



THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-002208

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

Dear Chair

I refer to the Senate Standing Committee for Scrutiny of Bills' Report 10 of 2017 tabled on 6 September 2017, which includes a report on the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*.

I would like to take this opportunity to thank the Committee for its consideration of the compatibility of the Bill with Australia's human rights obligations.

I provide the enclosed additional information in response to the Committee's requests for further advice on certain aspects of the Bill.

I trust this additional information is of assistance.

Yours sincerely

Michael Keenan

Encl: Response to the Senate Standing Committee for Scrutiny of Bills' *Report 10 of 2017*, concerning the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*

Strict liability offences

Item 20, proposed section 76A of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee requests the Minister's advice as to the grounds for penalising persons lacking fault in respect of providing a digital currency exchange service without being registered (including providing any examples of where a person could unintentionally provide a digital currency exchange).

Minister for Justice's response:

As noted in the Explanatory Memorandum and the Second Reading Speech, international organisations such as the Financial Action Task Force have identified high money laundering and terrorist financing risks associated with digital currencies. Digital currency exchanges are an emerging industry with new technologies that have been operating without any regulatory oversight since their inception. The offence for providing digital currency exchange services without being registered with AUSTRAC is an important sanction to ensure that the regulation of this sector is effective. Members of this emerging industry should not be able to avoid liability by arguing that they did not know that they had obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ('AML/CTF Act') to register with AUSTRAC.

The provisions relating to digital currency exchange providers, including the offence in proposed section 76A, have been closely modelled on the existing provisions in the AML/CTF Act relating to remittance providers. The decision to impose strict liability is not taken lightly, and there are a number of safeguards. Firstly, the defence of honest and reasonable mistake of fact is available. Secondly, AUSTRAC has a range of enforcement powers available, including infringement notices, civil penalty orders and criminal sanctions. In most cases of inadvertent non-compliance with AML/CTF obligations, AUSTRAC would seek to work with the reporting entity to encourage compliance. Thirdly, there will be a transition period before commencement of the provisions, enabling AUSTRAC and the Attorney-General's Department to educate and work with industry to adjust their existing systems and take the time to understand their obligations before the digital currency exchange provisions commence.

As noted above, where instances of non-compliance are identified, AUSTRAC would have regard to relevant facts and circumstances and consider the most appropriate mechanism to address the issue. The offence provisions are part of the available tools, and would be used sparingly to address cases of serious and/or systemic non-compliance with AML/CTF obligations.

Significant matters in delegated legislation

Item 20, proposed sections 76K and 76L of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee's view is that significant matters, such as the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- why it is considered necessary to leave details about renewal and suspension of registrations to delegated legislation;
- if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations;
- why the bill only provides that the rules *may* provide for the review of decisions relating to suspension and applications for renewal, rather than providing that such decisions *will* be subject to merits review; and
- the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister for Justice's response:

As noted above, the digital currency exchange provisions are modelled closely on equivalent provisions for the registration of remittance service providers, which were considered by the Scrutiny of Bills Committee in its report dated 23 March 2011. The same considerations, set out below, apply in relation to the registration of digital currency exchange service providers.

The inclusion of detail in the AML/CTF Rules rather than the Act is consistent with the broader approach of the AML/CTF regime. The AML/CTF Rules are an important part of Australia's AML/CTF regime, which set out the details of technical and procedural matters as well as providing flexibility for the AUSTRAC CEO to consider matters that may not be possible to conclusively address through primary legislation. The techniques used by money launderers are continually changing, and services and technologies that may present a money laundering or terrorist financing risk are also constantly evolving. It is important that the AML/CTF regulatory framework is designed so that it can adapt quickly to the nature of the threat posed by these serious crimes. The AML/CTF Rules are disallowable instruments which must be tabled in Parliament and registered on the Federal Register of Legislation.

Regulations can also be made under the AML/CTF Act, but have tended to be used sparingly.¹ As noted above, it is the Rules that are well-known to industry and regulated entities to be the source of the detail that sits under the AML/CTF Act. Changing the approach for the digital currency sector would be inconsistent with the broader framework of the AML/CTF Act.

As context, the Rules made under Chapter 59 of the AML/CTF Rules for the equivalent provision relating to suspension of remitters (under section 75H), provide for internal review and notice to be given which includes the grounds on which the decision was made.

Moreover, the decisions that have a greater effect on the operation of a digital currency exchange, such as a decision by the AUSTRAC CEO not to register a person or cancel a registration, will be subject to merits review. Decisions on suspensions are better left to the Rules to give AUSTRAC flexibility in its response.

AUSTRAC consults extensively with regulated entities during the development of the AML/CTF Rules. AUSTRAC's consultation procedures require draft AML/CTF Rules to be published on the AUSTRAC website for a minimum period of four weeks. AUSTRAC liaises with relevant industry associations during the development and implementation of AML/CTF Rules who in turn keep their members informed of the issues. If a new or amended Rule is of particular interest to a segment of AUSTRAC's regulated population, AUSTRAC sends targeted emails and letters to regulated entities it considers to be most affected.

¹ Currently, there is only one regulation in operation under the AML/CTF Act: *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2016*.

Civil penalty provisions

Item 20, proposed subsections 76A(11) and 76P(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

Item 73, proposed subsection 199(13) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

Item 75, proposed subsection 200(16) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee requests the Minister's advice as to the appropriateness of making certain provisions, including a failure to notify of a change of circumstances, subject to civil penalties of up to 20,000 penalty units for an individual (or \$4.2 million) and 100,000 penalty units (or \$21 million) for a body corporate.

Minister for Justice's response:

It is well recognised that money laundering can be a very lucrative crime, and therefore penalties for behaviour that may allow money laundering to occur need to be sufficiently high to be an effective deterrent. All civil penalty provisions in the AML/CTF Act carry a maximum fine of 100,000 penalty units for corporations and 20,000 penalty units for individuals. Pursuant to section 175 of the AML/CTF Act, the Federal Court may order a person to pay a pecuniary penalty and in determining the pecuniary penalty must have regard to all relevant matters, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

The significance of the offences that have been highlighted by the Committee should not be understated. For example, failure to notify AUSTRAC of changes in circumstances that could materially affect a person's registration can have serious consequences. Changes in key personnel or beneficial ownership of a digital currency exchange could expose the business to money laundering and terrorism financing risks. Notifying AUSTRAC is important to ensure that AUSTRAC has correct information to consider the ongoing suitability for that business to provide designated services, to consider whether the risk of ML/TF continues to be sufficiently mitigated and also to ensure that valuable information that may be of relevance to law enforcement and other investigatory agencies is accurate.

The proposed civil penalty provisions in the Bill are consistent with other existing provisions in the Act. This is in accordance with the Guide to Framing Commonwealth Offences (The Guide), which notes that ‘a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question’. These businesses have the potential to generate significant criminal proceeds far exceeding the maximum penalties available under the standard ratio. The Guide contemplates the use of higher penalties to combat corporate or white collar crime to counter the potential financial gains from committing an offence.

Immunity for civil or criminal liability

Item 20, proposed section 76R of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee requests the Minister's advice as to why it is considered appropriate to provide immunity from civil or criminal liability so that affected persons will no longer have a right to bring an action to enforce their legal rights. The committee considers it may be appropriate, at a minimum, for proposed section 76R to be amended to provide that the immunity only applies to actions taken in good faith, and requests the Minister's response in relation to this matter.

Minister for Justice’s response:

Publication of the Digital Currency Exchange Register, or a list of persons whose registration has been cancelled, is largely procedural and administrative. It will be a question of fact whether a person is registered or their registration has been cancelled. Specifying a requirement for “good faith” publication does not appear necessary. The matter that will have greater relevance to the person is the decision preceding publication as to whether or not to register or cancel registration as a digital currency service provider. Those decisions are subject to appropriate review mechanisms.

As with the current Remittance Sector Register, the Digital Currency Exchange Register will be a central record for AUSTRAC of registered entities. If appropriate, AUSTRAC may permit others to have access to the Register. For example, financial institutions use the Remittance Sector Register to confirm that a person is legally authorised to conduct a remittance business, and the Digital Currency Exchange Register may similarly be used by an exchange counterpart to know that the person it is exchanging with is registered.

Fair hearing rights

Item 20, proposed subsection 76S(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee therefore requests the Minister's advice as to why it is necessary and appropriate to remove the requirement to notify an affected person before a decision is made not to register the person, to impose conditions on registration or to cancel registration.

Minister for Justice’s response:

The need for urgent refusal of registration or cancellation of registration of a digital currency exchange is likely to be a rare occurrence in practice. Cancellation without prior notice under

equivalent provisions applicable to the remittance sector has not been done to date. However, the availability of the power of refusal or cancellation of registration without notice remains appropriate in circumstances where law enforcement agencies and AUSTRAC identify an ongoing threat of terrorism financing, money laundering or serious crime for which the circumstances require an urgent response. For example, if suspected terrorism financing or other serious offences were being carried out by the digital currency exchange at the time of the decision, and providing notice may risk the criminal activities continuing to occur and/or risk the loss of vital evidence. It should also be noted that both internal review and merits review by the Administrative Appeals Tribunal continue to be available for decisions made without prior notice on the basis of urgency.

Seizure powers

Item 67, proposed subsection 199(2A) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

Item 71, proposed subsection 199(5) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

Item 72, proposed subsection 199(10) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

Item 74, proposed subsection 200(13A) of the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2017*

The committee requests the Minister's detailed justification for provisions that give police and customs officers the power to seize physical currency and bearer negotiable instruments without a warrant. In particular, the committee seeks the Minister's advice as to:

- why the proposed power is to seize the relevant items rather than a power to secure the items pending the obtaining of a warrant;
- whether, if the seizure power remains, there could be increased accountability for the exercise of this power, such as requiring senior police or executive authorisation for the exercise of the power; and
- whether legislative requirements are in place (and if not, why not) regulating:
 - the period of time seized items can be retained;
 - the process for seized material to be reviewed on a regular basis; and
 - the procedure for the return of the seized items

Minister for Justice's response:

The provisions relating to search and seizure are intended to address the known risk of money-laundering and terrorism financing through the movement of cash and bearer negotiable instruments across the border. The primary rationale for the 'seizure without warrant' power in the Bill is the time-sensitive nature of operations at the border. In the international airport environment, there may be only a limited opportunity between identifying physical currency/BNIs and the departure of the target on an international flight. Obtaining a warrant prior to seizure, or allowing physical currency/BNIs to be secured pending a warrant, would not be possible in these tight timeframes. If the AFP or Customs officers are not able to seize physical currency/BNIs at the time before the cross border movement is made, the money is unlikely to be able to be traced or recovered. This would undermine the very purpose of AML/CTF measures designed to prevent money laundering,

terrorism financing and other serious crimes.

A power to secure an item pending obtaining a warrant is similarly problematic, because the situation is still one where time is limited, and while the money or BNI could be secured, there may be limited capacity for the person to be delayed while waiting for a warrant to be obtained. It is preferable for the search and seizure powers to be able to be exercised effectively and decisive action taken where a suspicion of money laundering or terrorist financing arises. The powers are intended to prevent funds from being used for these purposes, while also balancing the interests of legitimate travellers who may be carrying cash and BNIs for legitimate purpose and seeking to move through the border without unnecessary delay.



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS17-001088

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley

I refer to the letter of 15 June 2017, sent to my senior adviser by Ms Anita Coles on behalf of the Senate Scrutiny of Bills Committee (the Committee) and my initial response to the Committee of 17 June 2017. I apologise for the delay in providing you with a final response.

The letter drew my attention to the Committee's *Scrutiny Digest 6 of 2017*, which requested information in relation to *Appropriation Bill (No. 1) 2017-2018*, *Appropriation Bill (No. 2) 2017-2018* and the *Government Procurement (Judicial Review) Bill 2017*. I have written to you separately on the *Government Procurement (Judicial Review) Bill 2017*.

Appropriation Bill (No. 1) 2017-2018

New Administered Outcomes

As mentioned in my previous responses to the Committee and in the Senate on 17 March 2016, the allocation of measures between odd and even-numbered bills is consistent with the long-standing interpretation by all Governments of the Senate-executive compact, as adjusted in 1999 following the introduction of accrual-based budgeting.

Examples of non-operating items (equity injections, administered assets and liabilities), State, ACT, NT and local government items and corporate entity items of new measures included in even-numbered bills from 2013-14 to 2015-16 are shown in Attachment A. Due to the difficulty of interrogating older data in various legacy systems and the call on departmental resources, the list for the purpose of this request does not go back further.

However further examples of new measures included in even-numbered bills from 2006-07, relating in these examples to New Administered Outcomes, are at Attachment B.

Advance to the Finance Minister

There have been 49 Advances to the Finance Minister (AFM) (included in 48 Determinations,) over the past twelve financial years from 2006-07. A summary is at Attachment C. A report is tabled in Parliament for every year in which one or more AFMs is provided. The reports regarding AFMs are published on my Department's website at:[http://www.finance.gov.au/publications/advance to the finance minister/](http://www.finance.gov.au/publications/advance%20to%20the%20finance%20minister/).

Appropriation Bill (No. 2) 2017-2018

Payments to States, ACT, NT and local government - Portfolio Budget Statements

My advice was sought as to whether my department is able to draw the new mandatory information requirement regarding appropriations for payments to the States, Territories and local government to the attention of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet.

These departments have included additional information on their websites since the Budget, as follows:

- the Attorney-General's Department at <https://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Pages/SchoolsSecurityProgramme.aspx>;
- the Department of Education and Training at <https://www.education.gov.au/funding-schools>; and
- the Department of the Prime Minister and Cabinet at <https://www.pmc.gov.au/resource-centre/pmc/portfolio-budget-statements-2017-2018>.

My Department has consulted with these departments. I am advised that the mandatory information requirements will be met in the future.

Payments to States, ACT, NT and local government - Budget Paper No. 3

The Committee also sought my advice regarding its suggestions in relation to the provision of general information in Budget Paper No. 3 about the terms and conditions attaching to section 96 grants to the States. My Department will liaise with the Department of the Treasury regarding the possible provision of additional information in Budget Paper No. 3 in the next Budget.

Debit Limits

The Committee further sought confirmation as to how much is currently expected to be spent in 2017-18 under each of the three grant programs for which a debit limit is specified in *Appropriation Bill (No. 2) 2017-2018*, and the reasons for appearing to set the debit limit for these programs well above the expected level of expenditure.

The debit limit for the Education Investment Fund for 2017-18 has been set at \$2 million and reflects the final payment for the remaining project, Creative Futures Tasmania.


The debit limit for general purpose finance assistance for 2017-18 has been set at \$5 billion consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$0.7 billion. The debit limit has been set higher to provide for variations in payment amounts, especially for royalty payments which vary following fluctuations in prices and production levels.

The debit limit for national partnership payments has been set at \$25 billion, again consistent with the limits set over the past three years. At this stage, the estimated expenditure in 2017-18 is \$12.6 billion. The debit limit has been set above the estimated level of expenditure to ensure that the Commonwealth has appropriate provision to manage variations in expenditure required prior to the passage of further annual Appropriation Bills, which could include:

- an increase to existing undertakings to the States, including movements of payments between years;
- providing for any large-scale natural disasters or other major unexpected events; or
- funding for existing programs that may be required following an estimates update.

Thank you for bringing the issues raised in the Committee's *Scrutiny Digest 6 of 2017* to my attention.

I have copied this letter to the Treasurer.

 Mathias Cormann
Minister for Finance

15 September 2017

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
	Appropriation Bill (No. 2)	Aboriginal Hostels Limited - upgrades and repairs	Aboriginal Hostels Limited	4,918
		Addressing gang violence and organised crime - National Anti-Gang Taskforce, Gang Intelligence Centre and Criminal Assets Confiscation Taskforce	Australian Federal Police	1,548
		Afghanistan - Australian Embassy	Department of Foreign Affairs and Trade	9,474
		Asbestos Safety and Eradication Agency - establishment	Department of Education, Employment and Workplace Relations	183
		Australian Broadcasting Corporation - continuation of Enhanced News Services	Australian Broadcasting Corporation	1,800
		Australian Broadcasting Corporation - digital delivery of content	Australian Broadcasting Corporation	1,500
		Australian Bureau of Statistics - additional funding for Input-Output Data Tables and the Household Expenditure Survey	Australian Bureau of Statistics	80
		Australian Communications and Media Authority - frequency monitoring facilities - upgrade and relocation	Australian Communications and Media Authority	4,706
		Australian Communications and Media Authority - revenue assurance project - continuation	Australian Communications and Media Authority	1,000
		Australian Government Grants System	Department of Finance and Deregulation	228
		Australian Radiation Protection and Nuclear Safety Agency - improving Australia's capacity to deliver effective radiation protection and nuclear safety	Australian Radiation Protection and Nuclear Safety Agency	2,500
		Australian Research Council - system standardisation	Australian Research Council	1,861
		Australian Securities and Investments Commission client contact centre — National Business Names registration system	Australian Securities and Investments Commission	1,591
			Australian Transaction Reports and Analysis Centre	8,171
		Australian Transaction Reports and Analysis Centre - Establishment of new data centre		
		Better Schools - National Plan for School Improvement - continued support for students with disabilities	Department of Education, Employment and Workplace Relations	388
		Bureau of Meteorology - recommissioning of Tennant Creek radar	Bureau of Meteorology	460
		Connecting People with Jobs - extension	Department of Education, Employment and Workplace Relations	240
		Family and Parental Payments - change to rules for receiving payments overseas	Department of Human Services	2,200
		Family Tax Benefit Part A - Changes to age of eligibility	Department of Human Services	1,828
		Improving Government Efficiency - Better Procurement Price Outcomes	Department of Finance and Deregulation	3,838
		Integrated Service Delivery Framework	Department of Human Services	1,776
			Department of Immigration and Citizenship	5,000
		Job Services Australia - changed payment arrangements for volunteer job seekers	Department of Education, Employment and Workplace Relations	160
		Living Longer. Living Better - addressing workforce pressures - aged care workforce supplement	Department of Veterans' Affairs	1,481
		Mental health services - expansion	Department of Veterans' Affairs	859
		Nairobi Chancery - construction	Department of Foreign Affairs and Trade	155
				210
		National Broadband Network - shareholder and regulatory policy support - increase	Department of Broadband, Communications and the Digital Economy	
		National Drought Program Reform	Department of Human Services	5,196
		National Medical Stockpile - replenishment	Department of Health and Ageing	16,579
		Official development assistance - Enhancing Australia's Commitment to Development in the Asia-Pacific Region	AusAID	350
		Official development assistance - Enterprise Resource Planning system	AusAID	1,501
		Pension Bonus Scheme - cease late registrations	Department of Veterans' Affairs	183
		Personal income tax — net medical expenses tax offset phase out	Australian Taxation Office	416
		Regional Assistance Mission to Solomon Islands - transition	Australian Federal Police	4,424
			Department of Foreign Affairs and Trade	87
			Attorney-General's Department	16,856
		Royal Commission into Institutional Responses to Child Sexual Abuse - establishment		
		Student Start-up Scholarships - conversion to Income Contingent Loans	Australian Taxation Office	1,047
		Superannuation reforms - extending the normal deeming rules to new superannuation account-based income streams	Department of Human Services	256

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000		
2013/14	Appropriation Bill (No. 4)	Superannuation reforms — higher concessional contributions cap	Australian Taxation Office	254		
		Superannuation reforms — reforming the tax exemption for earnings on superannuation assets supporting retirement income streams	Department of Finance and Deregulation	195		
		Supporting Senior Australians - Housing Help for Seniors - pilot	Department of Human Services Department of Veterans' Affairs	1,332 1,738		
		Synthetic greenhouse gases and ozone depleting substances - implementation of destruction incentives program and reduction in regulatory burden	Department of Sustainability, Environment, Water, Population and Communities Australian Institute of Family Studies	967 196		
		Tackling Problem Gambling - establishing the Australian Gambling Research Centre				
		Tax administration — enhancing Standard Business Reporting, the Australian Business Register and Australian Business Number administration	Australian Taxation Office	18,327		
		Tax agent services licensing regime - online registration for financial advisors	Australian Securities and Investments Commission Australian Taxation Office	1,020 1,607		
		Tax compliance — improving compliance through third party reporting and data matching				
		Townsville Convention and Entertainment Centre - contribution	Department of Regional Australia, Local Government, Arts and Sport	5,000		
		Addressing the Backlog and Reintroducing Temporary Protection Visas	Department of Immigration and Border Protection	3,600		
		Enhancing Border Controls and Improving Identity Management	Department of Immigration and Border Protection	1,000		
		Green Army - establishment	Department of Employment	264		
		Job Commitment Bonus - establishment	Department of Human Services	361		
		Operation Sovereign Borders - Enhancing people smuggling intelligence gathering, disruption and joint policing	Australian Federal Police	968		
			Australian Secret Intelligence Service	650		
			Australian Security Intelligence Organisation	100		
		Operation Sovereign Borders - joint agency taskforce	Department of Immigration and Border Protection	1,124		
		Relocation Assistance to Take up a Job programme - establishment	Department of Employment	258		
		Royal Commission into the Home Insulation Programme	Attorney-General's Department	100		
		Seniors Employment Incentive Payment - establishment	Department of Employment	514		
		Tackling Crime - increased cargo and mail screening at the border	Australian Customs and Border Protection Service	4,245		
		Tasmanian Jobs Programme - pilot	Department of Employment	138		
		Appropriation Bill (No. 6)	Royal Commission into Trade Union Governance and Corruption - establishment	Attorney-General's Department	5,043	
					80	
		2014/15	Appropriation Bill (No. 2)	A Competitive Agriculture Sector - stronger biosecurity and quarantine arrangements	Department of Agriculture	
				Australia's diplomatic engagement in Afghanistan - continuation	Department of Foreign Affairs and Trade	2,042
				Baghdad Embassy - relocation	Department of Foreign Affairs and Trade	8,227
				Bureau of Meteorology - improved efficiency	Bureau of Meteorology	100
				Commonwealth Seniors Health Card - include untaxed superannuation income in the eligibility assessment	Department of Veterans' Affairs	548
				Enhancing Online Safety for Children	Department of Communications	219
Export Finance and Insurance Corporation - capital injection	Department of Foreign Affairs and Trade			200,000		
Medicare Benefits Schedule - introducing patient contributions for general practitioner, pathology and diagnostic imaging services	Department of Human Services			5,406		
National Anti-Gang Squad	Australian Federal Police			179		
Personally Controlled Electronic Health Record System - continuation	Department of Human Services Department of Health			1,000 95		
Pharmaceutical Benefits Scheme - Medication Charts for Public and Private Hospitals						
Restart - boosting the wage subsidy for mature age job seekers	Department of Employment			1,241		
Routine Replenishment of the National Medical Stockpile	Department of Health			5,682		
Royal Commission into Trade Union Governance and Corruption - establishment	Attorney-General's Department			250		
Schools Security Programme	Attorney-General's Department			5,712		
Simplifying Medicare safety net arrangements	Department of Human Services			1,963		
Social Security Agreement with India	Australian Taxation Office			793		
Sporting Schools Initiative	Australian Sports Commission			1,500		
Stronger participation incentives for job seekers under 30	Department of Employment			4,685		
Timor-Leste Police Development Programme - continuation	Australian Federal Police			87		

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
	Appropriation Bill (No. 2)	Upholding quality - Higher Education Information Management System - expansion	Department of Education	915
		Western Front Interpretive Centre - Villers-Bretonneux, France - initial funding	Department of Veterans' Affairs	6,061
	Appropriation Bill (No. 4)	Bathurst 200 Commemorative Flagstaff Project - contribution	Department of Infrastructure and Regional Development	250
		Enhanced Public Register of Financial Advisers - establishment	Australian Securities and Investments Commission	3,415
		Higher Education Reforms - amendments	Australian Taxation Office	594
		Introduction of Temporary Protection Visas and Safe Haven Enterprise Visas	Department of Immigration and Border Protection	801
		Kyiv - interim embassy and Operation Bring Them Home	Department of Foreign Affairs and Trade	2,804
		National security - additional counter-terrorism funding	Australian Security Intelligence Organisation	15,660
			Department of Immigration and Border Protection	7,042
			Australian Crime Commission	3,422
		Pharmaceutical Benefits Scheme - new and amended listings	Department of Health	380
		Reform of the Remote Jobs and Communities Programme	Department of Employment	3,039
		Strengthening the Job Seeker Compliance Framework	Department of Employment	943
	Appropriation Bill (No. 6)	Inspector-General of Taxation - additional funding	Inspector General of Taxation	808
		Intercountry Adoption - national support service	Department of Foreign Affairs and Trade	144
	Appropriation Bill (No. 2)	Aged Care - Alignment of Aged Care Means Testing Arrangements	Department of Veterans' Affairs	151
		Australian embassy in Baghdad - continuation	Department of Foreign Affairs and Trade	10,979
		Australian Nuclear Science and Technology Organisation - interim radioactive waste storage	Australian Nuclear Science and Technology Organisation	4,668
		Australian Nuclear Science and Technology Organisation - repatriation of intermediate level radioactive waste	Australian Nuclear Science and Technology Organisation	4,543
		Australia's diplomatic engagement in Afghanistan - continuation	Department of Foreign Affairs and Trade	5,011
		Digital Transformation Agenda - Stage One and establishment of the Digital Transformation Office	Australian Taxation Office	14,776
			Department of Human Services	266
			Department of Social Services	34,187
			Department of Industry and Science	1,152
		Disability Employment - A Better Way to Work	Department of Employment	111
		Emerging International Airports	Department of Immigration and Border Protection	2,795
			Department of Agriculture	317
		Expanding Australia's Diplomatic Footprint	Department of Foreign Affairs and Trade	20,681
			Australian Securities and Investments Commission	1,352
		Growing Jobs and Small Business - crowd-sourced equity funding for public companies		
		Growing Jobs and Small Business - Engaging Early School Leavers	Department of Employment	295
		Growing Jobs and Small Business - Further Strengthening the Job Seeker Compliance Arrangements	Department of Employment	358
		Growing Jobs and Small Business - Wage Subsidies - redesign	Department of Employment	313
		Growing Jobs and Small Business - Youth Employment Strategy - Intensive Support for Vulnerable Job Seekers	Department of Employment	4,447
		Growing Jobs and Small Business - Youth Employment Strategy - Revised waiting period for youth income support	Department of Employment	798
		Growing Jobs and Small Business Package - National Work Experience Programme	Department of Employment	52
		Inspector-General of Taxation - additional funding	Inspector General of Taxation	198
		Intercountry Adoption - national support service	Department of Foreign Affairs and Trade	64
		Investment Approaches to Welfare	Department of Social Services	744
		Military Rehabilitation and Compensation Act 2004 - Single Appeal Path	Department of Veterans' Affairs	100
		National Disability Insurance Agency Full Scheme ICT	Department of Human Services	5,557
		National Immunisation Programme - new and amended listings	Department of Human Services	2,359
			Australian Secret Intelligence Service	6,891
		National Security — Australian Secret Intelligence Service — strengthening capabilities		
		National Security - Strengthen and Enhance Australia's Border Protection Services - further measures	Australian Commission for Law Enforcement Integrity	297
			Department of Immigration and Border Protection	18,472

Examples of measures in even-numbered Appropriation Bills - 2013/14 to 2015/16

ATTACHMENT A

Financial Year	Appropriation Bill	Measure Title	Agency Name	\$'000
		Norfolk Island Reform	Australian Taxation Office	942
			Department of Employment	65
			Department of Human Services	1,501
			Department of Immigration and Border Protection	5,359
			Department of Agriculture	961
		Reducing red tape - reforms to the Australian Taxation Office	Australian Taxation Office	18,800
			Department of Health	3,534
		Reducing the Burden of the Industrial Chemicals Regulatory Framework to Industry		
		Refugee resettlement arrangements for Illegal Maritime Arrivals in offshore processing centres	Department of Immigration and Border Protection	141,822
		Safety, Rehabilitation and Compensation Act 1988 reforms - Calculating Permanent Impairment and the Maximum Payable	Department of Veterans' Affairs	94
		Safety, Rehabilitation and Compensation Act 1988 reforms - Multiple Injuries Arising out of the One Event	Department of Veterans' Affairs	84
		Smaller Government - Immigration and Border Protection Efficiencies	Department of Immigration and Border Protection	4,265
		Streamlining and improving the sustainability of Courts	Department of Finance	7,864
		Strengthening Australia's foreign investment framework	Australian Taxation Office	9,234
			Department of the Treasury	1,700
		Strengthening the Integrity of Welfare Payments	Australian Transaction Reports and Analysis Centre	1,750
			Department of Human Services	51
		Supply and Replenishment of the National Medical Stockpile	Department of Health	6,924
		VET FEE-HELP - enhanced compliance regime	Department of Education and Training	3,600
		Welfare Payment Infrastructure Transformation — Tranche One	Department of Human Services	18,646
	Appropriation Bill (No. 4)	Addressing Welfare Reliance in Remote Communities	Department of Employment	426
			Department of Human Services	7,665
		Aged Care Provider Funding - Improved Compliance	Department of Health	10,674
		Higher Education Loan Programme - strengthened compliance	Australian Taxation Office	1,637
		National Disability Insurance Scheme - Transition to full Scheme	Department of Human Services	2,425
		Reducing red tape — improvements to data and analytics infrastructure of the Australian Taxation Office	Australian Taxation Office	11,385
		Streamlining Student Visa Processing	Department of Education and Training	308
		Syrian and Iraqi Humanitarian Crisis	Australian Security Intelligence Organisation	135
		Tax administration — Single Touch Payroll Reporting	Australian Taxation Office	59,524
		VET FEE-HELP - strengthened compliance	Department of Education and Training	243

Notes:

The information is from the Central Budget Management System (CBMS) and reflected in the relevant year's Budget Papers.

Amounts appearing in the schedules to the Bills are the proposed appropriation amount for the relevant item and further information can be found in the relevant entity Portfolio Statements.

New Administered Outcomes/Expenses

The following table shows examples of entirely New Administered Outcomes (known as New Administered Expenses prior to 2010-2011) included in even-numbered appropriation bills:

Bill	Portfolio	Entity	Outcome	Amount (\$m)
<i>Appropriation Bill (No. 2) 2012-2013</i>	Broadband, Communications and the Digital Economy	Telecommunications Universal Service Management Agency	Outcome 1 - Support the delivery of universal service and other public interest telecommunications services for all Australians in accordance with Government policy, including through the management of telecommunications service agreements and grants	45.000
<i>Appropriation Bill (No. 4) 2009-2010</i>	Treasury	Australian Prudential Regulation Authority	Outcome 1 - Enhanced public confidence in Australia's financial institutions through a framework of prudential regulation which balances financial safety and efficiency, competition, contestability and competitive neutrality	1.524
<i>Appropriation Bill (No. 2) 2007-2008</i>	Environment and Water Resources	Department of the Environment and Water Resources	Outcome 3 - More efficient and sustainable use of Australia's water resources	58.831
<i>Appropriation Bill (No. 4) 2007-2008</i>	Human Services	Medicare Australia	Outcome 1 - Improving Australia's health through payments and information	3.492

Use of Advance to the Finance Minister provisions over the past twelve financial years from 2006-07

The following table provides a summary of Advances to the Finance Minister (AFM) over the past twelve years. These are reported annually to the Parliament and published on my Department's website. The AFM's are available on the Federal Register of Legislation. A link to each Explanatory Statement is included below.

Year	Act	Qty	Description	Date	Amount (\$)
2017-18	No. 1	1	Australian Bureau of Statistics Departmental Item https://www.legislation.gov.au/Details/F2017L01005/Explanatory%20Statement/Text	09/08/2017	122,000,000.00
2016-17	-	0	-	-	-
2015-16	No. 1	1	Australian Electoral Commission Departmental Item https://www.legislation.gov.au/Details/F2016L00673/Explanatory%20Statement/Text	04/05/2016	101,237,000.00
2014-15	-	0	-	-	-
2013-14	-	0	-	-	-

Year	Act	Qty	Description	Date	Amount (\$)
2012-13	No. 1	6	Department of Education, Employment and Workplace Relations Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2013L00553/Explanatory%20Statement/Text	08/03/2013	24,117,394.97
			Department of Health and Ageing Administered Item, Outcome 13 https://www.legislation.gov.au/Details/F2013L00558/Explanatory%20Statement/Text	26/03/2013	107,000,000.00
			Administered Item, Outcome 10*	27/06/2013	12,500,000.00
			Administered Item, Outcome 14* https://www.legislation.gov.au/Details/F2013L01211/Explanatory%20Statement/Text		2,200,000.00
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2013L01045/Explanatory%20Statement/Text	18/06/2013	91,017,000.00
			Department of Regional Australia, Local Government and Sport Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2013L01265/Explanatory%20Statement/Text	28/06/2013	4,632,500.00

*This Determination included two Advances.

Year	Act	Qty	Description	Date	Amount (\$)
2011-12	No. 1	6	Department of Education, Employment and Workplace Relations Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2012L00049/Explanatory%20Statement/Text	11/01/2012	33,242,205.00
			Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2012L00774/Explanatory%20Statement/Text	22/03/2012	14,327,392.10
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2012L01521/Explanatory%20Statement/Text	10/05/2012	5,561,983.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2012L01522/Explanatory%20Statement/Text	28/06/2012	17,610,000.00
			Department of Regional Australia, Local Government, Arts and Sport Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2012L01523/Explanatory%20Statement/Text	28/06/2012	6,000,000.00
			Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2012L01529/Explanatory%20Statement/Text	28/06/2012	6,200,000.00
	No. 2	1	Department of Regional Australia, Regional Development and Local Government Payments to State, ACT, NT and local government item, Outcome 1 https://www.legislation.gov.au/Details/F2011L02712/Explanatory%20Statement/Text	05/12/2011	41,881,000.00

Year	Act	Qty	Description	Date	Amount (\$)
2010-11	No. 1	5	Department of the Prime Minister and Cabinet Administered Item, Outcome 2 https://www.legislation.gov.au/Details/F2011L00446/Explanatory%20Statement/Text	08/03/2011	30,701,000.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2011L01128/Explanatory%20Statement/Text	14/06/2011	7,500,000.00
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2011L01350/Explanatory%20Statement/Text	24/06/2011	3,130,000.00
			Department of Families, Housing, Community Services and Indigenous Affairs Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2011L01014/Explanatory%20Statement/Text	06/06/2011	14,159,000.00
			Australian Electoral Commission Departmental Item https://www.legislation.gov.au/Details/F2011L01016/Explanatory%20Statement/Text	06/06/2011	5,100,000.00

Year	Act	Qty	Description	Date	Amount (\$)
2009-10	No. 1	6	Department of the Treasury Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2010L00149/Explanatory%20Statement/Text	18/01/2010	29,675,000.00
			Department of Health and Ageing Administered Item, Outcome 14 https://www.legislation.gov.au/Details/F2010L00340/Explanatory%20Statement/Text	04/02/2010	6,440,080.00
			Department of Education, Employment and Workplace Relations Administered Item, Outcome 5 https://www.legislation.gov.au/Details/F2010L00597/Explanatory%20Statement/Text	25/02/2010	10,364,000.00
			Department of Immigration and Citizenship Administered Item, Outcome 4 https://www.legislation.gov.au/Details/F2010L01479/Explanatory%20Statement/Text	24/05/2010	72,572,000.00
			Department of Agriculture, Fisheries and Forestry Administered Item, Outcome 2 https://www.legislation.gov.au/Details/F2010L01677/Explanatory%20Statement/Text	08/06/2010	1,808,382.00
			AusAid Administered Item, Outcome 1 https://www.legislation.gov.au/Details/F2010L01790/Explanatory%20Statement/Text	22/06/2010	29,381,000.00

Year	Act	Qty	Description	Date	Amount (\$)		
2008-09	No. 1	7	Wheat Exports Australia Departmental Item https://www.legislation.gov.au/Details/F2008L04299/Explanatory%20Statement/Text	03/11/2008	1,107,000.00		
			Bureau of Meteorology Administered Item https://www.legislation.gov.au/Details/F2008L04452/Explanatory%20Statement/Text	24/11/2008	20,000,000.00		
			Department of Foreign Affairs and Trade Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L00486/Explanatory%20Statement/Text	09/02/2009	22,208,044.00		
			Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L02534/Explanatory%20Statement/Text	22/06/2009	2,266,200.00		
			Australian Trade Commission Administered item, Outcome 1 https://www.legislation.gov.au/Details/F2009L02450/Explanatory%20Statement/Text	16/06/2009	50,000,000.00		
			Department of Innovation, Industry, Science and Research Administered Item, Outcome 3 https://www.legislation.gov.au/Details/F2009L02491/Explanatory%20Statement/Text	18/06/2009	14,717,045.00		
			Department of Families, Housing, Community Services and Indigenous Affairs Administered item, Outcome 4 https://www.legislation.gov.au/Details/F2009L02600/Explanatory%20Statement/Text	25/06/2009	10,539,463.00		
			No. 2	2	Department of Infrastructure, Transport, Regional Development and Local Government State, ACT, NT and local government item, Outcome 3 https://www.legislation.gov.au/Details/F2009L00712/Explanatory%20Statement/Text	23/02/2009	206,500,247.00
					State, ACT, NT and local government item, Outcome 1 https://www.legislation.gov.au/Details/F2009L02601/Explanatory%20Statement/Text	25/06/2009	29,016,740.00

Year	Act	Qty	Description	Date	Amount (\$)
2007-08	No. 1	5	Australian Taxation Office Administered Expenses - Outcome 1 https://www.legislation.gov.au/Details/F2007L02200/Explanatory%20Statement/Text	05/07/2007	800,000.00
			Department of Health and Ageing Administered Expenses - Outcome 9 https://www.legislation.gov.au/Details/F2007L02389/Explanatory%20Statement/Text	27/07/2007	3,204,267.00
			Administered Expenses - Outcome 13 https://www.legislation.gov.au/Details/F2007L04155/Explanatory%20Statement/Text	17/10/2007	48,760,078.00
			Department of Agriculture, Fisheries and Forestry Administered Expenses - Outcome 1 https://www.legislation.gov.au/Details/F2008L00203/Explanatory%20Statement/Text	18/01/2008	90,183,625.00
			Department of Foreign Affairs and Trade Administered Expenses - Outcome 3 https://www.legislation.gov.au/Details/F2008L00647/Explanatory%20Statement/Text	25/02/2008	2,998,508.00
	No. 2	1	Department of Agriculture, Fisheries and Forestry Administered Payments to States, ACT, NT and local government - Outcome 1 https://www.legislation.gov.au/Details/F2008L00401/Explanatory%20Statement/Text	11/02/2008	73,226,278.00

Year	Act	Qty	Description	Date	Amount (\$)
2006-07	No. 1	4	Department of Foreign Affairs and Trade Administered Expenses- Outcome 3 https://www.legislation.gov.au/Details/F2006L02669/Explanatory%20Statement/Text	07/08/2006	8,989,493.00
			Administered Expenses- Outcome 3 https://www.legislation.gov.au/Details/F2007L00280/Explanatory%20Statement/Text	01/02/2007	8,989,493.00
			Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L01884/Explanatory%20Statement/Text	20/06/2007	19,527,125.00
			Department of Immigration and Citizenship Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L02027/Explanatory%20Statement/Text	27/06/2007	1,250,000.00
	No. 2	4	Department of Health and Ageing Administered Expenses- Outcome 1 https://www.legislation.gov.au/Details/F2007L01678/Explanatory%20Statement/Text	04/06/2007	12,026,000.00
			Department of Agriculture, Fisheries and Forestry Payments to States, ACT, NT and local government - Outcome 1 https://www.legislation.gov.au/Details/F2007L01934/Explanatory%20Statement/Text	22/06/2007	57,110,565.00
			Department of Transport and Regional Services Payments to States, ACT, NT and local government - Outcome 2 https://www.legislation.gov.au/Details/F2007L01925/Explanatory%20Statement/Text	22/06/2007	4,967,491.00
			Payments to States, ACT, NT and local government - Outcome 2 https://www.legislation.gov.au/Details/F2007L02028/Explanatory%20Statement/Text	27/06/2007	858,355.00



**THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR IMMIGRATION AND
BORDER PROTECTION**

Ref No: MS17-003515

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

Dear Senator

Thank you for your letter dated 14 September 2017 inviting me to respond to comments made in the Committee's *Scrutiny Digest No. 11 of 2017* concerning the Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017 (the Bill).

The Committee has asked my advice as to whether the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 153XD(6), will be made freely available to all persons interested in the law.

Subsection 153XD(6) is proposed to be inserted into the *Customs Act 1901* by the Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017. This provision contains the head of power to create regulations that may apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

I undertake that, should any such documents or other writing be incorporated in the regulations, their incorporation will be especially highlighted in the explanatory material for the regulations. Further, these documents and other writing would be referenced on the Department of Immigration and Border Protection website and through a Border Protection Notice that would indicate where any document(s) can be obtained.

These commitments are in addition to section 15J of the *Legislation Act 2003* which requires that an explanatory statement for an instrument that incorporates a document by reference must contain a description of such documents and indicate how they may be obtained.

I trust that these commitments will address the Committee's concerns about the availability of such documents.

“ALEX HAWKE”

29 / 9 / 2017



Senator the Hon Michaelia Cash

Minister for Employment

Minister for Women

Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003667

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

Dear Senator

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

This letter is in response to the letter of 7 September 2017 from the Senate Standing Committee for the Scrutiny of Bills concerning issues raised in the Committee's *Scrutiny Digest No. 10 of 2017* in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017.

The Australian Government made an election commitment to adopt the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption, led by Commissioner Heydon. The Bill responds to Recommendations 36, 37 and 38 of the Royal Commission relating to disqualification of officers.

The Royal Commission described the current disqualification regime for officers of registered organisations as 'limited' and identified a number of gaps in the existing law, including the narrow list of circumstances in which an official could be disqualified and the lack of consequences for persons who continue to act as officials when disqualified (Final Report, Volume 5, p. 225). The Bill will ensure more acceptable standards of behaviour and accountability for officers. As stated by Commissioner Heydon, 'officials who deliberately flout the law should not be in charge of registered organisations' (Final Report, Volume 5, p. 234).

The Bill also responds to additional Government election commitments to ensure fairness and transparency in workplaces, including giving the Federal Court greater scope to effectively deal with registered organisations that are dysfunctional or not serving the interests of their members and ensuring that amalgamations of registered organisations are subject to a public interest test.

The Royal Commission identified a 'deep-seated' and 'widespread' culture of lawlessness across the registered organisations it examined (Final Report, Volume 1, p. 12). The amendments in the Bill will combat this culture and improve the governance and democratic functioning of registered organisations for the benefit of their members.

For these reasons, the Government considers that the Bill should be progressed through the Parliament as a matter of the highest priority.

A detailed response to each of the issues raised in your correspondence with my office is at Attachment A. I trust that the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash

3/10/2017

Encl.

Detailed response to issues raised in Scrutiny Digest No. 10 of 2017 in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

Insufficiently defined disqualification powers in relation to proposed subsection 223(3)

Effect of proposed subsection 223(3)

Proposed subsection 223(3) provides that a ground for disqualification applies in relation to a person if multiple findings are made against an organisation whilst that person was an officer of that organisation and the person failed to take reasonable steps to prevent that conduct.

Issue

The Committee has sought advice as to whether it would be appropriate to include specific guidance in the Bill as to the type of reasonable steps that must be undertaken in order to avoid disqualification under proposed subsection 223(3). The Committee is concerned that the Bill does not provide more specificity about the actions it is expected an individual officer would need to take to avoid bearing consequences of a finding which relates to an organisation, rather than to the individual.

Discussion

The reasonable steps defence is derived from the long-standing reasonable person test of the common law. A similar ground for disqualification from managing corporations (which relevantly includes the reasonable steps defence) applies under the *Corporations Act 2001* (Cth) (Corporations Act).¹

The reasonable steps defence entails an objective test² applied to the particular circumstances of the case as to whether or not the steps taken were sufficient. The test involves considering if the steps taken would be in accordance with those a 'prudent and reasonable' person.³

It is not appropriate, nor possible, to be specific about the actions expected of an individual officer in taking reasonable steps to prevent an organisation from breaching a law. It is established that reasonable steps will vary depending on the circumstances.⁴ It is also not uncommon for Commonwealth legislation to omit specific guidance as to what constitutes reasonable steps.⁵ This seems to have been recognised by the Committee by not calling into question the 'reasonable steps' requirements in its recent consideration of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

In addition, even where this disqualification ground exists, it will still be a matter for the Federal Court in the exercise of its discretion, to determine if disqualification is justified in all of the circumstances.

¹ *Corporations Act 2001* (Cth), s 206E

² *Vaughan v Menlove* (1837) 132 ER 490; *Blyth v. Company Proprietors of the Birmingham Water Works* (1856) 156 ER 1047.

³ *Blyth v. Company Proprietors of the Birmingham Water Works* (1856) 156 ER 1047.

⁴ *Aldridge v Booth* (1988) 80 ALR 1.

⁵ For example, Australian Privacy Principle 11 in Schedule 1 to the *Privacy Act 1988* requires entities to 'take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity collects is accurate, up-to-date and complete ... [and to] take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is ... accurate, up-to-date, complete and relevant.'

Reversal of evidential burden of proof in relation to proposed subsection 323H(6)

Effect of proposed subsections 323H(5) and (6)

Proposed subsection 323H(5) makes it an offence if a person does not comply with a notice requiring the person to deliver to the administrator specified books that are in the person's possession. Proposed subsection 323H(6) provides an exception to this offence, stating that the offence does not apply to the extent that the person is entitled to retain possession of the books, and the defendant bears the evidential burden to point to evidence that suggests that the person is entitled to retain possession of the books.

Issues

The Committee has sought advice as to why it is appropriate to use an offence-specific defence (which reverses the evidential onus of proof) in proposed subsection 323H(6) and the fact that the Explanatory Memorandum to the Bill does not directly address the reversal of the evidential burden of proof in the provision.

The Committee has also sought advice as to why the question of whether a person is entitled to retain possession of relevant books is a matter peculiarly within the person's knowledge.

Discussion

Proposed section 323H of the Bill is modelled on s 438C of the Corporations Act, which adopts the same formulation of the offence and defence applicable to a person's right to retain books.

The Committee's attention is drawn to the fact that the imposition of an evidential burden does not impose a legal burden of proof upon the defendant and is consistent with the common law and the *Criminal Code Act 1995* (Cth) (Criminal Code Act), which codifies the common law on this and other points. When a defendant wishes to take advantage of a defence it is always the case at common law and under the Criminal Code Act that the defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist. When the defendant discharges this evidential burden, the prosecution then has the legal burden of proof to disprove the matter beyond a reasonable doubt.

In relation to the question of whether a person is entitled to retain possession of relevant books is a matter peculiarly within the person's knowledge, the Committee's attention is drawn to the definition of 'books' in the *Fair Work (Registered Organisations Act) 2009* which is broadly framed and includes any record of information or a document. An administrator would be appointed to resolve the circumstances set out in a declaration made under proposed section 323 and therefore may require documents or information relating to the conduct which resulted in the declaration. This could include personal diaries/calendars or other records, or personal financial statements. Whether the documents required by the administrator are documents belonging to the person is a matter peculiarly within the person's knowledge. A person relying on this defence can easily adduce evidence to discharge the burden by simply pointing to the fact that the information belongs to the person or contains personal information belonging to the person.

Immunity from civil liability in relation to proposed section 323K

Effect of proposed section 323K

Proposed section 323K excludes an administrator appointed under proposed section 323A, or a person acting under the direction of an administrator, from liability for acts or omission done in good faith in the performance or exercise, or purported performance or exercise, of any function or power of the administrator.

Issue

The Committee has sought advice as to why it is necessary and appropriate to provide administrators with immunity under proposed section 323K.

Discussion

Proposed section 323K of the Bill is modelled on s 290D of the *Industrial Relations Act 1996* (NSW) (NSW IR Act), which expressly provides that any administrator appointed under that Act to a State registered organisation has immunity from liability.

Providing an administrator with immunity from liability is not an uncommon feature of a scheme of administration. Administrators appointed under the Corporations Act are liable for the debts they incur in the performance of their functions as administrators and are entitled to be indemnified out of the company's property for these debts and debts or liabilities incurred in good faith and in the performance or exercise, or purported performance or exercise, of any of their functions or powers as administrator.⁶ In the context of registered organisations, and as already noted above, the NSW IR Act provides a similar immunity from liability.

Providing an administrator with immunity from liability is often considered necessary and appropriate to create an incentive to encourage individuals to agree to act as administrators. In the absence of such immunity, it would be very difficult to achieve an effective administration regime. It is not intended that the immunity cover both criminal and civil liability. As statutory immunity provisions may limit the private rights of other individuals, it is usual for a court to construe them narrowly and for immunity provisions that cover both criminal and civil liability to expressly state so. The lack of express statement and the heading for the provision 'Administrator not to be sued' indicates to the Court that the provision is directed at immunity from civil proceedings only. Importantly, for any immunity to apply, it would need to be proven that the administrator was acting in good faith in the performance or exercise of their functions or powers for the immunity to apply.

The reference to 'purported' performance or exercise of any function or power reflects the indemnity provisions of the Corporations Act.⁷ The reference to 'purported' performance reflects the intention that acts and omissions an administrator mistakenly thought were in the scope of their functions will be covered by the proposed immunity, provided that the administrator was acting in good faith.

⁶ *Corporations Act 2001* (Cth), Part 5.3A, Div 9.

⁷ *Corporations Act 2001* (Cth), s 443D(aa).



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

Ref No: MS17-003377

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

Dear Senator

Thank you for your letter of 7 September 2017 in relation to issues identified by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest No. 10 of 2017* concerning the *Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017*.

Please find my advice in relation to the Committee's comments at Attachment A.

The contact officer in the Department of Immigration and Border Protection is Heimura Ringi, Acting Assistant Secretary, Legislation Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

PETER DUTTON

21/09/17

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Part 1 of Schedule 1 – Public disclosure of sanctions

Significant matters in delegated legislation

The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation all details of the categories of information that may be published about actions taken against sponsors who fail to satisfy their sponsorship obligations.

The Government considers it appropriate to set out the technical details, regarding what information about sanctions is required to be published, in the regulations. Prescribing the information that must be disclosed in the regulations is consistent with other provisions in the *Migration Act 1958* (the Migration Act). For example, section 140ZH (also in Division 3A) allows the Minister to disclose information of a prescribed kind about a visa holder, a former visa holder, or an approved sponsor of a visa holder or former visa holder to an approved or former approved sponsor of the visa holder, or a prescribed agency of the Commonwealth or a State or Territory.

The scope of information that will be published is narrow. It is intended that this will be limited to information that identifies the sponsor, breach and sanction. This provides the Minister with flexibility to update the regulations in instances where, for example, there is a change of data available, without going through the legislative amendment process.

The regulations that will set out the detail of what information must be published, will be subject to Parliamentary scrutiny and disallowance when they are tabled in Parliament.

Procedural fairness

The committee requests the Minister's advice as to why the natural justice hearing rule is being excluded in its entirety in relation to the publication by the Minister of information prescribed by the regulations in relation to sanctions taken against approved sponsors. The committee considers it may be appropriate to remove proposed subsection 140K(5) which removes the natural justice hearing rule, or at a minimum, to limit its application so it is clear an affected person is entitled to a hearing as to whether or not the Minister is not required to publish information by virtue of proposed subsection 140K(7), and requests the Minister's advice in relation to this matter.

This measure is intended to deter businesses from breaching their obligations, allow Australians and overseas workers to inform themselves about breaches, and increase public confidence in the integrity of our visa programmes. To achieve this, it is necessary to publish all or a high percentage of breaches. This gives overseas workers and Australians confidence that they have a clear picture of any business that has breached their obligations, and serves as a warning to businesses that if they breach their obligations, they will be publically named.

Sponsors will continue to be afforded natural justice regarding whether a sponsorship obligation has been breached. Publication will only occur where it has been determined by a delegate that the breach is serious enough to warrant the imposition of a sanction under section 140K of the Migration Act.

The implementation of the measure will include a comprehensive communications package to inform sponsors, visa holders, and the Australian public of the measure. The Department will also advise individual sponsors during the sanction process that breaches will be published.

Whilst exemptions may be prescribed in the regulations, the Government has not at this point identified any appropriate exemptions, and does not intend to prescribe any at this point.

The committee also considers it may be appropriate for the bill to be amended to require that publication be delayed until after the time limit for an application for review has expired, after a final determination of a review application, and after a decision in relation to an application for a court order under section 140K has been determined, and requests the Minister's advice in relation to this matter.

The public disclosure of details when a party breaches regulatory requirements is an existing practice within the Australian Government. The Migration Agents Registration Authority regularly publishes details of disciplinary decisions taken against migration agents on its website. This includes agent names, registration numbers, and the results of compliance investigations. Similarly, the Fair Work Ombudsman (FWO) publishes details, including business names, litigation outcomes, enforceable undertakings, and compliance partnerships on the FWO website.

The alternative in this circumstance, to not publish a sanction until the time limit for review has expired, significantly weakens the impact of the measure. This approach would leave workers uninformed of employers that have been found to have breached their obligations, exposing them to potentially exploitive circumstances known to Government.

The proportion of sanction decisions that are overturned at review is very low. In 2015-16, 372 sponsors were sanctioned (cancelled and/or barred), and 28 were issued with infringement notices.¹ Of the 372 sponsors who were cancelled and/or barred, only 38 sought review through the Administrative Appeals Tribunal (AAT).² In 2015-16, the AAT set aside only 11 cases.³

The Department will notify sanctioned sponsors that the decision will be published, and that they are able to advise the Department if they seek review. The Department will then include this in the published information. Where a sanction decision is

¹ Department of Immigration and Border Protection Annual Report 2015-16, pg 43.
<http://www.border.gov.au/ReportsandPublications/Documents/annual-reports/part-3-2015-16.pdf>

² Data from the AAT, Migration caseload summary 2015-16

³ Data from the AAT, Migration caseload summary 2015-16. These cases were lodged in 2015-16 or earlier.

varied or overturned on review, the Department will respectively update or remove the sanction information from publication.

Immunity from civil liability

The committee requests the Minister's advice as to why it is considered appropriate to provide the Minister with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

The provision of civil immunity is consistent with similar legislation, including the requirement to publish disciplinary details of registered migration agents under section 305A of the Migration Act.

The publication of sponsor sanction outcomes is in the public interest as it will assist in protecting visa holders by further reducing the potential for their exploitation, and it will allow workers to make informed decisions about potential employers. Publication will demonstrate that there are public repercussions for sponsors who breach their obligations, and act as a deterrent to a sponsor who may otherwise breach their obligations. The Government considers that it is not appropriate for the Minister to be held civilly liable in this context.

Retrospective application

The committee therefore requests the Minister's detailed justification for the retrospective application of these amendments, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

On 18 March 2015, the Government indicated its intention to publish the details of employers who breach their sponsorship obligations. The Government did this by publically accepting the recommendation in the report *Robust New Foundations - A Streamlined, Transparent and Responsive System for the 457 Programme*, to make sanction details public.

The Government considers that it is appropriate to apply this measure from 18 March 2015, as the measure will benefit visa holders and the wider public by further reducing the potential for exploitation, and by allowing workers to make informed decisions about potential employers. The measure will demonstrate that there are public repercussions for sponsors who breach their obligations, and will act as a deterrent to a sponsor who may otherwise breach their obligations.

The Department already undertakes a range of activities to deter businesses from breaching their sponsorship obligations, and inform visa holders and Australians about breaches. These include employer education and awareness visits, monitoring of compliance with sponsorship obligations and visa conditions, investigation of allegations, liaison with the Fair Work Ombudsman, imposition of sanctions, and publication of aggregate data on breaches.

The current framework does not allow Australians and overseas workers to sufficiently inform themselves about breaches as current information in the public domain does not identify business which have breached their legal obligations. The current framework also prevents the Department from advising persons making allegations that a sponsor has been sanctioned, which undermines public confidence in the compliance framework as complainants are unaware of any outcome of their allegation. Therefore, the Government committed to allow the public disclosure of sponsor sanctions, including information to identify the sponsor that breached their obligations.

Around 400 sponsors are sanctioned annually, therefore publishing sanction action taken since 18 March 2015 would include up to 600 sponsors. This includes sanctions for underpaying visa holders, and where the visa holder has not participated in the nominated occupation. These sanctions protect local wages and conditions, and ensure the 457 programme is only used to meet genuine skill shortages.

Publication will only occur where it has been determined by a departmental delegate that a sponsor has breached a sponsorship obligation and the breach is serious enough to warrant the imposition of a sanction under section 140K of the Migration Act.

Part 2 of Schedule 1 – Tax file numbers

Significant matters in delegated legislation

The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation the purposes for which tax file numbers may be used, recorded or disclosed.

The Government considers it appropriate to set out the technical details, regarding the purposes for which tax file numbers will be used, in the regulations. The scope of the regulations is limited to the facilitation of the Department of Immigration and Border Protection as specified in the Migration Act. It is intended that the regulations will limit the tax file number measure to research and compliance purposes.

The regulations will be subject to parliamentary scrutiny and disallowance when they are tabled in Parliament.



The Hon Alan Tudge MP
Minister for Human Services

MB17-000674

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

Dear Chair

Thank you for your letter of 7 September 2017 regarding the Committee's *Scrutiny Digest No. 10 of 2017*, which requested the following additional information in relation to the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017:

Significant matters in delegated legislation:

The committee requests the Minister's detailed advice as to why the primary legislation does not include more guidance and safeguards in relation to the cashless debit card scheme, such as in relation to site selection and participant criteria, given the bill proposes that the operation of the debit card be no longer time-limited and restricted to a small-scale trial.

I would like to provide the following information and advice to the Committee in response to this request.

Expansion of the Cashless Debit Card

The expansion of the Cashless Debit Card is necessary to allow the Government an opportunity to build on the research findings of the evaluation (see below), to help test the card and the technology that supports it in more diverse communities and settings.

To give effect to this intention, the Bill proposes that the legislated maximums for sites, participants and the sunset date be removed, since the initial trial within these parameters has been completed. However, the Bill does not indefinitely extend or expand the Cashless Debit Card program. The legislation only removes a date beyond which the program could not continue, and allows the flexibility to test the arrangements in further sites as needed. Parliament would still retain the right to consider any expansion through legislative instruments.

Use of delegated legislation

As described in the *House of Representatives Practice* (6th Edition), delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail. Once Parliament has laid down the principles of a new law, delegated legislation is the appropriate method through which to work out the application of the law in greater detail within, but not exceeding, those principles.

The principles around the Cashless Debit Card set out in the primary legislation include the objectives for trialling such arrangements, parameters for trial participation and guidance on the split and usage of restricted welfare payments.

Broadly, the use of delegated legislation such as legislative instruments allows the Government, with appropriate parliamentary scrutiny, to work out the application of the Cashless Debit Card on a community-by-community basis.

Site selection

The selection of sites for the Cashless Debit Card is guided by the objectives of the primary legislation. The use of legislative instruments to specify a location and define the details of how the program can operate in any particular location provides the necessary flexibility to give effect to the objectives of the program in a chosen location.

The two new locations for the Cashless Debit Card have been selected based on several factors, including community readiness and willingness, high levels of disadvantage and welfare dependence, and high levels of social harm caused by alcohol, drugs and gambling.

Details such as participant numbers and start and end dates are dependent on community needs. The use of instruments allows Government to work more closely with individual communities to tailor application of the Cashless Debit Card to meet these community needs, within the broader principles set out in the legislation.

The potential for new Cashless Debit Card sites is driven by community interest. The expansion provides for a greater number of communities to see positive outcomes as have been shown in previous communities. Many communities around the country have shown an interest in the card. There is a sense of urgency from these communities, which are looking for more tools to address the devastating impact of alcohol, drugs and gambling on their people.

In current and potential sites, engagement with community members and leaders has been ongoing, informally and formally to help Government better understand local needs and gauge interest in the program.

Participant criteria

The primary legislation does include guidance and safeguards in relation to participant criteria. The legislation specifies which social security payments can trigger a participant for the program, and that a specified trial area must be the 'usual place of residence' for a participant in that location to be triggered.

Further criteria for participation within these limitations can be specified through disallowable instruments. However, any application of the Cashless Debit Card to participants outside those specified in the legislation would be subject to the level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending Bill.

The criteria for participation set out in the legislation are directly linked to the objectives of the Cashless Debit Card. The program is testing whether restricting the amount of cash in a community can reduce the overall social harm caused by welfare-fuelled alcohol, gambling and drug misuse at the individual and community level. The community wide impacts of these harmful goods mean that the Cashless Debit Card program is most effective when a majority of people in a community who receive a welfare payment participate in the program.

However, as outlined above, these criteria can be further specified through a legislative instrument to meet a particular community's needs in addressing social harm. For example, the Cashless Debit Card could be applied to particular cohorts. In the Hinkler electorate, the intention is to roll out the Cashless Debit Card to under 35s on Newstart, Parenting Payment and Youth Allowance (Job Seeker), which will help determine whether a cohort-based approach to implementation is as effective.

Cashless Debit Card trial evaluation results

Since the introduction of the Bill on 17 August 2017, the final independent evaluation of the Cashless Debit Card trial has been finalised. The final report by ORIMA Research was released on 1 September 2017, and included results from the two initial trial sites, Ceduna, South Australia and the East Kimberley, Western Australia.

The evaluation found that it has had a “considerable positive impact” in the communities where it has operated. It also concluded the Cashless Debit Card “has been effective in reducing alcohol consumption and gambling in both trial sites and [is] also suggestive of a reduction in the use of illegal drugs”, and “that there is some evidence that there has been a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling.”

In particular, the evaluation reported the following findings:

- Of people surveyed who drank alcohol before the trial started, 41 per cent reported drinking alcohol less frequently (up from 25 per cent in the Wave 1 survey, which was done approximately six months into the trial); 37 per cent of binge drinkers were doing this less frequently (up from 25 per cent at Wave 1).
- A decrease in alcohol-related hospital presentations including a 37 per cent reduction in Ceduna in the first quarter of 2017 compared with first quarter of 2016 (immediately prior to the commencement of the trial).
- A 14 per cent reduction in Ceduna in the number of apprehensions under the *Public Intoxication Act* compared to the previous year.
- In the East Kimberley, decreases in the alcohol-related pick-ups by the community patrol services in Kununurra (15 per cent reduction) and Wyndham (12 per cent), and referrals to the sobering up shelter in Kununurra (8 per cent reduction).
- A decrease in the number of women in East Kimberley hospital maternity wards drinking through pregnancy.
- Qualitative evidence of a decrease in alcohol-related family violence notifications in Ceduna.

- A noticeable reduction in the number of visible or public acts of aggression and violent behaviour. Nearly 40 per cent of non-participants perceived that violence in their community had decreased.
- People are now seeking medical treatment for conditions that were previously masked by alcohol effects.
- 48 per cent of gamblers reported gambling less (up from 32 per cent at Wave 1).
- In Ceduna and surrounding local government areas (which covers a much bigger region than the card's operation), poker machine revenue was down 12 per cent. This is the equivalent of almost \$550,000 less spent on poker machines in the 12 month trial.
- The card has had "a positive impact in lowering illegal drug use" across the two sites.
- Of drug takers, 48 per cent reported using illegal drugs less often (up from 24 per cent at Wave 1).
- 40 per cent of participants who had caring responsibility reported that they had been better able to care for their children (up from 31 per cent at Wave 1).
- 45 per cent of participants have been better able to save more money (up from 31 per cent at Wave 1).
- Feedback that there has been a decrease in requests for emergency food relief and financial assistance in Ceduna.
- Merchant reports of increased purchases of baby items, food, clothing, shoes, toys and other goods for children.
- Considerable observable evidence being cited by many community leaders and stakeholders of a reduction in crime, violence and harmful behaviours over the duration of the trials.

Thank you for raising these matters and allowing me to provide additional information.

Yours sincerely

Alan Tudge

28 SEP 2017



TREASURER

Ref: MC17-007597

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley

I refer to the letter of the Senate Scrutiny of Bills Committee (the Committee) of 14 September 2017 concerning the:

- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017;
- Treasury Laws Amendment (2017 Measures No. 5) Bill 2017; and
- Treasury Laws Amendment (Housing Tax Integrity) Bill 2017.

The Committee raised matters including retrospective application, significant matters in delegated legislation, and review rights. I appreciate the Committee's consideration of the Bills and have attached a detailed response.

I trust this information will be of assistance to you.

The Hon Scott Morrison MP

3 / 10 / 2017

ATTACHMENT

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017

Retrospective application of the proposed vacancy fees regime for foreign persons

For details, see below response on the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017.

Treasury Laws Amendment (2017 Measures No. 5) Bill 2017

Significant matters in delegated legislation – financial benchmark rules and compelled financial benchmark rules (Schedule 1, item 1, sections 908CA and 908CD)

The Committee's view is that significant matters, such as the key details about how the financial benchmark administrator licensee regime is to operate and, in particular, the imposition of civil penalties, should be included in primary legislation unless there is a sound justification for the use of delegated legislation. In addition, if such matters are to be included in delegated legislation, the Committee seeks advice on why this is appropriate to include these in rules rather than in regulations.

The Bill allows for the Australian Securities and Investments Commission (ASIC) to make financial benchmark rules and compelled financial benchmark rules and provides the parameters for matters these may address.

- The financial benchmark rules may address matters such as the responsibilities of benchmark administrator licensees and the generation and administration of financial benchmarks. Financial benchmarks and their generation and administration can be complex. As each financial benchmark is different, the flexibility of being able to quickly tailor the requirements to each financial benchmark subject to the regime is important to benchmark administrators. The appropriate operation of financial benchmarks is important to domestic and offshore users of these benchmarks and supports confidence in the Australian market.
- The compelled financial benchmark rules may be made to require an entity to provide data or information on a licensed significant financial benchmark, or to require a benchmark administrator licensee to continue to operate a significant financial benchmark specified in its licence. To effectively respond to rapid shifts or developments in the marketplace that may otherwise compromise the ongoing generation and provision of the significant financial benchmark, such rules are likely to be required at short notice, such as a few days or less. Primary legislation and regulations would not generally facilitate such a timely response. It is important to note that these rules only apply to significant financial benchmarks. That is, a benchmark that is systematically important in Australia, or a benchmark where there would be a material impact on Australian retail or wholesale investors if there was a disruption to the operation or integrity of the benchmark.

For non-compliance with the rules, a civil penalty may apply. The high maximum amount of the penalty recognises the potentially significant impact that serious misconduct in relation to financial benchmarks may have, given their widespread use in the financial system. However, as noted in the explanatory memorandum to the Bill, while the Bill imposes a high maximum amount, the primary objective of this penalty is to act as a deterrent to breaches. In practice, if a monetary penalty was to be sought, it would be proportionate to the seriousness of the breach.

In addition to responding flexibly to changing market dynamics, the obligations to be imposed on financial benchmark licensees also need to be flexible in response to international developments, including at short notice. It is important for Australia that licensed benchmark administrators and benchmark end users that Australia's regulatory regime be recognised as equivalent to key regimes overseas and that this status is maintained. Without equivalence recognition, Australian benchmarks would not be able to be used by global market participants which would cause significant market disruption. For example, Australia's largest banks may not be able to raise certain types of funding overseas as they do currently, which could negatively affect credit provision to the Australian economy. The use of rules is the most effective and timely mechanism for ensuring equivalence recognition is maintained over time.

The rules approach was also broadly supported by stakeholders in their submissions to the Council of Financial Regulator's consultation on the proposed regime, noting that this would better ensure that obligations are targeted to addressing specific risks arising from benchmark administration and continue to be aligned to global best practice, ensuring equivalence. Flexibility is also necessary so that the nature of the obligations can be tailored to apply appropriately to different benchmarks, as well as adapt to changes and emerging risks in those benchmarks. With the compelled financial benchmark rules it is particularly important that the regime could be amended in response to rapid market developments or industry feedback.

The use of ASIC rules to prescribe much of the detail of the regime and the imposition of a civil penalty via the primary legislation for a failure to comply with the rules are both consistent with the approach taken in comparable contexts, including in relation to derivative trade reporting and market integrity rules. Checks and balances are provided in the Bill in relation to the making of the rules, including importantly the need for the Minister to consent to the making or varying of ASIC rules.

Procedural fairness relating to the immediate suspension or cancellation of a benchmark administrator licence in specified circumstances (Schedule 1, item 1, section 908BI)

The Committee seeks advice on why section 908BI, which allows for the immediate suspension or cancellation of a benchmark administrator licence in specified circumstances, does not require that ASIC provide the benchmark administrator licensee with procedural fairness.

Section 908BI sets out the circumstances when ASIC may suspend or cancel a benchmark administrator licence immediately. These circumstances are narrow and are objective circumstances that would be within the knowledge of the licensee because the licensee has:

- asked ASIC for the suspension or cancellation;
- ceased carrying on a benchmark administration business for the relevant financial benchmark;
- become a Chapter 5 body corporate (meaning broadly that it is being wound up or is under administration); or
- failed to pay a levy amount that is overdue¹.

Beyond the narrow grounds set out in section 908BI, the other grounds that may give rise to a suspension or cancellation are dealt with under section 908BJ, which does require ASIC to give the licensee an opportunity to respond because the grounds under section 908BJ are less objective and more contestable. Under section 908BJ the grounds for suspension or cancellation are where ASIC considers that the licensee has breached a condition of its licence, or one of its obligations under Part 7.5B of the *Corporations Act 2001* or the associated financial benchmark rules. As the grounds are more contestable, it is appropriate in these circumstances for ASIC to be obliged to afford the licensee the opportunity to respond to the proposed grounds for suspension or cancellation at a hearing before ASIC makes a decision.

Immunity from civil or criminal liability where specified actions are undertaken in good faith in accordance with the compelled financial benchmark rules (Schedule 1, item 1, section 908CJ)

The Committee seeks advice on why it is considered appropriate to provide a protected person with civil and criminal immunity so that any affected persons have their right to bring an action to enforce their legal rights limited to a situation where a lack of good faith is shown.

¹ As outlined in the Minister's second reading speech for the ASIC Supervisory Cost Recovery Levy Bill 2017, these provisions exist to ensure the integrity of ASIC's cost recovery regime. In line with the *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017*, entities have the ability to apply for a waiver of their liability for a levy if there are exceptional circumstances justifying a waiver, or for extensions to the due date of payment.

The immunity created by section 908CJ applies only to acts done in compliance with a requirement imposed on the person under the compelled financial benchmark rules (see above response on significant matters in delegated legislation, for a brief explanation of these rules). This protection is appropriate because if it has become necessary to compel a person to do something under the compelled financial benchmark rules, they will be doing an act necessary to support the continued existence and availability of a significant financial benchmark. This is of benefit to the Australian economy and all users of the benchmark. If the rare and exceptional circumstances have arisen such that it is necessary to compel a person to do something under the compelled financial benchmark rules, it is likely that there is a degree of abnormal market conditions and uncertainty. In recognition of the potential difficulties faced by a compelled person in these circumstances, it is appropriate to provide civil and criminal immunity so long as the person is acting in good faith in carrying out the requirement imposed compulsorily on them in order to preserve the continued availability of the significant financial benchmark.

The impact on an affected person who is not able to bring an action against a person protected under section 908CJ is less than the widespread and significant impact that would be suffered by users of a significant financial benchmark if its availability was disrupted.

Treasury Laws Amendment (Housing Tax Integrity) Bill 2017

Retrospective application of the measures relating to travel costs deductions (Schedule 1, item 5)

The retrospective application of these amendments is consistent with the 2017-18 Budget announcement by the Government. This is necessary to ensure taxpayers could not avoid the operation of the amendments by incurring deductible travel costs prior to the Bill being passed. It will also ensure affected taxpayers who incur travel costs throughout the income tax year, beginning 1 July 2017, are treated equally. Any adverse impact is expected to be minor, given the retrospective application was included in the 2017-18 Budget announcement and has been widely publicised.

Retrospective application of the proposed vacancy fees regime for foreign persons (Schedule 3, item 12 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017)

Schedule 3 of the Bill, and the related Imposition Bill, implement an annual vacancy fee on foreign owners of residential real estate where their property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

The vacancy fee was announced as part of the 2017-18 Budget as an annual vacancy charge to take immediate effect for foreign persons who make a foreign investment application for residential property from 7.30pm on 9 May 2017. This is to ensure that foreign persons could not circumvent the operation of the amendments by lodging applications to acquire residential property between the time of the announcement and the commencement of the amendments to avoid the vacancy fee and the requirement to make properties available for occupation.

Importantly, foreign persons who made a foreign investment application before 7:30pm on 9 May 2017, but have not yet purchased a property or had not yet been notified of the outcome of their application will not be affected. Consequently the vacancy fee only applies to new applications and applicants were on notice of the new fee from the time it commenced. In particular, the Foreign Investment Review Board website provided clear alerts and guidance material highlighting the new rule.

The retrospective application of the vacancy fee can also be managed by affected foreign persons as they have a full 12 month period to ensure that the property is occupied or made genuinely available for at least six of the 12 months. Foreign owners of residential real estate will be required to report annually about the use of their property in the previous 12 months – the first possible date that reporting may be required is 9 May 2018.

Furthermore, foreign owners of residential property will have the full 12 month period to gather any relevant documentation (for example, proof of occupation) required for the purpose of the vacancy fee. Noting the above timeframes, the earliest that a liability for the vacancy fee could arise is 9 May 2018.

The annual vacancy fee is intended to make more properties available to Australians, the benefits of which would outweigh possible adverse consequences of the early commencement of the amendments.

Review rights relating to the creation of a charge over Australian land to recover unpaid vacancy fees of foreign persons (Schedule 3, item 7, section 115L)

The Committee seeks advice on if declarations made under section 115L relating to the creation of a charge over Australian land will be subject to merits review, and if not, the justification for this.

A decision to declare a charge over a property under section 115L of Schedule 3 to the Bill is not subject to merits review consistent with the existing treatment of decisions under the *Foreign Acquisitions and Takeovers Act 1975* (the Act), which are not afforded with merits review.

Providing for merits review would be inconsistent with the existing operation of the Act, and could adversely impact the enforcement of the annual vacancy fee. A decision to declare a charge under section 115L could not occur while a review process was underway, and the delay to declare a charge may allow for the asset to be disposed of prior to recouping unpaid vacancy fees.

Furthermore, foreign persons affected by a decision to declare a charge over the property may be based overseas with limited interaction with the Australian regulatory systems (including taxation). As such, there will be fewer avenues available to recover the amounts owed to the Commonwealth (as a result of non-payment of the vacancy fee) because there may be no other assets or income available within Australia to enforce payment. The assumption that the foreign person will be based overseas is drawn from the fact that they have incurred the vacancy fee as a result of leaving the property vacant for more than six months of a 12 month period.

While formal merits review will not be available, foreign persons will be afforded the opportunity to engage with the Australian Taxation Office (ATO) about the payment of vacancy fees prior to the ATO taking action to declare a charge over the property.

At the time foreign persons notify the ATO of the acquisition of the property, they will be notified of:

- the requirements to utilise the property for at least six months of a 12 month period;
- the liability to pay a vacancy fee if this requirement is not met; and
- the potential enforcement of unpaid vacancy fees through mechanisms such as declaring a charge over the land.

The ATO will also endeavour to contact foreign persons that may be subject to enforcement action and provide them the opportunity to engage with and declare any relevant information prior to commencing enforcement action. A foreign person subject to a charge under section 115L will be notified by the ATO that a charge has been declared over the property, and can seek alternative methods for meeting unpaid vacancy fees (for example, garnishee provisions).

