Act 1977* there is potential for investigations and court proceedings to be unreasonably hindered.

The Government considers that the requirements in relation to the court proceedings for pleadings, filing of evidence and discovery provide sufficient protections for parties and should not be interfered with, undermined or replicated by requiring a statement of reasons to be produced at the investigation stage.

There are specific provisions for review built into the Bill where such review is appropriate. For example, where a person is issued with a compliance notice they may seek a review of that decision in a relevant court (clause 100). Decisions regarding the issuing of examination notices will be subject to oversight by the Commonwealth Ombudsman.

To provide an additional layer of oversight pursuant to the judicial review of administrative decisions is unnecessary, is likely to delay and hinder the operations of the ABCC and will create unnecessary costs and delays. There is already appropriate oversight built into the specific legislation based on previous analogous legislation.

Building and Construction Industry (Improving Productivity) Bill 2013

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of authorised applicant

The Committee has sought advice as to the justification of the necessity for further ‘authorised applicants’ to be able to be prescribed by rules.

Clause 5 of the Bill defines the term ‘authorised applicant’, which provides the basis for determining who may seek an order relating to an alleged contravention of a civil remedy provision. For the purposes of the Bill, an authorised applicant may be the ABC Commissioner or any other inspector, a person affected by the contravention, or a person prescribed by the rules (which may also provide that a person is prescribed only in relation to circumstances specified in the rules). This definition is based on the definition of ‘eligible person’ that was used for the same purpose in the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996*.

The ability to broaden the category of authorised applicants will ensure that the legislation adapts, if necessary, to changing industry conditions or to take advantage of administrative efficiencies so that persons best placed to take action regarding a breach of a provision of the Bill (because for example of particular knowledge/expertise) are able to pursue remedies for that breach. For example, prescribing another appropriate regulatory body as an authorised applicant may be appropriate if it is better placed to undertake enforcement activities in relation to particular alleged contraventions.

Finally, any rules that are made to prescribe a person as an ‘eligible person’ will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any broadening of the category.

Delegation of legislative power

Clause 6

The Committee has sought a more detailed explanation as to why it is appropriate for rules to be made to include additional activities within the definition of ‘building work’.

As highlighted by the Committee, the definition of ‘building work’ is integral to the operation of the Bill as it determines the scope of the Bill’s application. While the definition contained in the Bill is appropriate and adapted for current practices and arrangements in the building and construction industry, it is important that there is sufficient flexibility to ensure that activities that are clearly intended to fall within the scope of the legislation are not inadvertently excluded for reasons of form and not substance. The definition of ‘building work’ in both of the Bill’s predecessors (the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012*) contained the same ability to prescribe activities as ‘building work’ by regulation. An equivalent rule making power is also provided that would allow certain activities to be excluded from the definition of ‘building work’.

Building industry participants have supported the use of this rule making power as a mechanism to ensure that an appropriate boundary is set around the scope of the Bill, in particular in relation to the coverage of supply and transport activities and off-site prefabrication activities.² The ability to include or exclude activities by rules recognises the evolving nature of the industry, for example changes in technology that result in new work practices.

² Australian Industry Group submission to the Senate Education and Employment Legislation Committee, p. 5.

The approach has been to make the definition as clear as possible, in order to give clear guidance to participants in the industry, with the necessary flexibility to deal with any unintended consequences being addressed through the rule making power. Any rules that are made to adapt the definition of 'building work' will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any extension of this definition.

Trespass on personal rights and liberties—reversal of onus

Subclause 7(4)

The Committee has sought further information on a number of issues relating to the exclusion of action based on a reasonable concern about an imminent risk to health and safety from the definition of 'industrial action'.

Firstly, the Committee has sought the Minister's elaboration on why a person seeking to rely on this exclusion from the definition of 'industrial action' has the burden of proving that the paragraph applies. This approach was first adopted in the *Building and Construction Industry Improvement Act 2005*, and was also incorporated into the *Workplace Relations Act 1996*. The right of an employee to take action (such as ceasing work) based on a reasonable concern about an imminent risk to his or her health or safety is a critical element in ensuring that workers are able to protect their health and safety at work without falling afoul of the relevant restrictions on the taking of industrial action. However, this right is, unfortunately, the subject of repeated and deliberate abuse by certain building industry unions. The building and construction industry has had the benefit of specific scrutiny by the Cole Royal Commission. That Royal Commission found evidence of systemic misuse of occupational health and safety issues to advance industrial objectives, noting that:

Misuse of non-existent occupational health and safety issues for industrial purposes is rife in the building and construction industry. Genuine occupational health and safety hazards are also rife. When industrial action is taken allegedly because of occupational health and safety concern by workers or unions, the onus of establishing the legitimacy of the concerns should be on those taking that action on that basis. Individual workers know when occupational health and safety issues are, and are not, justified. The onus should therefore be on workers to establish that occupational health and safety concern justified industrial action, and that they did not unreasonably refuse their employer's direction to perform other safe available work.³

The misuse of health and safety concerns undermines the existing framework around the taking of industrial action in the building and construction industry and recklessly politicises health and safety concerns in a way that jeopardises safety standards in the industry. To combat this, it is appropriate to require parties who seek to rely on their reasonable concern about an imminent risk to their health and safety to be required to bear the burden of proving that concern in situations where there is doubt about the genuineness of the concern. This will discourage the misuse of this right while ensuring that parties who take action based on a reasonable concern are not disadvantaged.

The Committee has also sought a more detailed explanation as to why a legal burden is placed on employees by clause 7(4), rather than an evidential burden. It would undermine the effectiveness of the prohibition on unlawful industrial action if an employee seeking to rely on the exception held an evidential burden rather than a legal one. This is because the relevant employee is the party best placed to establish the reasonableness of their concern. Furthermore, it is appropriate that this is a legal burden of proof as it relates to matters that are both peculiarly within the knowledge of the defendant and which would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

As outlined in the Statement of Compatibility with Human Rights, the employee is not required to demonstrate that there was in fact an imminent risk to his or her safety, but that they reasonably held

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 73.

that concern. In this case, an employee will be required to prove that they held such a concern on the balance of probabilities and were acting in good faith. This is an appropriate standard to require given the serious and ongoing misuse of the exception in the industry.

Finally, the Committee has sought a more detailed explanation as to why employees will also be required to demonstrate that they did not unreasonably refuse to perform other available work that is safe and appropriate when seeking to rely on the exception. The Cole Royal Commission expressly recommended that the reverse onus also apply to this aspect of the exception, for the same reasons as outlined above.

Delegation of legislative power

Subclause 11(2)

The Committee has sought advice as to the justification for the rule making power contained in clause 11(2) that allows for the extension of the Bill to the exclusive economic zone or the waters above the continental shelf.

The ability to extend the operation of the Bill in these zones through rules is unremarkable and mirrors section 33 of the *Fair Work Act 2009*. The ability to extend the coverage of the Bill in these areas is necessary in light of the ongoing evolution in the way that building work is undertaken in these areas. This will ensure that the Bill is able to be adapted to meet these changing circumstances. Any rules that are made to extend the coverage of the Bill will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight.

Undue dependence upon insufficiently defined powers

Delegation of legislative power

Paragraphs 19(1)(d) and 40(1)(c)

The Committee has sought advice as to why it is necessary to allow delegation of the ABC Commissioner and Federal Safety Commissioner's powers and functions to 'a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph'.

Both the ABC Commissioner and the Federal Safety Commissioner have a wide range of powers and functions. The ability to delegate specific powers and functions to other persons is an important tool in allowing them to manage these obligations and ensure that they are able to effectively and efficiently manage the workload that comes with these positions.

In the majority of cases, powers will be delegated to officers who are specifically listed in clauses 19 and 40, however the nature of the work that is undertaken by the respective Commissioners means that, in some cases, the most appropriate person to exercise the power or function may not fall within that specific list (because particular knowledge or expertise may be required). In these situations it may be necessary for the ABC Commissioner or Federal Safety Commissioner to delegate to persons with the appropriate skills and knowledge.

A range of safeguards are included in the Bill to ensure that any delegations by the ABC Commissioner and the Federal Safety Commissioner are transparent and able to be scrutinised by both Parliament and any other interested party:

- Rules that are made to prescribe a person for these purposes will be subject to disallowance by both Houses of Parliament, which will ensure that there is an appropriate degree of Parliamentary oversight.
- When delegating powers and functions, the Bill requires that Commissioners must publish details of the delegation as soon as practicable after the delegation takes place. All delegations may be subject to directions regarding how the delegate is able to exercise the powers or functions with which they have been vested, and if these directions are of general application they are taken to be a legislative instrument and therefore subject to oversight by Parliament.

- The ABC Commissioner is only able to delegate his or her power to issue examination notices to either a Deputy ABC Commissioner or, if no Deputy Commissioner has been appointed, to a Senior Executive Service (SES) employee or acting SES employee.

Broad discretionary power

Subclause 21(3)

The Committee has stated that it may be desirable to indicate with more detail the nature of suitable qualifications or experience for the appointment of a person as ABC Commissioner, but has left the question of whether the proposed approach is appropriate to the Senate as a whole.

The approach taken to the appointment of the ABC Commissioner mirrors the equivalent provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* and is the same approach taken to the appointment of the Fair Work Ombudsman under the *Fair Work Act 2009*. The appointment is also subject to the Australian Government Merit and Transparency Policy that is administered by the Australian Public Service Commission.

Merits review – provision of reasons

Clause 28

The Committee has stated that the provision relating to the termination of the ABC Commissioner's appointment does not specifically provide for the provision of reasons in the event of termination and has sought advice as to whether consideration has been given to including such a requirement in the Bill.

Clause 28 of the Bill mirrors the provisions in both the *Building and Construction Industry Improvement Act 2005* and the *Fair Work (Building Industry) Act 2012* which also do not include a requirement that the Minister provide reasons if he or she terminates the appointment of a Commissioner. Other comparable legislation, including the *Safe Work Australia Act 2008* and the *Asbestos Safety and Eradication Agency Act 2013* also do not require the provision of reasons in such circumstances. This does not prevent the Minister providing the ABC Commissioner with reasons for the termination of the appointment, consistent with principles of procedural fairness.

Termination of the Commissioner's appointment can only be undertaken by the Minister in a very limited range of circumstances, which are clearly set out in the Bill. Where the grounds for termination can be clearly described (such as in the case of bankruptcy or absence from duty) the Minister must terminate the Commissioner's appointment. In relation to misbehaviour or physical or mental incapacity, the Minister 'may' terminate the Commissioner's appointment. This will ensure that the Minister has sufficient flexibility to consider all the relevant circumstances before terminating a Commissioner's appointment on these grounds.

Delegation of legislative power—determination of important matters by regulation

Clause 43

The Committee has sought advice as to whether consideration has been given to including more elements relating to the work, health and safety (WHS) accreditation scheme in the primary legislation, noting that most aspects of the scheme are established by legislative instrument.

The WHS accreditation scheme provides that, subject to certain financial thresholds, only builders who are accredited under the scheme can perform building work that is funded directly or indirectly by the Commonwealth. The specifics of the scheme, such as the relevant financial thresholds and the criteria that must be met for accreditation, are currently provided for in the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*. It is intended that this instrument will be preserved as rules made under clause 43 of the Bill following the passage of the Bill. It is not uncommon for these types of schemes to be contained in subordinate legislation as it allows flexibility to deal with changing circumstances in the building and construction industry and changes that may occur in the health and safety environment or legislative framework. The most recent amendment to the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*, for example, amended

the application of the scheme to make provision for joint ventures where one of the parties carries out work outside Australia and is therefore unable to meet the full requirements of the scheme. This flexibility ensures that the scheme is able to be adapted to meet changing circumstances and Commonwealth government procurement imperatives while continuing to ensure that only builders with a strong commitment to health and safety are able to enter into contracts for building work funded by the Commonwealth. It is noted that the rules are subject to disallowance by both Houses of Parliament. This ensures that there is an appropriate degree of Parliamentary oversight of any extension of the scheme.

Penalties

Clause 49 and Clause 81

The Committee has sought an explanation of the proposed approach to penalty levels in the Bill.

In relation to clause 49 of the Bill, the Committee notes that the penalties in the provision are significantly higher than the equivalent provision of the *Fair Work Act 2009*. This approach was explicitly recommended by the Cole Royal Commission, which considered the issue of strike pay at some length. In particular, the Cole Royal Commission noted that the then existing prohibitions on the claiming, payment and acceptance of strike pay were being widely disregarded in the industry.⁴ The Royal Commission found that *'head contractors, in particular, are willing to succumb to the financial demands of unions to buy industrial peace. This can include agreeing to substantial increases in wages and salaries, paying strike pay or numerous other contributions or donations that are demanded.'*⁵ The Royal Commission considered this stemmed from a willingness by union officials to flout their own obligations under the *Workplace Relations Act 1996* to not seek or accept strike pay. In reaching this conclusion, the Royal Commission had regard to statements made by Mr Joe McDonald, the then former Assistant Secretary of the Construction, Forestry, Mining and Energy Union Western Australian Branch, who was quoted as saying in relation to strike pay that *'Every time there's been a strike, I've asked for it'* and that he did not *'pay regard to the law in relation to [taking] a shilling from the ruling class and paying it to the workers'*.⁶

In formulating its recommendations, the Cole Royal Commission found that *'widespread disregard for the laws of the Commonwealth Parliament should not be tolerated. The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it.'*⁷ Given the apparent willingness of unions to demand strike pay despite the long standing prohibitions that have been contained in various iterations of the Commonwealth's workplace relations legislation it is vital that significant penalties be adopted in order to provide an effective deterrent. It is on this basis that the penalties for contraventions of the strike pay laws contained in the *Fair Work Act 2009* have been increased.

In relation to clause 81 of the Bill, the Committee has requested advice as to similar penalties in other Commonwealth legislation to assist in assessing whether the proposed approach is appropriate.

The Government's intention is to restore penalties to the levels set by the *Building and Construction Industry Improvement Act 2005* because the implementation of the *Fair Work (Building Industry) Act 2012* has in its view demonstrated that lower penalties are inadequate in achieving real change in the industry. The government consider that the economic and industrial performance of the building and construction industry improved while the ABCC existed. During its period administering the industry specific laws and penalties, the ABCC provided economic benefits for consumers, higher levels of productivity and fewer days lost to industrial action. Finally, it is important to note that the penalties represent the maximum penalty that may be imposed and not a fixed or average penalty.

⁴ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 236.

⁵ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 206.

⁶ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 25.

⁷ *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 237.

Comparable penalties are found in the *Competition and Consumer Act 2010*, which provides for a maximum pecuniary penalty of \$750,000 for conduct by a body corporate that breaches the secondary boycott provisions of that Act. A \$500,000 penalty applies to individuals. Similarly, penalties in the *Australian Securities and Investment Commission Act 2001* can be as high as \$1.7 million for conduct by a body corporate and \$340,000 for an individual.

Trespass on personal rights and liberties—reversal of onus

Clause 57

The Committee has sought further advice as to the justification for, and fairness of, the reversal of the onus of proof in relation to contraventions of clause 47 of the Bill (relating to unlawful picketing) and Part 2 of Chapter 6 of the Bill (coercion and discrimination).

As noted in the extract from the Statement of Compatibility with Human Rights that is quoted by the Committee, Chapter 6 of the Bill is modelled on Part 3-1 of Chapter 3 of the *Fair Work Act 2009*. The presumption has been included because, in the absence of a presumption relating to the reasons for which certain actions are taken, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. This presumption has also been extended to the prohibition on unlawful picketing that is contained in clause 47 of the Bill as picketing action is only prohibited if it is motivated by purposes listed in the provision or is otherwise unlawful. As with the prohibitions in Chapter 6, it would be extremely difficult, if not impossible, for a complainant to establish a person's motivation for the purposes of clause 47.

The presumption set out in clause 57 of the Bill applies unless the person proves otherwise on the balance of probabilities. As noted in the recent case of *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, displacing a presumption such as the one contained in clause 57 of the Bill only requires a search for the relevant person's 'real or actual intents' but does not extend to displacing an attributed intent derived from presumptions of a different kind.⁸ In practice, when doing this a person will be free to produce relevant evidence that demonstrates their actual intent when undertaking the action in question. In the case of unlawful picketing, for example, it would be open to a person who had engaged in picketing action to present evidence of their motivation for engaging in that behaviour. Clearly the evidence will vary depending on the nature of the matter but could take the form of documentary evidence such as email correspondence, or testimony from other parties engaged in the picketing activity directed at demonstrating that the activity resulted from an alternative motivation.

Trespass on personal rights and liberties—privacy

Clause 61

In relation to the ABC Commissioner's ability to issue a written notice to a person requiring them to give information, produce documents or attend before the ABC Commissioner, the Committee has noted that the Statement of Compatibility with Human Rights contains a detailed justification for the clause and also noted that there are a number of safeguards to promote the appropriate implementation of the examination notice regime. In light of these circumstances, the Committee has left the question of whether the proposed approach is appropriate to the Senate as a whole.

Insufficiently defined administrative powers—broad delegation of powers

Paragraphs 66(1)(c) and 68(1)(c)

The Committee has sought advice as to the justification for the ability of the ABC Commissioner and the Federal Safety Commissioner to appoint consultants as ABC Inspectors and Federal Safety Officers respectively.

The ability of the ABC Commissioner and the Federal Safety Officer to appoint consultants is an important tool to allow them to engage persons with relevant experience or expertise on an ad hoc

⁸ *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160 at paragraph 84.

basis. This is particularly vital given the wide variety of building work that will fall within the scope of the Bill which will require specialised knowledge to regulate appropriately. To effectively support the work of the ABC Commissioner, it may be necessary to allow such consultants to exercise the power and functions of either ABC Inspectors or Federal Safety Officers. The Federal Safety Commissioner, for example, makes extensive use of consultants due to the specialist skills required of Federal Safety Officers, such as relevant lead or principal auditor certifications, familiarity with relevant Australian Standards and the ability to assess applications across all Australian jurisdictions.

There are limitations in place to ensure that consultants are only engaged where necessary and appropriate. As noted by the Committee, both the ABC Commissioner and the Federal Safety Commissioner must be satisfied that the consultant in question is ‘an appropriate person to be appointed as an inspector’ before they are able to make such an appointment. Consultants may only be engaged under clause 32 and clause 42 where they have suitable qualifications and experience to assist the ABC Commissioner and Federal Safety Commissioner respectively. If appointed as inspectors, consultants must comply with any direction issued by the ABC Commissioner and the Federal Safety Commissioner respectively.

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

The Committee has sought advice as to why it is not possible to comprehensively provide the purposes for which inspectors may exercise their compliance power in the primary legislation.

The ability to expand the range of circumstances in which inspectors may exercise compliance powers has been included so that the prescribed functions and powers may be adapted to reflect changing circumstances in the building and construction industry. The industry is dynamic and new unforeseen regulatory challenges may arise which require a swift response.

A rule that seeks to add new purposes for which ABC Inspectors and Federal Safety Officers can exercise compliance powers will be a legislative instrument and therefore subject to disallowance by Parliament. Further, this kind of provision is not unusual. Section 706 of the *Fair Work Act 2009* includes an identical ability to expand the range of circumstances in which inspectors can exercise compliance powers.

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant

Clause 72

The Committee has sought a justification of the need for the approach taken to the power of authorised inspectors to enter premises under the Bill, particularly whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements and requirements that guidelines for the implementation of these powers be developed.

The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the *Fair Work Act 2009*, with some minor amendments to reflect the approach taken in the *Building and Construction Industry Improvement Act 2005*. The approach in the Bill is accordingly consistent with a long history of inspector powers in industrial legislation. Similar powers are found in other industrial legislation such as the *Work Health and Safety Act 2011*.

The *Guide to Framing Commonwealth Offences* quotes the Committee as stating that entry without consent or judicial warrant should only be allowed in a very limited range of circumstances. It is the Government’s view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, this would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore,

resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

In relation to senior executive authorisation for the exercise of the powers, such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. The unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

Finally, the Committee has sought views on whether consideration has been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of employment of Fair Work Building Industry Inspectors. As such, ABC inspectors will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such guidelines. Where the ABC Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The ABC Commissioner will also be able to adopt administrative guidelines to inform ABC inspectors on the use of their powers and exercise of their functions. Any such document would be designed to provide practical, up-to-date advice to ABC inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

**Trespass on personal rights and liberties—definition of offence, ‘reasonable excuse’
Subclauses 76(3), 77(3) and 99(8)**

The Committee has sought advice as to the justification for the use of the defence of ‘reasonable excuse’ in relation to failure to comply with a request to a person to provide their name and address, a record or document or a compliance notice.

The *Guide to Framing Commonwealth Offences* notes that the defence of ‘reasonable excuse’ should not be applied unless it is not possible to design more specific defences. In the cases highlighted by the Committee it would be impossible to list specific defences given the broad range of circumstances that could justify a person’s failure to comply with the request from the inspector or the compliance notice. In this way the wide array of factors that may constitute a ‘reasonable excuse’ provides an important safeguard to individuals. The term ‘reasonable excuse’ is used in the comparable provisions of the *Fair Work Act 2009* and its predecessor, the *Workplace Relations Act 1996*. The long-standing use of the term ‘reasonable excuse’ in comparable contexts and the case law that has developed in the area will assist both individuals and the regulator regarding the scope of this term.

What is a reasonable excuse will depend on all the circumstances. For example, in the case of a person failing to comply with a request to provide their name and address, a person may have a reasonable excuse if he or she could not understand or respond to the request due to a disability. In the case of a failure to produce a record or document a reasonable excuse in such an instance would be where the documents to be produced were previously removed by the police or another regulatory authority. Finally, in the case of a failure to comply with a compliance notice that has been issued under the Bill, a reasonable excuse could be if the person did not receive the compliance notice and was not aware of its existence.

**Trespass on personal rights and liberties—reversal of onus
Clause 93**

The Committee has sought advice as to the justification for the reversal of onus proposed in clause 93.

Clause 93 is a model provision that is taken from clause 99 of the Regulatory Powers (Standard Provisions) Bill 2013. The explanatory memorandum to the Bill explains that this clause means that if a person wishes to rely on a defence they bear the evidential onus of proving that defence. This is a general statement of how the evidential burden will apply in relation to the Bill and does not act to reverse the onus of proof itself. The reasons for reversing the onus of proof in clauses 7 and 57 are discussed above.

**Trespass on personal rights and liberties—self-incrimination
Clauses 102 and 104**

The Committee has sought a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary.

The construction industry provides many jobs for workers in small business, large enterprises and contractors. It is critical to a productive, prosperous and internationally competitive Australia. The Coalition Government recognises the importance of an industry that is vital to job creation and which is essential to Australia's economic and social well-being.

The establishment of the ABCC in 2005 provided a genuinely strong watchdog for the building and construction industry. The ABCC was responsible for decreased lawlessness in the industry and significant productivity gains that benefitted every Australian and the Australian economy as a whole.

As highlighted by the Committee, the Cole Royal Commission considered that the abrogation of the privilege against self-incrimination was necessary on the grounds that the regulator would otherwise not be able to adequately perform its functions due to the closed culture of the industry. It is evident that the findings of the Cole Royal Commission are as relevant today as they were at the time of their initial publication with a culture of silence remaining prevalent in the building and construction industry.

The privilege against self-incrimination is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to perform their compliance functions, including monitoring compliance with the Bill and other designated building laws. The production of documents will be a key method of allowing inspectors to effectively investigate whether the Bill or a designated building law is being complied with and to collect evidence to bring enforcement proceedings. It means that all relevant information is available to them. If the ABCC is constrained in its ability to collect evidence, the entire regulatory scheme may be undermined. Finally, the approach adopted in the Bill is also consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.

The Committee has also sought information on why the use and derivative use immunities in relation to these provisions are limited to criminal proceedings for information obtained when an authorised officer enters premises under paragraph 74(1)(d), under a notice under subclause 77(1), or from documents referred to in subclauses 104(a) and 104(b). The application of use and derivative use immunity in relation to criminal proceedings recognises the severe consequences that can flow from a criminal prosecution and act to encourage parties to comply with requests for information without fear of criminal sanction. Application of the immunities to civil proceedings, however, would severely undermine the ability of the regulator to take enforcement action for breaches of the Bill. It would prevent the use of information that has been provided to inspectors during the course of their investigations—as well as any information, document or thing obtained as a direct or indirect consequence of the use of these powers—from being used in civil proceedings against the individual who provided information or had custody of or access to the document at the time. The extension of the immunities to civil proceedings may also create an incentive for individuals to refuse any cooperation with the regulator unless information has been formally requested by an inspector under

Division 3 of Part 3 of the Bill. This is consistent with the approach taken in the *Fair Work Act 2009* which also provides that a record or document obtained under the comparable paragraphs are not admissible in evidence against the individual in criminal (but not civil) proceedings.

Trespass on personal rights and liberties—inappropriate delegation of legislative power
Subclause 120(3)

The committee has sought advice as to the justification for the rule making power in clause 120 that provides for certain rules to take effect from the commencement of the subsection for which the rules are to be made if those rules are made within 120 days.

This provision was included to allow for modification to the operation of the Bill in order to prevent unforeseen difficulties that may arise in the early stages of implementing the Bill. The time limit on the use of this provision will ensure that its use will be limited. Any such rules will be subject to disallowance by both Houses of Parliament. This will ensure that there is an appropriate degree of Parliamentary oversight of any rules that seek to have retrospective effect.

Fair Work (Registered Organisations) Amendment Bill 2013

The Government's policy

The Committee raised a number of concerns with the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) related to proposed offence provisions that have been based on provisions of the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). As explained in the Statement of Compatibility with Human Rights which accompanied the Bill, many of the provisions of the Bill are based on the regulation of companies under the Corporations Act and the ASIC Act.

In particular, the proposed Registered Organisations Commissioner (RO Commissioner) has been given a range of information gathering powers which, along with the new offence provisions, are designed to ensure compliance with the framework. These powers and new offence provisions replicate, with minor modification, powers and offences under the ASIC Act. It is the Government's position that to ensure that the new Registered Organisations Commission (RO Commission) can effectively investigate breaches or potential breaches of the RO Act, it is necessary for the relevant ASIC Act offences to be replicated so that the RO Commission has enforcement tools that are appropriate and sufficient to carry out its functions.

The Government accepts that registered organisations are not corporations and that these organisations should not be directly covered by the Corporations Act or ASIC Act. It is the Government's position that each provision of the Bill that replicates a Corporations Act or ASIC Act provision is necessary and appropriate to establish a regulatory framework sufficient to meet the Government's policy objectives.

Trespass on personal rights and liberties – penalties various

The Committee has requested clarification with respect to three matters relating to penalties proposed under the Bill. They are:

1. The extent of similarities between offences introduced by the Bill and offences under the Corporations Act; and
2. Whether the penalties are in any instance higher than in relation to offences under the Corporations Act
3. Whether the increased penalty in proposed item 228 is higher than other similar offences and the justification for the proposed approach.

With respect to the first matter, the table at Appendix A sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. While the Alert Digest only refers to offences under the Corporations Act the table shows that most new offences under the Bill come from the ASIC Act. The relevant provisions of the Bill largely replicate provisions of these Acts.

With respect to the second matter, the table at Appendix B compares the penalties for the proposed offences in the Bill and corresponding offences under the Corporations Act and the ASIC Act. The table makes clear that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, 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 penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) are greater than the equivalent ASIC Act penalty (5 penalty units) to ensure consistency with other similar offences under the Bill.

Finally, in relation to the third matter, the penalties for the offences proposed in item 226 and 227 at item 228, proposed subsection 337(1), are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. 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.

The only people who have anything to fear from these provisions of this Act are those who break the law and do the wrong thing – as found by a Court of Law.

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

The Committee has requested a more detailed explanation of why strict liability is required to secure adequate enforcement of the obligations in Schedule 2, item 230, proposed section 337AA.

In accordance with the Government's policy, 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). It is the Government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing Commonwealth Offences* (p.24), 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.

The Committee has also sought advice as to whether, if the strict liability offences are to be maintained, consideration has been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, I expect 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.⁹

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

As noted by the Committee, the use of a defence in proposed subsections 337(2) to (4) and 337AB(2) (items 229 and 230) shifts the burden of proof from the prosecution to the defence. The Committee has sought advice as to the justification for reversing the onus of proof for these provisions.

Proposed subsections 337(2) to (4) and 337AB(2) replicate subsections 63(5)–(8) of the ASIC Act. In accordance with the Government's policy for the regulation of registered organisations, these amendments ensure that the defences to the offences referred to in those provisions are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof. In this respect I note that the *Guide to Framing Commonwealth Offences* provides that an evidential burden of proof should generally apply to a defence.¹⁰

⁹ In this regard, I refer the Committee to the ASIC website:
<https://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Investigations%20and%20enforcement>.

¹⁰ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 Edition, Attorney-General's Department, Commonwealth Government, p 51.

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.

It is also important 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. The 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.

Trespass on personal rights and liberties – reversal of onus of proof

Schedule 2, item 230, proposed subsection 337AC(2)

The Committee has also sought advice as to the justification for the reversal of proof and the higher standard of a legal burden of proof in item 230 (proposed subsection 337AC(2)) of the Bill. 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 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. The maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

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.

Trespass on personal rights and liberties—privilege against self-incrimination

Schedule 2, item 230, proposed section 337AD

The Committee has sought further justification for the abrogation of the privilege against self-incrimination in item 230, proposed section 337AD of the Bill. 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 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.

The inclusion of a use immunity but not a derivative use immunity in proposed section 337AD is also important. 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 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...*¹¹

Similarly, 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.

¹¹ Corporations Legislation (Evidence) Amendment Bill 1992, explanatory memorandum p 1.

The Committee has also sought information in relation to why a person must ‘claim’ the privilege. 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.

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

The Committee has sought advice as to the effect of, and rationale for, the provisions of item 230, proposed sections 337AF–337AK, and specifically whether these provisions are designed to broaden the scope of admissible evidence against a defendant.

These provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation.¹² . Importantly, as with 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).

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.

Proposed section 337AF 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. Importantly, 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.

¹² *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301.

Proposed section 337AG 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). However, 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).

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.

Proposed section 337AK 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. This 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.

Appendix A

Comparison of offences under the Bill, the Corporations Act and ASIC Act

<p>Proposed section in the Bill</p>	<p>Equivalent section in the <i>Corporations Act 2001</i> and <i>Australian Securities and Investment Commission Act 2001</i></p>
<p>Item 163, proposed section 290A</p> <p>Good faith—officers of organisations and branches</p> <p>(1) An officer of an organisation or a branch commits an offence if he or she:</p> <p>(a) is reckless; or</p> <p>(b) is intentionally dishonest; and fails to exercise his or her powers or discharge his or her duties:</p> <p>(c) in good faith in the best interests of the organisation; or</p> <p>(d) for a proper purpose.</p> <p>Use of position—officers and employees of organisations and branches</p> <p>(2) An officer or employee of an organisation or a branch commits an offence if the officer or employee uses his or her position dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation; or</p> <p>(b) recklessly as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or causing detriment to the organisation.</p> <p>Use of information—officers and employees of organisations and branches</p> <p>(3) A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch commits an offence if he or she uses the information dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation; or</p> <p>(b) recklessly as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or causing detriment to the organisation.</p>	<p><i>Corporations Act 2001</i>, section 184</p> <p>Good faith—directors and other officers</p> <p>(1) A director or other officer of a corporation commits an offence if they:</p> <p>(a) are reckless; or</p> <p>(b) are intentionally dishonest; and fail to exercise their powers and discharge their duties:</p> <p>(c) in good faith in the best interests of the corporation; or</p> <p>(d) for a proper purpose.</p> <p>Use of position--directors, other officers and employees</p> <p>(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or</p> <p>(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.</p> <p>Use of information--directors, other officers and employees</p> <p>(3) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or</p> <p>(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.</p>
<p>Item 230, proposed section 337AB</p>	<p><i>ASIC Act 2001</i>, section 65</p>

<p>Obstructing person acting under this Part</p> <p>(1) A person must not:</p> <p>(a) engage in conduct that results in the obstruction or hindering of a person in the exercise of a power under this Part; or</p> <p>(b) engage in conduct that results in the obstruction or hindering of a person who is executing a warrant issued under section 335L.</p> <p>(2) Subsection (1) does not apply to the extent that the person has a reasonable excuse.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the Criminal Code).</p> <p>(3) The occupier, or person in charge, of premises that a person enters under a warrant issued under section 335L must not intentionally or recklessly fail to provide to that person all reasonable facilities and assistance for the effective exercise of his or her powers under the warrant.</p>	<p>Obstructing person acting under this Part</p> <p>(1) A person must not:</p> <p>(a) engage in conduct that results in the obstruction or hindering of a person in the exercise of a power under this Part; or</p> <p>(b) engage in conduct that results in the obstruction or hindering of a person who is executing a warrant issued under section 36.</p> <p>(1A) Subsection (1) does not apply to the extent that the person has a reasonable excuse.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the Criminal Code.</p> <p>(2) The occupier, or person in charge, of premises that a person enters under a warrant issued under section 36 must not intentionally or recklessly fail to provide to that person all reasonable facilities and assistance for the effective exercise of his or her powers under the warrant.</p>
<p>Item 230, proposed section 337AC</p> <p>Concealing documents relevant to investigation</p> <p>(1) If the Commissioner, or a person or body to whom the Commissioner has delegated the conduct of an investigation, is investigating, or is about to investigate, a matter, a person must not:</p> <p>(a) in any case—engage in conduct that results in the concealment, destruction, mutilation or alteration of a document relating to that matter; or</p> <p>(b) if a document relating to that matter is in a particular State or Territory—engage in conduct that results in the taking or sending of the document out of that State or Territory or out of Australia.</p> <p>(2) It is a defence to a prosecution for a contravention of subsection (1) 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.</p> <p>Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2) (see section 13.4 of the Criminal Code).</p>	<p>ASIC Act 2001, section 67</p> <p>Concealing books relevant to investigation</p> <p>(1) Where ASIC is investigating, or is about to investigate, a matter, a person must not:</p> <p>(a) in any case—engage in conduct that results in the concealment, destruction, mutilation or alteration of a book relating to that matter; or</p> <p>(b) if a book relating to that matter is in a particular State or Territory—engage in conduct that results in the taking or sending of the book out of that State or Territory or out of Australia.</p> <p>(2) It is a defence to a prosecution for a contravention of subsection (1) if it is proved that the defendant intended neither to defeat the purposes of the corporations legislation, nor to delay or obstruct an investigation, or a proposed investigation, by ASIC.</p> <p>Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2), see section 13.4 of the Criminal Code.</p>
<p>Item 230, proposed section 337AE</p>	<p>ASIC Act 2001, section 69</p>

<p>Legal professional privilege</p> <p>(1) This section applies if:</p> <p>(a) under this Part, a person requires a lawyer:</p> <p>(i) to give information; or</p> <p>(ii) to produce a document; and</p> <p>(b) giving the information would involve disclosing, or the document contains, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.</p> <p>(2) The lawyer is entitled to refuse to comply with the requirement unless the person to whom, or by or on behalf of whom, the communication was made, consents to the lawyer complying with the requirement.</p> <p>(3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:</p> <p>(a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and</p> <p>(b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and</p> <p>(c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the document, or the part of the document, containing the communication.</p>	<p>Legal professional privilege</p> <p>(1) This section applies where:</p> <p>(a) under this Part, Division 3 of Part 10, or Division 2 of Part 11, a person requires a lawyer:</p> <p>(i) to give information; or</p> <p>(ii) to produce a book; and</p> <p>(b) giving the information would involve disclosing, or the book contains, as the case may be, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.</p> <p>(2) The lawyer is entitled to refuse to comply with the requirement unless:</p> <p>(a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is being wound up—the liquidator of the body; or</p> <p>(b) otherwise—the person to whom, or by or on behalf of whom, the communication was made; consents to the lawyer complying with the requirement.</p> <p>(3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:</p> <p>(a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and</p> <p>(b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and</p> <p>(c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, or the part of the book, containing the communication.</p>
<p>Items 226, 227 and 229, proposed section 337</p> <p>Offences in relation to investigation by Commissioner</p> <p>(1) A person commits an offence if:</p> <p>(a) the person fails, intentionally or recklessly, to comply with a requirement under subsection 335(2):</p> <p>(i) to give information or produce a document; or</p> <p>(ii) to attend before the Commissioner or delegate; or</p> <p>(iii) to give to the Commissioner such other reasonable assistance as is specified in a notice under that subsection; or</p> <p>(b) the person gives information, or produces a</p>	<p>ASIC Act 2001, section 63</p> <p>Non-compliance with requirements made under this Part</p> <p>(1) A person must not intentionally or recklessly fail to comply with a requirement made under:</p> <p>(a) section 19; or</p> <p>(b) subsection 21(3); or</p> <p>(c) section 30, 30A, 31, 32A, 33 or 34; or</p> <p>(d) subsection 37(9); or</p> <p>(e) section 38; or</p> <p>(f) section 39.</p> <p>(2) A person must not fail to comply with a requirement made under section 41, 42, 43 or 44.</p> <p>(3) A person must not fail to comply with a requirement made under subsection 21(1) or 29(2), paragraph 24(2)(a) or subsection 49(3) or</p>

<p>document, in purported compliance with a requirement under subsection 335(2), and the person knows, or is reckless as to whether, the information or document is false or misleading; or</p> <p>(c) when attending before the Commissioner or delegate in accordance with a requirement under subsection 335(2), the person makes a statement, whether orally or in writing, and the person knows, or is reckless as to whether, the statement is false or misleading; or</p> <p>(d) the person fails, intentionally or recklessly, to comply with:</p> <p>(i) a requirement under subsection 335D(3) to answer a question; or</p> <p>(ii) a requirement under subsection 335N(9) to explain a matter about the content of a document or to which a document relates; or</p> <p>(iii) a requirement under section 335P to explain where documents may be found, and who last had possession, custody or control of the document and where that person may be found; or</p> <p>(iv) a requirement under section 335Q to identify property of an organisation and explain how the organisation has kept account of that property.</p> <p>... (2) Paragraphs (1)(a) and (d) do not apply to the extent that the person has a reasonable excuse.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in subsections (2) to (4) (see subsection 13.3(3) of the Criminal Code).</p>	<p>58(1), (2) or (4).</p> <p>(4) A person must comply with a requirement made under subsection 23(2) or 48(2).</p> <p>(5) Subsections (1), (1A), (2) and (3) do not apply to the extent that the person has a reasonable excuse.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p>(6) Paragraph (1)(d) does not apply to the extent that the person has explained the matter to the best of his or her knowledge or belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p>(7) Paragraph (1)(e) does not apply to the extent that the person has stated the matter to the best of his or her knowledge or belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p>(8) Paragraph (1)(f) does not apply to the extent that the person has, to the extent that the person is capable of doing so, performed the acts referred to in paragraphs 39(a) and (b).</p> <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p>64 False information (ASIC Act 2001)</p> <p>(1) A person must not:</p> <p>(a) in purported compliance with a requirement made under this Part; or</p> <p>(b) in the course of an examination of the person; give information, or make a statement, that is false or misleading in a material particular.</p> <p>(2) A person must not, at a hearing, give evidence that is false or misleading in a material particular.</p> <p>(3) It is a defence to a prosecution for a contravention of subsection (1) or (2) if it is proved that the defendant, when giving the information or evidence or making the statement, believed on reasonable grounds that it was true and not misleading.</p> <p>Note: A defendant bears a legal burden in relation to the matter in subsection (3), see section 13.4 of the Criminal Code.</p>
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Source: Fair Work (Registered Organisations) Amendment Bill 2013, *Corporations Act 2001*, *Australian and Securities Investment Commission Act 2001*.

Section 337AA proscribes various sections as being strict liability offences. Proposed section 337AA provides:

“337AA Strict liability offences

- (1) A person commits an offence of strict liability if the person:
 - (a) fails to comply with a requirement under subsection 335D(1) to take an oath or make an affirmation; or
 - (b) contravenes subsection 335E(2) (questioning to take place in private); or
 - (c) fails to comply with a requirement under paragraph 335G(2)(a) in relation to a record of statements made during questioning; or
 - (d) contravenes section 335H (conditions on use of copies of records of statements made during questioning).
- (2) A person commits an offence of strict liability if the person fails to comply with a requirement under 335F(2) to stop addressing an investigator, or questioning an attendee.
- (3) Subsections (1) and (2) do not apply to the extent that the person has a reasonable excuse.

The following table compares these offences with their equivalent in the ASIC Act.

<p>Item 230, proposed subsection 337AA(1)(a)</p> <p>“(1) A person commits an offence of strict liability if the person: (a) fails to comply with a requirement under subsection 335D(1) to take an oath or make an affirmation; or”</p> <p>Item 223, proposed subsection 335D(1)</p> <p>“335D Requirements made of attendee</p> <ol style="list-style-type: none"> (1) The investigator may question the attendee on oath or affirmation and may, for that purpose: <ol style="list-style-type: none"> (a) require the attendee to either take an oath or make an affirmation; and (b) administer an oath or affirmation to the attendee. <p>Note: Failure to comply with a requirement made under this subsection is an offence (see section 337AA).”</p>	<p>ASIC Act 2001, subsection 63(3)</p> <p>“(3) A person must not fail to comply with a requirement made under subsection 21(1) ...”</p> <p>ASIC Act 2001, subsections 21(1) and (1A)</p> <p>“21 Requirements made of examinee</p> <ol style="list-style-type: none"> (1) The inspector may examine the examinee on oath or affirmation and may, for that purpose: <ol style="list-style-type: none"> (a) require the examinee to either take an oath or make an affirmation; and (b) administer an oath or affirmation to the examinee. <p>Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).</p> <p>(1A) An offence under subsection 63(3) relating to subsection (1) of this section is an offence of strict liability.”</p>
<p>Item 230, proposed subsection 337AA(1)(b)</p> <p>“(b) contravenes subsection 335E(2) (questioning to take place in private); or”</p> <p>Item 223, proposed subsection 335E(2)</p> <p>“335E Questioning to take place in private</p> <p>...</p> <ol style="list-style-type: none"> (2) A person must not be present during the questioning unless he or she is: <ol style="list-style-type: none"> (a) the investigator or the attendee; or (b) the Commissioner or a member of staff assisting the Commissioner authorised by the Commissioner to be present; or 	<p>ASIC Act 2001, section 22</p> <p>“22 Examination to take place in private</p> <ol style="list-style-type: none"> (1) The examination must take place in private and the inspector may give directions about who may be present during it, or during a part of it. (2) A person must not be present at the examination unless he or she: <ol style="list-style-type: none"> (a) is the inspector, the examinee or a member; or (b) is a staff member approved by ASIC; or (c) is entitled to be present by virtue of: <ol style="list-style-type: none"> (i) a direction under subsection (1); or (ii) subsection 23(1). (3) Subsection (2) is an offence of strict liability. <p>Note: For <i>strict liability</i>, see section 6.1 of the <i>Criminal Code</i>.”</p>

<p>(c) is entitled to be present:</p> <ul style="list-style-type: none"> (i) because of a direction under subsection (1); or (ii) because the person is the attendee’s lawyer, or another person accompanying the attendee as mentioned in paragraph 335(3)(a). <p>Note: Failure to comply with this subsection is an offence (see section 337AA).”</p>	
<p>Item 230, proposed subsection 337AA(1)(c)</p> <p>“(c) fails to comply with a requirement under paragraph 335G(2)(a) in relation to a record of statements made during questioning; or”</p> <p>Item 223, proposed subsection 335G</p> <p>“335G Record of statements</p> <p>(1) The investigator may, and must if the attendee so requests, cause a record to be made of statements made during the questioning.</p> <p>(2) If a record made under subsection (1) is in writing or is reduced to writing:</p> <ul style="list-style-type: none"> (a) the investigator may require the attendee to read it, or to have it read to him or her, and may require him or her to sign it; and (b) the investigator must, if requested in writing by the attendee to give to the attendee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the investigator imposes. <p>Note: Failure to comply with a requirement under paragraph (2)(a) is an offence (see section 337AA).”</p>	<p>ASIC Act 2001, subsection 63(3)</p> <p>“(3) A person must not fail to comply with a requirement made under subsection ... 24(2)(a)...”</p> <p>ASIC Act 2001, section 24</p> <p>“24 Record of examination</p> <p>(1) The inspector may, and must if the examinee so requests, cause a record to be made of statements made at the examination.</p> <p>(2) If a record made under subsection (1) is in writing or is reduced to writing:</p> <ul style="list-style-type: none"> (a) the inspector may require the examinee to read it, or to have it read to him or her, and may require him or her to sign it; and (b) the inspector must, if requested in writing by the examinee to give to the examinee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the inspector imposes. <p>Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).</p> <p>(3) An offence under subsection 63(3) relating to paragraph (2)(a) of this section is an offence of strict liability.</p> <p>Note: For <i>strict liability</i>, see section 6.1 of the <i>Criminal Code</i>.”</p>
<p>Item 230, proposed subsection 337AA(1)(d)</p> <p>“(d) contravenes section 335H (conditions on use of copies of records of statements made during questioning).”</p> <p>Item 223, proposed subsection 335H</p> <p>“335H Copies given subject to conditions</p> <p>If a copy is given to a person under subsection 335G(2) subject to conditions, the person, and any other person who has possession, custody or</p>	<p>ASIC Act 2001, section 25</p> <p>“25 Giving to other persons copies of record</p> <p>(1) ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person’s lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.</p> <p>(2) If ASIC gives a copy to a person under subsection (1), the person, or any other person who has possession, custody or control of the</p>

control of the copy or a copy of it, must comply with the conditions.

Note: Failure to comply with this section is an offence (see section 337AA).”

copy or a copy of it, must not, except in connection with preparing, beginning or carrying on, or in the course of, a proceeding:

(a) use the copy or a copy of it; or

(b) publish, or communicate to a person, the copy, a copy of it, or any part of the copy’s contents.

(2A) Subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(3) ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of a written record of the examination, or such a copy together with a copy of any related book.”

Appendix B

Comparison of proposed penalties under the Bill and the ASIC Act and Corporations Act

RO Amendment Bill proposed offence provision and penalty	Corresponding corporations legislation offence provision and penalty
Item 163, proposed section 290A 2,000 penalty units or imprisonment for 5 years, or both	Corporations Act, section 184 and Schedule 3 2,000 penalty units or imprisonment for 5 years, or both
Item 226, proposed paragraph 337(1)(a), item 227, proposed paragraph 337(1)(d) and item 228, amended subsection 337(1) 100 Penalty units or imprisonment for 2 years, or both	ASIC Act, subsection 63(1) 100 Penalty units or imprisonment for 2 years, or both
Item 223, proposed subsection 335D(1) and item 230, proposed paragraph 337AA(1)(a) 60 penalty units	ASIC Act, subsection 21(1) and subsection 63(3) 10 penalty units or imprisonment for 3 months, or both
Item 223, proposed subsections 335E(2) and item 230, proposed paragraph 337AA(1)(b) 60 penalty units	ASIC Act, subsection 22(2) 10 penalty units or imprisonment for 3 months, or both
Item 223, proposed paragraph 335G(2)(a) and item 230, proposed paragraph 337AA(1)(c) 60 penalty units	ASIC Act, paragraph 24(2)(a) and subsection 63(3) 10 penalty units or imprisonment for 3 months, or both
Item 223, proposed section 335H and item 230, proposed paragraph 337AA(1)(d) 60 penalty units	ASIC Act, section 26 10 penalty units or imprisonment for 3 months or both
Item 223, proposed subsection 335F(2) and item 230, proposed subsection 337AA(2) 60 penalty units	ASIC Act, subsection 23(2) and subsection 63(4) 5 penalty units
Item 230, proposed subsection 337AB(1) 100 penalty units or imprisonment for 2 years, or both	ASIC Act, subsection 65(1) 100 penalty units or imprisonment for 2 years, or both
Item 230, proposed subsection 337AB(3) 25 penalty units or imprisonment for 6 months, or both	ASIC Act, subsection 65(2) 25 penalty units or imprisonment for 6 months, or both
Item 230, proposed subsection 337AC(1) 200 penalty units or imprisonment for 5 years, or both	ASIC Act, subsection 67(1) 200 penalty units or imprisonment for 5 years, or both
Item 230, proposed subsection 337AE(3) 10 penalty units or imprisonment for 3 months, or both.	ASIC Act, subsection 69(3) 10 penalty units or imprisonment for 3 months, or both.