



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

ELEVENTH REPORT
OF
2014

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 2014

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

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

Bills	Page No.
Carbon Farming Initiative Amendment Bill 2014	546
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014	553

Carbon Farming Initiative Amendment Bill 2014

Introduced into the House of Representatives on 18 June 2014

Portfolio: Environment

Introduction

The committee initially commented on this bill in *Alert Digest No. 7 of 2014*. The Minister responded to the committee's comments in a letter dated 14 July 2014. The committee sought further information in relation to two matters and the Minister responded in letters dated 14 and 28 August 2014. The committee's further comments in relation to the issue of migrating the content of regulations into legislative rules are contained in the committee's *Tenth Report of 2014* (pp 418–421). The committee's further comments in relation to the issue of incorporating material by reference are detailed below. A copy of the relevant letter is attached to this report.

Alert Digest No. 7 of 2014 - extract

Background

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

Alert Digest No. 7 of 2014 - extract

Delegation of legislative power—incorporating material by reference

Insufficient parliamentary scrutiny

Schedule 1, item 14

The third point concerns matters that may be prescribed by regulations or rules and which incorporate material contained in another document 'as in force or existing from time to time'. The explanatory memorandum (at p. 74) seems to suggest that the regulations, or rules, could include highly technical, complex and changeable matters that will not be included in the subordinate legislation itself.

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

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

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

Minister's first response - extract

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

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

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

Why it is necessary to rely on material incorporated by reference

The Committee has asked why it is necessary to rely on material incorporated by reference. Material will most often be incorporated by reference in the legislative determinations for estimating emissions reductions from projects, known as 'methods'. Methods set out the rules by which these reductions will be measured and verified. These rules are technical in

nature and typically very detailed. They provide instructions on the measurement of different sources of emissions and other variables, and mathematical formula for calculating net reductions in emissions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The amended Act also provides for the Minister to seek the advice of the independent Emissions Reduction Assurance Committee before varying a method, including a model or

calculator incorporated into a method, except when the variation is of a minor nature. Advice from the Emissions Reduction Assurance Committee relevant to a variation of a method determination will be published on the Department's website (www.environment.gov.au), and similarly the revised method will be available through the Clean Energy Regulator website.

Committee's first response

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

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

Minister's further response - extract

In its *Ninth Report of 2014*, the Committee notes that some material intended to be incorporated by reference under the Bill (including ISO Standards) is only available at a cost and has sought advice about whether innovative solutions can be identified to provide free public access to such material.

As noted in my previous responses to the Committee (14 July and 14 August 2014), I am keen to ensure this issue is managed in a way that is consistent with the principle that the law be publicly and freely available.

Reducing regulatory burden is a priority for the Government. In making or amending legislation, I am mindful of regulatory impacts for individuals and businesses. Where material such as ISO standards has a cost, its incorporation by reference in methodology

determinations under the Emissions Reduction Fund is carefully considered and where possible, alternative options for compliance are provided.

For example, under the Carbon Farming Initiative, the number of methodology determinations that rely on meeting a formal standard are in the minority. Where they have been referenced, this has not resulted in any issues. This reflects that referencing technical matters such as ISO standards is a common business practice and one to which businesses operating under the relevant legislation are accustomed.

An alternative approach has been used in the Carbon Credits (Carbon Farming Initiative) (Reducing Greenhouse Gas Emissions by Feeding Dietary Additives to Milking Cows) Methodology Determination 2013 (F2013L01554), which uses a generic reference to the appropriate or relevant industry standard. This allows for the auditor and the Clean Energy Regulator to be satisfied as to the applicability of the standard and whether it had been achieved. It is also reasonable to assume that projects operating an activity in a particular industry are already aware of, and have access to standards that are appropriate or applicable to their industry and as such are not likely to incur additional costs. The flexibility to entertain such an approach in future methodology determinations is not constrained by the Bill.

Moreover, the overall objective of the Emissions Reduction Fund is to secure least cost carbon abatement and reducing the costs associated with creating carbon credits is an important element of this. Undue regulatory or compliance costs imposed on businesses would act against achievement of this objective.

The Department of the Environment will continue to make every effort to ensure that incorporating material by reference in methodology determinations under the Emissions Reduction Fund is only used where necessary and appropriate, and will examine possible innovative approaches that improve public access.

I trust that the advice outlined here adequately addresses the Committee's request.

Committee's further response

The committee thanks the Minister for this detailed response. The committee notes the Minister's statement that decisions to incorporate material by reference where there is a cost to access the material (such as ISO standards) are 'carefully considered and where possible, alternative options for compliance are provided.' Further, the Minister states that the number of methodology determinations under the Carbon Farming Initiative that rely on meeting a formal standard are in the minority and where they have been referenced, this has not resulted in any issues because 'referencing technical matters such as ISO standards is a common business practice and one to which businesses operating under the relevant legislation are accustomed'.

(continued)

The committee welcomes this additional information and the Minister's commitment to careful consideration of decisions to incorporate material by reference. The committee appreciates the context in which the referencing of this material is currently proposed and the Minister's indication that it mitigates against any scrutiny concern. However, the committee reiterates its general views about the incorporation of legislative provisions by reference to other documents, not only in relation to where there is a cost to access the material, but also more generally as the incorporation of material by reference raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny. The committee is concerned that such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms (for example if a generic reference is used inappropriately).

Noting the additional information provided by the Minister and the committee's comments outlined above, the committee leaves the question of whether the proposed approach in this provision is appropriate to the Senate as a whole.

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

Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014

Introduced into the House of Representatives on 24 June 2014

The bill received the Royal Assent on 30 June 2014

Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 8 of 2014*. The Minister responded to the committee's comments in a letter dated 26 August 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2014 - extract

Background

This bill is part of a package of four bills. The bill seeks to amend approximately 250 Acts across the Commonwealth to support the implementation of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and its related rules and instruments.

As a result of the implementation of the PGPA Act this bill will:

- replace references to the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997* with the equivalent provisions in the PGPA Act;
- simplify enabling legislation where provisions of the PGPA Act cover a matter previously dealt with in enabling legislation; and
- amend enabling legislation to clarify which matters (and to what extent) are covered by the PGPA Act and which matters (and to what extent) are covered by the enabling legislation, such as in the case of planning and reporting, or disclosure of interest arrangements where an entity may have additional obligations over and above those imposed through the PGPA Act.

Delegation of legislative power—incorporation by reference Schedule 1, item 24

Section 20A of the PGPA Act provides that an accountable authority of a Commonwealth entity may, by written instrument, give instructions to an official of the entity about any matter relating to the finance law (these instructions are known as ‘accountable authority instructions’).

Section 101 of the PGPA Act establishes a general rule-making power. Item 24 of this bill proposes to add subsection 101(4) which provides that:

...the rules may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in instructions given under section 20A of this Act as in force or existing from time to time.

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The committee also notes that ‘accountable authority instructions’ issued under section 20A of the PGPA Act are not legislative instruments and are therefore not subject to the publication and disallowance requirements outlined in the *Legislative Instruments Act 2003*.

The explanatory memorandum justifies the insertion of subsection 101(4) by noting, at page 17, that it:

...will support the operation of the PGPA rules that will support the implementation of the PGPA Act in such a way as to allow accountable authorities to take into account the nature of the entities, the level and scope of the risks inherent in the activities they undertake and the controls that need to be maintained.

Given that ‘accountable authority instructions’ may be incorporated into the rules, although the bill has already been passed by the Parliament, as is its usual practice, the committee still seeks the Minister’s advice as to whether such instructions will be publicly available and readily accessible and how any person affected by material incorporated by reference will become aware of any changes made to its content.

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

Minister's response - extract

Accountable authorities of Commonwealth entities may issue instructions under section 20A of the PGPA Act to their officials concerning the management of public resources for which an accountable authority is responsible. These instructions have a similar function to the Chief Executive's Instructions issued under the *Financial Management and Accountability Act 1997* (FMA Act) to provide direction to officials on the application of the finance law within the entity.

Accountable authorities' instructions, therefore, are of an administrative rather than a legislative nature. Subsection 20A(3) clarifies that these instructions are not considered legislative instruments to which the *Legislative Instruments Act 2003* would apply. While instructions are readily available to the officials affected, it may not always be appropriate for them to be made publicly available. For example, they may contain information that relates to internal processes for sensitive areas such as debt management; areas that may expose an entity to an increased risk of fraud, such as banking procedures; directions on methods for the detection of fraud; or mitigation and interdiction methods to deal with illegal activity. Instructions may also include delegation details which, if public, may open a risk that the identities of persons making sensitive decisions could be revealed to the general public in cases where it is not safe or otherwise appropriate to do so.

Committee response

The committee thanks the Minister for this response and **notes that it would have been useful if the key information above had been included in the explanatory memorandum.**

Alert Digest No. 8 of 2014 - extract

Delegation of legislative power Schedule 2, items 10–15

These items make minor modifications to section 32B but the provision, as provided for in the FFLA Act (No. 3) 2012, is largely retained.

In the committee's *Alert Digest No. 7 of 2012* the committee commented on paragraph 32B(1)(b). The committee noted that this provision enables the regulations to specify the

arrangements which will be authorised by the new statutory source of authority to make, vary or administer an arrangement or grant (under section 32B). Determining which arrangements and grants will attract this source of statutory authority through regulations (rather than primary legislation) was said to be ‘necessary so that the Government can continue these activities in the national interest’.

The committee has consistently expressed its preference that important matters be included in primary legislation whenever this is appropriate, and for the explanatory memorandum to outline a clear justification when the use of delegated legislation is proposed. In light of this, and the High Court’s reasoning in *Williams (No. 1)* (sometimes described as the School Chaplains’ Case), the committee stated that it expected a more detailed justification in the explanatory memorandum of the question of whether it is appropriate to delegate to the executive (through the use of regulations) how its powers to contract and to spend are to be expanded. Although the bill had already been passed by the Parliament, as is its usual practice the committee still sought the former Finance Minister’s advice as to the justification of this delegation of legislative power.

The former Finance Minister’s response was reported in the committee’s *11th Report of 2012* (pp 376–377). The former Minister stated that:

I understand the issue here is why is legislative authority for Government spending activities provided by delegated legislation rather than primary legislation.

Every year the Australian Government spends over \$300 billion. Over 75 per cent of this spending is made using special appropriations, that is spending authorised by legislation other than the annual appropriation Acts. However, given the range, frequency and, at times, urgency of Government spending, delegated legislation was favoured over primary legislation, providing a more practical method for authorising spending, while ensuring that the regulations that authorise spending activities are tabled in Parliament and are subject to scrutiny and disallowance by the Parliament on a case by case basis.

The initial list of over 450 spending activities was added to Schedule 1AA of the FMA Regulations by primary legislation, the FFLA Act (No. 3), and not by delegated legislation. Parliament considered and approved this list of spending activities. Parliament also agreed that, once the initial list of spending activities was prescribed by the FFLA Act (No. 3), regulations could be made to add, remove or amend spending activities.

In view of the important scrutiny concerns in relation to this provision, particularly in light of the High Court’s recent decision affirming *Williams (No. 1)*, although the bill has already been passed by the Parliament, as is its usual practice, the committee still seeks the current Minister’s advice as to whether any consideration has been given to amending this provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements and grants. The committee notes that if new spending activities are not to be authorised by primary legislation it would be possible to provide for scrutiny in a number of ways, for example by:

- requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or
- incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*);

and the committee also seeks the Minister's advice about these, or other possible options.

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

With the commencement of the operative provisions of the PGPA Act on 1 July 2014, the majority of the provisions in the FMA Act have been repealed and the Act renamed as the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act). Among the provisions retained in the FF(SP) Act is section 32B of the former FMA Act, which establishes legislative authority for the Government to make, vary and administer arrangements and grants through the *Financial Management and Accountability Regulations 1997* (FMA Regulations), including arrangements and grants for the purposes of programmes specified in the FMA Regulations.

At the time the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (PGPA(C&T) Act) was being developed and considered by the Parliament, the legislative authority to spend mechanism in section 32B of the FMA Act and regulation 16 and Schedule 1AA of the FMA Regulations was under legal challenge before the High Court. The Government decided not to make major policy and legislative adjustments to these provisions while the mechanism was under review by the Court in *Williams v Commonwealth* [2014] HCA 23 (*Williams No. 2*). As part of transitioning the provisions of section 32B of the FMA Act into the new FF(SP) Act, steps have been taken to improve the legislative clarity of new items in terms of the purpose, nature and scope of authorised programmes, their linkage to programmes as appropriated and described in the Portfolio Budget Statements, and their relationship to a constitutional head of legislative power.

These are important improvements that enhance the transparency to the Parliament and to the public.

The High Court handed down its decision in *Williams No. 2* on 19 June 2014. It did not decide that section 32B was invalid. Section 32B mechanism now contained in the FF(SP) Act provides an open and practical mechanism for authorising Government spending. Regulations are registered and then tabled separately in each House of Parliament, which allows both the House of Representatives and the Senate, sometimes concurrently but often in tandem, the opportunity to examine and disallow spending activities on an item by item basis.

The transparency mechanisms outlined above provide the Parliament with an enhanced standard of information in assessing the purpose and context for each programme that is added to the Regulations.

On occasion, programmes are brought into operation quickly where there are urgent and necessitous circumstances. In other cases, commencement dates have been aligned to natural business cycles for the commercial or community sector, for instance to ensure programmes are operational by the start of a financial year (with flow-on effects for parties contracting with applicants for funds under such programmes).

In such cases, it would not be appropriate to impose an inflexible mechanism to delay the date of effect for Regulations, pending closure of a period for moving disallowance, or for positive approval in each House of Parliament.

Committee response

The committee thanks the Minister for this response and notes that ‘steps have been taken to improve the legislative clarity of new items in terms of the purpose, nature and scope of authorised programmes, their linkage to programmes as appropriated and described in the Portfolio Budget Statements, and their relationship to a constitutional head of legislative power.’

However, the committee restates its preference that important matters, such as establishing legislative authority for arrangements and grants, should be included in primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals. In this regard the committee is also disappointed that the government has indicated that it considers that it would not be appropriate to provide for some level of increased Parliamentary scrutiny through modified disallowance procedures.

(continued)

The committee therefore intends to draw this matter to the attention of Senators under principle 1(a)(iv) of the committee's terms of reference where appropriate in the future.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information as it is possible that regulations made under section 32B of the *Financial Framework (Supplementary Powers) Act 1997* may contain matter more appropriate for parliamentary enactment or individual items in the regulations may raise questions as to their relationship to a constitutional head of legislative power.

The committee notes that this particular bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this bill.

Senator Helen Polley
Chair



The Hon Greg Hunt MP
Minister for the Environment

RECEIVED

28 AUG 2014
Senate Standing C'ttee
for the Scrutiny
of Bills

MS14-002098

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

28 AUG 2014

Dear Senator Polley *Helen*

I refer to a request from the Senate Scrutiny of Bills Committee Secretariat conveyed to my Office on 17 August 2014 seeking further information about material incorporated by reference under the Carbon Farming Initiative Amendment Bill (2014).

In its *Ninth Report of 2014*, the Committee notes that some material intended to be incorporated by reference under the Bill (including ISO Standards) is only available at a cost and has sought advice about whether innovative solutions can be identified to provide free public access to such material.

As noted in my previous responses to the Committee (14 July and 14 August 2014), I am keen to ensure this issue is managed in a way that is consistent with the principle that the law be publicly and freely available.

Reducing regulatory burden is a priority for the Government. In making or amending legislation, I am mindful of regulatory impacts for individuals and businesses. Where material such as ISO standards has a cost, its incorporation by reference in methodology determinations under the Emissions Reduction Fund is carefully considered and where possible, alternative options for compliance are provided.

For example, under the Carbon Farming Initiative, the number of methodology determinations that rely on meeting a formal standard are in the minority. Where they have been referenced, this has not resulted in any issues. This reflects that referencing technical matters such as ISO standards is a common business practice and one to which businesses operating under the relevant legislation are accustomed.

An alternative approach has been used in the *Carbon Credits (Carbon Farming Initiative) (Reducing Greenhouse Gas Emissions by Feeding Dietary Additives to Milking Cows) Methodology Determination 2013* (F2013L01554), which uses a generic reference to the appropriate or relevant industry standard. This allows for the auditor and the Clean Energy Regulator to be satisfied as to the applicability of the standard and whether it had been achieved. It is also reasonable to assume that projects operating an activity in a particular industry are already aware of, and have access to standards that are appropriate or applicable to their industry and as such are not likely to incur additional costs. The flexibility to entertain such an approach in future methodology determinations is not constrained by the Bill.

Moreover, the overall objective of the Emissions Reduction Fund is to secure least cost carbon abatement and reducing the costs associated with creating carbon credits is an important element of this. Undue regulatory or compliance costs imposed on businesses would act against achievement of this objective.

The Department of the Environment will continue to make every effort to ensure that incorporating material by reference in methodology determinations under the Emissions Reduction Fund is only used where necessary and appropriate, and will examine possible innovative approaches that improve public access.

I trust that the advice outlined here adequately addresses the Committee's request.

Yours sincerely

Greg Hunt



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: B14/922

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

A handwritten signature in blue ink, appearing to read 'Mathias'.

Dear Senator

I refer to the letter of 10 July 2014 sent to my office from the Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee) seeking my advice on issues raised by the Committee about the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014*.

Please find enclosed responses to these issues that explain the intent of the provisions in the context of the new Commonwealth financial framework.

I trust that this information addresses the Committee's concerns.

Kind regards

A handwritten blue mark, possibly a stylized 'M' or a checkmark, above the name.

Mathias Cormann
Minister for Finance

26 August 2014

Response to Comments by the Senate Standing Committee for the Scrutiny of Bills on the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (PGPA (C&T) Act)

1. Delegation of legislative power – incorporation by reference (Section 20A of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act))

Relevant provisions:

- Schedule 1, item 24

Issue: Given that ‘accountable authority instructions’ may be incorporated into the rules, although the bill has already been passed by the Parliament, as is its usual practice, the Committee still seeks the Minister’s advice as to whether such instructions will be publicly available and readily accessible and how any person affected by material incorporated by reference will become aware of any changes made to its content.

Response:

Accountable authorities of Commonwealth entities may issue instructions under section 20A of the PGPA Act to their officials concerning the management of public resources for which an accountable authority is responsible. These instructions have a similar function to the Chief Executive’s Instructions issued under the *Financial Management and Accountability Act 1997* (FMA Act) to provide direction to officials on the application of the finance law within the entity.

Accountable authorities’ instructions, therefore, are of an administrative rather than a legislative nature. Subsection 20A(3) clarifies that these instructions are not considered legislative instruments to which the *Legislative Instruments Act 2003* would apply. While instructions are readily available to the officials affected, it may not always be appropriate for them to be made publicly available. For example, they may contain information that relates to internal processes for sensitive areas such as debt management; areas that may expose an entity to an increased risk of fraud, such as banking procedures; directions on methods for the detection of fraud; or mitigation and interdiction methods to deal with illegal activity. Instructions may also include delegation details which, if public, may open a risk that the identities of persons making sensitive decisions could be revealed to the general public in cases where it is not safe or otherwise appropriate to do so.

2. Delegation of legislative power (section 32B of the *Financial Management and Accountability Act 1997*)

Relevant provisions:

- Schedule 2, items 10-15

Issue: The Committee seeks the current Minister's advice as to whether any consideration has been given to amending this provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements and grants.

The Committee notes that if new spending activities are not to be authorised by primary legislation it would be possible to provide for scrutiny in a number of ways, for example by:

- requiring the approval of each House of the Parliament before new regulations come into effect; or
- incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect;

and the Committee also seeks the Minister's advice about these, or other possible options.

Response:

With the commencement of the operative provisions of the PGPA Act on 1 July 2014, the majority of the provisions in the FMA Act have been repealed and the Act renamed as the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act). Among the provisions retained in the FF(SP) Act is section 32B of the former FMA Act, which establishes legislative authority for the Government to make, vary and administer arrangements and grants through the *Financial Management and Accountability Regulations 1997* (FMA Regulations), including arrangements and grants for the purposes of programmes specified in the FMA Regulations.

At the time the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (PGPA(C&T) Act) was being developed and considered by the Parliament, the legislative authority to spend mechanism in section 32B of the FMA Act and regulation 16 and Schedule 1AA of the FMA Regulations was under legal challenge before the High Court. The Government decided not to make major policy and legislative adjustments to these provisions while the mechanism was under review by the Court in *Williams v Commonwealth* [2014] HCA 23 (*Williams No.2*). As part of transitioning the provisions of section 32B of the FMA Act into the new FF(SP) Act, steps have been taken to improve the legislative clarity of new items in terms of the purpose, nature and scope of authorised programmes, their linkage to programmes as appropriated and described in the

Portfolio Budget Statements, and their relationship to a constitutional head of legislative power.

These are important improvements that enhance the transparency to the Parliament and to the public.

The High Court handed down its decision in *Williams No.2* on 19 June 2014. It did not decide that section 32B was invalid. Section 32B mechanism now contained in the FF(SP) Act provides an open and practical mechanism for authorising Government spending. Regulations are registered and then tabled separately in each House of Parliament, which allows both the House of Representatives and the Senate, sometimes concurrently but often in tandem, the opportunity to examine and disallow spending activities on an item by item basis.

The transparency mechanisms outlined above provide the Parliament with an enhanced standard of information in assessing the purpose and context for each programme that is added to the Regulations.

On occasion, programmes are brought into operation quickly where there are urgent and necessitous circumstances. In other cases, commencement dates have been aligned to natural business cycles for the commercial or community sector, for instance to ensure programmes are operational by the start of a financial year (with flow-on effects for parties contracting with applicants for funds under such programmes).

In such cases, it would not be appropriate to impose an inflexible mechanism to delay the date of effect for Regulations, pending closure of a period for moving disallowance, or for positive approval in each House of Parliament.