



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

SEVENTH REPORT
OF
2015

12 August 2015

ISSN 0729-6258 (Print)

ISSN 2204-3985 (Online)

Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator Katy Gallagher	ALP, Australian Capital Territory
Senator the Hon Bill Heffernan	LP, New South Wales
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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

SEVENTH REPORT OF 2015

The committee presents its *Seventh Report of 2015* 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.
Responsiveness to committee requests for information	507
Airports Amendment Bill 2015	509
Appropriation Bill (No. 4) 2014-2015	511
Australian Small Business and Family Enterprise Ombudsman Bill 2015	517
Criminal Code Amendment (Animal Protection) Bill 2015	526
Customs Amendment (Australian Trusted Trader Programme) Bill 2015	536
Export Charges (Collection) Bill 2015	540
Imported Food Charges (Collection) Bill 2015	
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	544
Passports Legislation Amendment (Integrity) Bill 2015	559
Private Health Insurance (Prudential Supervision) Bill 2015	562

Responsiveness to requests for further information

The committee has 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, senator or member 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 to 30 June 2015

Bill	Portfolio	Correspondence	
		Due	Received
Airports Amendment Bill 2015	Infrastructure and Regional Development	02/07/15	03/07/15
Appropriation Bill (No. 4) 2014-2015	Finance		
<i>Minister's 2nd further response</i>		02/07/15	15/07/15
<i>Treasurer's response</i>		02/07/15	<i>Not yet received</i>
Australian Small Business and Family Enterprise Ombudsman Bill 2015	Treasury	02/07/15	03/07/15
Customs Amendment (Australian Trusted Trade Programme) Bill 2015	Immigration and Border Protection	02/07/15	21/07/15
Export Charges (Collection) Bill 2015	Agriculture	02/07/15	20/07/15
Imported Food Charges (Collection) Bill 2015	Agriculture	02/07/15	20/07/15
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	Immigration and Border Protection		
<i>Minister's 2nd further response</i>		02/07/15	21/07/15
Law Enforcement Legislation Amendment (Powers) Bill 2015	Justice	29/05/15	02/06/15

Bill	Portfolio	Correspondence	
		Due	Received
Passports Legislation Amendment (Integrity) Bill 2015	Foreign Affairs	02/07/15	22/07/15
Private Health Insurance (Prudential Supervision) Bill 2015	Treasury	02/07/15	24/06/15
Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015	Employment	29/05/15	09/06/15
Tax Laws Amendment (2015 Measures No. 1) Bill 2015	Treasury	02/07/15	<i>Not yet received</i>

Members/Senators responsiveness to 30 June 2015

Bill	Member/Senator	Correspondence
		Received
Criminal Code Amendment (Animal Protection) Bill 2015	Senator Back	28/07/15
Iron Ore Supply and Demand (Commission of Inquiry) Bill 2015	Mr Katter	*
Marriage Amendment (Marriage Equality) Bill 2015	Mr Shorten	*

* not yet received

Airports Amendment Bill 2015

Introduced into the House of Representatives on 6 June 2015

Portfolio: Infrastructure and Regional Development

The bill received Royal Assent on 30 June 2015

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Minister responded to the committee's comments in a letter dated 2 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

This bill amends the *Airports Act 1996* to provide for the determination of an airport plan for Sydney West Airport.

Delegation of legislative power

Item 30, proposed subsection 96B(11)

This subsection provides that an airport plan for Sydney West Airport is not a legislative instrument, which means that disallowance and sunset provisions of the *Legislative Instruments Act 2003* will not apply. The justification provided for this is:

The status of an airport plan is therefore consistent with major development plans and master plans, which are also not legislative instruments. This is appropriate because, like master plans and major development plans, an airport plan does not determine the content of the law; it just triggers particular legal effects such as an authorisation to implement the airport plan and a sanction for not complying with its conditions. It is the Act, and not the plan, that creates these legal effects. For this reason it is highly likely that, even in the absence of subsection (11), an airport plan would not be a legislative instrument: it is of an administrative character. Subsection (11) is thus declaratory and is designed to make the legal status of the airport plan clear to a reader of the legislation. (See explanatory memorandum, p. 14)

Although it may be accepted that the plan 'just triggers particular legal effects' it remains the fact that the legal obligations which are created by the Act are given substance by the plan, that is their content is filled out by the determination of the plan. As such, the determination of a plan is a decision that arguably has legislative elements thus it is one which is difficult to clearly categorise as having only a legislative or administrative

character (the courts have recognised this is a difficult line to draw in the context of such cases). **For this reason, the committee seeks the Minister's advice as to whether consideration has been given to providing at least some level of parliamentary scrutiny of the plan (such as a tabling requirement), even if it is considered that it should not be subject to disallowance.**

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

I note the concerns raised by the committee in relation to parliamentary scrutiny of the airport plan. Consistent with existing processes for master and major development plans under the *Airports Act 1996*, for which there are no tabling requirements, the Bill requires an airport plan for Sydney West airport to be published on the Department of Infrastructure and Regional Development's website once the plan has been determined.

This will be preceded by a period of public consultation on a draft airport plan as part of the consultation process for the environmental impact statement for the proposed Western Sydney airport.

Taken together, I consider these steps will provide adequate opportunity for scrutiny of the airport plan.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that there will be some level of public scrutiny of the airport plan for Sydney West airport as there will be a period of public consultation on the draft airport plan and the final plan will be published on the Department of Infrastructure and Regional Development's website.

The committee notes the Minister's advice, though it regards the level of public scrutiny outlined as being different from the opportunity for Parliamentary scrutiny and oversight. However, the bill has already passed both Houses of the Parliament and the committee therefore makes no further comment.

Appropriation Bill (No. 4) 2014-2015

Introduced into the House of Representatives on 12 February 2015

Portfolio: Finance

The bill received Royal Assent on 2 April 2015

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2015*. The Minister responded to the committee's initial comments in a letter dated 8 May 2015. The committee sought further information and the Minister responded in a letter dated 4 June 2015.

Following the Minister's second response the committee sought additional information and the Minister responded in a letter dated 15 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2015 - extract

Background

This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2014-2015*.

Delegation of legislative power

Clause 14

Clause 14 of the bill deals with the Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 14 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, ACT, NT and local government may be made: clause 14(2)(a); and
- the amounts and timing of those payments: clause 14(2)(b).

Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum (at p. 12) states that this is:

...because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) will simply determine how appropriations for State, ACT, NT and local government items will be paid. The determinations are issued when required. However, payments can be made without either determination.

While the explanatory memorandum states that these determinations do not alter the appropriations approved by the Parliament, it is not clear to the committee exactly what is contained in such determinations. In addition, it is not clear whether the determinations are published and made publicly available. As a result, it is not possible for the committee to accurately assess the nature and character of these Executive determinations. The committee notes that provisions similar to clause 14 have been a regular feature of previous appropriation bills. **However, noting the above comments and the terms of section 96 of the Constitution which provides that ‘...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’ [emphasis added], the committee seeks the Minister’s advice in relation to:**

- **the content of such determinations;**
- **whether the determinations are published and made publicly available;**
- **how any terms or conditions applying to payments made under these determinations are formulated;**
- **how ‘payments can be made without either determination’ (as indicated at p. 12 of the explanatory memorandum); and**
- **how grants made pursuant to these determinations fit into the wider scheme of making s 96 grants to the States, including, for example, grants of financial assistance to a State made under subparagraph 32B(1)(a)(ii) of the *Financial Framework (Supplementary Powers) Act 1997* (noting that regulations made under the Supplementary Powers Act are disallowable, while subclause 14(4) of this bill provides that determinations made under subclause 14(2) are not legislative instruments and are therefore not disallowable).**

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 initial response – Fifth Report of 2015

Determinations under clause 14 of Bill No. 4 are rare. Terms and conditions are not required for payments to States, Territories and local government. Most payments to the States and Territories are governed and appropriated through the *Federal Financial Relations Act 2009*.

For the payments to States, Territories and local government in an even-numbered Appropriation Act, generally other legislative or agreed frameworks determine how the payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. Many of these arrangements can be found on the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The relevant Minister specified under an Appropriation Act may make terms and conditions via a determination if the alternative framework does not adequately allow the Minister to manage the payment. Responsibility for making a determination (if any) rests with the Minister.

A recent example of a determination made (in part) under an equivalent provision in an Appropriation Act is the Natural Disaster Relief and Recovery Arrangements Determination 2012 (Determination). This can be found on the Australian Government Disaster Assist website (<http://www.disasterassist.gov.au>). The Determination primarily operates under the Federal Financial Relations framework. For the State of Queensland, the Determination operates in parallel to an existing National Partnership Agreement (Agreement) between the Commonwealth and Queensland.

In this situation, the Agreement has overriding authority unless the parties agree otherwise. Consequently, only when the Agreement does not adequately provide terms and conditions for a payment and Queensland agrees, could the relevant Minister rely on the Determination to make terms and conditions via the Appropriation Act.

Thank you for bringing this matter to my attention.

Committee's initial response

The committee thanks the Minister for this response. The committee notes the Minister's advice that determinations made under provisions equivalent to clause 14 of Appropriation Bill (No. 4) 2014-2015 are rare and that most payments to the States and Territories are governed and appropriated through the *Federal Financial Relations Act 2009*. However, noting section 96 of the Constitution provides that '...the Parliament may grant financial assistance to any State on such terms and conditions *as the Parliament thinks fit*' [emphasis added], the committee remains concerned that it appears that these determinations are not subject to parliamentary scrutiny or disallowance and are not published in a systematic manner.

In order to assist the committee in further scrutinising this standard provision and the determinations made under it, the committee requests the Minister's further advice in relation to any other instances in which determinations have been made under these provisions in the past ten years. The committee also requests the Minister's advice as to whether the government would consider it appropriate to subject these determinations to the parliamentary disallowance process or, at least, to table such determinations in both Houses of Parliament to ensure that they are available for scrutiny by the Parliament.

Minister's first further response – Sixth Report of 2015

Thank you for the letter of 14 May 2015, requesting further advice in relation to any other instances in which determinations have been made under clause 14 or similar provisions in the past ten years, and whether the government would consider it appropriate to subject these determinations to disallowance or, at least, to table such determinations.

As previously advised, determinations under clause 14 or its equivalent are rare. My department has researched the years back to the implementation of the Intergovernmental Agreement on Federal Financial Relations in 2008 and has been unable to identify any determinations apart from the National Disaster Relief and Recovery Arrangements Determination 2012. Details of this determination were previously provided to the Committee.

Since 2009, the framework for making payments to states, territories and local governments has fundamentally changed to enable greater parliamentary scrutiny and transparency. From the signing of the Intergovernmental Agreement on Federal Financial Relations in 2008, there was agreement between the Commonwealth and the states and territories that payments to the states and territories should be made under the Federal Financial Relations framework. Since that time, payments under clause 14 in Appropriation Bill (No. 4) 2014-2015 or equivalent have progressively decreased, and instead have been made under the standing appropriation contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*.

The power to determine amounts of financial assistance to be paid to the states and territories under the Federal Financial Relations framework is delegated from the Parliament to the Treasurer. Accordingly, I suggest that questions in relation to parliamentary scrutiny may be more appropriately directed to the Treasurer.

I have copied this response to the Treasurer.

Committee's first further response

The committee thanks the Minister for this further response.

The committee notes the Minister's advice that since the signing of the Intergovernmental Agreement on Federal Financial Relations in 2008 payments made under provisions equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 have progressively decreased, and instead have been made under the standing appropriation contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. In this regard, the Minister advised that his department 'has been unable to identify any determinations apart from the National Disaster Relief and Recovery Arrangements Determination 2012' which had been made under provisions equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 since the implementation of the Intergovernmental Agreement on Federal Financial Relations in 2008.

continued

The committee again thanks the Minister for Finance for this advice which has assisted the committee in understanding the operation of this standard provision and the determinations made under it. However, the committee requests the Finance Minister's further advice in relation to:

- why it was necessary to utilise a provision equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 to make the National Disaster Relief and Recovery Arrangements Determination 2012 (rather than utilising the process established under the Intergovernmental Agreement on Federal Financial Relations and related Acts); and
- whether this standard provision will still be required in future appropriation bills given that it appears that it has only been used on one occasion (in 2012) since the Intergovernmental Agreement on Federal Financial Relations was signed in 2008. In this regard, the committee notes that the standard provision was included in *Appropriation Bill (No. 2) 2015-2016* (clause 16).

The committee also notes the Finance Minister's advice that the power to determine amounts of financial assistance to be paid to the States and Territories under the Federal Financial Relations framework is delegated from the Parliament to the Treasurer. The Minister therefore suggested that questions in relation to parliamentary scrutiny may be more appropriately directed to the Treasurer.

Noting this, and the terms of section 96 of the Constitution which provides that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit' [emphasis added], the committee also seeks the Treasurer's general advice as to what parliamentary (and public) scrutiny mechanisms are available in relation to payments made to States and Territories under the standing appropriations contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. For example, the committee is interested in whether details about payments made to States and Territories (and the terms and conditions attached to them) are published in a comprehensive, systematic and publicly available manner.

Minister's second further response - extract

The National Disaster Relief and Recovery Arrangements (NDRRA) Determination 2012 uses clause 14 of Appropriation Bill (No. 4) 2014-2015 (or equivalent provision) for concessional interest rate loans. The NDRRA Determination enables two forms of financial assistance: national partnership payments covered under the Intergovernmental Agreement on Federal Financial Relations; and concessional interest rate loans.

Concessional interest rate loans are not covered by the Federal Financial Relations framework, so therefore rely on the mechanism under clause 14 (or equivalent) within the even-numbered Appropriation Bills.

While determinations may be rare, clause 14 or similar provisions will be required in future Appropriation Bills. Clause 14 or equivalent would need to be available in future in order to support concessional loans under the NDRRA Determination. As previously advised, generally other legislative or agreed frameworks determine how payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. In particular circumstances clause 14 may be needed if an alternative framework does not adequately allow the relevant Minister to manage payments to states, territories and local governments in accordance with the purposes for which the money was appropriated by Parliament.

I have copied this response to the Treasurer and the Minister for Justice, who has responsibility for the National Disaster Relief and Recovery Arrangements and associated Determinations.

Committee's second further response – request to the Minister for Finance

The committee thanks the Minister for Finance for this helpful response.

The committee notes that much of the explanatory information provided to the committee would also be useful in assisting Senators and others in understanding the operation of this standard provision and the determinations made under it. **The committee therefore requests that additional explanatory material in relation to this standard provision be included in explanatory memoranda accompanying future even-numbered appropriation bills.**

Committee comment – request to the Treasurer

The committee notes that it has not yet received a response from the Treasurer about the committee's request for general advice as to what parliamentary (and public) scrutiny mechanisms are available in relation to payments made to States and Territories under the standing appropriations contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. **As this is a matter of ongoing interest to the committee, the committee takes this opportunity to reiterate its request to the Treasurer as detailed at page 515 above.**

Australian Small Business and Family Enterprise Ombudsman Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Minister responded to the committee's comments in a letter received 3 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

This bill establishes the Australian Small Business and Family Enterprise Ombudsman, and specifies the powers and functions of the Ombudsman.

Merits review

Subclause 92(b)

This subclause provides that decisions by the Ombudsman that it is not in the public interest to delete information, a recommendation or an opinion from a report or advice before it is tabled or published may be appealed to the AAT. However, the relevant provisions (subparagraphs 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii), and 63(3)(a)(ii)) provide for a decision to be comprised of two elements: (i) that the information or recommendation would be 'likely to adversely affect the interests of any persons' and (ii) that the Minister reasonably believes that it is in the public interest to delete the information or recommendation'. **The committee seeks the Minister's clarification as to whether both elements of this decision may be challenged in an appeal to the AAT.**

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 – Subclause 92(b)

The merits review subclause in 92(b) of the Bill allows parties to appeal a decision made by the Ombudsman, under subparagraphs 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii) and 63(3)(a)(ii), regarding whether it is in the public interest to delete information, a recommendation or an opinion from a report or advice before it is tabled or published. Appeals relate only to the public interest element in these subparagraphs, and not to whether the relevant information or recommendation would be 'likely to adversely affect the interests of any persons'. This latter issue is an objective matter, and therefore subject to administrative decisions judicial review (ADJR).

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that appeals to the AAT are only available in relation to the public interest element of a decision to delete information, a recommendation or an opinion from a report or advice before it is tabled or published. The committee is not persuaded that the question of whether the relevant information or recommendation would be 'likely to adversely affect the interests of any persons' is not suitable to be considered as part of an appeal to the AAT. Although the issue is described by the Minister as 'an objective matter', it may raise questions of fact and degree that could readily be subjected to merits review.

The committee draws this concern to the attention of Senators, requests that the key information provided by the Minister be included in the explanatory memorandum, and leaves the question of whether the proposed approach in relation to merits review of these decisions is appropriate to the Senate as a whole.

Alert Digest No. 6 of 2015 - extract

Undue trespass on personal rights and liberties—evidential burden on defendant

Subclauses 48(3), 82(2) and 91(5)

The explanatory memorandum does not appear to address the justification for the imposition of an evidential burden on a defendant imposed by this bill in relation to:

- subclause 48(3) – whether or not a person is excused or released from attending a hearing;
- subclause 82(2) – whether an exception to an offence for the use or disclosure of protected information applies; and
- subclause 91(5) – whether an exception to an offence for the secondary disclosure and use of protected information applies.

As discussed in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 50):

A defence reverses the burden of proof that would usually apply in an offence, by requiring the defendant to discharge the burden of proof for one or more elements... Consequently, it is only appropriate to place an issue in a defence in certain circumstances.

...

The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant.

The committee expects that any proposal to impose an evidential burden on a defendant will be fully justified in the explanatory material accompanying a bill. As the explanatory memorandum does not address this matter, the committee seeks the Minister's advice as to the justification for the proposed approach in each of the instances outlined above.

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

Undue trespass on personal rights and liberties – Subclauses 48(3), 82(2) and 91(5)

The imposition of an evidential burden on the defendant in the circumstances specified in subclauses 48(3), 82(2) and 91(5) of the Bill is appropriate. In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the matters to which these subclauses relate, are matters readily within the knowledge of the defendant, and might not always readily be known to the Ombudsman – such as, for example, where a person discloses protected information in accordance with ‘a law of a State or a Territory’ (subparagraph 82(2)(b)(ii)).

An evidential burden placed on the defendant is not uncommon. Similar notations to those in the current Bill exist in other Commonwealth legislation (for example, see subsection 186N (2), *Bankruptcy Act 1966* – where a person has an evidential burden regarding having a ‘reasonable excuse’ for not returning a certificate of registration as a debt agreement administrator).

Subclause 48(3) of the Bill (whether or not a person is excused or released from attending a hearing), requires a person to simply produce a copy of something which would show that the person was excused from attendance a hearing, and there is a relatively low penalty for failing to meet this requirement.

Subclause 82(2) (whether an exception to the offence of disclosing or using protected information applies) requires a person to simply indicate a provision in legislation which authorised the person’s disclosure or use of protected information.

Subclause 91(5) (an exception to secondary disclosure or use of protected information) requires that a person, who disclosed or used protected information, provides something which indicates that the disclosure for use was with the consent of the Ombudsman, or was for the purpose of enforcing certain laws.

The evidential burden in each of these circumstances can easily be met. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

Committee response

The committee thanks the Minister for his response and notes the Minister's advice that the 'evidential burden in each of these circumstances can easily be met' and that therefore the imposition of an evidential burden on the defendant is reasonable.

The committee will generally have scrutiny concerns where an evidential burden applies to matters in an offence-specific defence that are not peculiarly within the knowledge of the defendant. In this bill, for example, subclause 48(3) provides a defence where the Ombudsman has excused or released a person from attending a hearing—clearly this matter would be readily within the knowledge of the Ombudsman. The committee is also more likely to have scrutiny concerns where the offence to which the defence or exception applies has a significant penalty. In this instance the offences in subclauses 82(1) and 91(4) both include a significant penalty (imprisonment for 2 years or 120 penalty units, or both).

It is therefore not clear to the committee why the burden of proving these matters is appropriately moved from the prosecution to the defence. **The committee draws this matter to the attention of Senators, requests that the key information provided by the Minister be included in the explanatory memorandum and leaves to the Senate as a whole the question of whether the application of an evidential burden on the defendant in each of these provisions is appropriate.**

Alert Digest No. 6 of 2015 - extract

Undue trespass on personal rights and liberties—privacy Part 5, Division 2

Part 5, Division 2 deals with the protection of 'protected information' and authorises the use or disclosure of protected information in various circumstances. **As neither the explanatory memorandum nor the statement of compatibility consider the justification for, and interaction between, these provisions and the privacy interests of affected persons the committee seeks the Minister's advice about 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

Privacy – Part 5, Division 2

Part 5, Division 2 in the Bill will ensure accountability and transparency in relation to the use or disclosure of protected information. Following extensive consultations with stakeholders, this Division takes into account the need for individual rights under privacy laws to be protected, and includes strict penalties for a person assisting a small business or family enterprise, and a professional disciplinary body, if they handle protected information in a way that is inappropriate.

As stated in the explanatory memorandum to the Bill, the Ombudsman's ability to make information publicly available is an important part of having an Ombudsman with 'real power' consistent with the Government's election commitment, however, this objective has been balanced in the Bill with the need to ensure that protected information is handled appropriately. Public officials must be accountable for their actions – including what they do with 'protected information'. Unlawful disclosure of such information may cause great harm to some people, and it is appropriate that there should be penalties to deter unlawful disclosure. Exceptions to these provisions are also in place to provide people with a defence if, for example, they are able to show that the protected information was used for a proper purpose.

In these circumstances, the provisions dealing with protected information are consistent with individuals' privacy rights. Indeed, for the protection of privacy, the decisions of the Ombudsman in relation to certain information are reviewable by the Administrative Appeals Tribunal under section 92 of the Bill. Also, safeguards are in place, for example, individual rights and protections in relation to self-incrimination and legal professional privilege will be maintained under the Bill (clause 93).

Committee response

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

Alert Digest No. 6 of 2015 - extract

Possible undue trespass on personal rights and liberties

Delegation of legislative power

Clause 96

Clause 96 provides for the making of rules, but without the standard restrictions now outlined in Office of Parliamentary Counsel Drafting Direction 3.8, which states:

27 If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
 - (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) amend this [*Act/Ordinance*].

28 You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).

29 Alternatively, if the instructor's policy is that a [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

As this wording includes important safeguards in relation to the use of subordinate legislation that is not in the form of a regulation, **the committee seeks the Minister's advice as to whether the provision can be amended so that it aligns with the requirements in Drafting Direction 3.8.**

Pending the Minister's reply, 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 and 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 96

I note the Committee's view concerning the delegation of legislative powers, however, no amendment to this provision is necessary. The provision is consistent with existing standard form provisions, which are present in other legislation, such as that relating to the Inspector-General of Taxation who will, like the proposed Ombudsman, be interacting with other Commonwealth officials, such as the Commonwealth Ombudsman, to deal with issues raised by small businesses. I note that the Committee, when it examined amendments to the Inspector-General of Taxation's legislation on 11 February 2015, did not comment on the similar provision existing in the Inspector-General legislation.

As the Committee noted in one of its regular reports, the recently revised Drafting Direction 3.8 is 'a policy statement and not a mandatory requirement'. Clause 96 of the Bill, moreover, does not deal with any 'significant provisions' relevant to Drafting Direction 3.8.

The Bill will establish an Ombudsman who can advocate for small businesses and family enterprises and provide assistance to them. The Bill is therefore concerned with supporting the rights of those who run small businesses and family enterprises. The Bill will not be a mechanism by which businesspeople, for example, are arrested or detained. It is therefore both practical and desirable for the Bill to use the proposed standard form provision for the delegation of legislative powers.

Additionally, the Bill does not limit the ability of Parliament (and the public in general) to understand and effectively scrutinise rules made under the Bill. Any rule made under this provision is a legislative Instrument within the meaning of the *Legislative Instruments Act 2003*, and thus would be tabled in Parliament and be subject to disallowance. Legislative instruments are further scrutinised by the Senate Standing Committee for Regulations and Ordinances, which considers and reports on all instruments that come before it, to ensure that they are in accordance with appropriate exercises of delegated legislative power.

Subsection 17(1) of the Legislative Instruments Act also requires a rule-maker, to be satisfied that appropriate consultation has been undertaken before the person makes a legislative instrument. This requirement applies to all legislative instruments, but is particularly important if the instrument is likely to have an 'effect on business'. Small business legislative instruments will, of course, have some effect on businesses, and therefore must be publicly consulted on.

Committee response

The committee thanks the Minister for this response and notes the points made. However, in the committee's view the point of the (relevant) requirements in new OPC Drafting Direction 3.8 (DD3.8) is to ensure that appropriate safeguards are in place for the new drafting approach that relies more on the use of *rules* (which are not required to be drafted by OPC or approved by the Federal Executive Council) rather than *regulations*. Therefore, the relevance of referring to provisions made before the new DD3.8 guidelines commenced, and in identifying an example that relates to a power to make *regulations* rather than *rules*, is unclear to the committee.

While the committee is aware that provisions might have originally been drafted before the new requirements were widely disseminated, and is aware that OPC states that DD3.8 is 'a policy statement rather than a mandatory requirement', in considering whether a proposed provision is consistent with the scrutiny principles outlined in Senate Standing Order 24, the scrutiny committee's expectation is that all legislation considered by Parliament will generally comply with the standards outlined in the OPC's drafting directions unless a comprehensive and persuasive justification is provided.

The committee therefore restates its request for this provision to be amended so that it aligns with the requirements in Drafting Direction 3.8. The committee draws this concern and its comments on this matter at pages 21–35 of the committee's *First Report of 2015* to the attention of the Senate.

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

Criminal Code Amendment (Animal Protection) Bill 2015

Introduced into the Senate on 11 February 2015

By: Senator Back

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2015*. Senator Back responded to the committee's comments in a letter dated 28 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2015 - extract

Background

This bill amends the *Criminal Code Act 1995* to:

- insert new offences in relation to failure to report a visual recording of malicious cruelty to domestic animals, and interference with the conduct of lawful animal enterprises; and
- make consequential amendments.

Undue trespass on personal rights and liberties—reversal of burden of proof Schedule 1, item 1, proposed subsection 383.5(3)

This proposed subsection provides that the defendant will bear an evidential burden in relation to making out the matter in paragraph 383.5(1)(c), namely, that malicious cruelty was not reported to a relevant authority within 1 day after the activity occurred and that the visual record of that activity was not given to such an authority within 5 days. The explanatory memorandum argues that this approach is appropriate as it 'reflects the fact that it would be significantly more difficult and costly for the prosecution to in effect prove a negative—i.e. that the activity was not reported—as information about whether the matter was reported would in most cases be peculiarly within the knowledge of the defendant' (at p. 3).

On the other hand, it may be noted that the matter the defendant is being required to prove is central to the question of liability for the offence. Further, it is arguably the case that the relevant authorities should be required to implement systems which facilitate proof through systems for recording, processing and storing records. Given the existence of such systems it may be considered inappropriate to require defendants to discharge an evidential burden of proof. It is also suggested that the appropriateness of placing an evidential burden on defendants may be thought problematic as the entities to whom disclosure of cruelty

reports and delivery of records must be made is not defined with precision, but by reference to whether the authority has ‘responsibility for enforcing laws relating to animal welfare’. In light of these matters and the brevity of the justification offered for the approach the committee seeks the Senator's more detailed explanation of the reversal of onus be sought. **The committee therefore seeks the Senator’s explanation as to why the entities to whom disclosure of cruelty and the delivery of records must be made cannot be defined with more precision as uncertainty in the operation of offences may also be considered to trespass on personal rights and liberties.**

Pending the Senator’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.

Senator's response - extract

Definition of entities

The Committee sought an explanation as to why entities to whom the disclosure of cruelty must be made cannot be defined within the Bill with more certainty. The concern was that possible uncertainty might be potentially considered a trespass on personal rights and liberties.

It is firstly important to appreciate that fundamental differences exist in the management regimes under various State and Territory jurisdictions in Australia in relation to the enforcement of animal welfare. As such it is not practical to clearly define the reporting agency in each jurisdiction, particularly as State legislatures may change their administrative arrangements at their discretion over time.

As an example, in the Northern Territory enforcement responsibility resides with the Animal Welfare Authority, in Western Australia with the Department of Agriculture, in South Australia and New South Wales it resides with the RSPCA, while in Victoria certain authorised local council officers have powers as well. While the RSPCA is a key agency in most jurisdictions in Australia it may not always have full enforcement powers. The police will always have a law enforcement role but they may not necessarily have primary responsibility.

As such it would be unnecessarily burdensome to include references in the Bill to state legislation and regulatory arrangements which are subject to change.

If there was any doubt at all regarding the relevant authority to report to, the person would only need to seek the advice of the RSPCA which has a national toll-free 24 hour

telephone service for assistance in reporting specific cases of cruelty. Alternatively a call could be made to Crime Stoppers.

Therefore, while the requisite reporting authorities in each state and territory are not specifically listed in the Bill, it is not burdensome or unreasonable to require a person to take the responsibility to identify the relevant authorities.

To respond directly to the Committee's concerns, I strongly contend this does not constitute or imply any trespass on personal rights and liberties. While all citizens within our community do have rights, importantly they also have responsibilities which they must exercise. There are countless examples under today's statutes where to achieve compliance, people must assume personal responsibility and initiative.

For instance, if the law requires a person to hold a valid licence to drive on the roads, it is the individual's responsibility to identify the relevant licensing authority as well as the various requirements which will need to be met. It is not reasonable to break the law because a person believed their human rights were being offended because the name of the authority was not specifically listed in the legislation.

To plead ignorance of the identity of the reporting authorities in the absence of calling the RSPCA or police is neither a reasonable defence nor a trespass on a person's rights or liberties.

New amendment

It is relevant at this point to advise that I would accept the recommendation of the Senate Rural and Regional Affairs and Transport Committee to propose an amendment which requires visual records of malicious cruelty to be reported and provided 'as soon as practicable' rather than 'reported within 1 day and handed over within 5 days'. In certain legitimate cases this may lessen the pressure on persons who hold visual records without true knowledge of the reporting authority, as it gives them the necessary time to ask somebody, or call the responsible authority.

Committee response

The committee thanks the Senator for his detailed response. The committee notes the Senator's intention to amend the bill to extend the reporting timeframe, which may 'lessen the pressure on persons who hold visual records'. **The committee requests that the key information above outlining the practical challenges of including more specificity in the bill and other points be included in the explanatory memorandum. In light of the information provided, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 2 of 2015 - extract

**Undue trespass on personal rights and liberties—absolute liability
Schedule 1, item 1, proposed subsections 383.5(5), 385.5(4) and 385.10(4)**

Absolute liability applies in relation to the ‘jurisdictional’ element of the offence set out in subsection 383.5(4). In light of the explanation at p 4 of the explanatory memorandum, which is consistent with the *Guide to Framing Commonwealth offences, Civil Penalties and Enforcement Powers*, the committee makes no further comment.

This issue also arises in relation to subsection 385.5(4) and subsection 385.10(4)

In the circumstances, the committee makes no further comment on these subsections.

Senator's response - extract

Absolute liability

Absolute liability is appropriate and required in this element of the offences because it is a jurisdictional element. A jurisdictional element of an offence is one which does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the commonwealth, states and territories. This is consistent with commonwealth criminal law policy, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

I note that the Committee previously had no issues with the very same principle being applied to the relevant provisions of the Law and Justice Legislation Amendment (Identity Crimes and other Measures) Bill 2010.

Nevertheless, I accept the need to ensure the provisions in relation to the application of absolute liability are openly explained.

Committee response

The committee thanks the Senator for taking the opportunity to provide this additional information.

Alert Digest No. 2 of 2015 - extract

Undue trespass on personal rights and liberties—new offences and penalties Schedule 1, item 1, proposed subsection 385.5(1), 385.10(1), section 385.20

These provisions detail penalties for the offences of destroying or damaging property connected with an animal enterprise, causing fear of death or serious bodily injury to a person connected with the carrying on of an animal enterprise. Section 385.20 sets out aggravated offences in relation to conduct that results in the differing levels of economic damage or that results in physical injury or death.

The penalties involve significant custodial penalties ranging from 1 year imprisonment to life imprisonment.

The committee's normal expectation is that new offences will be justified by reference to (a) the need for the offences where existing offences would also cover the conduct (e.g. crimes against property and persons) and (b) that penalties imposed for new offences be justified by comparison with those imposed for similar offences in Commonwealth legislation. **As the explanatory memorandum does not address these matters, the committee seeks the Senator's comprehensive justification for the proposed approach.**

Pending the Senator'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.

Senator's response - extract

New offences & penalties

a) The need for the offences where existing offences would also cover the conduct (e.g. crimes against property and persons)

The Committee sought justification as to whether existing offences might already cover the conduct of crimes against person and property and whether the penalties are consistent.

While some elements of the possible suite of offences might be provided for in existing legislation (such as trespass or arson) there are other offences which may impact upon a primary producer or animal enterprise manager attempting to lawfully conduct their business (such as biosecurity breaches, releasing animals from captivity, preventing the transportation of stock and interfering with husbandry practices) which are not.

Whatever the reason, it is apparent that incidences of the types of illegal activities contemplated in this Bill are currently not being prosecuted through normal channels.

Therefore there is strong justification for legislation which defines and captures the central nature of the problem relating to malicious cruelty to animals and the protection to law-abiding primary producers so that the enforcement action which is currently not being taken in a timely manner will be taken in the future.

b) That penalties imposed for new offences be justified by comparison with those imposed for similar offences in Commonwealth legislation.

The various levels of penalties within Commonwealth, State and Territory Criminal Codes are quite inconsistent. This Bill will provide some consistency by way of federal legislation.

The proposed maximum penalties are in most cases less than comparable State and Territory legislation for malicious property damage.

For instance, in NSW under *s195 of the Crimes Act 1900*, a person who intentionally or recklessly destroys or damages property is liable for imprisonment for up to five years; or if the damage is caused by fire or explosion, for up to ten years. However if the offences are carried out in the company of another, the maximum terms are longer.

Under *s29 of the Commonwealth Crimes Act 1914*, destroying or damaging Commonwealth property by fire has a maximum penalty of ten years imprisonment.

Under the Australian Capital Territory *Crimes Act 1900*, offenders can be imprisoned for fifteen years plus 1500 penalty units, or up to twenty years if they acted dishonestly with a view to gain. Indeed, even threatening to damage property by fire has a maximum of seven years jail plus 700 penalty units.

In Tasmania, under the *Criminal Code Act 1924*, a person placing combustible material with the intent to injure property faces a maximum jail term of twenty one years plus a discretionary fine. In my home state of Western Australia, under *s144 of the Criminal Code* the maximum penalty for wilful damage to property by fire is fourteen years.

Where there is a lack of uniformity between the various jurisdictions, this Bill delivers a degree of consistency while also providing penalties which are moderate by comparison.

Committee response

The committee thanks the Senator for his detailed response and **requests that the key information above be included in the explanatory memorandum. In light of the information provided, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator's additional comment - extract

Personal rights and liberties

The Committee also questioned whether the provisions might unduly trespass on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference. This matter has been comprehensively addressed in the response to the Parliamentary Joint Committee on Human Rights which is attached for reference.

In short, this is a fair Bill which respects the rights and liberties of all citizens. It respects the community's right to have an expectation that malicious cruelty towards animals will be expeditiously redressed. It respects the right of persons to gather evidence of suspected cruelty however it endows a responsibility to hand this over to enforcement authorities as soon as practicable. It also compels them to undertake their activities lawfully and never cause damage to property, persons or enterprise.

Under s385 persons have the right to utilise the defences of peaceful demonstration, acting in good faith in relation to an industrial matter, and publishing in good faith regarding a matter of public interest.

Importantly, I draw the Committee's attention to the right of a farmer, primary producer or animal enterprise manager to support their family and lawfully conduct their business without illegal interruption from those who simply do not respect this right. As with all other citizens in the community, they hold the right to protection under the law when their fundamental rights and liberties to maintain the safety of their property and person are threatened, as supported by Article 3 of the Universal Declaration of Human Rights.

Therefore the Bill respects the rights and liberties of all members of the community and does not unduly trespass on these civic privileges.

Committee response

The committee notes the Senator's additional comment.

Alert Digest No. 2 of 2015 - extract

**Undue trespass on personal rights and liberties—reversal of burden of proof
Schedule 1, item 1, proposed subsection 385.15**

This provision provides for three defences to conduct which would otherwise be caught by offences in Division 385. The defences are that the conduct is (a) peaceful picketing, or some other legally sanctioned peaceful demonstration; (b) done in good faith in connection with an industrial dispute or an industrial matter, or (c) publishing in good faith a report or commentary about a matter of public interest. In relation to each of these defences, a defendant bears an evidential burden of proof.

The statement of compatibility (at p. 8) states:

This is appropriate as it reflects the fact that it would be significantly more difficult and costly for the prosecution to in effect prove matters such as the fact that the activity was not reported, as information about whether the matter was reported would in most cases be peculiarly within the knowledge of the defendant.

Unfortunately this justification for the approach lacks specificity and seems directed only to the offence in Division 383, not those in Division 385. Given that aggravated versions of the offences attract very significant penalties and that the matters in the offence are central to the question of liability, **the committee seeks the Senator's detailed justification for this approach.**

Pending the Senator'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.

Senator's response - extract

Reversal of burden of proof

The Committee sought a response to comments relating to the need for the defendant to bear an evidential burden in relation to the requirement to report.

In relation to Divisions 383 and 385, this is appropriate as it reflects the fact that it would be significantly more difficult and costly for the prosecution to prove that an activity was not reported. In effect it would require the prosecution to prove a negative, however given the information about whether the matter was reported or not would peculiarly be within the knowledge of the defendant, under the circumstances it is a simple and reasonable obligation for the defendant to assume the burden of proof.

It is noted the Committee accepted the same argument for the Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013.

Specifically in relation to Division 385, a defendant will bear a burden of proof for the defences of peaceful picketing, acting in good faith, and publishing in good faith. This requirement actually allows the defendant an excellent opportunity to 'prove the positive' that their actions were justifiable. It also provides a platform for them to bring in witnesses and character references to ensure they receive a full and fair hearing.

Given it is a very subjective line of defence which the defendant has elected to choose, it is also appropriate for them to support and prove their assertions beyond reasonable doubt. Conversely, it would not necessarily serve the interests of justice if the prosecution took an aggressive lead in questioning the intent and good faith of defendants.

Committee response

The committee thanks the Senator for this response. **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.**

Senator's additional comment - extract

Summary

In conclusion, unfortunately it is not uncommon for people to record activities of animal cruelty and then consciously withhold the recordings for extended periods of time, thereby allowing the violent treatment of animals to endure. As such, I strongly contend that the requirement to hand over visual recordings when they come to hand is justifiable, reasonable and proportionate and does not adversely impact upon the common law rights of citizens. Also, the activities undertaken to damage the property or thwart and inhibit the ability of primary producers or others to conduct their lawful operations need to be protected.

This Bill is an important step forward as it ensures that malicious cruelty against animals can be more firmly reported in a timely, responsible and lawful manner.

Committee response

The committee notes the Senator's additional comment.

Customs Amendment (Australian Trusted Trader Programme) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Immigration and Border Protection

The bill received Royal Assent on 25 June 2015

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Minister responded to the committee's comments in a letter dated 21 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

This bill amends the *Customs Act 1901* to establish and set up the framework for the Australian Trusted Trader Program.

The bill also makes a consequential amendment to the *Australian Border Force Act 2015*.

Delegation of legislative power

Clause 11

The purpose of this bill is to establish the Australian Trusted Trader Program. The key elements of the program are, however, to be prescribed by rules (that is, by legislative instrument). **As the explanatory material does not address why the core features of the scheme are not contained in the bill (such as eligibility for the program, obligations from which participants are released and relevant considerations for decisions to enter into a trusted trader agreement) the committee seeks the Minister's detailed 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

I note that the Committee tabled its *Alert Digest No. 6 of 2015* on 17 June 2015 and requested an explanation of why key elements of the Australian Trusted Trader Programme (the Programme) are to be prescribed by rules (a legislative instrument).

The regulatory framework for the Programme consists of three elements:

1. The Bill - which has amended the *Customs Act 1901* (Cth) (Customs Act) to establish the Programme and provide the necessary heads of power to implement key principles of the Programme;
2. Rules - this will be a legislative instrument (which will be subject to parliamentary scrutiny and disallowance). This will set out details for and in relation to the operation of the Programme (for example, the qualification criteria, relevant considerations for decisions, conditions of participation and benefits that may be made available to entities); and
3. An agreement - which may be entered into with each entity if the entity nominates itself to participate in the Programme and the Comptroller-General of Customs considers that it is reasonably likely that the entity will satisfy the qualification criteria set out in the rules. Each agreement will set out further detail of the benefits that the entity qualifies for, how certain benefits will apply to that entity and any terms and conditions specific to that entity's participation in the Programme.

The regulatory framework for the Programme has been designed to balance stability and transparency of the Programme, allow reasonable flexibility to take account of the dynamic international trade environment and ensure the continued relevance of the Programme to traders. Including the qualification criteria, benefits and relevant considerations for decisions in the rules will:

- enable the Programme processes and operational design during the pilot phase of the Programme to be refined in a timely and transparent manner;
- enable the Programme to mature in accordance with a phased approach to implementation; and
- allow the Programme to have continued relevance to traders.

Pilot phase of the Programme

The Programme commenced on 1 July 2015 as a pilot to test and refine processes and design before it is opened to the wider trading community. The pilot for the Programme will operate in three stages over a period of approximately 12 months. The qualification criteria and relevant considerations for decisions will be tested as part of the pilot Programme and may need to be refined. Due to the short timeframes for each stage of the

pilot (approximately three to four months), it is critical to the success of the Programme that there is flexibility to refine those elements in a timely manner before the next stage commences. Prescribing these elements in the rules rather than the primary legislation will enable the Programme processes and design to be refined in a flexible and transparent manner. As the rules are a legislative instrument, they will be subject to parliamentary scrutiny and disallowance.

Phased approach to implementation

Flexibility to refine the operational detail of the Programme will also be required following the pilot as any further expansion of the Programme will be undertaken in a phased approach. Each phase will involve an increase in the number of participants, greater complexity in the business models and supply chains of entities seeking to participate in the Programme and the development of further benefits for participants. Each phase will also be subject to an evaluation prior to commencing the next phase.

Continued relevance to traders

The qualification criteria and the benefits will be consistent with the World Customs Organization SAFE Framework of Standards to Secure and Facilitate Global Trade and the World Trade Organization Agreement of Trade Facilitation. However, to ensure relevance to Australian traders, the qualification criteria and benefits will take into account the Australian context and have regard to the various business models in Australia's trade environment.

The international trade environment is dynamic, with new business models frequently emerging. As new business models emerge, further opportunities to reduce the regulatory burden associated with customs procedures at the border may be identified. If these opportunities are to be made available to a trusted trader, further benefits, or legislative obligations that an entity may be released from, or may meet in an alternative manner, will need to be prescribed. Prescribing these matters in the rules will provide reasonable flexibility for the Programme to have continued relevance to traders.

Consultation

The Programme has been co-designed in partnership with industry and relevant government agencies through the Trusted Trader Industry Advisory Group (IAG). Consistent with the co-design approach, the design of the regulatory framework has been considered by the IAG. The general consensus of the IAG was that flexibility was required in the regulatory framework to ensure operational matters of the Programme may be refined in a timely manner and to take account of variability in business models. The IAG supported a model involving amendments to the Customs Act to establish key principles of the Programme and allow rules, in the form of a legislative instrument, and agreements to contain the operational detail of the Programme. Furthermore, an exposure draft of the Bill was provided to IAG members for comment. Feedback on the exposure draft was positive. In particular, it was noted that the Bill reflected discussions held at IAG meetings.

Committee response

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

Export Charges (Collection) Bill 2015

Imported Food Charges (Collection) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Minister responded to the committee's comments in a letter dated 20 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

These bills are part of a package of bills. The bill will provide authority to collect charges in relation to the export of regulated goods and charges for imported food.

Delegation of legislative power

Clause 11

This clause allows for late payment fees to be prescribed by the regulations. While this appears to be technical and administrative content that is generally appropriate for subordinate legislation, the committee is interested in whether consideration has been given to providing parameters in the bill to ensure that the power will be appropriately limited. **The committee therefore seeks the Minister's advice about this matter.**

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

Minister's response - extract

Delegation of legislative power

I agree with the Committee's assessment that the technical and administrative content of clauses 11 of these bills is generally appropriate for subordinate legislation.

I note that clause 11 is effectively identical to section 13 of the *Quarantine Charges (Collection) Act 2014*. A late payment fee in relation to unpaid quarantine charges has been established under the Quarantine Charges (Collection) Regulations 2014. Establishing different arrangements for late payment provisions in these bills would be inconsistent with related import and export legislation. This would compound the already complex administration of imported and exported goods.

It is my expectation that the Department of Agriculture (the department), in consultation with the Office of Parliamentary Counsel, considers the breadth of power of any regulation and includes appropriate limitations when drafting legislation for my consideration.

Clause 22 of the bills permit the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed. This extends to prescription of a late payment fee for the purposes of clause 11 of the bills. This was considered to operate as a limitation on the exercise of the power in clause 11 of the bills. In this regard, it was considered that the Governor General would not, as a matter of practice, make any regulations which prescribe any late payment fee that could be seen as excessive, unreasonable or otherwise legally invalid.

Committee response

The committee thanks the Minister for this response and reiterates its view that it is important for explanatory materials to reflect the justification for the use of delegated legislation. **The committee therefore requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 6 of 2015 - extract

Undue trespass on personal rights and liberties—protection from civil proceedings

Clause 20

The explanatory memorandum in relation to this clause states:

This clause provides that the Commonwealth or a protected person exercising powers under the Bill will have protection from civil proceedings for anything done, or omitted to be done, in good faith. Civil proceedings involve legal disputes between individuals based on one person claiming that the other has failed in his or her legal duty. Protection from civil proceedings allows those required under the Bill

to make decisions and take action to manage exported goods appropriately, and to do so without the fear of civil proceedings being taken against them.

The term ‘in good faith’ means without malice or without intent to defraud. Protection from civil proceedings does not extend to criminal offences—for example, theft or intentional destruction of documents or property.

The committee notes this information, but seeks the Minister’s more detailed explanation as to why it is considered appropriate that affected persons have their right to bring an ordinary action to enforce their legal rights limited to situations where lack of good faith is shown (especially as bad faith can only be established in very limited circumstances). The committee also seeks examples to illustrate circumstances in which civil liability might ordinarily arise, but will be excluded by 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

Undue trespass on personal rights and liberties—protection from civil proceedings

As indicated above, the administration of imported and exported goods is complex and is regulated by many pieces of related legislation. Achieving consistency across this legislation is important for those who are regulated by it and those who give effect to it.

I draw the Committee's attention to the protection from civil proceedings provided by section 644 of the *Biosecurity Act 2015*, section 82 of the *Quarantine Act 1908* and by reference to the *Quarantine Charges (Collection) Act 2014* (see section 41), section 38 of the *Imported Food Control Act 1992* and section 22 of the *Export Control Act 1982*. The inclusion of a provision that provides for protection from civil proceedings provides a sound justification for the inclusion of similar provisions in these bills.

I expect the circumstances where such protections would be required will be isolated. Regardless, I consider it appropriate that the protection exists for persons making lawful decisions under these Acts, where there is the potential for loss by that party, without the threat of civil proceedings.

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

Committee response

The committee thanks the Minister for this response. The committee notes the explanation provided, but retains concerns about the proposed approach. The existence of similar provisions is of interest to the committee, but is not determinative of its views in any specific instance. The committee notes that it is expected that the protection from civil proceedings will only be needed in ‘isolated’ cases, and would have welcomed actual examples (as requested) to illustrate what these might be. **The committee draws its concern about this protection from civil liability 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.**

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Introduced into the House of Representatives on 5 March 2015

Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 3 of 2015*. The Minister responded to the committee's comments in a letter dated 23 April 2015. The committee sought further advice and the Minister responded in a letter dated 12 June 2015.

Following the Minister's second response the committee sought additional information and the Minister responded in a letter dated 21 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2015 - extract

Background

This bill amends the *Migration Act 1958* to:

- provide a single broad discretionary power to collect one or more personal identifiers from non-citizens and citizens at the border;
- enable flexibility as to the types of personal identifiers that may be required, the circumstances in which they may be collected, and the places where they may be collected;
- enable personal identifiers to be provided by an identification test or by another way specified by the minister or an officer;
- enable personal identifiers to be required either orally, in writing, or through an automated system;
- enable personal identifiers to be collected from minors and incapable persons without the need to obtain consent, or require the presence of a parent, guardian or independent person during the collection; and

General comment

Broad discretionary power

Insufficient safeguards

Proposed paragraph 257A(5)(a) provides that if a person is required to provide a personal identifier under subsection 257A(1) that those identifiers must be 'provided by way of one or more identification tests carried out by an authorised officer or an authorised system'.

The statement of compatibility explains that the Act currently provides for a ‘series of safeguards which apply to the carrying out of an identification test,’ which is a test ‘carried out in order to obtain a personal identifier’ and that these will continue in relation to personal information gathered pursuant to paragraph 257A(5)(a). However, as the statement of compatibility further explains, ‘new paragraph 257(5)(b) provides a new power for the Minister or an officer to require that personal identifiers be provided in "another way" (at p. 37). The result is that this power ‘will provide the Minister or an officer with flexibility about how a person is to provide personal identifiers when required to do so, allowing the system of safeguards and legislative instruments which currently govern the collection of personal identifiers to be bypassed where an officer or the Minister authorises a different method of collection’ (p. 37). It is worth setting out the justification for this approach in full:

One element of the policy intent for paragraph 257A(5)(b), as described above, is that this flexible new power will be used to implement the use of small, mobile, hand-held electronic scanners to collect an image of a person’s fingers (maximum of four fingers), allowing quick checks against established databases of persons who have come into contact with authorities and provided fingerprints by another route, including under another provision under the Migration Act. This is a non-intrusive method, similar to methods used in several other countries around the world, yet effective in detecting imposters and persons who are of concern. Scanned finger images will be stored in the hand-held device, for only as long as is necessary to conduct the required checks, and return results to the hand-held device. Data will be transmitted via secure Commonwealth-endorsed standards. No data will be retained in the hand-held device, or in departmental systems following the scan.

Where a match occurs, only minimal information will be displayed on the hand-held device to indicate a match/no match has occurred. A unique identifying number will be visible, which will enable departmental officers to obtain biographic and other relevant details from data holdings to determine the most appropriate course of action. Each match will be assessed on a case-by-case basis.

In these minimally invasive circumstances, the bypassing of the safeguards that apply to more invasive methods of collection is reasonable. The benefits from this additional layer of checking are clear and in certain circumstances could be very significant, while the imposition on an individual’s privacy is minimal. As such this measure is compatible with Article 17 of the ICCPR.

The current policy intent is that the flexible new power in paragraph 257A(5)(b) will be used in these circumstances, which are compatible with Article 17 of the ICCPR. However, the power in paragraph 257A(5)(b) is extremely broad, but only those personal identifiers listed in subsection 5A(1) are authorised to be collected without further legislation. However, compliance with Australia’s international obligations is to be measured by what Australia does *in toto* by way of legislation, policy and practice, and the Government’s view is that this is the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future. (statement of compatibility, p. 42)

The committee makes no further comment on the general question of whether the proposed system and practices outlined for the collection of images of a person's fingers is appropriate and leaves this matter to the consideration of the Senate as a whole.

The difficulty from a scrutiny perspective, however, is that the system, policy and practice associated with this method for the collection of personal identifiers will be left entirely to departmental policy and practice, without any legislative oversight. As the statement of compatibility accepts, the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers, which are not subject to existing safeguards in the Act, is 'extremely broad' (p. 42). This power may be used to authorise other ways for the collection of personal identifiers which may raise different considerations and the appropriateness of which would not be subject to parliamentary scrutiny. Further, no reason is given for why it is necessary to, in effect, delegate these policy questions to the department or the Minister, other than that it is the government's view that this is 'the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future'.

In light of these issues, the claim in the statement of compatibility that the measure is compatible with the right to privacy needs to be understood in the context that the power authorises methods of collection which are not limited to that which is explained and justified in the explanatory material (see pp. 21, 37 and 42). **The committee therefore expresses reservations about the breadth of paragraph 257A(5)(b) and seeks further advice from the Minister as to the rationale for the proposed approach. In this regard, the committee particularly notes the lack of limits on the specification of further ways to collect personal identifiers, the lack of Parliamentary oversight of the important policy issues that the specification of further methods of collection may entail, and that the implementation of the use of 'hand-held electronic scanners to collect an image of a person's fingers' could be achieved through the use of a targeted amendment which included appropriate safeguards.**

Pending the Minister's reply, the committee draws Senators' attention to these matters, 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 first response – Fifth Report of 2015

Developments in biometric technologies are at the forefront of the reforms in the Bill. The Bill supports collecting personal identifiers, such as fingerprints, by way of a mobile, nonintrusive scanning device. Safeguards that apply to current technology are not relevant to this new, quick scanning technology.

In addition to collecting personal identifiers by way of an identification test, the Department seeks legislative authority to collect personal identifiers in other ways. For example, it is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial image and 10 fingerprints may take 30-60 minutes to complete; and
- impractical and inefficient for the Department to delay large numbers of travellers to conduct the test.

Verification checks

The Bill supports collecting personal identifiers, specifically fingerprints, by way of a 'verification check'. The Department currently conducts verification checks on a consent basis at Perth and Melbourne airports. Currently, the verification check involves a scan of a single finger of a non-citizen who has previously provided their facial image and 10 fingerprints when lodging a visa application overseas in a higher-risk country. These checks take less than 60 seconds to complete and are conducted in public using a mobile, handheld device. More than 12,000 verification checks have been conducted at Perth and Melbourne airports since 2012 using the mobile scanner.

The Department intends to use an upgraded hand-held scanner using the new powers in the Bill:

- rather than a 'one-to-one' check directly against an individual's fingerprint data, the expanded 'verification check' will involve a 'one-to-many' check against existing data holdings. A one-to-many search involves seeking to match a single biometric against thousands of biometrics in a database. The Department's checks with partner countries are a current example of a 'one-to-many' search conducted by the Department.
- the verification check is efficient, quick and non-intrusive. Rather than taking 30 to 60 minutes to complete via an 'identification test', the check will take approximately 30 seconds to complete. This will allow the Department to strengthen Australia's border and conduct more checks than is possible currently.
- checks will be conducted in public; only two to four fingers will be scanned.
- results of checks will be available in real-time; results of an 'identification test' are usually available within 24 hours, which makes collecting personal identifiers by an identification test impractical at the border.

The approach to conducting verification checks in public is consistent with other checks conducted in public at airports, such as bag checks and the explosives residue check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's professional integrity framework. Administrative and criminal penalties may apply for breaches.

In addition to being used at Australia's border, a 'verification check' will support the Department to identify non-citizens in the Australian community who:

- are working in breach of their visa conditions;
- have remained in Australia beyond the date of their visa, and are therefore in Australia unlawfully; and
- have come to the attention of law enforcement while living in the Australian community.

Collecting personal identifiers by a means other than an identification test, provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient, quick and non-intrusive. Only those individuals identified as being of higher risk would be subject to a verification check.

The technological capability to conduct a verification check using a mobile, hand-held scanner device has only recently offered the opportunity to implement a relatively non-expensive, accurate and speedy additional tool to be able to effectively and efficiently resolve identity and other concerns. The Bill will provide the flexibility to collect personal identifiers in situations that require a fast and non-intrusive method of collection. This approach is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that are accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Committee's first response

The committee thanks the Minister for this response.

The committee notes the Minister's advice as to the intended use of mobile hand-held scanner devices. However, the scope of the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers is significantly broader and there is no capacity for Parliamentary scrutiny of this and any future authorisation of procedures and processes under this provision. **While the committee prefers the inclusion of important matters in primary legislation, in the absence of such an approach the committee seeks the Minister's advice as to whether the bill can be amended to require legislative authority for future arrangements to be established by regulation.**

Pending the Minister's further reply, the committee draws Senators' attention to these matters, 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 second response – Sixth Report of 2015

Insufficient safeguards

While the committee prefers the inclusion of important matters in primary legislation, in the absence of such an approach the committee seeks the Minister's advice as to whether the bill can be amended to require legislative authority for future arrangements to be established by regulation.

Previous responses to the Committee have emphasised the difficulty of providing for all circumstances in legislation relating to the collection of personal identifiers under the *Migration Act 1958*.

The current legislative framework in the *Migration Act 1958* for the collection of personal identifiers was introduced more than ten years ago. This framework is inflexible and restricts the Department's authority to collect personal identifiers to specific circumstances. As a result, the Department is prevented from using current technology effectively because of limitations in legislation.

The Government's position is that using a legislative framework that expressly and exhaustively specifies the methods in which personal identifiers are to be collected under the new power, or to provide for future arrangements to be specified by regulation, will limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats.

Committee's second response

The committee thanks the Minister for this response, however, the committee is not persuaded that the use of regulations to provide for future arrangements would 'limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats'. In fact, speed and flexibility are often cited to the committee as reasons for the use of subordinate legislation for matters that would otherwise be appropriately included in primary legislation. In addition, the use of regulations would appropriately provide for Parliamentary scrutiny of this and any future authorisation of procedures and processes under this provision.

The committee is of the view that the scope of the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers is broad and it is therefore highly desirable for the bill to provide that authorisation of new methods for the collection of personal identifiers should be established by regulation. The committee draws this view 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.

Minister's third response - extract

The Committee is concerned about the breadth of the power to provide for future arrangements, and it is not persuaded that the use of regulations would inhibit the Department's ability to respond quickly.

The Government continues to hold the view that a broad power in the Bill is necessary and appropriate to require persons to provide personal identifiers for the purposes of the Migration Act and Regulations. This is consistent with, and critical to the Department's key function in being able to effectively regulate, in the national interest, the coming into and presence in Australia of noncitizens.

The Bill clearly sets out on the face of the legislation this new, simplified biometrics power, which will enhance the integrity of the immigration programme and strengthen community protection outcomes.

Committee's third response

The committee thanks the Minister for taking the opportunity to provide this additional information. However, the committee remains concerned about the breadth of the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers. **The committee therefore considers that it would be highly desirable for the bill to provide that authorisation of new methods for the collection of personal identifiers should at a minimum be established by regulation, rather than being left to executive discretion.**

In this context, the committee reiterates its view that it is not persuaded that the use of regulations to provide for future arrangements would 'limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats'. Speed and flexibility are often cited to the committee as reasons for the use of subordinate legislation and, in addition, the use of regulations would appropriately provide for Parliamentary scrutiny of any future authorisation of procedures and processes under this provision.

The committee draws these comments to the attention of Senators and leaves the question of whether the proposed approach to this broad discretionary power is appropriate to the Senate as a whole.

Alert Digest No. 3 of 2015 - extract

Broad discretionary power

Items 52 and 53

These items, in effect, remove certain limits that currently apply to the collection of personal identifiers from minors and incapable persons. These current limits include a requirement to obtain consent, and a requirement for a parent, guardian or independent person to be present during the collection of personal identifiers. The statement of compatibility includes a lengthy discussion on the reasons for doing so and the justifiability of the amendments. It is argued, among other things, that the policy intention is that only a small number of such persons would be required to provide personal identifiers and that this intention would be facilitated through giving officers 'clear policy guidance' (e.g., at p. 45) so that the general discretionary power of collection will be exercised appropriately. In relation to the rights of children it is also stated that the policy guidance will 'include provision for the careful engagement with children, taking into their vulnerability into account' (at p. 46).

The general concerns identified with the breadth of the discretionary power in new section 257A to collect personal identifiers are exacerbated in this context. If the proposed broad discretionary power is enacted, it is suggested that there is scope to include further legislative guidance as to the exercise of that power in the particular circumstances of minors and incapable persons. **The committee therefore seeks the Minister's advice as to whether consideration has been given to including more detail in the bill about what matters must be addressed and considered in exercising this power in the context of minors and incapable persons. In this regard, the committee notes that leaving such requirements to policy does not enable Parliament to assess whether the limitations on rights have been adequately justified.**

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 first response – Fifth Report of 2015

There are an increasing number of cases known, including some now reported in the media, where minors are implicated in violent extremism. In some instances this includes underage women travelling overseas to marry foreign fighters; an extreme case of our broader concerns about vulnerable children.

The Department is prohibited by law from collecting certain types of personal identifiers from minors¹ under the age of 15 and incapable persons². In locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors or incapable persons. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor or an incapable person by refusing consent or refusing to be present with a minor or incapable person during collection of personal identifiers. This would undermine the purpose of the Bill by removing the Department's authority to collect personal identifiers. The results would be:

- reduced integrity of identity data by not definitively linking identity with associated security information;
- inconsistency with partner countries where fingerprints are collected based on operational policy. The United States requires fingerprints from minors who are more than 14 years old as a matter of policy. In New Zealand, the Immigration Act (2009) does not set an age limit for the collection of biometrics. The UK Immigration (Biometric Registration) Regulations (2008) extended the biometric requirement to provide both a digital photograph and fingerprints to minors aged six upwards, which aligns with EU Regulation;
- preventing the case-by-case collection of personal identifiers from individuals identified as of concern;
- less protection for children who have been, or who are at risk of being trafficked;
- failure to address the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply. The Department is aware of cases where persons have claimed to be under 15 years of age to prevent collection of fingerprints. This circumvents the purpose of conducting fingerprint checks, which is to accurately identify individuals and detect persons of concern. Collecting fingerprints is the most reliable method to accurately ensure that the right person is subject to action, and not another person who is misidentified;
- failure to address the risk of radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere. The conflict in the Middle East has provided evidence of the involvement of children in extreme acts of violence. Where a minor is suspected of involvement in terrorist activity or serious criminal activity, fingerprints would enable searches of Australian law enforcement data holdings and partner country databases, such as the United States.

¹ A person under the age of 18 years.

¹ A person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier, such as a person with an intellectual disability.

The Bill supports the approach increasingly adopted by international organisations such as the United Nations in using biometrics to protect vulnerable people. Since 2013, the UNHCR has been developing a new global Biometric Identity Management System (BIMS) that involves collecting a facial image, fingerprints and iris scans of refugees, including children, worldwide. According to the UNHCR's *Policy on Biometrics in Refugee Registration and Verification {2010}*, biometrics provide stronger protections for refugees by preventing identity theft.

Consent to collect

The Bill will authorise personal identifiers to be collected from a minor or incapable person without the consent of a parent/guardian or independent person, which will align current provisions in the Migration Act with those that apply at Australia's border where consent is not required.

The Bill will align Australia with the mandatory biometric collection rules that currently operate in almost all other countries.

Presence of a parent/guardian or independent person

The Bill will also permit the Department to collect personal identifiers from minors and incapable persons without the presence of a parent/guardian or independent person. This measure is to ensure that the collection of personal identifiers is not prevented by a parent/guardian/independent person refusing to be present during collection of personal identifiers. Such a refusal would be as disruptive if a parent/guardian or independent person refused consent for personal identifiers to be collected.

Nothing in the Migration Act authorises the collection of personal identifiers in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person, including a minor or incapable person, with humanity and with respect for human dignity. Use of force or other form of coercion to collect personal identifiers from any person would not be used under the new power in section 257A. Where an individual refuses to provide a personal identifier, including a parent/guardian/independent person who refuses on behalf of a minor or incapable person, the consequences will depend on the circumstances at the time. For example, in the context of a visa application, a minor's visa application may be refused, thereby preventing their travel to Australia.

Existing policy framework

The Department already exercises flexibility and discretion under provisions in the Migration Act when collecting personal identifiers. For example, currently:

- as a matter of policy, the Department does not collect facial images of a visa applicant in Australia who is aged 0 to 4 years. (No change under the Bill to this policy is proposed);

- as a matter of policy, the Department does collect a facial image of a minor aged 0 to 4 years at the time of visa application where the minor is offshore. (No change under the Bill to this policy is proposed);
- the Department collects only a facial image from 5 to 9 year olds who apply for a visa onshore. (No change under the Bill is proposed).

Primarily, collecting personal identifiers, particularly offshore, is an important tool to protect children who have been, or who are at risk of being trafficked. The full extent of child trafficking of minors into Australia is not known. Personal identifiers, particularly fingerprints, would make it easier to more accurately identify a child than is possible using a facial image, given the significant degree of change in facial features that occurs as children age.

The Bill will enable the Department to collect personal identifiers to respond to risks as they arise in its operational environment with less intrusion than is currently possible using non-biometric based methods.

Committee's first response

The committee thanks the Minister for this detailed response and notes the additional information provided. **The committee remains of the view that it would be preferable to include more detail in the bill to guide the exercise of this broad power in the context of minors and incapable persons.** In particular, the committee is interested in the possibility of including a requirement for reasonable steps to be taken to ensure that a parent/guardian or independent person can be present with a minor or incapable person and in reporting requirements.

Noting the vulnerability of minors and incapable persons, the importance of effective oversight of these broad powers, and the stated policy intention that only a small number of such persons would be required to provide personal identifiers, **the committee seeks the Minister's advice as to whether the bill could be amended to include:**

- 1. a requirement for the Department to take reasonable steps to ensure that a parent/guardian or independent person can be present with a minor or incapable person during a process in which the collection of personal identifiers is sought and completed (though once reasonable steps have been undertaken the process could proceed without such a person being present); and**
- 2. a requirement that the Department:**
 - (a) publicly report on the number of instances in which personal identifiers are collected from minors and incapable persons without consent or the presence of a parent, guardian or independent person; and**
 - (b) provide periodic reports to the Ombudsman in relation to the use of the collection power in these circumstances.**

Minister's second response – Sixth Report of 2015

Broad discretionary power items 52 and 53

The committee remains of the view that it would be preferable to include more detail in the bill to guide the exercise of this broad power in the context of minors and incapable persons. In particular, the committee is interested in the possibility of including a requirement for reasonable steps to be taken to ensure that a parent/guardian or independent person can be present with a minor or incapable person and in reporting requirements.

Noting the vulnerability of minors and incapable persons, the importance of effective oversight of these broad powers, and the stated policy intention that only a small number of such persons would be required to provide personal identifiers, the committee seeks the Minister's advice as to whether the bill could be amended to include:

1. a requirement for the Department to take reasonable steps to ensure that a parent/guardian or independent person can be present with a minor or incapable person during a process in which the collection of personal identifiers is sought and completed (though once reasonable steps have been undertaken the process could proceed without such a person being present)

The Government is currently considering its response to the Senate legal and Constitutional Affairs Legislation Committee's 5 June 2015 report on the Bill, which raised a similar issue. A response to the Scrutiny of Bills Committee on this issue will be provided in due course.

Committee's second response

The committee thanks the Minister for this response and looks forward to receiving the further advice about this matter as soon as possible.

2. a requirement that the Department:
 - (a) publicly report on the number of instances in which personal identifiers are collected from minors and incapable persons without consent or the presence of a parent, guardian or independent person

The Department will keep statistics on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person. The Department agrees to make these publicly available.

- (b) provide periodic reports to the Ombudsman in relation to the use of the collection power in these circumstances.

Information collected by the Department on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person, will be made available to the Ombudsman.

Committee's second response

The committee thanks the Minister for this response and welcomes the commitment to record and publish statistics about the collection of personal identifiers from minors and incapable persons without consent or without the presence of a parent, guardian or independent person.

Similarly, the committee thanks the Minister for the commitment to make information available to the Ombudsman in relation to the number of instances in which the collection power is used in these circumstances.

In the absence of a legislative requirement to undertake these actions, the committee seeks the Minister's advice as to how his department will ensure that they occur.

Minister's third response - extract

The Committee looks forward to receiving further advice about whether the Bill should include a requirement for the Department to take reasonable steps to ensure that a parent, guardian or an independent person be present with a minor or incapable person during the collection of personal identifiers.

The Government has considered this proposal carefully and thanks the Committee for its suggestion.

The Government is of the view that the Bill should not include a legislative requirement for the Department to take reasonable steps to ensure that a parent or guardian or an independent person be present with a minor or incapable person during the collection of personal identifiers. The Department will however specify in policy the circumstances where reasonable steps will be taken to ensure that a parent or guardian is present during the collection of personal identifiers.

As the ability to collect personal identifiers from minors and incapable persons is necessary in circumstances where there is a suspicion of trafficking or exploitation, it is important that in these instances, a parent or guardian is not able to circumvent the

collection of personal identifiers by refusing to be present. Therefore the inclusion of a legislative requirement to take reasonable steps to ensure that a parent or guardian be present during the collection of personal identifiers may in certain circumstances undermine the very purpose of the legislation and the best interests of the child themselves.

It is important that the policy reflects the flexible use of this broad power to meet operational requirements and to allow the Department to respond effectively and quickly to new and unprecedented threats.

As the Committee would be aware the Bill will authorise the use of *verification checks* to verify identity and conduct checks of persons who are identified as being of higher risk at Australia's border and other locations. Collecting fingerprint scans by way of a *verification check* at the border is a quick and non-intrusive process and will be conducted in **public**, just as the current explosives detection test at airports is conducted in public. Fingerprint scans will not be retained beyond the time it takes to conduct the check (around 30 seconds).

Identification tests, which are currently authorised by the Migration Act and carried out by authorised officers, will continue to be conducted according to procedures set out in the Migration Act, such as sections 258B and 258F. An *identification test* involves collecting a scan of all fingers and a facial image, which may involve the removal of clothing that obscures the face, such as a headscarf. Biometric information collected through an *identification test* is retained by the Department.

For an *identification test* conducted at the border, the minor will be removed to a separate place and the test will be conducted by two authorised officers, in accordance with sections 258B-258G of the Migration Act. As a matter of policy, the department would request a parent or guardian to accompany the minor while the test is being conducted. The test may be conducted by a male or female officer. A Departmental officer will seek the consent and presence of the minor's parent or guardian for a *verification check* or *identification test* to be conducted. In the case of an unaccompanied minor, where an *identification test* is required, the test will be conducted in the presence of two authorised officers, one of whom will be a female. This is consistent with frisk search practices.

Where cooperation for a *verification check* or *identification test* is not provided, a Departmental officer will advise the parent or guardian and the minor of the consequences of refusing to provide personal identifiers. Where consent and presence is still withheld, the relevant consequence/s will follow. This may include conducting further checks with other agencies or other checks to resolve the issue of concern. The delay may result in missed flights or refused border clearance for noncitizens. Force or coercion will not be used under section 257A to conduct the *verification check* or *identification test*.

Policy guidance will be made publicly available to provide assurances to the public that the collection of personal identifiers from minors and incapable persons are transparent.

In the absence of a legislative requirement to make information available to the Ombudsman in relation to the number of instances in which the collection power is used, the Committee seeks the Minister's advice as to how his department will ensure that this occurs.

As previously commented, the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person will be made publicly available. This information will be included as part of the Department's Annual Report.

Furthermore the investigative powers of the Ombudsman as provided in the *Ombudsman Act 1976*, which include powers to require certain types of information, continue to operate in instances where an investigation is being conducted by the Ombudsman.

The Department will continue to cooperate with the Ombudsman in any investigation that it conducts.

Committee's third response

The committee thanks the Minister for this detailed response. However:

- while the committee notes the intended policy arrangements for the collection of personal identifiers from a minor or incapable person, it remains of the view that it is preferable to include a legislative requirement for the department to take reasonable steps to ensure that a parent or guardian be present with a minor or incapable person during the collection of personal identifiers unless there are reasonable grounds to believe that this would undermine the purpose of the legislation and possibly the best interests of the child (such as in exploitation or trafficking situations); and
- the committee would prefer that the requirement to make information available to the Ombudsman at least annually be included in the bill.

The committee draws these comments to the attention of Senators and leaves the question of whether proposed approach in relation to this broad discretionary power is appropriate to the Senate as a whole.

Passports Legislation Amendment (Integrity) Bill 2015

Introduced into the House of Representatives on 4 June 2015

Portfolio: Foreign Affairs

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Minister responded to the committee's comments in a letter dated 22 July 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

This bill amends the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to:

- provide that a travel document may be issued to a person on the Minister's own initiative, to facilitate a lawful requirement to travel;
- align the definition of 'parental responsibility' more closely to that in the *Family Law Act 1975* (Cth);
- provide that the Minister may refuse to process a passport application if there are reasonable grounds to suspect fraud or dishonesty in the application; and
- amend existing offences in response to the fraudulent use of Australian travel documents, whether genuine or false.

The bill also makes minor consequential amendments to a number of other Acts and repeals the *Australian Passports (Transitional and Consequential) Act 2005*.

Broad discretionary power

Merits review

Schedule 1, item 61, new subsection 53(4)

This item confers a broad discretionary power on the Minister to refuse any name or signature of the person that the Minister considers to be unacceptable, inappropriate or offensive. The explanatory memorandum provides a long list of examples of unacceptable, inappropriate or offensive names (see p. 19). The statement of compatibility (at p. 35) gives a detailed justification of the approach:

A person may use the most recent name registered by the person with an Australian Registry of Births, Deaths or Marriages. However, the principal object of the Passports Act is to provide for the issue and administration of Australian passports,

to be used as evidence of identity and citizenship by Australia citizens who are travelling internationally. Given that passports are documents which are presented to officials in other countries as evidence of a person's identity and citizenship, a restriction on the use of unacceptable or offensive names and signatures is reasonable and necessary. Examples of unacceptable names include names which are or contain: an expletive; a racial or ethnic slur or implication; an obscene or offensive term; a political statement or slogan; the name of, or reference to, a public institution or public office; a term that could mislead people into believing that the bearer has been awarded or conferred a title, award or decoration; or a string of words that would not commonly be recognised as a name.

A similar situation arises in relation to signatures which contain offensive words or symbols. While a person is entitled to create any signature they wish, there are certain words, phrases and images which are considered inappropriate and should not be included in a signature printed in a Commonwealth document.

Although the rationale for the power may be accepted, the exercise of the power could mean that a person may not use their lawful name for travel purposes. **The committee therefore seeks the Minister's advice as to:**

- **whether consideration has been given to drafting the power so that it is more constrained (by, for example, including a non-exhaustive list of examples of what may constitute an unacceptable, inappropriate or offensive name or signature in the legislation); and**
- **whether the exercise of this power will be subject to merits review by the AAT.**

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

I confirm that consideration was given to including a non-exhaustive list of examples in the drafting of the power to refuse a name or signature as unacceptable, inappropriate or offensive (item 61 of the Bill). It was decided that, as a non-exhaustive list would not limit the power of the provision, it was preferable to include such a list of examples in the Explanatory Memorandum.

I confirm the intention that merits review rights will apply to a decision made under the proposed new subsection 53(4), to refuse a name as unacceptable, inappropriate or

offensive. My Department is in the process of preparing an amendment to the Bill to add a merits review right for this provision.

Committee response

The committee thanks the Minister for this response and notes that consideration was given to the possible inclusion of a non-exhaustive list of examples in the bill; however this was ultimately included in the explanatory memorandum instead. While thorough supporting material is useful and encouraged, the committee would still prefer to see a list included in the primary legislation itself as an aid to statutory interpretation because non-statutory material (such as that included in an explanatory memorandum) can only be used by a court in limited circumstances relating to the use of extrinsic material.

The committee welcomes the Minister's advice as to the intended inclusion of merits review rights.

The committee leaves the question of whether the proposed approach in relation to this broad discretionary power is appropriate to the consideration of the Senate as a whole.

Private Health Insurance (Prudential Supervision) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

The bill received Royal Assent on 26 June 2015

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2015*. The Assistant Treasurer responded to the committee's comments in a letter dated 24 June 2015. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2015 - extract

Background

This bill is part of a package of five bills. The bill seeks to:

- transfer the prudential supervisory functions from the Private Health Insurance Administration Council to the Australian Prudential Regulation Authority (APRA);
- provide for the registration of private health insurers and prohibit unregistered entities from carrying on a health related business;
- require private health insurers to have health benefit funds;
- provide that APRA approves restructures, mergers, acquisitions and terminations of health benefit funds;
- empower APRA to appoint an external manager of a health benefit fund;
- outline duties and liabilities of directors;
- enable APRA to establish prudential standards and to exercise powers under the standards;
- outline obligations of private health insurers;
- provide for the monitoring and investigation of private health insurers;
- provide that APRA can obtain an enforceable undertaking from a person in connection with a matter in relation to which APRA has a power or function;
- provide that APRA may seek remedies for a contravention of an enforceable obligation;

- provide for the Administrative Review Tribunal to review decisions made by APRA; and
- set out matters in relation to approvals, determinations and rules.

Broad discretionary power

Subsection 15(1)

This clause provides that APRA may grant an application to be registered as a private health insurer, subject to any terms and conditions it deems appropriate. The explanatory memorandum does not state why it is necessary to frame the power to grant an application and to impose conditions so broadly. Although it is the case that decisions made under this provision are reviewable by the AAT, **the committee seeks the Minister's advice as to whether consideration can be given to including more guidance in the bill itself about how this power is to be exercised (for example, the inclusion of considerations which must be addressed) rather than leaving such questions to be determined in an ad hoc way through the policy which arises from the making of individual decisions.**

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.

Assistant Treasurer's response - extract

Broad discretionary power in subclause 15(1)

Subsection 15(1) provides that the Australian Prudential Regulation Authority (APRA) may, in writing, grant an application for registration, subject to such terms and conditions as APRA considers appropriate. The Committee has noted that this is a broad discretionary power. The Government considers that this breadth is appropriate given the critical role private health insurers play in the health system, and the range of possible considerations that may need to be taken into account by APRA in the registration process.

For example, when applying for registration, if a start-up insurer undertakes to confine itself to a particular type of business for a limited time, APRA could grant the application for registration subject to a time-limited condition that the insurer confine itself to that type of business.

The existing power for the Private Health Insurance Administration Council to register applicants in section 126-20 of the *Private Health Insurance Act 2007* is also broad. Similarly, the comparable powers in section 9 of the *Banking Act 1959* and section 13 of the *Insurance Act 1973* are broad.

Section 14 of the Bill provides for matters or criteria relating to registration to be set out in rules, made by way of a disallowable instrument. An entity whose registration has been refused will be entitled to right of review both internally through APRA and then the Administrative Appeals Tribunal (section 168).

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee reiterates its general view that it is preferable to include guidance on the face of the legislation in relation to how a broad discretionary power such as this is to be exercised (rather than leaving such questions to be determined in an ad hoc way through the policy which arises from the making of individual decisions).

However, in this instance, as the bill has already passed both Houses of the Parliament the committee makes no further comment.

Alert Digest No. 6 of 2015 - extract

Undue trespass on personal rights and liberties—reversal of onus of proof

Subsections 73(6), 74(6), 112(4), 116(2) and 142(2)

There is no justification in the explanatory memorandum for placing an evidential burden on the defendant for defences available in circumstances in which records must be provided to external managers or in which APRA can require the provision of specified information. **The committee therefore seeks the Minister's advice as to the justification for the reversal of the onus of proof in these circumstances.**

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.

Assistant Treasurer's response - extract

Reversal of onus of proof: subsections 73(6), 74(6), 112(4), 116(2) and 142(2)

The Bill does not reverse the onus of proof. Instead, subsections 73(6), 74(6), 112(4), 116(2) and 142(2) contain defences and each has a note that the defendant bears an evidential burden in relation to establishing the defence, as is ordinarily the case in relation to a defence in accordance with section 13.3 of the Criminal Code.

These provisions do not go any further than the default position under the Criminal Code, with the relevant notes confirming that the Criminal Code position applies. The burden on the defendant is an evidential one (that is, to adduce or point to evidence that suggests a reasonable possibility that the defence can be made out). There has been no attempt to create a higher legal burden.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee is aware that there has been no attempt to impose a legal burden of proof on the defendant in relation to these provisions; however, as the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states, offence-specific defences (including those that only impose an evidential burden on the defendant) still 'reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence' (p. 50). As a result offence-specific defences should only be included in legislation where the circumstances specifically warrant their inclusion.

Noting the above, the committee expects that explanatory materials accompanying bills will fully justify the inclusion of provisions which impose an evidential burden on the defendant. In this instance, the committee notes that the Assistant Treasurer has not provided a specific explanation in relation to these provisions, however, in this instance as the bill has already passed both Houses of the Parliament the committee makes no further comment.

Alert Digest No. 6 of 2015 - extract

Delegation of legislative power—Incorporation of instruments from time to time

Subsection 92(7)

This subclause provides that:

A prudential standard may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time...

A justification for the proposed approach is outlined at p. 69 (5.15) of the explanatory memorandum, which includes the information that the ability to incorporate material from time to time ‘will mean that APRA will not need to remake a prudential standard each time the Actuaries Institute updates its standard on financial condition reports for private health insurers’.

In light of this explanation, the committee makes no further comment on the proposed inclusion of this power. **However, the committee seeks the Minister’s advice as to whether the standards which will be incorporated will be readily and freely available to the public, and in particular whether consideration has been given to including a requirement in the legislation that such standards be published and updated on APRA’s website.**

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.

Assistant Treasurer’s response - extract

Subsection 92(7) – consideration of whether standards should be freely available online

Subsection 92(7) allows APRA to incorporate material into prudential standards. The provision enables APRA’s prudential standards to refer to and incorporate guidance and standards published by professional bodies as updated from time to time, such as professional standards issued by the Actuaries Institute. APRA’s power to incorporate

material means that APRA will not need to remake a prudential standard each time the guidance and standards are updated.

The standards published by the Actuaries Institute are available on their website.

Committee response

The committee thanks the Assistant Treasurer for this response.

The committee notes the Assistant Treasurer's advice that the standards published by the Actuaries Institute are available on the institute's website. However, it is not clear from the Assistant Treasurer's advice that these standards will be *readily and freely* available, or whether any consideration was given to including a requirement in the legislation that such standards be published and updated on APRA's website.

The committee reiterates its general view that it will have scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- mean that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards or industry databases, is not publicly available or is available only if a fee is paid).

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

As the bill has already passed both Houses of the Parliament the committee makes no further comment.

Alert Digest No. 6 of 2015 - extract

Delegation of administrative power

Section 147

Under subsection 147(1) an inspector may delegate any of the inspector's monitoring and investigation powers under Division 3 to an ARPA staff member. Although subsection 147(2) requires that an inspector must not delegate powers to an APRA staff member unless the inspector is satisfied that the staff member has suitable qualifications and experience to exercise those powers, the necessity and appropriateness of delegation of these significant powers is not addressed in any detail in the explanatory memorandum. **The committee therefore seeks the Minister's further elaboration of the justification for this approach.**

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

Assistant Treasurer's response - extract

Delegation of administrative power – section 147

Section 130 of the Bill allows APRA to appoint an APRA staff member with suitable qualifications and experience as an inspector to investigate a private health insurer.

Section 147 allows an inspector to delegate some or all of their powers; accordingly, it allows the inspector to limit a delegate's powers to a subset of the inspector's powers, as long as the delegate is an APRA staff member with suitable qualifications and experience.

This ensures that the inspector can delegate a defined aspect of an investigation to a person with specialised technical skills (for example, actuarial or accounting skills), if necessary.

It also allows the inspector to delegate the conduct of the investigation to a suitably qualified person for a defined period if it is necessary for the inspector to take leave, or otherwise absent themselves, from the investigation for that period.

Committee response

The committee thanks the Assistant Treasurer for this response, and **notes that it would have been useful had this information been included in the explanatory memorandum.**

As the bill has already passed both Houses of the Parliament the committee makes no further comment.

Senator Helen Polley
Chair



The Hon Warren Truss MP

Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

RECEIVED

- 3 JUL 2015

Senate Standing C'ttee
for the Scrutiny
of Bills

02 JUL 2015

PDR ID: MC15-002932

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

Dear Senator Polley

Thank you for the letter dated 18 June 2015 from Ms Toni Dawes, Senate Scrutiny of Bills Committee Secretary, regarding the assessment of the Airports Amendment Bill 2015 (the Bill) by the Senate Scrutiny of Bills Committee.

I note the concerns raised by the committee in relation to parliamentary scrutiny of the airport plan. Consistent with existing processes for master and major development plans under the *Airports Act 1996*, for which there are no tabling requirements, the Bill requires an airport plan for Sydney West airport to be published on the Department of Infrastructure and Regional Development's website once the plan has been determined.

This will be preceded by a period of public consultation on a draft airport plan as part of the consultation process for the environmental impact statement for the proposed Western Sydney airport.

Taken together, I consider these steps will provide adequate opportunity for scrutiny of the airport plan.

I trust this information will be of assistance.

Yours sincerely

WARREN TRUSS

RECEIVED

- 30 JUL 2015


Senate Standing C'ttee
for the Scrutiny
of Bills



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MS15-001156

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


Dear Senator Polley


Thank you for the letter of 18 June 2015, requesting further advice in relation to clause 14 of Appropriation Bill (No. 4) 2014-2015 (and equivalent provisions in other Appropriation Bills).

The National Disaster Relief and Recovery Arrangements (NDRRA) Determination 2012 uses clause 14 of Appropriation Bill (No. 4) 2014-2015 (or equivalent provision) for concessional interest rate loans. The NDRRA Determination enables two forms of financial assistance: national partnership payments covered under the Intergovernmental Agreement on Federal Financial Relations; and concessional interest rate loans. Concessional interest rate loans are not covered by the Federal Financial Relations framework, so therefore rely on the mechanism under clause 14 (or equivalent) within the even-numbered Appropriation Bills.

While determinations may be rare, clause 14 or similar provisions will be required in future Appropriation Bills. Clause 14 or equivalent would need to be available in future in order to support concessional loans under the NDRRA Determination. As previously advised, generally other legislative or agreed frameworks determine how payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. In particular circumstances clause 14 may be needed if an alternative framework does not adequately allow the relevant Minister to manage payments to states, territories and local governments in accordance with the purposes for which the money was appropriated by Parliament.

I have copied this response to the Treasurer and the Minister for Justice, who has responsibility for the National Disaster Relief and Recovery Arrangements and associated Determinations.

Kind regards


 Mathias Cormann
Minister for Finance

15 July 2015



Minister for Small Business

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

Dear Senator

Australian Small Business and Family Enterprise Bill 2015

I refer to the Committee's letter of 18 June 2015 concerning the above Bill. I thank the Committee for its interest in the Bill, and I provide the following response to the Committee's comments.

Merits review – Subclause 92(2)

The merits review subclause in 92(2) of the Bill allows parties to appeal a decision made by the Ombudsman, under subparagraphs 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii) and 63(3)(a)(ii), regarding whether it is in the public interest to delete information, a recommendation or an opinion from a report or advice before it is tabled or published. Appeals relate only to the public interest element in these subparagraphs, and not to whether the relevant information or recommendation would be 'likely to adversely affect the interests of any persons'. This latter issue is an objective matter, and therefore subject to administrative decisions judicial review (ADJR).

Undue trespass on personal rights and liberties – Subclauses 48(3), 82(2) and 91(5)

The imposition of an evidential burden on the defendant in the circumstances specified in subclauses 48(3), 82(2) and 91(5) of the Bill is appropriate. In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the matters to which these subclauses relate, are matters readily within the knowledge of the defendant, and might not always readily be known to the Ombudsman – such as, for example, where a person discloses protected information in accordance with 'a law of a State or a Territory' (subparagraph 82(2)(b)(ii)).

An evidential burden placed on the defendant is not uncommon. Similar notations to those in the current Bill exist in other Commonwealth legislation (for example, see subsection 186N(2), *Bankruptcy Act 1966* – where a person has an evidential burden regarding having a 'reasonable excuse' for not returning a certificate of registration as a debt agreement administrator).

Subclause 48(3) of the Bill (whether or not a person is excused or released from attending a hearing), requires a person to simply produce a copy of something which would show that the person was excused from attendance a hearing, and there is a relatively low penalty for failing to meet this requirement.

Subclause 82(2) (whether an exception to the offence of disclosing or using protected information applies) requires a person to simply indicate a provision in legislation which authorised the person's disclosure or use of protected information.

Subclause 91(5) (an exception to secondary disclosure or use of protected information) requires that a person, who disclosed or used protected information, provides something which indicates that the disclosure for use was with the consent of the Ombudsman, or was for the purpose of enforcing certain laws.

The evidential burden in each of these circumstances can easily be met. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

Privacy – Part 5, Division 2

Part 5, Division 2 in the Bill will ensure accountability and transparency in relation to the use or disclosure of protected information. Following extensive consultations with stakeholders, this Division takes into account the need for individual rights under privacy laws to be protected, and includes strict penalties for a person assisting a small business or family enterprise, and a professional disciplinary body, if they handle protected information in a way that is inappropriate.

As stated in the explanatory memorandum to the Bill, the Ombudsman's ability to make information publicly available is an important part of having an Ombudsman with 'real power' consistent with the Government's election commitment, however, this objective has been balanced in the Bill with the need to ensure that protected information is handled appropriately. Public officials must be accountable for their actions – including what they do with 'protected information'. Unlawful disclosure of such information may cause great harm to some people, and it is appropriate that there should be penalties to deter unlawful disclosure. Exceptions to these provisions are also in place to provide people with a defence if, for example, they are able to show that the protected information was used for a proper purpose.

In these circumstances, the provisions dealing with protected information are consistent with individuals' privacy rights. Indeed, for the protection of privacy, the decisions of the Ombudsman in relation to certain information are reviewable by the Administrative Appeals Tribunal under section 92 of the Bill. Also, safeguards are in place, for example, individual rights and protections in relation to self-incrimination and legal professional privilege will be maintained under the Bill (clause 93).

Delegation of legislative power – Clause 96

I note the Committee's view concerning the delegation of legislative powers, however, no amendment to this provision is necessary. The provision is consistent with existing standard form provisions, which are present in other legislation, such as that relating to the Inspector-General of Taxation who will, like the proposed Ombudsman, be interacting with other Commonwealth officials, such as the Commonwealth Ombudsman, to deal with issues raised by small businesses. I note that the Committee, when it examined amendments to the Inspector-General of Taxation's legislation on 11 February 2015, did not comment on the similar provision existing in the Inspector-General legislation.

As the Committee noted in one of its regular reports, the recently revised Drafting Direction 3.8 is 'a policy statement and not a mandatory requirement'. Clause 96 of the Bill, moreover, does not deal with any 'significant provisions' relevant to Drafting Direction 3.8.


The Bill will establish an Ombudsman who can advocate for small businesses and family enterprises and provide assistance to them. The Bill is therefore concerned with supporting the rights of those who run small businesses and family enterprises. The Bill will not be a mechanism by which businesspeople, for example, are arrested or detained. It is therefore both practical and desirable for the Bill to use the proposed standard form provision for the delegation of legislative powers.

Additionally, the Bill does not limit the ability of Parliament (and the public in general) to understand and effectively scrutinise rules made under the Bill. Any rule made under this provision is a legislative instrument within the meaning of the *Legislative Instruments Act 2003*, and thus would be tabled in Parliament and be subject to disallowance. Legislative instruments are further scrutinised by the Senate Standing Committee for Regulations and Ordinances, which considers and reports on all instruments that come before it, to ensure that they are in accordance with appropriate exercises of delegated legislative power.

Subsection 17(1) of the Legislative Instruments Act also requires a rule-maker, to be satisfied that appropriate consultation has been undertaken before the person makes a legislative instrument. This requirement applies to all legislative instruments, but is particularly important if the instrument is likely to have an 'effect on business'. Small business legislative instruments will, of course, have some effect on businesses, and therefore must be publicly consulted on.

I thank the Committee again for its interest in this important measure. I note that the Bill was passed by the House of Representatives on 17 June 2015, and has now been referred to the Senate Legal and Constitutional Affairs Legislation Committee, which is expected to report on the Bill by 11 August 2015. I shall forward a copy of this letter to that Committee for its information.

I hope that this response assists in the Committee's consideration of the Bill.

Yours sincerely



BRUCE BILLSON



DR CHRISTOPHER BACK
Liberal Senator for Western Australia

PERTH
Unit E5, 817 Beeliar Drive
Cockburn Central WA 6164

PO Box 3468
SUCCESS WA 6964

Telephone: (08) 9414 7288
Facsimile: (08) 9414 8819
FreeCall: 1300 301 846
Email: senator.back@aph.gov.au

CANBERRA
Parliament House
Canberra ACT 2600
Telephone: (02) 6277 3733
Facsimile: (02) 6277 5877

28 July 2015

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

Dear Chair,

Helen

Referring to the Criminal Code Amendment (Animal Protection) Bill 2015 (the Bill) which was introduced to the Senate on 11 February 2015, I would like to provide a response to the Committee's concerns as set out in Alert Digest No. 2 on 4 March 2015.

Definition of entities

The Committee sought an explanation as to why entities to whom the disclosure of cruelty must be made cannot be defined within the Bill with more certainty. The concern was that possible uncertainty might be potentially considered a trespass on personal rights and liberties.

It is firstly important to appreciate that fundamental differences exist in the management regimes under various State and Territory jurisdictions in Australia in relation to the enforcement of animal welfare. As such it is not practical to clearly define the reporting agency in each jurisdiction, particularly as State legislatures may change their administrative arrangements at their discretion over time.

As an example, in the Northern Territory enforcement responsibility resides with the Animal Welfare Authority, in Western Australia with the Department of Agriculture, in South Australia and New South Wales it resides with the RSPCA, while in Victoria certain authorised local council officers have powers as well. While the RSPCA is a key agency in most jurisdictions in Australia it may not always have full enforcement powers. The police will always have a law enforcement role but they may not necessarily have primary responsibility.

As such it would be unnecessarily burdensome to include references in the Bill to state legislation and regulatory arrangements which are subject to change.

If there was any doubt at all regarding the relevant authority to report to, the person would only need to seek the advice of the RSPCA which has a national toll-free 24 hour telephone service for assistance in reporting specific cases of cruelty. Alternatively a call could be made to Crime Stoppers.

Therefore, while the requisite reporting authorities in each state and territory are not specifically listed in the Bill, it is not burdensome or unreasonable to require a person to take the responsibility to identify the relevant authorities.

To respond directly to the Committee's concerns, I strongly contend this does not constitute or imply any trespass on personal rights and liberties. While all citizens within our community do have rights, importantly they also have responsibilities which they must exercise. There are countless examples under today's statutes where to achieve compliance, people must assume personal responsibility and initiative.

For instance, if the law requires a person to hold a valid licence to drive on the roads, it is the individual's responsibility to identify the relevant licensing authority as well as the various requirements which will need to be met. It is not reasonable to break the law because a person believed their human rights were being offended because the name of the authority was not specifically listed in the legislation.

To plead ignorance of the identity of the reporting authorities in the absence of calling the RSPCA or police is neither a reasonable defence nor a trespass on a person's rights or liberties.

New amendment

It is relevant at this point to advise that I would accept the recommendation of the Senate Rural and Regional Affairs and Transport Committee to propose an amendment which requires visual records of malicious cruelty to be reported and provided 'as soon as practicable' rather than 'reported within 1 day and handed over within 5 days'.

In certain legitimate cases this may lessen the pressure on persons who hold visual records without true knowledge of the reporting authority, as it gives them the necessary time to ask somebody, or call the responsible authority.

Absolute liability

Absolute liability is appropriate and required in this element of the offences because it is a jurisdictional element. A jurisdictional element of an offence is one which does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the commonwealth, states and territories. This is consistent with commonwealth criminal law policy, as described in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

I note that the Committee previously had no issues with the very same principle being applied to the relevant provisions of the Law and Justice Legislation Amendment (Identity Crimes and other Measures) Bill 2010.

Nevertheless, I accept the need to ensure the provisions in relation to the application of absolute liability are openly explained.

New offences & penalties

a) The need for the offences where existing offences would also cover the conduct (e.g. crimes against property and persons)

The Committee sought justification as to whether existing offences might already cover the conduct of crimes against person and property and whether the penalties are consistent.

While some elements of the possible suite of offences might be provided for in existing legislation (such as trespass or arson) there are other offences which may impact upon a primary producer or animal enterprise manager attempting to lawfully conduct their business (such as biosecurity breaches, releasing animals from captivity, preventing the transportation of stock and interfering with husbandry practices) which are not.

Whatever the reason, it is apparent that incidences of the types of illegal activities contemplated in this Bill are currently not being prosecuted through normal channels.

Therefore there is strong justification for legislation which defines and captures the central nature of the problem relating to malicious cruelty to animals and the protection to law-abiding primary producers so that the enforcement action which is currently not being taken in a timely manner will be taken in the future.

a) That penalties imposed for new offences be justified by comparison with those imposed for similar offences in Commonwealth legislation.

The various levels of penalties within Commonwealth, State and Territory Criminal Codes are quite inconsistent. This Bill will provide some consistency by way of federal legislation.

The proposed maximum penalties are in most cases less than comparable State and Territory legislation for malicious property damage.

For instance, in NSW under *s195 of the Crimes Act 1900*, a person who intentionally or recklessly destroys or damages property is liable for imprisonment for up to five years; or if the damage is caused by fire or explosion, for up to ten years. However if the offences are carried out in the company of another, the maximum terms are longer.

Under *s29 of the Commonwealth Crimes Act 1914*, destroying or damaging Commonwealth property by fire has a maximum penalty of ten years imprisonment.

Under the Australian Capital Territory *Crimes Act 1900*, offenders can be imprisoned for fifteen years plus 1500 penalty units, or up to twenty years if they acted dishonestly with a view to gain. Indeed, even threatening to damage property by fire has a maximum of seven years jail plus 700 penalty units.

In Tasmania, under the *Criminal Code Act 1924*, a person placing combustible material with the intent to injure property faces a maximum jail term of twenty one years plus a discretionary fine. In my home state of Western Australia, under s144 of the *Criminal Code* the maximum penalty for wilful damage to property by fire is fourteen years.

Where there is a lack of uniformity between the various jurisdictions, this Bill delivers a degree of consistency while also providing penalties which are moderate by comparison.

Personal rights and liberties

The Committee also questioned whether the provisions might unduly trespass on personal rights and liberties in breach of principle 1(a)(1) of the Committee's terms of reference. This matter has been comprehensively addressed in the response to the Parliamentary Joint Committee on Human Rights which is attached for reference.

In short, this is a fair Bill which respects the rights and liberties of all citizens. It respects the community's right to have an expectation that malicious cruelty towards animals will be expeditiously redressed. It respects the right of persons to gather evidence of suspected cruelty however it endows a responsibility to hand this over to enforcement authorities as soon as practicable. It also compels them to undertake their activities lawfully and never cause damage to property, persons or enterprise.

Under s385 persons have the right to utilise the defences of peaceful demonstration, acting in good faith in relation to an industrial matter, and publishing in good faith regarding a matter of public interest.

Importantly, I draw the Committee's attention to the right of a farmer, primary producer or animal enterprise manager to support their family and lawfully conduct their business without illegal interruption from those who simply do not respect this right. As with all other citizens in the community, they hold the right to protection under the law when their fundamental rights and liberties to maintain the safety of their property and person are threatened, as supported by Article 3 of the Universal Declaration of Human Rights.

Therefore the Bill respects the rights and liberties of all members of the community and does not unduly trespass on these civic privileges.

Reversal of burden of proof

The Committee sought a response to comments relating to the need for the defendant to bear an evidential burden in relation to the requirement to report.

In relation to Divisions 383 and 385, this is appropriate as it reflects the fact that it would be significantly more difficult and costly for the prosecution to prove that an activity was not reported. In effect it would require the prosecution to prove a negative, however given the information about whether the matter was reported or not would peculiarly be within the knowledge of the defendant, under the circumstances it is a simple and reasonable obligation for the defendant to assume the burden of proof.

It is noted the Committee accepted the same argument for the Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013.

Specifically in relation to Division 385, a defendant will bear a burden of proof for the defences of peaceful picketing, acting in good faith, and publishing in good faith.

This requirement actually allows the defendant an excellent opportunity to 'prove the positive' that their actions were justifiable. It also provides a platform for them to bring in witnesses and character references to ensure they receive a full and fair hearing.

Given it is a very subjective line of defence which the defendant has elected to choose, it is also appropriate for them to support and prove their assertions beyond reasonable doubt. Conversely, it would not necessarily serve the interests of justice if the prosecution took an aggressive lead in questioning the intent and good faith of defendants.

Summary

In conclusion, unfortunately it is not uncommon for people to record activities of animal cruelty and then consciously withhold the recordings for extended periods of time, thereby allowing the violent treatment of animals to endure. As such, I strongly contend that the requirement to hand over visual recordings when they come to hand is justifiable, reasonable and proportionate and does not adversely impact upon the common law rights of citizens. Also, the activities undertaken to damage the property or thwart and inhibit the ability of primary producers or others to conduct their lawful operations need to be protected.

This Bill is an important step forward as it ensures that malicious cruelty against animals can be more firmly reported in a timely, responsible and lawful manner.

Yours sincerely

Dr Chris Back
Senator for Western Australia



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MC15-126319

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

Dear Senator

I refer to the letter of 18 June 2015 from the Committee Secretary, concerning the Customs Amendment (Australian Trusted Trader Programme) Bill 2015 (the Bill).

I note that the Committee tabled its *Alert Digest No. 6 of 2015* on 17 June 2015 and requested an explanation of why key elements of the Australian Trusted Trader Programme (the Programme) are to be prescribed by rules (a legislative instrument).

The regulatory framework for the Programme consists of three elements:

1. The Bill – which has amended the *Customs Act 1901* (Cth) (Customs Act) to establish the Programme and provide the necessary heads of power to implement key principles of the Programme;
2. Rules – this will be a legislative instrument (which will be subject to parliamentary scrutiny and disallowance). This will set out details for and in relation to the operation of the Programme (for example, the qualification criteria, relevant considerations for decisions, conditions of participation and benefits that may be made available to entities); and
3. An agreement – which may be entered into with each entity if the entity nominates itself to participate in the Programme and the Comptroller-General of Customs considers that it is reasonably likely that the entity will satisfy the qualification criteria set out in the rules. Each agreement will set out further detail of the benefits that the entity qualifies for, how certain benefits will apply to that entity and any terms and conditions specific to that entity's participation in the Programme.

The regulatory framework for the Programme has been designed to balance stability and transparency of the Programme, allow reasonable flexibility to take account of the dynamic international trade environment and ensure the continued relevance of the Programme to traders. Including the qualification criteria, benefits and relevant considerations for decisions in the rules will:

- enable the Programme processes and operational design during the pilot phase of the Programme to be refined in a timely and transparent manner;
- enable the Programme to mature in accordance with a phased approach to implementation; and
- allow the Programme to have continued relevance to traders.

Pilot phase of the Programme

The Programme commenced on 1 July 2015 as a pilot to test and refine processes and design before it is opened to the wider trading community. The pilot for the Programme will operate in three stages over a period of approximately 12 months. The qualification criteria and relevant considerations for decisions will be tested as part of the pilot Programme and may need to be refined. Due to the short timeframes for each stage of the pilot (approximately three to four months), it is critical to the success of the Programme that there is flexibility to refine those elements in a timely manner before the next stage commences. Prescribing these elements in the rules rather than the primary legislation will enable the Programme processes and design to be refined in a flexible and transparent manner. As the rules are a legislative instrument, they will be subject to parliamentary scrutiny and disallowance.

Phased approach to implementation

Flexibility to refine the operational detail of the Programme will also be required following the pilot as any further expansion of the Programme will be undertaken in a phased approach. Each phase will involve an increase in the number of participants, greater complexity in the business models and supply chains of entities seeking to participate in the Programme and the development of further benefits for participants. Each phase will also be subject to an evaluation prior to commencing the next phase.

Continued relevance to traders

The qualification criteria and the benefits will be consistent with the World Customs Organization SAFE Framework of Standards to Secure and Facilitate Global Trade and the World Trade Organization Agreement of Trade Facilitation. However, to ensure relevance to Australian traders, the qualification criteria and benefits will take into account the Australian context and have regard to the various business models in Australia's trade environment.

The international trade environment is dynamic, with new business models frequently emerging. As new business models emerge, further opportunities to reduce the regulatory burden associated with customs procedures at the border may be identified. If these opportunities are to be made available to a trusted trader, further benefits, or legislative obligations that an entity may be released from, or may meet in an alternative manner, will need to be prescribed. Prescribing these matters in the rules will provide reasonable flexibility for the Programme to have continued relevance to traders.

Consultation

The Programme has been co-designed in partnership with industry and relevant government agencies through the Trusted Trader Industry Advisory Group (IAG). Consistent with the co-design approach, the design of the regulatory framework has been considered by the IAG. The general consensus of the IAG was that flexibility was required in the regulatory framework to ensure operational matters of the Programme may be refined in a timely manner and to take account of variability in business models. The IAG supported a model involving amendments to the Customs Act to establish key principles of the Programme and allow rules, in the form of a legislative instrument, and agreements to contain the operational detail of the Programme. Furthermore, an exposure draft of the Bill was provided to IAG members for comment. Feedback on the exposure draft was positive. In particular, it was noted that the Bill reflected discussions held at IAG meetings.

Thank you for your letter.

Yours sincerely

PETER DUTTON

21/7/15



The Hon. Barnaby Joyce MP

**Minister for Agriculture
Federal Member for New England**

Ref: MC15-005044

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

Dear Senator Polley *Helen*

Thank you for your letter of 18 June 2015 on behalf of the Senate Scrutiny of Bills Committee (the Committee) in relation to the Export Charges (Collection) Bill 2015 and the Imported Food Charges (Collection) Bill 2015.

My response to the matters raised by the Committee, which are identical for both bills, is set out below.

Delegation of legislative power

I agree with the Committee's assessment that the technical and administrative content of clauses 11 of these bills is generally appropriate for subordinate legislation.

I note that clause 11 is effectively identical to section 13 of the *Quarantine Charges (Collection) Act 2014*. A late payment fee in relation to unpaid quarantine charges has been established under the Quarantine Charges (Collection) Regulations 2014. Establishing different arrangements for late payment provisions in these bills would be inconsistent with related import and export legislation. This would compound the already complex administration of imported and exported goods.

It is my expectation that the Department of Agriculture (the department), in consultation with the Office of Parliamentary Counsel, considers the breadth of power of any regulation and includes appropriate limitations when drafting legislation for my consideration.

Clause 22 of the bills permit the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed. This extends to prescription of a late payment fee for the purposes of clause 11 of the bills. This was considered to operate as a limitation on the exercise of the power in clause 11 of the bills. In this regard, it was considered that the Governor General would not, as a matter of practice, make any regulations

which prescribe any late payment fee that could be seen as excessive, unreasonable or otherwise legally invalid.

Undue trespass on personal rights and liberties—protection from civil proceedings

As indicated above, the administration of imported and exported goods is complex and is regulated by many pieces of related legislation. Achieving consistency across this legislation is important for those who are regulated by it and those who give effect to it.

I draw the Committee's attention to the protection from civil proceedings provided by section 644 of the *Biosecurity Act 2015*, section 82 of the *Quarantine Act 1908* and by reference to the *Quarantine Charges (Collection) Act 2014* (see section 41), section 38 of the *Imported Food Control Act 1992* and section 22 of the *Export Control Act 1982*. The inclusion of a provision that provides for protection from civil proceedings provides a sound justification for the inclusion of similar provisions in these bills.

I expect the circumstances where such protections would be required will be isolated. Regardless, I consider it appropriate that the protection exists for persons making lawful decisions under these Acts, where there is the potential for loss by that party, without the threat of civil proceedings.

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

Yours sincerely

Barnaby Joyce MP

20 JUL 2015



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MC15-126320

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

Dear Senator Polley

I refer to the Committee's Sixth Report of 2015 relating to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.

In response to the Committee's request for further information on the Bill, I provide the attached.

The contact officer in my department is Rachael Spalding, First Assistant Secretary, Strategic Policy and Planning Division, who can be contacted on (02) 6264 1964.

Thank you for considering this response.

Yours sincerely

PETER DUTTON

21/7/15

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (the Bill)

The Committee is concerned about the breadth of the power to provide for future arrangements, and it is not persuaded that the use of regulations would inhibit the Department's ability to respond quickly.

The Government continues to hold the view that a broad power in the Bill is necessary and appropriate to require persons to provide personal identifiers for the purposes of the Migration Act and Regulations. This is consistent with, and critical to the Department's key function in being able to effectively regulate, in the national interest, the coming into and presence in Australia of non-citizens.

The Bill clearly sets out on the face of the legislation this new, simplified biometrics power, which will enhance the integrity of the immigration programme and strengthen community protection outcomes.

In the absence of a legislative requirement to make information available to the Ombudsman in relation to the number of instances in which the collection power is used, the Committee seeks the Minister's advice as to how his department will ensure that they occur.

As previously commented, the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person will be made publicly available. This information will be included as part of the Department's Annual Report.

Furthermore the investigative powers of the Ombudsman as provided in the *Ombudsman Act 1976*, which include powers to require certain types of information, continue to operate in instances where an investigation is being conducted by the Ombudsman.

The Department will continue to cooperate with the Ombudsman in any investigation that it conducts.

The Committee looks forward to receiving further advice about whether the Bill should include a requirement for the Department to take reasonable steps to ensure that a parent, guardian or an independent person be present with a minor or incapable person during the collection of personal identifiers.

The Government has considered this proposal carefully and thanks the Committee for its suggestion.

The Government is of the view that the Bill should not include a legislative requirement for the Department to take reasonable steps to ensure that a parent or guardian or an independent person be present with a minor or incapable person during the collection of personal identifiers. The Department will however specify in policy the circumstances where reasonable steps will be taken to ensure that a parent or guardian is present during the collection of personal identifiers.

As the ability to collect personal identifiers from minors and incapable persons is necessary in circumstances where there is a suspicion of trafficking or exploitation, it is important that in these instances, a parent or guardian is not able to circumvent the collection of personal identifiers by refusing to be present. Therefore the inclusion of a legislative requirement to take reasonable steps to ensure that a parent or guardian be present during the collection of personal identifiers may in certain circumstances undermine the very purpose of the legislation and the best interests of the child themselves.

It is important that the policy reflects the flexible use of this broad power to meet operational requirements and to allow the Department to respond effectively and quickly to new and unprecedented threats.

As the Committee would be aware the Bill will authorise the use of *verification checks* to verify identity and conduct checks of persons who are identified as being of higher risk at Australia's border and other locations. Collecting fingerprint scans by way of a *verification check* at the border is a quick and non-intrusive process and will be conducted in *public*, just as the current explosives detection test at airports is conducted in public. Fingerprint scans will not be retained beyond the time it takes to conduct the check (around 30 seconds).

Identification tests, which are currently authorised by the Migration Act and carried out by authorised officers, will continue to be conducted according to procedures set out in the Migration Act, such as sections 258B and 258F. An *identification test* involves collecting a scan of all fingers and a facial image, which may involve the removal of clothing that obscures the face, such as a headscarf. Biometric information collected through an *identification test* is retained by the Department.

For an *identification test* conducted at the border, the minor will be removed to a separate place and the test will be conducted by two authorised officers, in accordance with sections 258B-258G of the Migration Act. As a matter of policy, the department would request a parent or guardian to accompany the minor while the test is being conducted. The test may be conducted by a male or female officer. A Departmental officer will seek the consent and presence of the minor's parent or guardian for a *verification check* or *identification test* to be conducted. In the case of an unaccompanied minor, where an *identification test* is required, the test will be conducted in the presence of two authorised officers, one of whom will be a female. This is consistent with frisk search practices.

Where cooperation for a *verification check* or *identification test* is not provided, a Departmental officer will advise the parent or guardian and the minor of the consequences of refusing to provide personal identifiers. Where consent and presence is still withheld, the relevant consequence/s will follow. This may include conducting further checks with other agencies or other checks to resolve the issue of concern. The delay may result in missed flights or refused border clearance for non-citizens. Force or coercion will not be used under section 257A to conduct the *verification check* or *identification test*.

Policy guidance will be made publicly available to provide assurances to the public that the collection of personal identifiers from minors and incapable persons are transparent.



THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

I provide the following response to the points raised by the Scrutiny of Bills Committee in relation to the Passports Legislation Amendment (Integrity) Bill 2015 (the Bill).

I confirm that consideration was given to including a non-exhaustive list of examples in the drafting of the power to refuse a name or signature as unacceptable, inappropriate or offensive (item 61 of the Bill). It was decided that, as a non-exhaustive list would not limit the power of the provision, it was preferable to include such a list of examples in the Explanatory Memorandum.

I confirm the intention that merits review rights will apply to a decision made under the proposed new subsection 53(4), to refuse a name as unacceptable, inappropriate or offensive. My Department is in the process of preparing an amendment to the Bill to add a merits review right for this provision.

I trust this information is of assistance.

Yours sincerely

 Julie Bishop

22 JUL 2015



Assistant Treasurer

RECEIVED

25 JUN 2015

Senate Standing C'ttee
for the Scrutiny
of Bills

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

24 JUN 2015

Dear Senator Polley

Thank you for the letter of 18 June 2015 from the Senate Scrutiny of Bills Committee (the Committee) Secretary to my office in relation to issues raised in *Alert Digest No. 6 of 2015* concerning the Private Health Insurance (Prudential Supervision) Bill 2015.

I would like to thank you for the opportunity to provide further information on the issues identified by the Committee. I have addressed each of these concerns in **Attachment A** to this letter.

I trust that this additional information will be sufficient to address the Committee's concerns; however, if the information is not sufficient, I am happy to provide further detail in relation to any specific identified gaps in the explanatory information provided.

Yours sincerely

JOSH FRYDENBERG

RESPONSE TO QUESTIONS FROM THE COMMITTEE

Issue	Explanation
<p>Broad discretion in subsection 15(1)</p>	<p>Subsection 15(1) provides that the Australian Prudential Regulation Authority (APRA) may, in writing, grant an application for registration, subject to such terms and conditions as APRA considers appropriate. The Committee has noted that this is a broad discretionary power. The Government considers that this breadth is appropriate given the critical role private health insurers play in the health system, and the range of possible considerations that may need to be taken into account by APRA in the registration process.</p> <p>For example, when applying for registration, if a start-up insurer undertakes to confine itself to a particular type of business for a limited time, APRA could grant the application for registration subject to a time-limited condition that the insurer confine itself to that type of business.</p> <p>The existing power for the Private Health Insurance Administration Council to register applicants in section 126-20 of the <i>Private Health Insurance Act 2007</i> is also broad. Similarly, the comparable powers in section 9 of the <i>Banking Act 1959</i> and section 13 of the <i>Insurance Act 1973</i> are broad.</p> <p>Section 14 of the Bill provides for matters or criteria relating to registration to be set out in rules, made by way of a disallowable instrument. An entity whose registration has been refused will be entitled to right of review both internally through APRA and then the Administrative Appeals Tribunal (section 168).</p>
<p>Reversal of onus of proof: Subsections 73(6), 74(6), 112(4), 116(2) and 142(2)</p>	<p>The Bill does not reverse the onus of proof. Instead, subsections 73(6), 74(6), 112(4), 116(2) and 142(2) contain defences and each has a note that the defendant bears an evidential burden in relation to establishing the defence, as is ordinarily the case in relation to a defence in accordance with section 13.3 of the Criminal Code.</p> <p>These provisions do not go any further than the default position under the Criminal Code, with the relevant notes confirming that the Criminal Code position applies. The burden on the defendant is an evidential one (that is, to adduce or point to evidence that suggests a reasonable possibility that the defence can be made out). There has been no attempt to create a higher legal burden.</p>
<p>Subsection 92(7) - consideration of whether standards should be freely available online.</p>	<p>Subsection 92(7) allows APRA to incorporate material into prudential standards. The provision enables APRA's prudential standards to refer to and incorporate guidance and standards published by professional bodies as updated from time to time, such as professional standards issued by the Actuaries Institute. APRA's power to incorporate material means that APRA will not need to remake a prudential standard each time the guidance and standards are updated.</p> <p>The standards published by the Actuaries Institute are available on their website.</p>

<p>Delegation of legislative power - section 147</p>	<p>Section 130 of the Bill allows APRA to appoint an APRA staff member with suitable qualifications and experience as an inspector to investigate a private health insurer.</p> <p>Section 147 allows an inspector to delegate some or all of their powers; accordingly, it allows the inspector to limit a delegate's powers to a subset of the inspector's powers, as long as the delegate is an APRA staff member with suitable qualifications and experience.</p> <p>This ensures that the inspector can delegate a defined aspect of an investigation to a person with specialised technical skills (for example, actuarial or accounting skills), if necessary.</p> <p>It also allows the inspector to delegate the conduct of the investigation to a suitably qualified person for a defined period if it is necessary for the inspector to take leave, or otherwise absent themselves, from the investigation for that period.</p>
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