SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2015

14 October 2015

ISSN 0729-6258 (Print)

ISSN 2204-3985 (Online)

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Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 2015

The committee presents its *Eleventh 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:

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 as 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 September 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		
Minister's 2nd further response		02/07/15	15/07/15
Treasurer's response		02/07/15	28/08/15
Asian Infrastructure Investment Bank Bill 2015	Treasury	03/09/15	01/09/15
Australian Citizenship Amendment (Allegiance to Australia) Bill 2015	Immigration and Border Protection	27/08/15	*Not yet received**
Australian Defence Force Cover Bill 2015	Defence	27/08/15	17/08/15
Australian Defence Force Superannuation Bill 2015	Defence	27/08/15	17/08/15
Australian Immunisation Register Bill 2015	Health	01/10/15	29/09/15
Australian Small Business and Family Enterprise Ombudsman Bill 2015	Treasury	02/07/15	03/07/15

Bill	Portfolio	Correspondence	
		Due	Received
Customs Amendment (Australian Trusted Trader Programme) Bill 2015	Immigration and Border Protection	02/07/15	21/07/15
Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015	Environment	24/09/15	08/10/15
Export Charges (Collection) Bill 2015	Agriculture	02/07/15	20/07/15
Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015	Treasury	24/09/15	30/09/15
Imported Food Charges (Collection) Bill 2015	Agriculture	02/07/15	20/07/15
Law Enforcement Legislation Amendment (Powers) Bill 2015	Justice	29/05/15	02/06/15
Medical Research Future Fund Bill 2015	Finance	27/08/15	14/09/15
Migration Amendment (Regional Processing Arrangements) Bill 2015	Immigration and Border Protection	27/08/15	29/09/15
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	Immigration and Border Protection		
Minister's 2nd further response		02/07/15	21/07/15
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 and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015	Treasury	24/09/15	18/09/15
Tax Laws Amendment (2015 Measures No. 1) Bill 2015	Treasury	02/07/15	22/08/15

**The Minister's office is liaising with the committee in relation to the timing of the response.*

Members/Senators responsiveness to 30 September 2015

Bill	Member/Senator	Correspondence Received
Criminal Code Amendment (Animal Protection) Bill 2015	Senator Back	28/0715
Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015	Senators Leyonhjelm and Day	24/08/15

Australian Immunisation Register Bill 2015

Introduced into the House of Representatives on 10 September 2015
Portfolio: Health

Introduction

The committee dealt with this bill in *Alert Digest No.10 of 2015*. The Minister responded to the committee's comments in a letter dated 30 September 2015. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2015 - extract

Background

This bill provides for the expansion and consolidated management of Australian immunisation registers.

Undue trespass on personal rights and liberties—privacy
Broad discretionary power
Subclause 22(3)

Subclause 22(3) empowers the Minister for Health (or delegate) to authorise, in writing, a person to make a record of, disclose or otherwise use protected information "for a specified purpose that the Minister is satisfied is in the public interest". This power is in addition to subclause 22(2), which provides in detail for the uses and disclosures that are authorised for the purposes of the Privacy Act.

The explanatory memorandum does not discuss why it is necessary to supplement instances of authorised uses and disclosures by conferring a broad power on the Minister, conditioned only upon her or his satisfaction that the authorisation is in the public interest. The explanatory memorandum (at p. 15) gives an example of a situation that may be deemed to be in 'the public interest', that is 'where a child protection agency requests information when investigating the welfare of a child'. If the envisaged use of the power is focused on circumstances in which the welfare of a child is at stake, it would be appropriate for the power to be more narrowly drafted to reflect this. In addition, the explanatory memorandum refers to disclosure being limited to 'a specified person or to a specified class of persons', but this limitation does not appear in the text of the provision.

The committee seeks the Minister's advice as to the justification for the breadth of this power, especially given that its exercise may affect individual privacy. In

particular, the committee is interested in whether consideration has been given to drafting the power more narrowly.

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 or to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principles 1(a)(i) and 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

Subsection 22(3) sets out that I, as Minister for Health, may authorise a person to make a record of, disclose or otherwise use protected information stored within the immunisation register for a specified purpose that I am satisfied is in the public interest.

The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973,* which currently apply to the existing National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

An example of when this public interest power may be used is where a child protection agency requests information when investigating the welfare of a child. In the 2014-2015 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973.* In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information (for example, immunisation history) to child protection agencies along with the police to assist in the determination of a child's welfare.

Another example could involve a request by a public health unit or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them of potential safety issues or the administration of ineffective vaccines in relation to a particular batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in subsection 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a

case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration should be given to an individual's privacy and other interests, which should be balanced against the identified public interest outcome.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information. For this reason, I do not believe that an amendment to the explanatory memorandum is warranted in this instance.

Committee response

The committee thanks the Minister for this detailed response. **The committee notes that this information would be useful to Senators and others in understanding the operation of this broad discretionary power and therefore requests that the key information above be included in the explanatory memorandum.**

In relation to the reference in the explanatory memorandum to information being able to be disclosed to 'a specified person or to a specified class of persons', the committee notes the Minister's advice that the use of the word 'disclose' in subsection 22(3) 'inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information'. **While it may be open for this implication to be made, and the committee welcomes the Minister's commitment to specify the person or persons to whom information could be released, the committee still considers that it would assist if such a limitation were included in the text of the provision itself.** The committee's concern is that it would be possible for material to be authorised for disclosure without specifying or limiting the authorised recipients of the information.

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

Alert Digest No. 10 of 2015 - extract

Undue trespass on personal rights and liberties—reversal of onus of proof
Clauses 24 to 27

These clauses provide for a number of exceptions to an offence relating to dealings with protected information. For each of these exceptions the defendant bears an evidential burden in relation to the matters in each clause.

Although the explanatory memorandum describes the legal effect of an evidential burden, it provides no justification for the reversal of the onus. **The committee therefore seeks the Minister's advice as to the justification for the reversal of onus, particularly addressing the relevant principles set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).**

> *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

Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.

An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015.*

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. A burden of proof that a law imposes on a defendant is an

evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden.

Subsection 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.

Subsection 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, to produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.

Subsection 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

Subsection 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.

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 this detailed response. **The committee notes that this information would be useful to Senators and others in understanding the operation of these provisions and therefore 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 placing an evidential burden on the defendant in these circumstances is appropriate to the Senate as a whole.

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Introduced into the House of Representatives on 20 August 2015
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No.9 of 2015*. The Treasurer responded to the committee's comments in a letter dated 30 September 2015. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2015 - extract

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to repeal section 487 which extends the meaning of 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act).

Rights, liberties or obligations unduly dependent on non-reviewable decisions—limitation on standing to seek judicial review

General comment

This bill proposes to repeal section 487 of the EPBC Act. Under the ADJR Act, only persons who are 'persons aggrieved' have 'standing' to apply for judicial review. However, section 487 of the EPBC Act extends the meaning of 'persons aggrieved' for the purposes of the ADJR Act and, in so doing, expands the standing rule under the ADJR Act in relation to environmental decisions made under the EPBC Act. Section 487 enables individuals who are Australian citizens or residents, and organisations or associations established in Australia or an external territory, to seek judicial review if, in the two years prior to the decision they seek to challenge, they have engaged in a series of environmental conservation or research activities in Australia or an external territory.

The traditional approach to the question of standing (i.e. the question of who is entitled to seek judicial review of government action) focuses on whether individual interests have been affected by the impugned decision. This approach is reflected in the way the courts have interpreted the 'person aggrieved' test in the ADJR Act. The result of the proposed amendment is that standing to bring proceedings in relation to decisions under the EPBC Act will be restricted to the general standing requirement under the ADJR Act. In so doing the availability of judicial review is limited.

It is well accepted that restrictive standing rules pose particular problems in the area of environmental decision-making. Although environmental decisions affect the public generally insofar as the protection of the environment is a matter of established public interest, there may be no single person or group who can show that their interests are affected in a special way that is distinct from the interests of other members or classes of the public. The result is that there may be cases where decisions that breach important legal obligations which have been placed on government decision-makers (enacted to protect the public interest in the environment) cannot in practice be reviewed because no person or group's interests are affected in a manner which is distinct from the public generally. As environmental regulation often raises matters of general rather than individual concern, restrictive standing rules may therefore mean that such decisions are, in practice, beyond effective judicial review to ensure that the decisions comply with the law. From a scrutiny perspective, it is a matter of concern that the introduction of more restrictive standing rules may result in the inability of the courts, in at least some cases, to undertake their constitutional role (i.e. to ensure that Commonwealth decision-makers comply with the law).

The difficulty encountered by the focus on individual interests in the law of standing in the context of environmental decision-making explains why, in a significant number of cases, the courts have appeared to avoid applying the 'person aggrieved' test strictly or appear to have interpreted the test in a more liberal way. Indeed, environmental non-government organisations (environmental NGOs) have been given standing on the basis of a number of factors. For example in the case of *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 49 standing was granted on the basis that the group was a 'peak' body representing many groups, had been recognised by state and federal government agencies and departments in various ways (which included grant funding) and had conducted research into and made submissions on issues relevant to the particular decision. Although this approach to standing in environmental cases has been influential, it has also created uncertainty and it is fair to say that the case law lacks clear principles for determining when environmental NGOs will be accorded standing under the general law and under the 'person aggrieved' test of the ADJR Act. Considered against this background, the effect of the proposed amendment may not be to eliminate litigation but to refocus it—i.e. away from the question of whether there has been a breach of legal requirements towards the question of standing. There is a risk, therefore, that this amendment will not substantially reduce litigation given the uncertainty as to the circumstances in which environmental NGOs will be granted standing.

The committee is concerned that the explanatory memorandum does not include any detailed justification for the proposed amendment. The Report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) stated that section 487 had 'created no difficulties and should be maintained'. Indeed, the Independent Review committee considered that the real question was whether the extended standing provisions in the Act 'should be expanded further' (at p. 261). The explanatory memorandum does not provide any evidence that indicates section 487 has led to inappropriate litigation or has led an inappropriately high number of review applications.

Given that public interest litigation brought by environmental NGOs may in many situations be the only effective practical mechanism for enforcing laws enacted to protect the public interest in the environment, and the possibility that the proposed amendment may re-direct rather than eliminate litigation, the committee seeks detailed advice from the Minister as to why this limitation on the availability of judicial review of decisions under the EPBC Act is justified.

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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Minister's response - extract

I introduced the Bill into the House of Representatives on 20 August 2015. The Bill would repeal section 487 of the EPBC Act. Section 487 of the EPBC Act extends the range of persons and organisations who may apply for judicial review of EPBC Act approval decisions beyond those who may do so under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) and the *Judiciary Act I 903.*

The purpose of the Bill is to bring the arrangements for standing to make a judicial review application under the EPBC Act into line with the standard arrangements for permitting judicial review challenges to the Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act. In doing this, it limits the type of applicant who may apply for judicial review.

The intent of judicial review is to ensure that the Australian Government is correctly applying the law. There is though an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects and infrastructure developments. Such actions would pervert the original purpose of the extended standing provisions. The amendments seek to reduce this risk while still allowing review of decisions through the ADJR Act and the Judiciary Act.

Standing to make an application under the ADJR Act is determined by whether someone is a 'person aggrieved' by a decision of an administrative character made under an enactment. An aggrieved person includes a person whose interests are adversely affected by the decision. Generally, a person or organisation would need to show a 'special interest' that is adversely affected by the relevant decision.

Standing to make an application under section 398 of the Judiciary Act is determined by the common law, which provides that the applicant must either have a private right or be able to establish that he or she has a 'special interest in the subject matter'. 'Special

interest' would generally require that the applicant show an interest in the subject matter of the action which is beyond that of any other member of the public.

The amendments make the minimum change necessary to mitigate the identified emerging risk. Australia has some of the most stringent and effective environmental laws in the world. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate, granting approvals under the EBPC Act. The amendments also do not limit what decisions are reviewable.

Committee response

The committee thanks the Minister for this response. However, the committee is concerned that the Minster's response does not directly addresses the scrutiny issues which have been raised by the committee. In light of this, **the committee draws the Minister's response to the attention of the Senate, but expresses its continuing scrutiny concern that the practical effect of this bill is to limit the availability of judicial review in the absence of sufficient justification for that outcome.**

Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015

Introduced into the House of Representatives on 20 August 2015
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No.9 of 2015*. The Treasurer responded to the committee's comments in a letter dated 30 September 2015. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2015 - extract

Background

This bill is part of a package of three bills. The bill amends various Acts relating to foreign acquisitions and takeovers to:

- introduce certain civil and criminal penalties;
- transfer to the Australian Taxation Office the responsibility of regulating foreign investment in residential real estate; and
- lower screening thresholds for investments in Australian agriculture.

Delegation of legislative power
Schedule 1, item 3, proposed section 37 of the *Foreign Acquisitions and Takeovers Act 1975*

This proposed section is a regulation-making power to provide for a number of exceptions to the operation of the Act. Specifically, the section provides that regulations may be made that provide that the *Foreign Acquisitions and Takeovers Act 1975* (the Act), or specified provisions of the Act, do not apply to:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations; or
- foreign persons of the kind or in the circumstances prescribed by the regulations.

In addition, the regulations may provide that:

- land of a specified kind is not agricultural land; or

- specified foreign persons who take action in relation to interests in Australian land may disregard the fact that the land is agricultural land for all or specified purposes.

As the explanatory memorandum does not indicate why it is considered appropriate for these important exceptions to be provided for in the regulations (rather than primary legislation), the committee seeks detailed advice from the Treasurer as to the rationale for this proposed significant delegation of legislative power.

> *Pending the Treasurer's advice, 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.*

Treasurer's response - extract

Schedule 1, item 3, proposed section 37 of the Act - Delegation of legislative power

Schedule 1, item 3, proposed subsection 37(1) of the Act would permit regulations to be made that this Act, or specified provisions in this Act, do not apply in relation to any of, or any combination of:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations; or
- foreign persons of the kind or in the circumstances prescribed by the regulations.

In addition, proposed subsection 37(3) of the Act would permit that the regulations may provide that land of a specified kind is not agricultural land, and proposed subsection 37(4) would provide that the regulations may provide that specified foreign persons who take action in relation to interests in Australian land may disregard the fact that the land is agricultural land for all or specified purposes.

Exemptions from certain requirements in the Act are currently included in both the Act and the Foreign Acquisitions and Takeovers Regulation 1989. In response to feedback from some stakeholders that the legislative scheme as a whole would be easier to navigate if all exemptions were included in a single location, it was decided that all exemptions would be included in the regulations to be made under the Act. The decision to include all the exemptions in the regulations rather than the Bill has helped to minimise the complexity of

the Bill. This also assists with ensuring Australia's compliance with complex commitments made in trade agreements.

Committee response

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

The committee notes the Treasurer's advice that exemptions from certain requirements in the *Foreign Acquisitions and Takeovers Act 1975* are currently included in both the Act and the Regulations and that it has now been decided to include all the exemptions in a single location (i.e. the regulations to be made under the Act). The Treasurer notes that this 'has helped to minimise the complexity of the Bill' and will also assist with 'ensuring Australia's compliance with complex commitments made in trade agreements'.

The committee's general view is that important exemptions to legislative schemes should be provided for in the primary legislation itself, rather than allowing these exemptions to be determined by the executive in regulations. While a desire to reduce the complexity of the primary legislation is commendable, the committee does not consider that this is, of itself, sufficient justification for significantly reducing Parliamentary scrutiny by providing for important matters to be included in regulations. However, noting the Treasurer's further advice in relation to the need to ensure Australia's compliance with complex commitments made in trade agreements and noting the fact that the regulations will be disallowable, **the committee draws this delegation of legislative power to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole**.

The committee notes that the exposure draft regulations are available on the Treasury website at:
http://treasury.gov.au/ConsultationsandReviews/Consultations/2015/Regulations-to-implement-foreign-investment-reforms.

Alert Digest No. 9 of 2015 - extract

Delegation of legislative power
Schedule 1, item 4, proposed sections 44 and 48 of the *Foreign Acquisitions and Takeovers Act 1975*

Proposed section 44 permits regulations to be made that provide that a specified action is a 'significant action' for the purposes of the Act. The explanatory memorandum (at p. 51) provides three examples:

> … it is anticipated that regulations will prescribe the following actions to be significant actions:
>
> - the acquisition by a foreign person of an interest of at least 5 per cent in an entity or business that wholly or partly carries on an Australian media business;
> - the acquisition by a foreign government investor of a direct interest in an Australian entity or Australian business; and
> - the starting of an Australian business by a foreign government investor.

However, the explanatory memorandum does not explain why these and other proposed 'significant actions' cannot be included in the primary legislation rather than the regulations. **The committee therefore seeks detailed advice from the Treasurer as to the rationale for this proposed significant delegation of legislative power.**

The committee notes that the same issue arises in relation to proposed section 48 which specifies that the regulations may provide that a specified action is a 'notifiable action'. **The committee therefore also seeks the Treasurer's advice in relation to the rationale for this provision.**

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

Treasurer's response - extract

Schedule 1, item 4, proposed sections 44 and 48 of the Act - Delegation of legislative power

Proposed sections 44 and 48 of the Act would enable regulations to be made that provide that a specified action is a 'significant action' and a 'notifiable action' respectively. In short, if I am notified that a person is proposing to take a significant action, I can make an order prohibiting the significant action if I am satisfied that the action would be contrary to the national interest. If a significant action has already been taken and I am satisfied that this is contrary to the national interest, I can make certain orders that have the effect of undoing that action (for example, by disposing of an interest that has been acquired). I can also impose conditions in such circumstances as an alternative to a disposal order. Some actions, which are called notifiable actions, must be notified to me before the action can be taken. A foreign person who takes a notifiable action without first notifying me may be liable to civil and criminal penalties. The Bill specifies that certain actions are significant actions or notifiable actions.

It is essential that the Bill includes a mechanism that allows the Government to protect Australia's national interest over time by enabling it to quickly and effectively regulate evolving markets and new patterns in foreign investment (such as the emergence of new investment structures) and respond to changes in the Australian economy. Proposed sections 44 and 48 of the Act provide such a mechanism.

Committee response

The committee thanks the Treasurer for this response.

The committee notes the Treasurer's advice that these provisions (which enable the regulations to provide that a specified action is a 'significant action' or a 'notifiable action') are needed to allow the government 'to quickly and effectively regulate evolving markets and new patterns in foreign investment (such as the emergence of new investment structures) and respond to changes in the Australian economy.'

The committee considers that this general explanation does not justify the proposed delegation of legislative power with sufficient clarity. Given the significant consequences that may apply when a specified action is declared to be a 'significant action' or a 'notifiable action' (including the application of civil and criminal penalties and the potential for an order requiring a person to dispose of an interest), **the committee reiterates its request to the Treasurer for detailed advice as to the rationale for the significant delegation of legislative power in these provisions. In particular, it would assist the committee if examples could be provided of situations in which it is envisaged that these regulation-making powers would need to be utilised with such urgency that providing for the matter in an amendment to the primary legislation would be ineffective. In addition, noting the significant consequences outlined above, the committee requests the Treasurer's advice as to whether the disallowance process for these regulations can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:**

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

Exposure Draft of the Foreign Acquisitions and Takeovers Regulation 2015 (Regulation)

I note that the Government will shortly release an Exposure Draft of the Regulation. To assist the Committee, the Treasury will send an Exposure Draft of the Regulation to the Committee Secretariat once it is released for public comment.

Committee response

The committee thanks the Treasurer for this undertaking, which will assist the committee in examining this bill. Noting the committee's comments above in relation to the delegation of legislative power proposed in this bill and the consequent importance of the content of the Regulation, **the committee considers that the exposure draft of the Regulation should be available to Senators prior to passage of the bill through the Senate and therefore welcomes the fact that the exposure draft regulations are available on the Treasury website at: http://treasury.gov.au/ConsultationsandReviews/Consultations/2015/Regulations-to-implement-foreign-investment-reforms. The committee notes that there is an opportunity for interested parties to lodge a submission about the draft regulations by 30 October 2015.**

continued

The committee will consider the content of the exposure draft regulations and comment further if matters relevant to the principles outlined in standing order 24 are raised.

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

Migration Amendment (Regional Processing Arrangements) Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Immigration and Border Protection
Received the Royal Assent on 30 June 2015

Introduction

The committee dealt with this bill in *Alert Digest No. 7 of 2015*. The Minister responded to the committee's comments in a letter dated 29 September 2015. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2015 - extract

Background

This bill amends the *Migration Act 1958* to provide statutory authority which applies with effect from 18 August 2012 where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country.

Trespass on personal rights and liberties—retrospectivity

The amendments in this bill (which has received the Royal Assent) will commence from 18 August 2012. The explanatory memorandum (p. 4) states:

> The retrospective operation of these amendments is to put beyond doubt the Commonwealth's authority to take, or cause to be taken, actions in relation to regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure, from the date of commencement of the Regional Processing Act. The retrospective operation of these provisions will provide authority for all activity undertaken in relation to regional processing arrangements for the entire period these arrangements have been in place.

The purpose of proposed section 198AGA is to provide express statutory authority for the actions of the Commonwealth in relation regional processing functions commencing nearly 3 years ago. This authority will cover assistance provided by the Commonwealth to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries. It would also provide authority for the expenditure of Commonwealth money to facilitate such arrangements. The explanatory memorandum indicates that the 'retrospective operation of these provisions will provide authority for all activity undertaken in relation to

regional processing arrangements for the entire period these arrangements have been in place' (p. 4).

Proposed new subsection 198AHA(2) appears to confer authority on the Commonwealth in very broad terms: if the Commonwealth 'enters into an arrangement with a person or body in relation to the regional processing functions of a country'. Subsection 198AHA(2) provides:

The Commonwealth may do all or any of the following:

(a) take, or cause to be taken, any action in relation to the arrangement or regional processing functions of the country;

(b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;

(c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

The breadth of power conferred by this provision is confirmed by proposed subsection 198AHA(5), which defines action as including 'exercising restraint over the liberty of a person'.

A core postulate of the Australian conception of the rule of law is that all government action be authorised by law. A corollary of this is that people are entitled to have the legality of any governmental interference with their rights and obligations determined by reference to the legality of government action at the time they allege their rights have been adversely affected.

To the extent that such authorisation for actions which affect individual rights or obligations is provided retrospectively, the claim that the governors (along with the governed) are bound by the law is weakened. Although it can be accepted that there will be rare circumstances in which unlawful government decisions and actions should be retrospectively validated, so doing necessarily undermines the legal system's adherence to these fundamental values.

In light of this, the committee is of the view that the explanatory memorandum should have set out the case for the necessity or appropriateness of the retrospective validation of government decision-making in sufficient detail for the Senate to make informed judgements about the proposed approach. In this instance, it is a matter of considerable concern that the proposed amendments are in response to court action commenced in the High Court of Australia, but which is yet to be decided. Notably, the explanatory memorandum does not refer to that context nor explain the nature of the litigation and the rights which the applicants seek to vindicate.

More generally, it is of concern that a major policy initiative lacks an appropriate legislative foundation. It is therefore of considerable concern to the committee that the justification for the proposal to retrospectively confer legislative authority on the

Commonwealth can be described as brief and uninformative. Not only is there an absence of explanation of the background context (including litigation challenging the legality of the arrangements and the reasons why the government had considered that prior legislative authorisation for the arrangements was not required), but the fairness of retrospectivity in this context is also not addressed.

In addition, the committee does not consider that the fairness of retrospective validation on affected persons is adequately addressed by the conclusion in the statement of compatibility that the 'amendments in the Bill do not engage Australia's human rights obligations because the Government's position is that the Regional Processing Centres are managed and administered by the governments of the countries in which they are located, under the law of those countries'.

It is regrettable from a scrutiny perspective that the explanatory material accompanying this bill did not comprehensively describe the context, scope of, and justification for, the effect of the bill. Given the committee's concerns in this regard, although the bill has already been passed by the Parliament, as is its common practice, the committee still seeks the Minister's advice in relation to context, scope of, and justification for, the bill in light of the committee's comments 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

The committee is of the view that the explanatory memorandum should have set out the case for the necessity or appropriateness of the retrospective validation of government decision-making in sufficient details for the Senate to make informed judgments about the proposed approach. In this instance, it is a matter of considerable concern that the proposed amendments are in response to court action commenced in the High Court of Australia, but which is yet to be decided. The explanatory memorandum does not refer to the context nor explain the nature of the litigation and the rights which the applicants seek to vindicate.

The committee is concerned:

- that the justification for the proposal to retrospectively confer legislative authority on the Commonwealth is brief and uninformative;
- there is an absence of explanation of the background context and the fairness of retrospectivity is not addressed; and
- the fairness of retrospective validation on affected persons is not adequately addressed by the conclusion in the statement of compatibility.

The committee seeks the Minister's advice in relation to context, scope of, and justification for, the bill in light of the committee's comments.

Migration Amendment (Regional Processing Arrangements) Bill 2015

The Migration Amendment (Regional Processing Arrangements) Bill 2015 received Royal Assent on 30 June 2015.

The objective of the Bill

As outlined in the Explanatory Memorandum to the Bill, the Bill amends the *Migration Act 1958* to provide statutory authority for the Commonwealth's regional processing arrangements where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country.

The Bill provides statutory authority for the Commonwealth to provide assistance to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries, including the expenditure of Commonwealth money on these arrangements. The Bill confirms the ability of Australian officials, acting on behalf of the Commonwealth, to take action to assist the foreign government in the regional processing country, consistent with the law of that country. The purpose of the amendments made by the Bill is to strengthen and put beyond any doubt the existing legislative authority to give practical effect to the substantive regional processing provisions inserted by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 ('the Regional Processing and Other Measures Act').*

The Regional Processing and Other Measures Act is an act of the previous Labor government. The legislative scheme provides for the transfer of unauthorised maritime arrivals, who arrive in Australia by boat without a visa, to another country for assessment by that country of their claim to be refugees. The amendments in the Bill provide further legal reinforcement to arrangements that the previous Labour government put in place. Specifically, the amendments in the Bill provide statutory authority for the Commonwealth to:

- take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
- make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country; and
- do anything that is incidental or conducive to the taking of such action or the making of such payments.

The Bill does not change or in any way expand the current arrangements for regional processing. Any action undertaken by the Commonwealth can only occur when the Minister has designated a country as a regional processing country, and the

Commonwealth has entered into an arrangement regarding the functions of the regional processing country.

In terms of arrangements with regional processing countries, the government has entered into MOUs with the governments of Nauru and Papua New Guinea (PNG) relating to the transfer to and assessment and settlement in these countries. The Commonwealth has also entered into administrative arrangements with Nauru and PNG. The administrative arrangements underpin the MOUs. The administrative arrangements set out, with some degree of particularity, the various arrangements in respect of expenditure and costs for the transfer process from Australia to regional processing centres, arrival in regional processing centres, arrangements at the regional processing centres themselves and refugee assessment processes et cetera. The intention of the amendments in the Bill therefore, is to ensure that clear statutory authority is provided to cover the full gamut of the Commonwealth's conduct in connection with regional processing arrangements.

Regional processing arrangements are important to Australia's strong border protection policies. To ensure the long term viability of regional processing, the amendments in the Bill strengthen the existing legislative framework for regional processing activities. The amendments in the Bill are necessary to ensure that the legislative framework for regional processing remains sustainable and solid.

Litigation

A number of court matters seek to challenge the legality of the Commonwealth's actions in relation to regional processing.

These cases seek to challenge the legality of regional processing arrangements on the following bases:

- that the Commonwealth has no authority to detain the plaintiffs at the Nauru or Manus regional processing centres;
- that the Commonwealth has no authority to contract and spend money in relation to the Nauru or Manus regional processing centres; and
- that the Commonwealth has no authority to take the plaintiffs to Nauru or Manus

The validity of the existing legislative framework for regional processing arrangements was found to be valid by the High Court in the matter of *Plaintiff S156.*

The amendments in the Bill are intended to reinforce and complement the existing legislative framework by providing express statutory authority for the Commonwealth to continue to provide financial and other assistance to regional processing countries (PNG and Nauru) for the management and processing of unauthorised maritime arrivals. The Bill puts beyond doubt the Commonwealth's authority to perform its role of providing assistance and support to the governments of PNG and Nauru in order to continue to give effect to existing intergovernmental agreements and arrangements.

The fairness of retrospective validation

As explained in the Explanatory Memorandum, the retrospective operation of the amendments in the Bill is to put beyond doubt the Commonwealth's authority to take, or cause to be taken, actions in relation to the regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure, from the date of commencement of the Regional Processing and Other Measures Act. The retrospective operation of these provisions ensures that statutory authority for all activity undertaken in relation to regional processing arrangements exists for the entire period in which these arrangements have been in place.

The Bill also confirms the ability of Australian officials, acting on behalf of the Commonwealth, to take action to assist the foreign government in the regional processing country, consistent with the law of that country. The Bill only seeks to ensure that there is express legislative authority for the Commonwealth to provide assistance to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries. It does not purport to have any effect itself on the rights of those persons.

The regional processing centres are run by the regional processing countries. Australia does not restrain the liberty of anyone in PNG or Nauru. Any restraint of liberty of unauthorised maritime arrivals that may occur in PNG or Nauru would be pursuant to the laws of those countries. The management of regional processing centres in Nauru and PNG, including management of persons residing in such centres, is entirely a matter for the respective governments.

The retrospective application of the Bill, therefore does not affect the rights of persons residing in regional processing centres in Nauru and PNG. The Bill's retrospective operation is directed only to ensuring that there is express statutory authority for the Commonwealth's activities in support of regional processing arrangements for the entire period that such arrangements have been in place.

Committee response

The committee thanks the Minister for this response and notes that **it would have been useful had this more detailed explanation been available prior to passage of the bill**.

continued

The committee notes the Minister's advice that the bill does not change or expand 'current arrangements for regional processing' and that the intention of the bill is to ensure that 'clear statutory authority is provided to cover the full gamut of the Commonwealth's conduct in connection with regional processing arrangements'. However, where statutory authority is thought to be required to authorise actions which either lead to or give support to the detention of persons the committee considers that to be consistent with the scrutiny principles in standing order 24 such authority should be prospectively granted.

Although it is possible that particular actions may be declared unlawful in the absence of the amendments made by the bill, from a scrutiny perspective it is not clear why this possibility is, of itself, sufficient to justify retrospective validation given that retrospectivity significantly undermines the rule of law. As the committee noted above, a core postulate of the Australian conception of the rule of law is that all government action be authorised by law. A corollary of this is that people are entitled to have the legality of any governmental interference with their rights and obligations determined by reference to the legality of government action at the time they allege their rights have been adversely affected. The committee accepts that retrospective validation may arguably be appropriate in some situations, for example to avoid significant administrative disruption or to avoid exposing the Commonwealth to legal liability where there is a strong argument for achieving that outcome. However, the committee does not consider that changing the law retrospectively to seek to put the Commonwealth's authority beyond doubt is, of itself, sufficient justification for retrospective validation.

Finally, the committee notes the advice that the fairness of retrospective validation is not a matter of concern as the detention of persons and the management of regional processing centres in Nauru and Papua New Guinea is 'entirely a matter for the respective governments' of those countries. Whether or not that is so may raise difficult questions of legal interpretation about which the committee takes no position. Nevertheless, the committee notes the Minister's advice that the bill 'confirms the ability of Australian officials…to take action to assist the foreign government in the regional processing country' and that administrative arrangements between Australia and the governments of Nauru and Papua New Guinea 'set out, with some degree of particularity, the various arrangements in respect of expenditure and costs for the transfer process from Australia to regional processing centres, arrival in regional processing centres, arrangements at the regional processing centres themselves and refugee assessment processes et cetera'.

In addition, the committee reiterates the point that the significant breadth of power validated by the bill is confirmed by subsection 198AHA(5), which defines authorised action as including 'exercising restraint over the liberty of a person'.

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

Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015

Introduced into the House of Representatives on 20 August 2015
Portfolio: Treasury
Passed both Houses on 16 September 2015

Introduction

The committee dealt with this bill in *Alert Digest No.9 of 2015*. The Assistant Treasurer responded to the committee's comments in a letter dated 18 September 2015. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2015 - extract

Background

This bill amends various Acts relating to taxation.

Schedule 1 amends Subdivision 124-M of the *Income Tax Assessment Act 1997* relating to scrip for scrip roll-over.

Schedule 2 removes an income tax exemption which applied to employees of an Australian government agency who work overseas for not less than 91 continuous days in the delivery of Official Development Assistance.

Schedule 3 amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to increase the account balance threshold below which small lost member accounts will be required to be transferred to the Commission of Taxation from $2,000 to $4,000 from 31 December 2015, and from $4,000 to $6,000 from 31 December 2016.

Retrospective commencement
Schedule 1, item 15

The amendments made by Schedule 1 (relating to the integrity of the scrip for scrip roll-over) apply in relation to capital gains tax events happening after 7.30 pm on 8 May 2012. The explanatory memorandum (at p. 22) states that:

> The retrospective application of these amendments is appropriate. The Federal Court's decision in AXA revealed significant risks to the integrity provisions of the scrip for scrip roll-over. Addressing these integrity concerns will ensure that the roll-over operates as intended.

In developing the legislation, the Government has undertaken extensive consultation with interested parties since the publication of the proposals paper in July 2012. This was followed by public consultation on draft legislation in May 2015. Adverse impacts on taxpayers are therefore minimal.

The committee notes the statement that adverse impacts on taxpayers will be minimal, however (depending on the circumstances in a particular case) the committee is likely to have scrutiny concerns where a retrospective provision has even a 'minimal' adverse impact. The committee therefore seeks the Assistant Treasurer's further advice as to:

- **the need and rationale for the retrospective application of these amendments; and**
- **whether and how the retrospective application of these amendments may have an adverse impact on taxpayers, including any relevant concerns raised during the public consultation process.**

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

Assistant Treasurer's response - extract

The scrip for scrip rules operate to ensure that tax considerations do not impede takeovers and mergers involving companies and trusts. The amendments contained in Schedule 1 to the Bill will improve the integrity of the scrip for scrip rules ensuring they operate as intended.

The amendments to the scrip for scrip rules were announced by the former Government on 8 May 2012 in the 2012-13 Budget. The announcement was in response to the Federal Court decision in AXA Asia Pacific Holding Ltd v Commissioner of Taxation [2009] FCA 1427 (the AXA case). The AXA case highlighted a number of limitations in the existing integrity rules which are designed to ensure that capital gains tax is not deferred indefinitely.

Following a review of all announced but yet to be enacted tax and superannuation measures, the Government identified that this measure was critical to maintaining the integrity of the tax system.

Schedule 1 to the Bill seeks retrospective application from the date of original announcement: 7:30 pm on 8 May 2012. Applying this measure from the date of announcement minimises opportunities for tax planning between announcement and enactment, and is in line with the approach taken with other tax integrity measures. This

approach ensures taxpayers and their advisers are aware of the change when planning corporate and trust restructures, and maintains integrity in the system.

The retrospective application of this measure is important. It ensures that the loopholes identified in the AXA case are addressed, such that other large corporate groups cannot replicate the aggressive structure. It ensures that inappropriate tax planning does not occur, ensuring that Australia's corporate tax base is protected.

The Committee also requested further information on whether the retrospective application may have an adverse impact on taxpayers. The retrospective application of Schedule 1 to the Bill is not expected to have an adverse impact on taxpayers.

The taxpayers utilising these provisions are sophisticated, large businesses with access to expert tax advice. Advisers in this area would be fully aware of the application date and advice received through consultations indicated that taxpayers have been acting in accordance with the announcement.

Stakeholders did not raise concerns in relation to the retrospective application of these amendments in public consultation. A change to this position now, to make the measure prospective, could bring into question the tax implications of mergers and acquisitions activity in Australia since 8 May 2012.

Committee response

The committee thanks the Assistant Treasurer for this detailed response. **The committee notes that it would have been useful had the key information above 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 SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC15-016170

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

Dear Senator Helen

Thank you for your correspondence of 17 September 2015 in which you seek my advice in relation to subsection 22(3) and sections 24 to 27 of the Australian Immunisation Register Bill 2015.

Subsection 22(3) sets out that I, as Minister for Health, may authorise a person to make a record of, disclose or otherwise use protected information stored within the immunisation register for a specified purpose that I am satisfied is in the public interest.

The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973*, which currently apply to the existing National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

An example of when this public interest power may be used is where a child protection agency requests information when investigating the welfare of a child. In the 2014-2015 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973*. In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information (for example, immunisation history) to child protection agencies along with the police to assist in the determination of a child's welfare.

Another example could involve a request by a public health unit or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them of potential safety issues or the administration of ineffective vaccines in relation to a particular batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in subsection 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration should be given to an individual's privacy and other interests, which should be balanced against the identified public interest outcome.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information. For this reason, I do not believe that an amendment to the explanatory memorandum is warranted in this instance.

Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.

An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015*.

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden.

Subsection 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.

Subsection 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, to produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.

Subsection 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

Subsection 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.

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.

I trust that this additional information will be sufficient to address the Committee's concerns.

Yours sincerely

The Hon Sussan Ley MP

29 SEP 2015

The Hon Greg Hunt MP

Minister for the Environment

MC15-035710

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

Dear Senator Helen

I refer to the Alert Digest No.9 of 2015 which, in part, concerns the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the Bill). I note that the Committee has asked for detailed advice on the justification for repealing the extended standing provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

I introduced the Bill into the House of Representatives on 20 August 2015. The Bill would repeal section 487 of the EPBC Act. Section 487 of the EPBC Act extends the range of persons and organisations who may apply for judicial review of EPBC Act approval decisions beyond those who may do so under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) and the *Judiciary Act 1903*.

The purpose of the Bill is to bring the arrangements for standing to make a judicial review application under the EPBC Act into line with the standard arrangements for permitting judicial review challenges to the Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act. In doing this, it limits the type of applicant who may apply for judicial review.

The intent of judicial review is to ensure that the Australian Government is correctly applying the law. There is though an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects and infrastructure developments. Such actions would pervert the original purpose of the extended standing provisions. The amendments seek to reduce this risk while still allowing review of decisions through the ADJR Act and the Judiciary Act.

Standing to make an application under the ADJR Act is determined by whether someone is a 'person aggrieved' by a decision of an administrative character made under an enactment. An aggrieved person includes a person whose interests are adversely affected by the decision. Generally, a person or organisation would need to show a 'special interest' that is adversely affected by the relevant decision.

Standing to make an application under section 39B of the Judiciary Act is determined by the common law, which provides that the applicant must either have a private right or be able to establish that he or she has a 'special interest in the subject matter'. 'Special interest' would generally require that the applicant show an interest in the subject matter of the action which is beyond that of any other member of the public.

The amendments make the minimum change necessary to mitigate the identified emerging risk. Australia has some of the most stringent and effective environmental laws in the world. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate, granting approvals under the EBPC Act. The amendments also do not limit what decisions are reviewable.

Yours sincerely

Greg Hunt

TREASURER

30 SEP 2015

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 10 September 2015 from the Senate Scrutiny of Bills Committee (Committee) in relation to issues raised by *Alert Digest No. 9 of 2015* concerning the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (the Bill). Thank you for the opportunity to provide the following information on the matters raised by the Committee.

Schedule 1, item 3, proposed section 37 of the Act — Delegation of legislative power

Schedule 1, item 3, proposed subsection 37(1) of the Act would permit regulations to be made that this Act, or specified provisions in this Act, do not apply in relation to any of, or any combination of:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations; or
- foreign persons of the kind or in the circumstances prescribed by the regulations.

In addition, proposed subsection 37(3) of the Act would permit that the regulations may provide that land of a specified kind is not agricultural land, and proposed subsection 37(4) would provide that the regulations may provide that specified foreign persons who take action in relation to interests in Australian land may disregard the fact that the land is agricultural land for all or specified purposes.

Exemptions from certain requirements in the Act are currently included in both the Act and the Foreign Acquisitions and Takeovers Regulation 1989. In response to feedback from some stakeholders that the legislative scheme as a whole would be easier to navigate if all exemptions were included in a single location, it was decided that all exemptions would be included in the regulations to be made under the Act. The decision to include all the exemptions in the regulations rather than the Bill has helped to minimise the complexity of the Bill. This also assists with ensuring Australia's compliance with complex commitments made in trade agreements.

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Schedule 1, item 4, proposed sections 44 and 48 of the Act — Delegation of legislative power

Proposed sections 44 and 48 of the Act would enable regulations to be made that provide that a specified action is a 'significant action' and a 'notifiable action' respectively. In short, if I am notified that a person is proposing to take a significant action, I can make an order prohibiting the significant action if I am satisfied that the action would be contrary to the national interest. If a significant action has already been taken and I am satisfied that this is contrary to the national interest, I can make certain orders that have the effect of undoing that action (for example, by disposing of an interest of an interest that has been acquired). I can also impose conditions in such circumstances as an alternative to a disposal order. Some actions, which are called notifiable actions, must be notified to me before the action can be taken. A foreign person who takes a notifiable action without first notifying me may be liable to civil and criminal penalties. The Bill specifies that certain actions are significant actions or notifiable actions.

It is essential that the Bill includes a mechanism that allows the Government to protect Australia's national interest over time by enabling it to quickly and effectively regulate evolving markets and new patterns in foreign investment (such as the emergence of new investment structures) and respond to changes in the Australian economy. Proposed sections 44 and 48 of the Act provide such a mechanism.

Exposure Draft of the Foreign Acquisitions and Takeovers Regulation 2015 (Regulation)

I note that the Government will shortly release an Exposure Draft of the Regulation. To assist the Committee, the Treasury will send an Exposure Draft of the Regulation to the Committee Secretariat once it is released for public comment.

Yours sincerely

Scott Morrison

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-021761

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

Dear Senator

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills of 13 August 2015 to my office regarding *Alert Digest No. 7 of 2015.*

In response to the Committee's request for further information regarding the Migration Amendment (Regional Processing Arrangements) Bill 2015, I provide the attached.

The contact officer in my Department is Mr. Greg Phillipson, Assistant Secretary Legislation and Framework Branch who can be contacted on 02 6264 2594.

Yours sincerely

PETER DUTTON 29/9/15

Senate Scrutiny of Bills Committee
Alert Digest No. 7 of 2015
12 August 2015

Trespass on personal rights and liberties—retrospectivity

The committee is of the view that the explanatory memorandum should have set out the case for the necessity or appropriateness of the retrospective validation of government decision-making in sufficient details for the Senate to make informed judgments about the proposed approach. In this instance, it is a matter of considerable concern that the proposed amendments are in response to court action commenced in the High Court of Australia, but which is yet to be decided. The explanatory memorandum does not refer to the context nor explain the nature of the litigation and the rights which the applicants seek to vindicate.

The committee is concerned:

- that the justification for the proposal to retrospectively confer legislative authority on the Commonwealth is brief and uninformative;
- there is an absence of explanation of the background context and the fairness of retrospectivity is not addressed; and
- the fairness of retrospective validation on affected persons is not adequately addressed by the conclusion in the statement of compatibility.

The committee seeks the Minister's advice in relation to context, scope of, and justification for, the bill in light of the committee's comments.

Migration Amendment (Regional Processing Arrangements) Bill 2015

The Migration Amendment (Regional Processing Arrangements) Bill 2015 received Royal Assent on 30 June 2015.

The objective of the Bill

As outlined in the Explanatory Memorandum to the Bill, the Bill amends the *Migration Act 1958* to provide statutory authority for the Commonwealth's regional processing arrangements where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country.

The Bill provides statutory authority for the Commonwealth to provide assistance to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries, including the expenditure of Commonwealth money on these arrangements. The Bill confirms the ability of Australian officials, acting on behalf of the Commonwealth, to take action to assist the foreign government in the regional processing country, consistent with the law of that country. The purpose of the

amendments made by the Bill is to strengthen and put beyond any doubt the existing legislative authority to give practical effect to the substantive regional processing provisions inserted by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 ('the Regional Processing and Other Measures Act')*.

The Regional Processing and Other Measures Act is an act of the previous Labor government. The legislative scheme provides for the transfer of unauthorised maritime arrivals, who arrive in Australia by boat without a visa, to another country for assessment by that country of their claim to be refugees. The amendments in the Bill provide further legal reinforcement to arrangements that the previous Labour government put in place. Specifically, the amendments in the Bill provide statutory authority for the Commonwealth to:

- take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
- make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country; and
- do anything that is incidental or conducive to the taking of such action or the making of such payments.

The Bill does not change or in any way expand the current arrangements for regional processing. Any action undertaken by the Commonwealth can only occur when the Minister has designated a country as a regional processing country, and the Commonwealth has entered into an arrangement regarding the functions of the regional processing country.

In terms of arrangements with regional processing countries, the government has entered into MOUs with the governments of Nauru and Papua New Guinea (PNG) relating to the transfer to and assessment and settlement in these countries. The Commonwealth has also entered into administrative arrangements with Nauru and PNG. The administrative arrangements underpin the MOUs. The administrative arrangements set out, with some degree of particularity, the various arrangements in respect of expenditure and costs for the transfer process from Australia to regional processing centres, arrival in regional processing centres, arrangements at the regional processing centres themselves and refugee assessment processes et cetera. The intention of the amendments in the Bill therefore, is to ensure that clear statutory authority is provided to cover the full gamut of the Commonwealth's conduct in connection with regional processing arrangements.

Regional processing arrangements are important to Australia's strong border protection policies. To ensure the long term viability of regional processing, the amendments in the Bill strengthen the existing legislative framework for regional processing activities. The amendments in the Bill are necessary to ensure that the legislative framework for regional processing remains sustainable and solid.

Litigation

A number of court matters seek to challenge the legality of the Commonwealth's actions in relation to regional processing.

These cases seek to challenge the legality of regional processing arrangements on the following bases:

- that the Commonwealth has no authority to detain the plaintiffs at the Nauru or Manus regional processing centres;
- that the Commonwealth has no authority to contract and spend money in relation to the Nauru or Manus regional processing centres; and
- that the Commonwealth has no authority to take the plaintiffs to Nauru or Manus

The validity of the existing legislative framework for regional processing arrangements was found to be valid by the High Court in the matter of *Plaintiff S156.*

The amendments in the Bill are intended to reinforce and complement the existing legislative framework by providing express statutory authority for the Commonwealth to continue to provide financial and other assistance to regional processing countries (PNG and Nauru) for the management and processing of unauthorised maritime arrivals. The Bill puts beyond doubt the Commonwealth's authority to perform its role of providing assistance and support to the governments of PNG and Nauru in order to continue to give effect to existing intergovernmental agreements and arrangements.

The fairness of retrospective validation

As explained in the Explanatory Memorandum, the retrospective operation of the amendments in the Bill is to put beyond doubt the Commonwealth's authority to take, or cause to be taken, actions in relation to the regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure, from the date of commencement of the Regional Processing and Other Measures Act. The retrospective operation of these provisions ensures that statutory authority for all activity undertaken in relation to regional processing arrangements exists for the entire period in which these arrangements have been in place.

The Bill also confirms the ability of Australian officials, acting on behalf of the Commonwealth, to take action to assist the foreign government in the regional processing country, consistent with the law of that country. The Bill only seeks to ensure that there is express legislative authority for the Commonwealth to provide assistance to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries. It does not purport to have any effect itself on the rights of those persons.

The regional processing centres are run by the regional processing countries. Australia does not restrain the liberty of anyone in PNG or Nauru. Any restraint of liberty of unauthorised maritime arrivals that may occur in PNG or Nauru would be pursuant to the laws of those countries. The management of regional processing centres in Nauru and PNG, including management of persons residing in such centres, is entirely a matter for the respective governments.

The retrospective application of the Bill, therefore does not affect the rights of persons residing in regional processing centres in Nauru and PNG. The Bill's retrospective operation is directed only to ensuring that there is express statutory authority for the Commonwealth's activities in support of regional processing arrangements for the entire period that such arrangements have been in place.

Assistant Treasurer

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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18 SEP 2015

Dear Senator Polley

I am writing in response to your letter of 10 September 2015 concerning questions raised by the Standing Committee (the Committee) for the Scrutiny of Bills in respect of the retrospective application of Schedule 1 to the Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015 (the Bill).

The scrip for scrip rules operate to ensure that tax considerations do not impede takeovers and mergers involving companies and trusts. The amendments contained in Schedule 1 to the Bill will improve the integrity of the scrip for scrip rules ensuring they operate as intended.

The amendments to the scrip for scrip rules were announced by the former Government on 8 May 2012 in the 2012-13 Budget. The announcement was in response to the Federal Court decision in AXA Asia Pacific Holding Ltd v Commissioner of Taxation [2009] FCA 1427 (the AXA case). The AXA case highlighted a number of limitations in the existing integrity rules which are designed to ensure that capital gains tax is not deferred indefinitely.

Following a review of all announced but yet to be enacted tax and superannuation measures, the Government identified that this measure was critical to maintaining the integrity of the tax system.

Schedule 1 to the Bill seeks retrospective application from the date of original announcement: 7:30 pm on 8 May 2012. Applying this measure from the date of announcement minimises opportunities for tax planning between announcement and enactment, and is in line with the approach taken with other tax integrity measures. This approach ensures taxpayers and their advisers are aware of the change when planning corporate and trust restructures, and maintains integrity in the system.

The retrospective application of this measure is important. It ensures that the loopholes identified in the AXA case are addressed, such that other large corporate groups cannot replicate the aggressive structure. It ensures that inappropriate tax planning does not occur, ensuring that Australia's corporate tax base is protected.

The Committee also requested further information on whether the retrospective application may have an adverse impact on taxpayers. The retrospective application of Schedule 1 to the Bill is not expected to have an adverse impact on taxpayers.

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The taxpayers utilising these provisions are sophisticated, large businesses with access to expert tax advice. Advisers in this area would be fully aware of the application date and advice received through consultations indicated that taxpayers have been acting in accordance with the announcement.

Stakeholders did not raise concerns in relation to the retrospective application of these amendments in public consultation. A change to this position now, to make the measure prospective, could bring into question the tax implications of mergers and acquisitions activity in Australia since 8 May 2012.

I trust this information is of assistance to the Committee.

Yours sincerely

JOSH FRYDENBERG