Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 29 October—1 November 2012

Legislative Instruments registered with the Federal Register of Legislative Instruments 17 October—16 November 2012

Seventh Report of 2012

November 2012

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Membership of the committee

Members

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Ms Melissa Parke MP	Fremantle, Western Australia, ALP
Senator Anne Ruston	South Australia, LP
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Mr Dan Tehan MP	Wannon, Victoria, LP
Senator Matt Thistlethwaite	New South Wales, ALP
Mr Kelvin Thomson MP	Wills, Victoria, ALP
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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/index.htm

Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of all forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CPRD	Convention on the Rights of Persons with Disabilities
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights (as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*) of bills introduced into the Parliament during the period 29 October to 1 November 2012 and legislative Instruments registered with FRLI during the period 17 October to 16 November 2012.

Part 1 — Bills introduced 29 October–1 November 2012

The committee has commented on the following bills

This report is circulated to all Members and Senators.
Any Member or Senator who wishes to draw matters to the attention of the committee under the *Human Rights (Parliamentary Scrutiny) Act 2011* is invited to do so.

The committee has no comment on the following bills which are considered unlikely to raise any human rights concerns

The committee acknowledges the following response to comments made on a bill in the Second Report of 2012

The committee acknowledges the following response to comments made on a bill in the Third Report of 2012

The committee acknowledges the following responses to comments made on bills in the Fifth Report of 2012

The committee acknowledges the following responses to comments made on bills in the Sixth Report of 2012

Part 2 — Legislative Instruments registered with FRLI 17 October–16 November 2012

The committee has sought further information in relation to the following legislative instruments

The committee has deferred its consideration of the following legislative instruments

The committee acknowledges the following response to comments made on a legislative instrument in the Second Report of 2012

The committee acknowledges the following response to comments made on a legislative instrument in the Fifth Report of 2012

Appendices

Mr Harry Jenkins MP
Chair

Part 1

Bills introduced
29 October – 1 November 2012

The committee has commented on the following bills

Anti-Money Laundering Amendment (Gaming Machine Venues) Bill 2012

Introduced into the Senate on 30 October 2012
By: Senator Xenophon

Committee view

1.2 **The committee considers that the measures proposed are proportionate interferences with the right to privacy in pursuit of the objectives of eliminating money laundering and reducing the extent and impact of problem gambling.**

Purpose of the bill

1.3 This bill amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to:

- provide that poker machine payouts of more than $1,000 and the cashing of transferred cheques are threshold transactions which are reportable to AUSTRAC;
- require gaming machine venues to issue cheques for payouts of winnings or gaming machine credits over $1,000 with an indication that they have been issued for that purpose; and
- impose penalties for failure to issue cheques in those circumstances..

1.4 The purpose of the bill is to restrict opportunities for money laundering through poker machines.

Compatibility with human rights

1.5 The bill is accompanied by a statement of compatibility which identifies that the bill engages the right not to be subject to unlawful or arbitrary interference with one's privacy (article 17 of ICCPR) and states that the bill is compatible with human rights 'as it limits the right to privacy to the least amount possible and is in line with existing laws and regulations.'

Right to privacy

1.6 The statement of compatibility identifies the two aims of this bill as the reduction of money laundering and preventing 'money launderers taking advantage

of problem gamblers through purchasing or transferring winning tickets'. These aims are pursued by requiring the reporting of transactions involving winnings of $1,000 or more.

1.7 The bill seeks to bring within the framework of the existing anti-money laundering legislation a new category of transactions. At present the amount which triggers the applicability of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is $10,000 (a 'threshold transaction'). This bill seeks to reduce that amount to $1,000. By defining transactions involving gambling winnings of $1,000 as a 'threshold transaction', a number of provisions of the 2006 Act would apply. This would include the reporting of the transaction to AUSTRAC. This report would include providing details of the person who had won the money. The bill would also require that winnings of $1,000 or more would need to be paid in the form of a cheque.

1.8 Engaging in gambling is a lawful pursuit and a person's gambling activity would fall within the scope of protection of the right to respect for private life. Requiring a person to provide personal information and the amount on winnings to a regulatory authority and perhaps limiting the immediate availability of winnings, involve an interference with the enjoyment of that right. The question thus becomes whether the interference is aimed at the achievement of a legitimate objective, whether there is a rational connection between the limitation and the objective, and whether the limitation is proportionate to that restriction.

1.9 The bill states that it is pursing two objectives, the elimination of money-laundering and the limitation of problem gambling. Both of these goals are legitimate objectives.

1.10 The requirement of reporting significant cash transactions is accepted as contributing to the achievement of the anti-money laundering goal, in that it underpins the 2006 Act. The amount of $1,000 is a relatively small sum and raises the question of whether it is a proportionate measure when viewed as an anti-money-laundering measure. The explanatory memorandum states the requirement to report threshold transactions to AUSTRAC (normally $10,000) is 'already covered by the organisation's strict privacy requirements and the provisions in this bill would not alter that framework', but does not, however, address the proportionality issue, in particular as to whether the encroachment on the rights of the individual is justified, especially as the figure of $10,000 was presumably chosen as the appropriate level at which reporting requirements would be reasonably effective. The committee considers that this issue should have been expressly addressed in the statement of compatibility.

1.11 In relation to the second objective, the reduction of problem gambling, the statement of compatibility states that the proposed requirement that payment of

winnings of $1,000 or more be by cheque would 'help to prevent problem gamblers from “chasing their losses” and provides a cooling-off period while the cheque is cashed.’

1.12 The explanatory memorandum (p 2) suggests that not only would the measures proposed be an effective way of addressing money-laundering, but would also limit the opportunities for problem gamblers to go further into debt, noting that 'the limit of $1,000 would exclude most poker machine players due to the low value of most genuine wins, therefore limiting the right to privacy in the least amount possible while still achieving the desired outcome'.

Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013

Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013

Introduced into the House of Representatives on 30 October 2012
Portfolio: Finance and Deregulation

Committee view

1.13 **The committee notes that these bills form part of a complex package of primary and secondary legislation which raise issues of compatibility with human rights and will consider them in the context of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.**

Purpose of the bill

1.14 These bills seek an appropriation authority from Parliament for the additional expenditure of money from the Consolidated Revenue Fund. According to the Minister's second reading speech, the funding sought is consistent with, and already budgeted for in, the Mid-Year Economic and Fiscal Outlook.

1.15 The bills will provide additional appropriation to the Department of Immigration and Citizenship to address the increased costs of irregular maritime arrivals resulting from the higher rates of arrivals and the implementation of the recommendations of the Expert Panel on Asylum Seekers, including capital works and services for regional processing facilities on Nauru and Manus Island. The total appropriation being sought through these two bills is $1,674,982,000.

1.16 The total appropriation being sought in Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 is a little over $1.4 billion. This includes $110.6 million for Houston report measures, including $92.043 million to increase the humanitarian program by an additional 6,250 places to 20,000 per annum from 2012-2013; $8.181 million to increase the family reunion stream of the permanent migration program by 4,000 places; and $10 million to fund capacity-building initiatives in regional countries. It also includes $1.296 billion to meet expenses arising from the management of higher levels of irregular maritime arrivals and the operational expenses associated with the implementation of the expert panel's recommendations to establish regional processing centres on Nauru and Manus Island. This includes a $186 million accrual from 2011-2012.

1.17 The total appropriation being sought in Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013 is $267,980,000. This bill provides additional funding to the Department of Immigration and Citizenship for the requirements for departmental equity injections and requirements to create or acquire administered assets to discharge administered liabilities. The government will provide to the Department of Immigration and Citizenship $267,380,000 of administered assets and liabilities, funding in this bill for the Offshore Asylum Seeker Management program. This is to meet initial capital costs required to establish regional processing centres on Nauru and Manus Island, as recommended by the Expert Panel on Asylum Seekers.

Compatibility with human rights

1.18 The statement of compatibility with human rights contained in the explanatory memorandum to the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 states (p 4):

> 1 The Bill seeks to appropriate money for the ordinary annual services of the Government.
>
> 2 The Bill does not engage any of the applicable rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
>
> 3 The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as it does not raise any human rights issues.

1.19 As noted above, some of these funds to be appropriated are intended to support the increases in numbers under Australia's humanitarian program, which will be a contribution to the fuller enjoyment of a range of human rights and fundamental freedoms by those who benefit from those programs. Similarly, the increase in the family reunion program is a positive measure to promote the enjoyment of the right to be free from arbitrary or unlawful interference with one's family or private life in the ICCPR or the right of the family to protection, as well as the rights of children.

1.20 However, the vast bulk of the funds to be appropriated appear destined to support the arrangements for the offshore processing of the claims of asylum-seekers who arrive by boat, in accordance with the Houston Panel report recommendations. These new arrangements, authorised by earlier legislation (*Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related primary and delegated legislation), raise human rights concerns on the face of the legislation or are likely to do in their implementation. Accordingly, the appropriation of funds to permit their implementation may also be viewed as giving

rise to human rights issues, as this facilitates the taking of actions which may involve the failure by Australia to fulfil its obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.21 The chair of the committee wrote to the Minister on 22 August 2012 and again on 31 October 2012 seeking further information about the compatibility with human rights of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. The committee received a response from the Minister on Friday 23 November 2012, a copy of which can be found in Appendix 1.

1.22 In its sixth report, tabled on 31 October 2012, the committee indicated that it would defer consideration of the related Migration Amendment Regulation 2012 (No 5), which raised significant and complex rights issues, so that it could be examined as part of the broader package of amendments resulting from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. In this context the concerns raised by the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (discussed below), are also relevant.

1.23 These appropriation bills have now passed both Houses following their passage through the Senate on 19 November 2012.

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

Introduced into the House of Representatives on 31 October 2012
Portfolio: Attorney-General

Committee view

1.24 **The committee has written to the Attorney-General to seek further information on whether the bill gives rise to any concerns about the enjoyment of the right of access to courts and tribunals guaranteed by article 14(1) of the ICCPR and whether these changes could reduce the access individuals currently have to the National Native Title Tribunal.**

Purpose of the bill

1.25 This bill makes amendments to the administrative structures and processes of the National Native Title Tribunal, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia. The changed administrative structures and processes are intended to allow these agencies to achieve savings and operate more efficiently and effectively into the future. In particular, the bill will:

- amend the *Native Title Act 1993* to facilitate the transfer of the National Native Title Tribunal's appropriations, staff and some of its administrative functions to the Federal Court of Australia;
- amend the Native Title Act to reflect that the National Native Title Tribunal is no longer a statutory agency for the purposes of the *Financial Management and Accountability Act 1997*; and
- amend the *Family Law Act 1975* and the *Federal Magistrates Act 1999* to facilitate the merger of the administrative functions of the Family Court of Australia and the Federal Magistrates Court of Australia, including by recognising a single Chief Executive Officer position for the two courts.

Compatibility with human rights

1.26 The statement of compatibility (which comprises paragraphs 16-21 of the explanatory memorandum) states that the amendments proposed by the bill are largely of a technical nature affecting the internal administrative practices of the courts and tribunals concerned without broader impacts on the wider community, and do not engage any of the rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act* 2011.

1.27 Nevertheless, as noted by the explanatory memorandum, one effect of the institutional changes proposed is that those staff presently employed by the National Native Title Tribunal will no longer be employed as staff of that tribunal. Accordingly, the rights of those employees in relation to employment (articles 7 and 8 of the ICESCR) is potentially engaged. However, the notes on clauses (para 43 of the explanatory memorandum) state that it is intended that staff of the National Native Title Tribunal will be transferred to the Statutory Agency declared under section 18Q of the *Federal Court of Australia Act 1976* for the purposes of the *Public Service Act 1999*. The applicable transfer will ensure 'certain protections (for example, with regard to remuneration and other conditions of employment) for transferring staff' The statement of compatibility states (para 20) that the bill 'does not have any known negative implications for the rights of staff employed by any of these agencies.'

1.28 One issue which is not directly addressed by either the statement of compatibility or the explanatory memorandum is whether the institutional changes will have any impact on access to justice, in particular whether the rights of potential users in practice to access the courts and tribunals will be limited by the changes. Article 14(1) of the ICCPR guarantees the right of a person to have access without discrimination to an independent court or tribunal for the determination of the person's rights and obligations in a suit at law (that is, civil rights and obligations).

Customs Amendment (Malaysia Australia Free Trade Agreement Implementation and Other Measures) Bill 2012

Introduced into the House of Representatives on 1 November 2012
Portfolio: Home Affairs

Committee view

1.29 **The committee seeks further clarification from the Minister for Home Affairs about the safeguards that will apply to any personal information provided pursuant to proposed sections 126ALC or 126ALD of the bill, when records or the answers to questions are disclosed to a Malaysian customs official.**

1.30 **The committee considers that the proposed new powers to require the production of records or the provision of answers to questions appear to be compatible with human rights. The committee notes that the statement of compatibility should have referred to the potential impact of the bill on the right not to incriminate oneself. The committee also reiterates its position set out in Practice Note 1 that a statement of compatibility should read as a stand-alone document and that all issues relating to compatibility with human rights should be addressed in the statement of compatibility.**

1.31 **The committee shares the concerns expressed by JSCOT that the MAFTA does not include express protections for labour rights, human rights or environmental rights and hopes that this omission will be rectified.**

Purpose of the bill

1.32 This bill amends the *Customs Act 1901* to introduce new rules of origin for goods imported into Australia from Malaysia to give effect to the Malaysia-Australia Free Trade Agreement, which will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

1.33 This bill is part of the legislation required to give effect to the provisions of the Malaysia-Australia Free Trade Agreement (MAFTA) (see also the Customs Tariff Amendment (Malaysia-Australia Free Trade Agreement Implementation) Bill 2012, below). The entry into and implementation of free trade agreements (FTAs) gives rise to a number of broad human rights issues, including the impact of FTAs on the enjoyment of the right to work and other rights in Australia.

1.34 The MAFTA was recently the subject of an inquiry by the Joint Standing Committee on Treaties (JSCOT). In its October 2012 report the JSCOT recalled its

earlier recommendations, made in the context of the ASEAN, Australia and New Zealand Free Trade Agreement (AANZFTA) that 'the Australian Government include consideration of environment protection, protection of human rights and labour standards in all future negotiation mandates for free trade agreements'.[1] The Joint Standing Committee on Foreign Affairs, Defence and Trade had made a similar recommendation in its report on Australia's relationship with ASEAN.[2]

1.35 In relation to the MAFTA, the JSCOT noted that there was no chapter on labour rights, human rights or environmental rights, though in one of the 'side letters' to the agreement the two Governments affirmed their commitment to international labour standards 'as members of the International Labour Organisation and under the Declaration on Fundamental Principles and Rights to Work and its follow-up (1998)' and, as noted in the explanatory memorandum (para 152), undertook to consider in two years the inclusion of a labour standards chapter in the agreement. The ILO Declaration covers four fundamental principles and rights at work: freedom of association and recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of occupation and employment. All of these rights are guaranteed by one or more of the human rights treaties listed by the *Human Rights (Parliamentary Scrutiny) Act* 2011.

1.36 The JSCOT recommended that an independent review of the MAFTA be conducted 24 months after its entry into force 'to assess actual outcomes of the treaty against the claimed benefits and potential negative consequences' and that the review should consider 'the economic, regional, social, cultural, regulatory, labour and environmental impacts.'

Compatibility with human rights

1.37 A separate statement of compatibility is provided within the body of the explanatory memorandum (p 57). It address only issues relating to compatibility with the right to privacy in article 14 of the ICCPR, but does not address issues relating to the right of a person not to incriminate oneself (article 14(3)(g) of the ICCPR) raised by the bill, although some of these are addressed in other parts of the explanatory memorandum.

[1] Joint Standing Committee on Treaties, Report 102, Chapter 2, 'Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area, Recommendation 5, p. 16

[2] Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into Australia's relationship with ASEAN', June 2009, p. xxii

Specific issues

1.38 The statement of compatibility notes that the bill provides for the making of regulations to impose record-keeping obligations on exporters (or producers) of goods bound for Malaysia who claim they are Australian originating goods for the purpose of obtaining a preferential tariff treatment in Malaysia (new section 126ALB). New section 126ALC requires a person to produce those records when requested to do so by an authorised officer. An authorised officer[3] may disclose these records to a Malaysian customs official.[4]

1.39 The bill also provides for a new section 126ALD under which an authorised person may require a person who is an exporter or producer of goods that are exported to Malaysia and that are claimed to be Australian originating goods for the purpose of obtaining a preferential tariff in Malaysia, to answer questions in order to verify the origin of the goods. The effect of section 243SA of the *Customs Act 1901* is that a failure to answer such a question may be an offence.

Right to privacy (article 17, ICCPR)

1.40 The statement of compatibility notes that the right to privacy is engaged by the requirement to keep and produce records, where they involve the collection and disclosure of personal information. It states that the collection and disclosure is for a limited and legitimate purpose, namely the verification for a claim of eligibility for preferential treatment, and is therefore justified and reasonable. The statement of compatibility also notes that the 'the collection and disclosure of personal information is protected under Australian law and the existing protections will not be altered in any way by the Bill.' The statement of compatibility does not explicitly address the issue in relation to the power to question and the answers to such questions, but the same issues would arise and the same justification would presumably apply.

1.41 While the statement of compatibility notes that Australian privacy laws apply to any use made by an authorised officer of such information, it is not clear whether the same or equivalent safeguards apply when the authorised person makes such records available to a Malaysian customs official.

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[3] '***authorised officer*** … means an officer of Customs authorised in writing by the CEO to exercise the powers or perform the functions of an authorised officer under that section.' *Customs Act 1901*, s 4.

[4] '***Malaysian customs official'*** is defined in the proposed new section 126ALA as meaning 'a person representing the customs administration of Malaysia.'

Right not to incriminate oneself (article 14(3)(g), ICCPR)

1.42 Neither the statement of compatibility nor the explanatory memorandum refer to the engagement of the bill with the right not to incriminate oneself guaranteed by article 14(3)(g) of the ICCPR. Section 243SB of the *Customs Act 1901* will make it an offence for a person to refuse to provide records requested by an authorised officer under the new section 126ALC. Similarly, section 243SA of the *Customs Act 1901* will make it an offence to refuse to provide answers to questions asked by an authorised officer under the new section 126ALD.

1.43 However, section 243SC of the *Customs Act 1901* provides that, unless a person has waived the right to not incriminate oneself, the person is not obliged to answer a question or to produce documents or records under sections 243SA or 243SB respectively, if doing so would tend to incriminate the person or result in further attempts to obtain evidence that would tend to incriminate the person.

Fair Indexation of Military Superannuation Entitlements Bill 2012

Introduced into the House of Representatives on 29 October 2012
By: Mr Bob Katter MP

Committee view

1.44 **The committee considers that the bill is unlikely to raise any concerns of compatibility with human rights. However, it has written to Mr Katter in an advisory capacity to draw his attention to the bill's engagement of Articles 7, 9 and 11 of the ICESCR.**

Purpose of the bill

1.45 This bill provides that the minister must, within six months of this legislation taking effect, take legislative action to index the Defence Force Retirement Benefit Scheme, the Defence Force Retirement and Death Benefit Scheme and the Military Superannuation and Benefits Scheme using the same methodology as that used for the Australian age and service pensions.

1.46 The bill contains a general statement of compatibility that simply states that the Bill is compatible with human rights without specifying any particular rights that it may promote or limit.

1.47 Insofar as the bill aims to ensure that military superannuation payments increase in line with other public pension payments, the bill may be viewed as contributing to the enjoyment of the right to an adequate standard of living guaranteed by article 11 of the International Covenant on Economic, Social and Cultural Rights, the right to social security guaranteed by article 9 of the ICESCR, and the right to just and favourable conditions of work guaranteed by article 7 of the ICESCR.

Fair Work Amendment Bill 2012

Introduced into the House of Representatives on 30 October 2012
Portfolio: Education, Employment and Workplace Relations

Committee view

1.48 **The committee notes this bill engages a range of work-related rights and draws the Parliament's attention to its comments on the changes to existing time limits applicable to the lodging of claims relating to unfair dismissal and adverse employment action.**

Purpose of the bill

1.49 This bill makes amendments to the operation of the *Fair Work Act 2009* in accordance with a number of the Fair Work Act Review Panel recommendations contained in the *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* of June 2012.

1.50 The bill also makes amendments in response to recommendations of the Productivity Commission in its final report on *Default Superannuation Funds in Modern Awards* (released on 12 October 2012), additional amendments to the structure and operation of the FWC and a number of technical amendments.

Compatibility with human rights

1.51 The bill is accompanied by a statement of compatibility which addresses in detail most of the human rights issues to which the bill gives rise. The statement notes that the bill is intended to promote the enjoyment of a number of rights, in particular the right to work (article 6 of the ICESCR), the right to just and favourable conditions of work (article 7 of the ICESCR), the right to organise and bargain collectively (article 8 of the ICESCR); non-discrimination in the enjoyment of the right to work (article 2 in conjunction with articles 6 and 7 of the ICESCR, as well the protections against discrimination in employment contained in the CEDAW, the ICERD, and the CRPD); and the right to a remedy for violations of the right to equality in work (ICESCR, CEDAW, CRPD).

1.52 The bill also proposes changes to the arrangements for the selection of default superannuation funds that are included in modern awards. The purpose is stated in the explanatory memorandum 'to ensure a transparent and contestable process that results in only those superannuation funds which are in the best interests of employees being included as default funds in modern awards' (p 13). These changes would appear to promote the more effective enjoyment of the right

to just and favourable conditions of work, the right to social security and right to an adequate standard of living in relation to superannuation default funds.

Compatibility issues

Right not to be unjustly deprived of work (article 6(1), ICESCR)

Right of access to court or tribunal in determination of rights and obligations (article 14(1), ICCPR)

1.53 The bill involves a number of changes to existing time limits applicable to the lodging of claims relating to unfair dismissal and adverse employment action. The bill aligns the time limits for bringing unjust dismissal claims with the time limits for bringing claims of adverse employment action, by increasing the former from 14 to 21 days and reducing the latter from 60 days to 21 days. The grounds on which a claim of adverse action can be brought are set out in Part 3-1 of the *Fair Work Act 2009*. The grounds include action inconsistent with a workplace right under a modern award or enterprise agreement, action based on the lawful industrial action of a person who is a member or officer of an industrial association, or discrimination on the basis of an extensive list of grounds.

1.54 The statement of compatibility (p 8) notes that the bill 'shortens the time limit for applying to the FWC to mediate or conciliate a dispute about a dismissal in contravention of Part 3-1 from 60 days to 21 days'. It also notes that the Fair Work Commission will have a discretion to accept late applications 'in exceptional circumstances'. The statement justifies the reduction by referring to the alignment with the (currently shorter) time limit for unfair dismissal claims, arguing (p 8) that

> This will provide greater clarity to applicants and respondents and will require applicants to determine at the outset which claim they intend to pursue. Where an employee challenges a dismissal, it is in the interest of both the employee and the employer for the matter to be resolved quickly so that, in the event of a successful challenge, the employee can return to their original position with minimal impact on relationships and management of the business. Together with the amendment made by Part 1 of Schedule 6, this amendment balances the need to provide sufficient time for employees to consider the most appropriate application, and the need to provide certainty for employers in relation to the types of claims they may be exposed to. The FWC's discretion to accept late applications protects employees in relation to how the time limit is applied.

1.55 Given that in many cases employees may be in a position of less power and have less extensive knowledge about their legal rights than employers, the reduction from 60 days to 21 days is a very significant limitation on the existing rights of employees to seek remedies for alleged violations of their rights. The advantages of

having the same time limit for related employment claims is understandable; however, it is not clear that it is appropriate for the alignment to be brought about by the drastic reduction in time limit for the significant rights that are protected under the general protections provisions of the *Fair Work Act 2009.* The suggestion that any unfairness can be alleviated because the FWC retains a discretion to allow late applications means that the right to a remedy is subject to an administrative discretion, the criteria for the exercise of which are not set out in the statement of compatibility. In any event, if the reduction to 21 days is unreasonable, allowing for its discretionary waiver may not adequately secure the right to a remedy. The statement of compatibility provides no justification for aligning the time limits at 21 days – rather than 60 days – other than to refer to the desirability of resolving matters 'quickly'.

1.56 The proposed alignment and reduction implements Recommendation 49 of the June 2012 report of the Panel that reviewed the *Fair Work Act 2009*.[5] The Panel commented in relation to the changes that introduced the 60-day time limit (p 244):

> The effect of the change is that employees now have 60 rather than 21 days within which to consider making an application alleging their dismissal was unfair. This gives greater time and procedural fairness to employees, but leaves employers with an extra 39 days of uncertainty about whether an ex-employee will apply to FWA alleging their dismissal was unlawful.

1.57 In relation to the time limit that should be adopted under a harmonised time limit, the Panel noted (p 244):

> Stakeholders submitted a variety of suggestions about the appropriate time limits within which employees should be required to apply to FWA to deal with a general protections dispute.
>
> Generally, employers submitted that the timeframes should be reduced. A number of employer representatives suggested that both section 365 (application for FWA to deal with a dispute involving dismissal) and section 372 (application for FWA to deal with a dispute not involving dismissal) be amended to prescribe a time limit of 14 days. ACCI recommended a time limit for both of 21 days. Yet more employers argued for both or either of the time limits to be reduced significantly.
>
> Submissions from employee representatives and advocates tended to call for the timeframes to be increased or abandoned. (footnotes omitted)

1.58 The Panel stated in conclusion (pp 244-245) that :

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[5] *Towards a more productive and equitable workplaces – Review of the Fair Work legislation*, June 2012, p 245.

In considering aligning the time limits the Panel weighed up requests from employers to reduce the time limit for making an application to FWA alleging a breach of s. 365, with the evidence presented by unions in consultations that 14 days would not be enough time in which to assess and advise members on the merits of a general protections dispute. Based on a range of competing factors the Panel recommends the time limits be harmonised at 21 days.

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Introduced into the House of Representatives on 31 October 2012
Portfolio: Immigration and Citizenship

Committee view

1.59 **The committee notes that this bill forms part of a complex package of primary and secondary legislation which raise issues of compatibility with human rights and will consider it in the context of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.**

Purpose of the bill

1.60 This bill amends the *Migration Act 1958* to:

- implement a recommendation of the Expert Panel on Asylum Seekers to provide that asylum seekers who unlawfully arrive anywhere in Australia are subject to the same regional processing arrangements as asylum seekers who arrive at an excised offshore place;
- ensure that a person does not cease to be a transitory person if they have been assessed to be a refugee; and
- provide for discretionary immigration detention of Papua New Guinea citizens who are unlawful non-citizens and are in a protected area.

Compatibility with human rights

General issues of compatibility with human rights

1.61 In principle, as a matter of international law persons who are not 'lawfully' present in Australian territory nonetheless enjoy a range of rights under the ICCPR and other relevant human rights treaties while they are present in Australia or under Australian jurisdiction. Those rights would include the right not to be arbitrarily deprived of life, to be free from torture or cruel, inhuman or degrading treatment, and a range of other rights. However, they would not enjoy all the rights guaranteed in the treaties, and their enjoyment of some rights may in certain circumstances be lawfully restricted to a greater extent than is the case for those who are lawfully in the country. Those rights in general would be applicable from the time such persons come under the effective control of Australian officials or enter Australian territory (including offshore territories). Australia's international responsibility for the

treatment of such persons is also likely to continue even if the persons are transferred to other countries which become involved in the detention of transferred persons or the consideration of their refugee claims.

Compatibility with human rights

1.62 The statement of compatibility states that the bill is compatible with human rights 'because it does not engage any obligations under relevant human rights treaties.' It states that the bill does not engage or is compatible with the right to freedom of movement (article 12, ICCPR) and the rights of aliens in relation to expulsion (article 13, ICCPR); the right not to be arbitrarily detained (article 9, ICCPR); the rights of children (Convention on the Rights of the Child, in particular article 3); and non-refoulement obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

1.63 It is difficult to assess these claims on the basis of this bill alone, given that it forms part of a complex set of legislative and administrative arrangements. Nonetheless, the committee considers that this bill on its face gives rise to issues of compatibility with human rights, in particular in so far as it involves the holding of children in detention and may involve transferring them to other countries as part of a regional processing framework.

1.64 The committee also considers that there may be issues of compatibility with the right not to be arbitrarily detained under article 9 of the ICCPR, if persons are detained while their refugee claims are processed in order to give effect to the 'no – advantage test' and the detention involved deliberate delays to what would otherwise have been the reasonably expeditious processing of such claims. While the Refugee Convention and its Protocol are not treaties listed in the *Human Rights Parliamentary Scrutiny) Act 2011*, issues of compliance with Australia's obligations under those treaties have also been raised by commentators.

National Electricity Bill 2012

Introduced into the House of Representatives on 29 October 2012
By: Mr Rob Oakeshott MP

Committee view

1.65 **The committee notes that the re-enactment or readoption of a national law or model law that has previously been adopted by the Parliament is not, by virtue of that prior adoption, exempt from human rights scrutiny or the requirement to provide a detailed statement of compatibility, especially if the adoption has taken place before the entry into force of the *Human Rights (Parliamentary Scrutiny) Act 2011*.**

Purpose of the bill

1.66 This bill makes the national electricity law a Commonwealth law by:

- incorporating the *Australian Energy Market Act 2004*, the *Australian Energy Market Commission Establishment Act 2004* (SA) and parts of the *National Electricity (South Australia) Act 1996* (SA) (the existing National Electricity Law);
- making the national electricity rules a disallowable instrument;
- establishing the Australian Energy Market Commission as a Commonwealth statutory authority;
- establishing a Consumer Advocacy Panel; and
- retaining the judicial review of decisions made by the Australian Energy Market Operator.

Compatibility with human rights

1.67 The bill is accompanied by a brief statement of compatibility, which states that the bill 'does not engage any of the applicable rights or freedoms beyond those currently engaged by the existing National Electricity Law, which has previously been adopted by the Commonwealth through the *Australian Energy Market Act 2004*'.

Compatibility issues

1.68 The explanatory memorandum makes clear that one of the concerns to which this bill responds is the significant increase in the price of electricity for consumers in recent years. To the extent that the bill aims to bring about different arrangements for the review of applications for price increases, with a view to

restraining them, it may be seen as promoting the right of persons to an adequate standard of living (article 11 of the ICESCR), given the importance of electricity supplies for peoples' everyday lives. Increases in electricity prices may also have a disproportionately severe impact on vulnerable groups, including those on fixed incomes.

1.69 The National Electricity Law contains a number of provisions with implications for the enjoyment of human rights (in particular criminal process rights).

National Gambling Reform Bill 2012

Introduced into the House of Representatives on 1 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Committee view

1.70 **The committee has written to the Minister for Families, Housing, Community Services and Indigenous Affairs seeking clarification on a number of issues before forming a view on the bill's compatibility with human rights.**

Purpose of the bill

1.71 This bill is part of a package of three bills in relation to a national scheme for gaming machines.

1.72 The bill provides for:

- precommitment systems for gaming machines;
- enables registered users to set a loss limit;
- requires gaming machines to display certain warnings;
- limits daily withdrawals from automatic teller machines located in gaming premises (excluding casinos) to $250;
- requires that new machines manufactured or imported are capable of supporting precommitment;
- establishes a Regulator to monitor and investigate compliance;
- provides for enforcement measures;
- establishes an Australian Gambling Research Centre within the Australian Institute of Family Studies; and
- provides for the Productivity Commission to undertake two inquiries.

1.73 The bill sets out extensive new regulatory arrangements intended to address problem gambling through the introduction of a system of voluntary precommitment and related measures. The bill establishes arrangements under which a person may register as a user and nominate a maximum amount that the person is prepared to lose in a specified time period through certain forms of gambling. The bill does not make gambling conditional on registration under the scheme but recognises the possibility that this may occur in the future. In order to take advantage of the registration system, a person will need to provide certain personal information. This

will be held electronically in such a way that the person will not be able to exceed the nominated limit wherever in a State or Territory he or she engages in gambling (unless the gambling takes place in a casino or other place excluded from the operation of the scheme).

1.74 The bill also includes a series of monitoring and enforcement measures underpinning the operation of the scheme. These include entry, search and seizure powers, the power to require a person to provide information or produce documents, and the power to operate machines or electronic equipment on private premises. The bill also creates a number of civil penalties and criminal offences, a number of which are strict liability offences; it also provides for the imposition of an evidential or legal burden on an accused person in a number of cases.

Compatibility with human rights

1.75 The statement of compatibility identifies the potential impact of the bill on the right to privacy (article 14 of the ICCPR) in so far as it requires the provision of personal information. The statement also notes that the use of reverse onus provisions engages the right to be presumed innocent until proven guilty (article 14(2) of the ICCPR). However, it provides only a general justification of the use of such provisions (which it states is limited to civil penalty provisions), without a listing or discussion of the individual provisions in the statement itself. Justifications of some reverse onus clauses appear in the explanatory memorandum.

1.76 The statement of compatibility does not refer to a number of strict liability offence provisions included in the bill (eg clauses 101, 115, 152) that may give rise to issues of compatibility. Once again, there is some discussion in the explanatory memorandum of the justifiability of those provisions.

1.77 The statement of compatibility does not, however, address any issues of compatibility with human rights that may arise from the provisions of the bill that relate to monitoring and enforcement, although there are justifications offered for the apparent encroachments on human rights in the notes on some individual clauses.

1.78 **The committee:**

- **reiterates its position set out in Practice Note 1 that a statement of compatibility should read as a stand-alone document;**
- **notes that, while the statement of compatibility adequately addresses the issues relating to the right to privacy and personal information, it would have been helpful for the general justification of reverse onus provisions in the statement of compatibility to have been supplemented by reference to**

individual provisions and for the statement to have addressed the strict liability offences created by the bill; and

- **further notes that there is no discussion in the statement of compatibility of any human rights issues that may arise from the monitoring and enforcement powers contained in the bill.**

Compatibility issues

Right to privacy

1.79 The right not to be subject to unlawful or arbitrary interference with one's privacy is guaranteed by article 17 of the ICCPR. The UN Human Rights Committee in its General Comment 16 has stated:

> The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.[6]

1.80 To be a permissible interference with the right, a measure must be provided by law, pursue a legitimate objective, have a rational connection to the achievement of the purpose, and be proportionate to the achievement of that goal.

1.81 To the extent that the precommitment registration scheme engages the right to privacy, the scheme pursues the legitimate objective of offering individuals the opportunity to participate in the scheme which may assist them to limit their gambling losses. The statement of compatibility states that, without the collection of the information, it would not be possible to identify players to enable them to restrict their losses. The collection and storage of the information has a rational connection to the achievement of this purpose. There are a number of limitations on the use to which the information may be put, and these are supported by provisions which make it an offence to deal with information in a manner inconsistent with the statute.

1.82 **The committee considers that the provisions of the bill which concern the treatment of personal information appear compatible with the right to privacy.**

[6] Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 1988, paragraph 10.

Presumption of innocence

1.83 The bill creates two categories of offences – civil penalties (Chapter 3), and criminal offences (Chapter 4). In relation to a number of civil penalties and strict liability offences the bill includes reverse onus provisions. Thus, if a person wishes to rely on certain excuses or exemptions, the person bears an evidential burden in relation to the relevant facts (see, eg clauses 58(7), and 65(3)).

1.84 Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.85 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, the reverse burden must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim. Human rights case-law has established that relevant factors to consider when determining if a reverse burden provision is justified include whether:

- the penalties are at the lower end of the scale;
- the offences arise in a regulatory context where participants may be expected to know their duties and obligations; and
- the burden relates to facts which are readily provable by the defendant as matters within their own knowledge or to which they have ready access.

1.86 While provisions which impose only an evidential burden are more likely to be considered compatible with the presumption of innocence, they should still be properly justified, particularly where the burden relates to an essential element of the offence.

Civil penalties as 'criminal offences'

1.87 Article 14(2) of the ICCPR states that everyone charged with a 'criminal offence' shall have the right to be presumed innocent until proved guilty according to law. Under international law the term 'criminal offence' includes not only offences or penalties that are classified as a criminal offence under national law, but also other forms of penalties that may be designated as civil penalties under domestic law. These penalties attract the protections which the ICCPR sets out in relation to 'criminal offences'.

1.88 In order to determine whether a penalty designated 'civil' is a 'criminal offence', the approach under international and comparative human rights law is to consider the substance and the effect of the proceedings, rather than their label. Therefore, it is possible for a civil regime which subjects a person to a high penalty and is intended to be punitive or deterrent in nature to constitute a 'criminal penalty' for the purposes of these rights.

1.89 Neither the explanatory memorandum nor the statement of compatibility addresses the issue of whether the civil penalties might be considered 'criminal offences' within the meaning of article 14(2). However, the statement of compatibility states generally in relation to each of the provisions that requires the defendant to bear an evidential burden, that each of the cases involve matters which are peculiarly within the knowledge of the defendant.

1.90 **The committee considers that, if the civil penalty offences were considered to be 'criminal offences' within the meaning of article 14(2) of the ICCPR, the imposition of evidential burdens on the defendant in these cases appear to be reasonable limitations on the presumption of innocence and to be compatible with human rights.**

Strict liability offences

1.91 The bill creates a number of strict liability offences, which are clearly criminal offences within the meaning of article 14(2). These include the offence of failure to lodge a return in relation to levies that may be payable under the scheme, without reasonable excuse (clauses 101(1) and (2)) and the failure by an authorised person to return an identity card (clause 115). These are not referred to in the statement of compatibility.

1.92 In each case the burden imposed on the defendant is an evidential one. The explanatory memorandum appears to be incorrect in relation to the burden imposed by one of these provisions. Clause 115(3) provides that the loss or destruction of an identity card is a defence to a failure to surrender it. The note on this subclause (explanatory memorandum, p 54) states that 'the defendant is required to prove, *on the balance of probabilities,* that they lost their card or that the card was stolen, which is information that would be within the particular knowledge of the defendant.' However, the legislative note to clause 115(3) states that, in accordance with subsection 13.3(3) of the Criminal Code, the defendant bears an evidential burden in relation to this matter. Subsection 13(3)(6) of the Criminal Code provides that an '***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.'

1.93 While there is no discussion of the strict liability offences in the statement of compatibility, the explanatory memorandum offers justifications for the various strict liability offences.

1.94 **The committee considers that the strict liability offences included in the bill, which provide for defences to be made out by discharge of an evidential burden, appear to be compatible with human rights.**

Enforcement powers

1.95 Chapter 7 of the bill provides for monitoring and investigation under the scheme. It confers powers on authorised persons that include a power to enter onto premises. It also confers a power on certain authorised persons to require individuals to answer questions, and provides that it is an offence to fail to do so (clause 148(3) and (4)). Similarly, clause 157 confers various powers on the Registrar, including powers to require the production of information, produce documents or to appear to answer questions. A failure to comply with such requirements amounts to an offence (clause 157(6)). The explanatory memorandum (p 70) states that clause 157(6) 'does not abrogate the common law privilege against self-incrimination', though it provides no further explanation of why this is so. No such statement is made in relation to clause 148 (explanatory memorandum, p 66).

1.96 These specific provisions and the powers of entry, search and seizure potentially raise issues of compatibility with human rights, and these are not addressed in the statement of compatibility nor in any consistent way in the explanatory memorandum.

1.97 **The committee proposes to seek clarification from the Minister as to whether the monitoring and enforcement powers conferred by the bill are consistent with human rights, in particular, but not limited, to whether the powers to require a person to provide information, to answer questions and to produce documents are consistent with the right not to incriminate oneself (article 14(3)(g) of the ICCPR) and rights to respect for one's privacy and correspondence (article 17 of the ICCPR).**

Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012

Introduced into the House of Representatives on 30 October 2012
Portfolio: Treasury

Committee view

1.98 **The committee has written to the Treasurer seeking clarification on a number of issues before forming a view on the bill's compatibility with human rights.**

Purpose of the bill

1.99 This bill amends the Banking Act 1959, First Home Saver Accounts Act 2008 and Life Insurance Act 1995 to:

- reduce to three years the period before amounts held by authorised deposit-taking institutions, first home saver account providers and life insurance companies are treated as unclaimed moneys; and
- provide for the payment of interest on unclaimed moneys claimed after 1 July 2013;

1.100 The bill also amends the Superannuation (Unclaimed Money and Lost Members) Act 1999 to:

- increase to $2000 the balance threshold below which small lost accounts are required to be transferred to the Commissioner of Taxation;
- decrease to 12 months the period of inactivity before inactive accounts of unidentifiable members are required to be transferred to the Commissioner; and
- provide for the payment of interest on all unclaimed superannuation moneys claimed after 1 July 2013.

1.101 Finally, the bill amends the *Australian Securities and Investments Commission Act 2001* to close the Companies and Unclaimed Moneys Special Account; and the *Corporations Act 2001* to establish a new process for the receipt and payment of unclaimed property and provide for the payment of interest on unclaimed property claimed after 1 July 2013.

Compatibility with human rights

1.102 The bill is accompanied by a brief statement of compatibility which states that the bill 'does not engage any of the applicable rights or freedoms', does not raise any human rights issues and is therefore compatible with human rights.

Right to privacy

1.103 The effect of the bill is to increase the dollar threshold of accounts that fall under the different statutes and to reduce the period of time for which a person may leave particular types of account without activity before sums standing to the credit of the accounts are required to be paid to the Australian Taxation Office (subject to being reclaimed, with interest, by the owner of the funds). The types of accounts include regular bank accounts, first homesavers accounts, unclaimed life insurance funds, superannuation funds, and unclaimed moneys under the *Corporations Act 2001*. The sums eligible to be transferred include amounts of up to $2,000 (up from $200); examples of the reduction of time are from 7 years to 3 years for bank accounts, and from 3 years to 1 year for superannuation accounts.

1.104 A person's operation of a bank account or superannuation account, including decisions as to what transactions the person wishes to engage in through that account, fall with the area of the person's private life, guaranteed by article 17 of the ICCPR. Accordingly, a person's right not to be subject to arbitrary or unlawful interference with their private life is engaged by an externally imposed requirement that balances in an account owned by them be transferred to the ATO after a specified period. A person's right to property is also engaged, although this right is not guaranteed as a freestanding right in the human rights treaties that fall under the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, any discrimination in the enjoyment of the right to property would be covered under various human rights guarantees, including article 26 of the ICCPR.

1.105 The question thus becomes whether the interference is aimed at the achievement of a legitimate objective, whether there is a rational connection between the limitation and the objective, and whether the limitation is proportionate to that restriction. The explanatory memorandum explains in general terms that:

> 'The Bill will bring forward the time at which money is recognised under the relevant law as lost or unclaimed, helping to reunite people with their money earlier, and will protect superannuation account balances transferred to the Australian Taxation Office (ATO) from erosion by fees and charges.'

1.106 The objective advanced is thus to preserve the person's funds from being eroded by fees and charges, which could be seen as a legitimate objective. The removal of funds to the ATO and the establishment of procedures for the reclaiming of those funds as well as the requirement to pay interest on balances, would have the effect of preserving balances. The issue of proportionality is less clear, and the explanatory memorandum does not offer an justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.

1.107 **The committee seeks clarification of the basis for determining that the significant reduction in the time which must elapse before funds are required to be transferred is a proportionate means of achieving the objectives pursued by the bill.**

Right to privacy

1.108 The ease of access to procedures for the recovery of funds that are transferred as lost or unclaimed funds is also relevant to the permissibility of the interference with the right to privacy. The system provided for under the legislation involves easy access by members of the public through the website of the Australian Securities and Investment Commission to an on-line database of unclaimed funds (https://www.moneysmart.gov.au/). Any person may search under any name and if there is a record under that the name, the database will display the full name of the account holder, the amount in the account, the address of the person or the institution, and the name of the institution at which the account was held.

1.109 While this system is extremely easy to access and use (and thus facilitates any effort by the owner of funds to reclaim them), the availability of this personal data also engages the right to privacy. There is no consideration of this issue in the explanatory memorandum or in the statement of compatibility.

1.110 **The committee seeks clarification of whether the procedures for identifying lost or unclaimed funds and seeking their return, in particular the availability of personal information online, engage the right to privacy of individual account holders and whether the procedures involve a permissible limitation on the enjoyment of that right.**

The committee has commented on the following bills which are considered unlikely to raise any human rights concerns

Customs Tariff Amendment (Malaysia-Australia Free Trade Agreement Implementation) Bill 2012

Introduced into the House of Representatives on 1 November 2012
Portfolio: Home Affairs

1.111 This bill amends the *Customs Tariff Act 1995* to give effect to the Malaysia-Australia Free Trade Agreement (MAFTA) by:

- providing free rates of customs duty for goods that are Malaysian originating goods;
- maintaining customs duty rates for certain Malaysian originating goods in accordance with the applicable concessional item; and
- specifying excise equivalent duties on certain alcohol, tobacco and petroleum products.

1.112 The statement of compatibility states that the bill 'does not engage, impact on, or limit in any way, the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011'* and is therefore compatible with human rights. While this bill implements the tariff reductions and other matters that form a central part of implementation of the MAFTA, the provisions of the bill itself do not appear to give rise to specific issues of compatibility with human rights. The broader issues resulting from the MAFTA are raised in the explanatory memorandum accompanying the Customs Amendment (Malaysia-Australia Free Trade Agreement Implementation and Other Measures) Bill 2012, and are dealt with in the discussion of that bill above.

1.113 **The committee considers the provisions of this bill do not give rise to any specific issues of compatibility with human rights.**

National Gambling Reform (Related Matters Bill (No. 1) 2012

Introduced into the House of Representatives on 1 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

1.114 This bill is part of a package of three bills in relation to a national scheme for gaming machines.

1.115 The bill imposes a supervisory levy on licensees of gaming machines.

1.116 No separate statement of compatibility was provided for this bill; instead, a combined statement was provided for all three bills that form part of this package. A combined explanatory memorandum for the three bills was also submitted. Neither document identifies any human rights issues raised by this bill.

1.117 **The committee considers that this bill does not appear to raise any issues of compatibility with human rights.**

National Gambling Reform (Related Matters Bill (No. 2) 2012

Introduced into the House of Representatives on 1 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

1.118 This bill is part of a package of three bills in relation to a national scheme for gaming machines.

1.119 The bill imposes a gaming machine regulation levy payable by anyone entitled to any gaming machine revenue from gaming machines which do not meet precommitment systems and warning requirements.

1.120 No separate statement of compatibility was provided for this bill; instead a combined statement was provided for all three bills that form part of this package. A combined explanatory memorandum for the three bills was also submitted. Neither document identifies any human rights issues raised by this bill.

1.121 **The committee considers that this bill does not appear to raise any issues of compatibility with human rights.**

Public Interest Disclosure (Whistleblower Protection) Bill 2012

Introduced into the House of Representatives on 29 October 2012
By: Mr Andrew Wilkie MP

1.122 This bill provides for a framework to facilitate public interest disclosures by public officials and provides those officials with protections by providing for:

- processes for who can make a public interest disclosure and to whom;
- the conduct of investigations;
- public interest disclosures to third parties;
- the obligations of agencies;
- legal protections of disclosers; and
- oversight of the disclosures.

1.123 The bill defines a public interest disclosure as the disclosure under certain circumstances of 'disclosable conduct', which is defined by section 9 as meaning corrupt conduct carried out by any public official or agency, or by any person in relation to a public official or agency; serious and substantial maladministration; misuse of public money or public property; danger to public health; danger to the environment; and detrimental action towards anyone as a result of a public interest disclosure.

Compatibility with human rights

1.124 The bill is accompanied by a statement of compatibility which states that:

> 'This bill advances human rights by establishing procedures for the disclosure of corruption, maladministration and other wrongdoing in the Commonwealth public sector. It protects public officials making such disclosures.'

The statement lists a number of rights which the bill is said to promote including the right to privacy and reputation (article 17, ICCPR), by protecting the privacy of those involved in making public interest disclosures; and the right to freedom of (political) expression, guaranteed under the Commonwealth Constitution but also by the article 19 of the ICCPR. The statement also notes that the bill promotes the enjoyment of the right to work by ensuring that a person who makes a disclosure will not be victimised or subject to reprisals as a result of making a protected public interest disclosure.

Right not to be subject to unlawful or arbitrary interference with one's reputation or privacy (article 17 ICCPR)

1.125 The making of a public interest disclosure, involving as it does an allegation of corrupt conduct, maladministration, or other conduct that would harm the reputation of the person who is alleged to have engaged in it, engages the right of a person not to be subject to arbitrary or unlawful interference with their reputation in accordance with article 17 of the ICCPR. The statement of compatibility recognises this interference, but notes that the procedures set out in the bill for disclosure are 'robust provisions [that] protect personal information about individuals involved and ensure that appropriate confidentiality is observed at all times.' It may be noted that, in addition to disclosures made within government and public agencies, the bill does permit a person to make a public interest disclosure to a journalist, subject to certain limitations (clauses 31, 32 and 33). The right to make a disclosure to a journalist arises only when a disclosure has been made within government, but has not been dealt with in accordance with the procedures laid down in the bill, so that the internal avenues have proved ineffective for resolving the issue or keeping the discloser informed.

1.126 The bill creates an offence of victimisation; a person who victimises a person because of a public interest disclosure commits a criminal offence (clause 46). It is not necessary that the person victimised has actually made or may make a disclosure; it is sufficient if it is shown that the alleged offender 'believes or suspects that a person has made, or may make a public interest disclosure' (explanatory memorandum, para 69).

Right to be presumed innocent (article 14(2), ICCPR)

1.127 The statement of compatibility notes that the criminal offence of using or divulging protected information is created by clause 58 and that this offence is subject to a defence that the use or divulging of the information has taken place under Commonwealth law (clause 58(3)). The defendant bears an evidential burden in relation to the establishment of this defence. This is a limitation of the right to be presumed innocent, and must be justified as a reasonable encroachment if it is to be permissible. The statement of compatibility argues that:

> 'Were the evidentiary burden not placed on the defendant, the prosecution would be forced to prove a negative: that no act or legal instrument exists that would cause the offences or offences not to apply. By placing the evidentiary burden on the defendant, the defendant is able to indicate which act or legal instrument they believe causes the offence or offences not to apply. This method appears in other investigation enabling laws, and is a reasonable and proportionate response to the operational problem caused by the nature of the offences described in clause 58.'

Freedom of expression (article 19, ICCPR)

1.128 Human rights jurisprudence has consistently attached great importance to the right to freedom of expression, which is protected in article 19 of ICCPR and encompasses the right to both receive and impart information. In general, political expression is afforded the greatest protection, with less rigorous principles being applied to artistic and commercial expression.

1.129 Whistleblowing, particularly in the context of public sector employment, will often have a connection with political communication and expression and/or have a strong public interest element. It is therefore likely to be regarded as being at the top end of the scale in terms of the sort of expression which is subject to protection. The UN Special Rapporteur on Freedom of Expression, for example, has endorsed the need for countries to take steps to protect individuals from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.[7]

1.130 While it may be premature to say there is a positive obligation to enact laws to protect whistleblowers, the draft laws under consideration would promote the effective exercise of the right to freedom of expression.

1.131 **The committee considers that the provisions of the bill appear to be compatible with human rights.**

[7] Report of the United Nations Special Rapporteur on Freedom of Expression, (2000) UN Doc. E/CN.4/2000/63, January 18, paras 43, 44.

Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 29 October 2012
By: Mr Andrew Wilkie MP

1.132 This bill makes consequential amendments to the Fair Work Act 2009, Ombudsman Act 1976, Parliamentary Service Act 1999 and Public Service Act 1999.

1.133 The bill is accompanied by a statement of compatibility, which states:

> 'The Bill does not engage any applicable rights or freedoms directly as it concerned with the administrative arrangements necessary for the implementation of the Public Interest Disclosure (Whistleblower Protection) Bill 2012.'

1.134 **The committee considers that the bill does not give rise to concerns about compatibility with human rights.**

Water Amendment (Water for the Environment Special Account) Bill 2012

Introduced into the House of Representatives on 31 October 2012
Portfolio: Sustainability, Environment, Water, Population and Communities

1.135 Further to the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012, this bill amends the *Water Act 2007* to establish the Water for the Environment Special Account for a 10-year period from the 2014-15 financial year to acquire additional environmental water entitlement and to remove constraints on the efficient use of environmental water for the Murray-Darling Basin Plan.

1.136 The statement of compatibility notes that the Bill engages the right to an adequate standard of living and the right to health guaranteed by articles 11 and 12 of the ICESCR. It draws on General Comment No 15 on the right to water adopted by the UN Committee on Economic, Social and Cultural Rights in 2002 which stated that '[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.' (para 2). The UN Committee also noted the importance of ensuring sustainable access to water resources for agriculture in order to realise the right to adequate food (para 7) and that access to water is relevant to other rights such as the right to gain a living by work.

1.137 This bill is supplementary to the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012, which the committee considered in its Fifth Report of 2012 did not appear to raise any human rights concerns.[8] The two bills were referred to the Senate Committee on Environment and Communications Legislation in October 2012. The report of the Senate Committee, issued on 19 November 2012, made no explicit reference to any human rights issues, but recommended passage of the bills.[9] The bills are also currently under consideration by the House Standing Committee on Regional Australia.

1.138 **The committee considers that this bill does not appear to raise any additional human rights concerns.**

[8] Fifth Report of 2012, October 2012, pp 40-41.

[9] Senate Committee on Environment and Communications Legislation, Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 [Provisions], Water Amendment (Water for the Environment Special Account) Bill 2012 [Provisions], Report, November 2012

The committee acknowledges the following responses to comments made on bills in the Second Report of 2012

Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012

Introduced into the Senate on 16 August 2012
By: Senator Xenophon
Response received: 23 November 2012

Committee view

1.139 **The committee thanks the Senator for his response.**

1.140 **The committee notes that this bill is currently being considered by the Senate Education, Employment and Workplace Relations Legislation Committee, which is due to report on 12 March 2013.**

1.141 **The committee has decided to defer finalising its views on this bill to take account of the Senate Education, Employment and Workplace Relations Legislation Committee's report.**

Purpose of the bill

1.142 The bill amends the *Fair Work Act 2009* to exclude employers in the restaurant and catering or retail industries that employ fewer than 20 full-time equivalent staff from being required to pay penalty rates under an existing or future modern award unless an employee has worked more than ten hours in a 24-hour period or more than 38 hours in a week.

1.143 The Senator's response can be found in Appendix 1.

The committee acknowledges the following responses to comments made on bills in the Third Report of 2012

International Fund for Agricultural Development Amendment Bill 2012

Introduced into the House of Representatives on 13 September 2012
Portfolio: Foreign Affairs
Response received: 31 November 2012

Committee view

1.144 **The committee thanks the Minister for his response. Having considered this further information, the committee is satisfied that the bill does not appear to give rise to any human rights concerns.**

Purpose of the bill

1.145 This bill amends the *International Fund for Agricultural Development Act 1977* to allow Australia to legally accede to the Agreement Establishing IFAD under Australian law by:

- amending the definition of 'Agreement' to ensure the legislation refers to the most recent version of the Agreement;
- repealing a section stating that membership of IFAD is approved; and
- removing the Schedule to the IFAD Act 1977 (as it refers the original IFAD Agreement) and replacing it with a web link to the most recent IFAD Agreement, which is updated as the Agreement is amended.

1.146 The Minister's response can be found in Appendix 1.

The committee acknowledges the following responses to comments made on bills in the Fifth Report of 2012

Higher Education Support Amendment (Streamlining and Other Measures) Bill 2012

Introduced into the House of Representatives on 19 September 2012
Portfolio: Industry, Innovation, Science, Research and Tertiary Education
Response received: 28 October 2012

Committee view

1.147 **The committee thanks the Minister for his response. Having considered this further information in conjunction with the statement of compatibility, the committee is satisfied that the bill does not appear to give rise to any human rights concerns.**

Purpose of the bill

1.148 This bill is intended to strengthen the integrity and quality framework underpinning the Higher Education Loan Program (HELP) schemes, improve information sharing and transparency with the national education regulators, improve arrangements for the early identification of low quality providers, and enable the government to better manage risk to students and public monies. The amendments give effect to the government's commitments under the 2012 COAG National Partnership Agreement on Skills Reform.

1.149 Schedule 2 of the bill provides that a notice revoking a higher education or vocational education training (VET) provider takes effect on the day the notice is registered on the Federal Register of Legislative Instruments. The statement of compatibility explains that the purpose of the amendments is:

> to ensure that notices of revocation take effect in a more timely and effective manner to prevent an organisation whose approval has been revoked, from continuing to offer FEE-HELP or VET FEE-HELP to students during the period between the Minister's decision to revoke a provider's approval and the time when the notice of revocation of approval takes effect. This will minimise risks to students.'

1.150 The Minister's response can be found in Appendix 1.

Law Enforcement Integrity Legislation Amendment Bill 2012

Introduced into the House of Representatives on 19 September 2012
Portfolio: Home Affairs
Response received: 29 October 2012

Committee view

1.151 **The committee thanks the Minister for his response. The committee considers that the Minister has adequately responded to the most of the issues raised by the committee in its fifth report. However, the committee has decided to defer finalising its views on the compatibility of this bill with human rights to enable closer consideration of the following issues:**

- **the partial exclusion of the *Fair Work Act 2009* for dismissals which have been declared to amount to serious misconduct; and**

- **the lack of criteria for listing substances as 'prohibited drugs' for the purposes of the proposed mandatory drug testing regime.**

Purpose of the bill

1.152 This bill introduces a range of measures which seek to prevent corruption in Commonwealth law enforcement agencies, and to enhance the response of law enforcement agencies to cases of suspected corruption. The key measures contained in the bill are:

- the introduction of targeted integrity testing for the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the Australian Customs and Border Protection Service (schedule 1, part 1) and associated investigative tools, including provision for new surveillance device warrants under the Surveillance Devices Act 2004 and using intercepted information accessed under the Telecommunications (Interception and Access) Act 1979 for integrity operations (schedule 1, part 3);
- extension of the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) to cover AUSTRAC, CrimTrac, and prescribed staff members in the Department of Agriculture, Fisheries and Forestry (DAFF) (schedule 1, part 2); and
- the introduction of measures to bring the Australian Custom and Border Protection Service's powers to act against corruption and misconduct into line with those of the Australian Federal Police and the Australian Crime Commission (schedule 2).

1.153 The Minister's response can be found in Appendix 1.

The committee acknowledges the following responses to comments made on bills in the Sixth Report of 2012

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012

Introduced into the House of Representatives on 10 October 2012
Portfolio: Attorney-General
Response received: 28 October 2012

Committee view

1.154 **The committee thanks the Attorney-General for her response. The committee considers that the Attorney-General has adequately responded to most of the issues raised by the committee in its sixth report. However, the committee has decided to defer finalising its views on the compatibility of this bill with human rights to enable closer consideration of the provisions relating to the superannuation forfeiture and recovery orders.**

Purpose of the bill

1.155 This bill amends the *Australian Federal Police Act 1979*, *Crimes Act 1914*, *Crimes (Superannuation Benefits) Act 1989*, *Criminal Code Act 1995*, *Customs Act 1901*, and *Law Enforcement Integrity Commissioner Act 2006* to:

- facilitate flexibility in the Commonwealth's serious drug offences framework to be able to respond quickly to new and emerging substances;
- expand the scope of existing identity crime offences, as well as enact new offences for the use of a carriage service in order to obtain and/or deal with identification information;
- create new offences relating to air travel and the use of false identities;
- improve the operation of the Law Enforcement Integrity Commissioner Act 2006;
- clarify that superannuation orders can be made in relation to all periods of a person's employment as a Commonwealth employee, not only the period in which a corruption offence occurred, and
- increase the value of a penalty unit and introduce a requirement for the triennial review of the penalty unit.

1.156 The Attorney-General's response can be found in Appendix 1.

Fair Entitlements Guarantee Bill 2012

Introduced into the House of Representatives on 11 October 2012
Portfolio: Education, Employment and Workplace Relations
Response received: 26 November 2012

Committee view

1.157 **The committee thanks the Minister for his response. Having considered this further information in conjunction with the statement of compatibility, the committee is satisfied that the bill does not appear to give rise to any human rights concerns.**

Purpose of the bill

1.158 This bill will replace the administrative General Employee Entitlements and Redundancy Scheme (GEERS) which currently assists employees who have lost their employment due to the liquidation or bankruptcy of their employer and who are owed certain employee entitlements.

1.159 The bill provides a scheme for the provision of financial assistance (an 'advance') to former employees whose employment has ended as the result of the winding up or bankruptcy of their employer. After making an advance, the Commonwealth assumes the individual's right to recover these amounts through the winding up or bankruptcy process of their employer.

1.160 The Minister's response can be found in Appendix 1.

Part 2

Legislative Instruments registered with FRLI
17 October–16 November 2012

Consideration of legislative instruments

2.1 The committee has considered 145 legislative instruments introduced into the Parliament between 17 October and 16 November 2012. The committee has also considered the Health Insurance (Dental Services) Amendment Determination (No. 1), which was introduced into Parliament on 10 September 2012. The committee had deferred its consideration of this instrument to enable closer examination. The full list of instruments scrutinised by the committee can be found in Appendix 2.

2.2 104 instruments do not appear to raise any human rights concerns and are accompanied by statements of compatibility that are adequate.

2.3 37 instruments do not appear to raise any human rights concerns but are accompanied by statements of compatibility that do not fully meet the committee's expectations. As the instruments in question do not appear to raise human rights compatibility concerns, the committee has written to the relevant Ministers in a purely advisory capacity providing guidance on the preparation of statements of compatibility. The committee hope that this approach will assist in the preparation of future statements of compatibility that conform more closely to the committee's expectations.

2.4 The committee is seeking further information from the relevant Minister on the following instruments before forming a view about their compatibility with human rights:

- Marine Order 21, issue 8
- Health Insurance (Dental Services) Amendment Determination (No. 1)

2.5 The committee has deferred its consideration of the following instruments to allow closer consideration of their impact on human rights:

- Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1);
- Social Security (Administration) (Schooling requirements – Person Responsible) Specification 2012; and
- Stronger Futures in the Northern Territory (Food Security Areas) Rule 2012

The committee has sought further information in relation to the following legislative instruments

Marine Order 21, issue 8

FRLI ID: F2012L02149
Tabled in the Senate on 19 November 2012 and the House of Representatives on 26 November 2012
Portfolio: Infrastructure and Transport

Committee view

2.6 **The committee seeks clarification from the Minister for Infrastructure and Transport on the potential rights impacts of this instrument to assist its consideration of the instrument's compatibility with human rights.**

Purpose of the instrument

2.7 This instrument provides for matters relating to the safety of navigation and emergency procedures for ships.

Compatibility with human rights

2.8 The statement of compatibility states that the instrument does not engage any human rights.

2.9 The committee notes that emergency procedures by their nature are likely to engage a range of human rights, including, for example, the right to life and the right to freedom of movement.

2.10 The committee proposes to write to the Minister for Infrastructure and Transport requesting clarification on the potential rights impacts of the instrument.

Health Insurance (Dental Services) Amendment Determination 2012 (No. 1)

FRLI ID: F2012L01837
Tabled in the Senate and the House of Representatives on: 10 September 2012
Portfolio: Health and Ageing

Committee view

2.11 **The committee seeks further information from the Minister for Health on several issues relating to the transitional arrangements and coverage of the replacement schemes before forming a view on the compatibility of this instrument with human rights.**

Purpose of the instrument

2.12 This determination amends the Health Insurance (Dental Services) Determination 2007 to enable a staged cessation to the payment of Medicare benefits for services available to people with chronic conditions and complex care needs whose oral health is impacting on their general health (also known as the Medicare Chronic Disease Dental Scheme or CDDS).

2.13 Specifically, the determination creates a staged approach to the cessation of the CDDS so that patients who have been provided with certain Medicare funded management plans for chronic medical conditions prior to 8 September 2012 may continue to access Medicare-eligible dental services under the CDDS until 30 November 2012.

2.14 From 1 December 2012 the principal determination will cease in its entirety, which will in effect discontinue the operation of the CDDS for all persons. However, Medicare benefits can still be paid for claims lodged after 30 November 2012, as long as the service was provided on or before 30 November 2012 for existing patients.

2.15 The closure of the CDDS is part of the government's proposed $4 billion dental reform package, which was announced on 29 August 2012, and includes:

- $2.7 billion to provide subsidised basic dental services to around 3.4 million eligible Australia children from January 2014 (also known as the Child Dental Benefit Schedule – CDBS);
- $1.3 billion to provide additional services for adults on low incomes through state dental services under a National Partnership Agreement (NPA) from July 2014; and
- $225 million in funding for dental capital and workforce, to support expanded services for outer metropolitan, regional, rural and remote areas.

2.16 The committee decided to defer its consideration of this instrument to enable closer examination of the issues and to take account of the findings of the Senate Community Affairs Legislation Committee's inquiry into the Dental Benefits Amendment Bill 2012 and related dental reforms, including the closure of the Chronic Disease Dental Scheme. That committee's report was released on 29 October 2012.

Compatibility with human rights

Right to health and right to social security

2.17 The statement of compatibility recognises that the closure of the CDDS could be considered to limit the right to health in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to social security in article 9 of ICESCR because it 'could reduce the ability of people currently eligible for the program to enjoy their highest attainable standard of health through access to these benefits'. The statement argues that the changes are nevertheless compatible with these rights because:

- the closure of the CDDS (which is not considered to target benefits to those who are most financially disadvantaged), is necessary to enable limited resources to be redirected to dental programs that more effectively target those most in financial need; and

- the provision for the staged closure of the CDDS allows current patients to continue treatment over a transition period, thereby mitigating any adverse impact on a person's existing reliance on the payment of Medicare benefits under the CDDS. It is also suggested that affected individuals will be able to access alternative means of support through state and territory public dental services, or Commonwealth funded rebates for private health insurance covering dental treatment.

2.18 The closure of the CDDS is likely to be considered as either retrogressive or a limitation on the rights to health and social security because they remove existing entitlements. It is therefore necessary for the government to demonstrate that the measures in question pursue a legitimate objective and have a reasonable relationship of proportionality between the means employed and the objective sought to be realised. In short, to be compatible with human rights, the closure of the CDDS must be (i) aimed at achieving a legitimate objective; and be (ii) rationally connected and proportionate to that objective.

2.19 The government has stated that the closure of the CDDS is necessary to enable resources to be redirected for dental services to low income patients to ensure equitable access to dental care, which may be considered to be a legitimate aim.

2.20 The Senate Community Affairs Legislation Committee report on the government's proposed dental reforms however identified some issues of concern with regard to the closure of the CDDS. These related to the transitional arrangements for those patients currently being serviced under the CDDS and the potentially reduced coverage of the replacement scheme(s).

2.21 According to the report, the Australian Dental Association (ADA) supported the reforms but 'expressed concern regarding the timeframe for the closure of the scheme, claiming that many patients will miss out on essential treatment as a result of the 30 November 2012 cut-off date:

> A 12-week period, to complete treatment, will mean that patients under the CDDS will not be able to finalise their treatment plans. Treatment of the chronically ill, for which this Scheme was designed, is often complex, requiring an extended period of time. Complex treatments are often staged to allow adequate healing… The ADA calls on the Australian Government to recognise that it is critical that arrangements are put in place to allow for treatment services to be completed even if this requires introducing a transition process for existing patients on a case by case basis.'[1]

2.22 While supportive of the overall reforms, the Australian Greens also expressed concerns 'about the timing of the new scheme and the delay between the cessation of the Chronic Disease Dental Scheme [on 30 November 2012] and the commencement of the CDBS [in January 2014] and the National Partnership Agreement [in July 2014]'.[2]

2.23 The Department of Health and Aging told the committee that it believed 'there will be sufficient capacity through the states and territories to treat those patients who have not completed their treatment under the CDDS' and that it was working to reach 'an agreement with the states and territories by the end of November to cover transitional arrangements'.[3]

2.24 The committee stated in its report that it:

> …looks forward to the outcome of the government's negotiations with the states and territories and hopes that the agreements will ensure that there will be no

[1] Report of the Senate Community Affairs Legislation Committee Inquiry into the Dental Benefits Amendment Bill 2012, October 2012, paragraph 2.37.

[2] Additional comments by the Australian Greens, Report of the Senate Community Affairs Legislation Committee Inquiry into the Dental Benefits Amendment Bill 2012, October 2012, pg 21.

[3] Report of the Senate Community Affairs Legislation Committee Inquiry into the Dental Benefits Amendment Bill 2012, October 2012, paragraph 2.40.

> gaps in service provision for any clinically necessary treatment that commenced under the CDDS.[4]

2.25 A further issue relating to the closure of the CDDS that was canvassed in the Senate Community Affairs Legislation Committee inquiry involved the coverage of the replacement scheme(s). In additional comments to the committee's report, Coalition Senators noted that 'over 80 per cent of patients accessing the [CDDS] were health care card holders who would not otherwise have been able to fund the dental treatment they accessed under the scheme' and expressed concern that the closure of the CDDS will leave these patients unable to access the dental care required to assist them with the management of complex chronic illnesses' because the reforms are 'seeking to redirect public dental funding to an entirely different demographic with the establishment of the framework of the CDBS':

> Under the proposed CDBS, eligible children between the age of two and 18 years will be able to access basic dental health care, capped at an entitlement of $1000 per child over two years. Coalition Senators are concerned that this entitlement is significantly less than the entitlement for dental care under the CDDS and is also limited to a basic service only. It is also concerning to Coalition Senators that the CDBS does not address adult chronic disease needs and also represents reduced support for children suffering chronic disease.[5]

2.26 The committee considers that these issues are likely to go towards the proportionality of these measures, in particular where they may involve the removal of access to essential treatment for financially disadvantaged patients.

2.27 **The committee proposes to write to the Minister for Health to seek clarification on the following issues before forming a view on the compatibility of this instrument with human rights:**

- **What provision has been made for the short term needs of existing CDDS patients who are financially disadvantaged during the transition period between the closure of the CDDS and the commencement of the NPA and the CDBS?**
- **What provision has been made for the short term needs of new patients (i.e., those who would have been eligible for CDDS benefits) who are financially disadvantaged during the transition period between the closure of the CDDS and the commencement of the NPA and the CDBS?**

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[4] Report of the Senate Community Affairs Legislation Committee Inquiry into the Dental Benefits Amendment Bill 2012, October 2012, paragraph 2.50.

[5] Additional comments by Coalition Senators, Report of the Senate Community Affairs Legislation Committee Inquiry into the Dental Benefits Amendment Bill 2012, October 2012, pg 19.

- **Whether the NPA and the CDBS in combination with other relevant benefits is likely to adequately meet the essential treatment needs of financially disadvantaged patients suffering chronic disease?**
- **How many existing CDDS patients will not be eligible under the NPA or CDBS?**

The committee has deferred its consideration of the following legislative instruments

Stronger Futures in the Northern Territory (Food Security Areas) Rule 2012

FRLI ID: F2012L02073
Tabled in the Senate and the House of Representatives on: 29 October 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Committee view

2.28 **The committee has decided to examine this instrument as part of its examination of the Stronger Futures package of legislation.**

Purpose of the instrument

2.29 This rule prescribes that certain major centres are not in the food security area and accordingly cannot be required to hold a licence.

Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1)

FRLI ID: F2012L02182
Tabled in the Senate on 19 November 2012 and the House of Representatives on 26 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Committee view

2.30 **The committee has decided to examine this instrument as part of its examination of the Stronger Futures package of legislation.**

Purpose of the instrument

2.31 This determination amends the Schooling Requirement Determination to provide for factors the Secretary must have regard to when determining whether special circumstances apply that justify a person's failure to comply with an attendance plan or compliance notice, or enter into a school attendance plan or in determining the date of effect of an arrears payment.

Social Security (Administration) Schooling requirements – Person Responsible) Specification 2012

FRLI ID: F2012L02179
Tabled in the Senate on 19 November 2012 and the House of Representatives on 26 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Committee view

2.32 **The committee has decided to examine this instrument as part of its examination of the Stronger Futures package of legislation.**

Purpose of the instrument

2.33 This specification seeks to enhance the operation of the Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) in the Northern Territory by prescribing employees of the Northern Territory Department of Education and Children's Services to assume the role of a 'person responsible' in relation to SEAM.

The committee acknowledges the following response to comments made on a legislative instrument in the Second Report of 2012

Broadcasting Services (Simulcast Period End Date - Remote Licence Areas) Determination 2012

FRLI ID: F2012L01725
Tabled in the Senate and the House of Representatives on 22 August 2012
Portfolio: Broadband, Communications and the Digital Economy

Committee view

2.34 **The committee thanks the Minister for confirming that the determination engages the right to freedom of expression in article 19(2) of the International Covenant on Civil and Political Rights. The committee makes no further comment on this instrument.**

Purpose of the instrument

2.35 This determination sets 10 December 2013 as the date by which each holder of a commercial television broadcasting licence in a remote licence area is to cease transmitting the commercial television broadcasting service concerned in analog mode.

2.36 The Minister's response can be found in Appendix 1.

The committee acknowledges the following response to comments made on a legislative instrument in the Fifth Report of 2012

Coal Mining Industry (Long Service Leave) Legislation Amendment Regulation 2012

FRLI ID: F2012L01873
Tabled in the Senate and the House of Representatives on 17 September 2012
Portfolio: Employment and Workplace Relations

Committee view

2.37 **The committee thanks the Minister for his response. Having considered this further information in conjunction with the statement of compatibility, the committee is satisfied that the bill does not appear to give rise to any human rights concerns.**

Purpose of the instrument

2.38 The *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011* provides that certain periods of service undertaken by eligible employees and former eligible employees between 1 January 2000 and 31 December 2011 may be counted towards their long service leave accrual. Schedule 5 of the Act sets out the timelines and dates by which certain administrative obligations are to be met in order to access these entitlements. This regulation:

- extends the timeline for former eligible employees to provide information to the Coal Mining Industry (Service Leave Funding) Corporation for the purposes of having periods of service recognised as qualifying service;
- extends the timeline by which the Coal Mining Industry (Service Leave Funding) Corporation is required to notify former and current eligible employees about records that it has in relation to them; and
- grants more time for the Corporation to seek actuarial advice in relation to the sufficiency of the Coal Mining Industry (Long Service Leave) Fund.

2.39 The Minister's response can be found in Appendix 1.

Appendix 1

Response to comments made in the Second, Third, Fifth and Sixth Reports of 2012

The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Mr Harry Jenkins MP
Chair, Joint Parliamentary Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012

I refer to your letter of 22 August 2012 and thank you for the opportunity to comment on the compatibility of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Act) with Australia's human rights obligations.

As you note, the Government is not under an obligation to table a human rights compatibility statement in relation to the Act because the relevant Bill was originally introduced into Parliament prior to the commencement of the requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Nonetheless, I am happy to confirm the Government's clear view that the Act complies with Australia's human rights obligations.

While the Act does not breach any of Australia's human rights obligations, as you would appreciate, the absence of inconsistency alone does not guarantee compliance with human rights standards. Rather, compliance with Australia's international obligations extends to what Australia does *in toto* by way of legislation, administration and practice. The Government considers that the actions taken under the Act to date also comply with Australia's international obligations.

The Act raises human rights considerations relating to detention, use of force, non-refoulement and family and children.

The Act does not engage rights relating to freedom of movement (Article 12 of the International Covenant on Civil and Political Rights (ICCPR)) or the expulsion of aliens (Article 13 of the ICCPR), as these provisions relate to rights for persons who are lawfully in a country and to the right to enter one's own country.

The Act operates in relation to people who are not lawfully in Australia and where Australia is not identified as their own country. Further, Article 14 of the ICCPR is

not engaged as it relates to the right to a fair hearing in respect of criminal charges only.

Detention

Article 9 of the ICCPR

Australia takes its obligations in relation to people in detention very seriously.

Article 9 of the ICCPR relates to the right to security of the person and freedom from arbitrary arrest or detention. The Government's position is that the detention of asylum seekers is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether proper grounds for the detention continue to exist.

In the context of Article 9, 'arbitrary' means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

The Act amended subsection 189(3) of the *Migration Act 1958* to remove the discretion to detain an offshore entry person (OEP) arriving at an excised offshore place and make detention mandatory. This change brought detention of unlawful non-citizens who arrived at excised offshore places in line with the detention of unlawful non-citizens who arrived elsewhere, reflecting what generally occurs in practice. This is consistent with Government policy that, in the absence of specific reasons not to detain, all OEPs should be detained for identity, security and other relevant checks.

However, the primary purpose of the temporary detention of OEPs under this amendment is to facilitate their removal to a regional processing country.

Insofar as the Act facilitates the detention of OEPs for the purpose of identity and security checks, and for the ultimate purpose of facilitating their transfer to a regional processing country (as defined by the *Migration Act 1958*), the Act cannot be said to be arbitrary or unreasonable. Further, OEPs can challenge the lawfulness of their detention in the High Court in accordance with the requirements of Article 9(4) of the ICCPR.

Article 10 of the ICCPR

Article 10 requires that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This article aims to ensure that persons deprived of their liberty enjoy all the rights set out in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

Article 10(1) has been interpreted as requiring state parties to provide detainees with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, etc).

Great care is taken by the Government to ensure that people in immigration detention are treated with respect and dignity, are provided with appropriate accommodation and services in a safe and secure environment.
The Detention Services Provider maintains a presence at all immigration detention facilities and is contracted to provide security, meaningful activities, food and other living necessities to individuals accommodated there. The Detention Services Provider is supported by many other organizations such as the International Health and Medical Service, including the Psychological Support Program and Torture and Trauma Counsellors, Life Without Barriers, Translating and Interpreting Service and the Red Cross.

My Department ensures services delivered by contracted service providers are provided in a fair, reasonable and humane manner, through implementation of performance standards in each contract which are focused on service outcomes to people in detention.

Immigration detention required by Australian law is also subject to external scrutiny by the Commonwealth Ombudsman, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees and the Australian Red Cross to ensure people in immigration detention are treated humanely, decently and fairly.

Use of force

The Act permits an officer to use such force is as reasonably necessary to facilitate the movement of OEPs to a designated country.

The use of force authorised by the Act does not amount to torture or cruel, inhuman or degrading treatment or punishment set out Article 7 of the ICCPR. This is because the use of force contemplated by the Act extends only to the placement, restraint or removal of an OEP for the legitimate and lawful objective of removing that person to a designated country. Moreover, the force authorised by the Act is limited to such force as is necessary and reasonable to achieve that objective.

As such, the use of force contemplated by the Act is consistent with Australia's obligations under Article 7 of the ICCPR.

Non-refoulement

In addition to the *non-refoulement* (non-return) obligation under the Refugees Convention (which is not one of the treaties specified in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*), Australia has an obligation to not send a person:

- To a country where they are at a real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 of the ICCPR, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)); or
- to a country which would send the person to another country where they would face such a risk.

As noted above, any legislative scheme – including that which provides for the taking of persons from Australia – is not expected to expressly guarantee compliance with these obligations so long as the combination of legislation, policies, procedures and practices enables Australia to so comply.

Subsection 198AB(1) of the *Migration Act 1958*, as inserted by the Act, provides that the Minister may designate, by legislative instrument, that a country is a regional processing country. The only condition for the exercise of the power under subsection 198AB(1) is that the Minister thinks it is in the national interest to so designate a country (s198AB(2)).

In considering the national interest, the Minister must have regard to whether or not the country has given Australia any assurances to the effect that the country will not expel or return a person taken to the country to another country where their life or freedom would be threatened for a Refugees Convention reason, and whether the country will make a refugee status assessment in respect of a transferee, or permit such an assessment to be made.

Moreover, new paragraph 198AB(3)(b) of the *Migration Act 1958* provides that the Minister, in considering the national interest for the purposes of s198AB(2), may have regard to any other matter which, in the opinion of the Minister, relates to the national interest. This confers on the Minister a discretion to take into account other matters. These matters could include, for example, whether or not the country has given Australia any assurances that the country will not send a transferred person to another country where there is real risk that the person will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or the imposition of the death penalty.

The Act further provides a mechanism for the Minister to determine that new section 198AD of the *Migration Act 1958* (which provides for the taking of offshore entry persons to a regional processing country) does not apply to an OEP, if the Minister thinks it is in the public interest to do so. This is a personal, non-compellable power that allows the Minister to exempt persons from the operation of section 198AD should, for example, issues arise in relation to obligations under the CAT or ICCPR.

Rights relating to families and children

Under Article 3 of the Convention on the Rights of the Child (CROC), Australia also has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children.

This does not mean these interests must be the overriding or only consideration. Rather, the best interests of the child must be a "primary" consideration, which must be considered with other primary considerations, including those outlined in the *Migration Act 1958* and the *Migration Regulations 1994*.

Article 3 of the CROC does not create any specific rights in respect of immigration. Consideration of the best interests of a child does not necessarily require a decision

to allow the child or the child's family to remain in Australia and may be outweighed by other primary considerations.

An important competing consideration is one of the central objectives underlying the Act, which is to prevent children from taking the dangerous boat journey to Australia. Further, national interest considerations, including the integrity of Australia's migration system, are primary considerations which in this context will generally outweigh the preference and interests of the child to remain in Australia.

In addition to its obligations under CROC, Australia has obligations in relation to families under the ICCPR.

Article 17 of the ICCPR states that no-one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The protection of the family unit under Articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest more generally.

In this context, "arbitrary" interference involves elements of injustice, unpredictability and unreasonableness. "Unlawful" interference means interference that is contrary to domestic law. Accordingly, interference with family is permissible where it is not arbitrary and where it is lawful at domestic law. Australia does not consider that the measures outlined in the Act amount to separation of family, noting that persons who travel to Australia together will not ordinarily be separated when taken to a regional processing country.

Further, to the extent that these measures may be perceived as interference with family, the Government maintains that these measures seek to achieve a legitimate purpose of preventing unlawful non-citizens from travelling to Australia by irregular means and are not arbitrary or unlawful and thus are consistent with Australia's obligations under Articles 17 and 23 of the ICCPR.

Article 24(1) of the ICCPR provides for the protection of children by the State, without discrimination, as required by their status as children. It is the Government's view that Article 24 does not give rise to an automatic right to remain in Australia. While in Australia's jurisdiction, however, the needs of children will be met according to their environment.

I have consistently worked to ensure that children are placed with their family in the least restrictive form of immigration detention possible and have access to the services discussed in relation to Article 10 of the ICCPR, above. If a child is an unaccompanied minor and falls under my responsibilities under the *Immigration (Guardianship of Children) Act 1946*, their needs are met through contracted service providers.

It is also relevant to note that subsection 199(4) of the *Migration Act 1958,* inserted by the Act, also provides a mechanism for the spouse or de facto partner of an OEP who is being taken, or about to be taken, to a regional processing country, to request that they also be taken or for an OEP to request that a dependent child or children be taken to a regional processing country with them.

I hope this information is of assistance.

Yours sincerely

[redacted]

CHRIS BOWEN

15 NOV 2012

NICK XENOPHON
Independent Senator *for* South Australia
AUSTRALIAN SENATE

Our ref: JEN–N/HW

The Hon. Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter dated 12 September 2012, regarding the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*. I note the concerns raised in your letter on behalf of the committee, and I seek to address these below.

The measures proposed in this bill aim to address the significant pressure placed on small businesses by penalty rates.

The importance of small businesses to the Australian economy cannot be underestimated. Information from Restaurant and Catering Industry Australia indicates that penalty rates could be threatening the viability of some 40,000 restaurant and catering businesses in Australia, putting some 250,000 jobs at risk.

A recent benchmarking report by the industry also indicated that, as a result of increase to penalty rates, 18.2 percent of businesses were closed on weekends and 33 percent were closed on public holidays. Based on the average shift length of four hours, over half a million shifts were lost during the year due to these closures.

This is a bad outcome for both small businesses and their employees. Putting this sector under further strain will lead to additional job losses and fewer employment opportunities, as well as less competition.

This bill applies to businesses with fewer than 20 full-time equivalent employees in the restaurant and catering, and retail industries. This definition is consistent with that of a 'small business' according to the Australian Bureau of Statistics.

The bill focuses on these industries as the most common to employ shift workers (particularly casuals) and to have a significant number of small businesses in their make-up.

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It is no exaggeration to say that many employees of small businesses are already disadvantaged because that business is closed on Sundays or the owners do not offer shifts on that day because of penalty rates. In the end, many employees may be better off because they will be able to work on that day, even if their penalty rates are limited.

Ultimately, while I acknowledge that this bill affects the circumstances in which some employees will be able to earn penalty rates, I believe this is outweighed by the overall benefit to both the economy and employment rates.

The bill does not engage the rights laid out in article 8(1)(a) of the International Covenant on Economics, Social and Cultural Rights.

I would welcome the committee's direction on whether an amended statement of compatibility should be tabled to address the above issues.

I hope this information is helpful. Please do not hesitate to contact me if the Committee would like any further details.

Yours sincerely

[redacted]

NICK XENOPHON

14 / 11 / 2012

SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letter of September 19 2012 regarding the International Fund for Agricultural Development (IFAD) Amendment Bill 2012.

As noted in your letter, the IFAD Amendment Bill 2012 was introduced into Parliament without a Statement of Compatibility with Human Rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Australian Agency for International Development (AusAID) has now developed the Statement in consultation with the Attorney-General's Department, please find this attached.

As outlined in the Statement, the IFAD Amendment Bill 2012 is compatible with human rights and does not raise any human rights issues.

It would be appreciated if the Parliamentary Joint Committee on Human Rights could consider this Statement of Compatibility by October 31 2012, which is the tentative timeframe by which the Joint Standing Committee on Foreign Affairs, Defence and Trade will consider this legislation.

For further assistance please contact Mr Paul Wojciechowski, Assistant Director General, Multilateral Policy and Partnerships Branch, AusAID on [redacted] or via email [redacted]

Thank you for bringing this matter to my attention.

Yours sincerely

[redacted]

Bob Carr

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

International Fund for Agricultural Development Amendment Bill (No.) 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill makes technical amendments to the International Fund for Agricultural Development Act (1977), enabling Australia to accede to the International Fund for Agricultural Development Agreement under domestic law.

The amendments include revising the definition of Agreement in Section 3 so it refers to the version of the International Fund for Agricultural Development Treaty to which Australia would be acceding, removes Section 4 of the Act as it is ineffective, and updating the Schedule to the Act to reference the current Agreement Establishing the International Fund for Agricultural Development (IFAD), as it has been amended since the original legislation was enacted.

The legislation approves Australia's membership of IFAD which was not repealed at the time of Australia's withdrawal from IFAD in 2004.

None of these amendments make any changes to the law.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

[Circulated by authority of Senator the Hon Bob Carr, Minister for Foreign Affairs]

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Science and Research

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins/ Harry

I write in response to your letter of 10 October 2012 on behalf of the Parliamentary Joint Committee on Human Rights relating to the Higher Education Support Amendment (Streamlining and Other Measures) Bill 2012 (the Bill).

The amendments in the Bill will enable the Government to strengthen the quality and accountability framework underpinning its income-contingent loan programs. Accordingly, I am pleased to provide the Committee with further information to support its determination on whether the Bill is compatible with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*. You raised two specific matters, firstly the impact, if any, these measures may have on students receiving FEE-HELP or VET FEE-HELP assistance, in circumstances where the organisation providing their education or training has its approval revoked with immediate effect; and secondly, regarding the information sharing provision in the Bill and the right to privacy.

In response to the first matter, the *Higher Education Support Act 2003* (the Act) expressly provides safeguards for students who are currently receiving FEE-HELP or VET FEE-HELP for studies undertaken through a provider that has been revoked. For FEE-HELP, under section 22-25, and for VET FEE-HELP, under clause 35 of Schedule 1A to the Act, I or my delegate can determine that an approval as a provider can be retained in respect of existing students. This means that the revocation is of limited effect for the purposes of assistance payable for the revoked body's existing students.

Notwithstanding these provisions, the Act also requires approved providers to have tuition assurance in place to protect students in the case where a provider ceases to offer a course. Where a provider is revoked and unable to deliver its courses, tuition assurance mechanisms would be activated (either under the Act or the legislation under the relevant national or state education regulators, whichever is appropriate). Students are either placed in a comparable course or provided with a refund of any upfront tuition fees paid.

In response to the second matter, while the Bill does not contain explicit provisions with regards to the storage, handling and disposal of any information collected (which may include personal information), any personal information collected under the proposed changes to the Act will be regulated by the *Privacy Act 1988* (the Privacy Act) as well as the *Archives Act 1983* (the Archives Act).

The information sharing provisions contained in Part 2 of Schedule 2 of the Bill will allow the Minister to seek information (which may include personal information) from the relevant national education regulators, Tertiary Education Quality and Standards Agency and the Australian Skills Quality Authority as well as the vocational education and training regulators of Victoria and Western Australia.

Commonwealth Ministers, as well as agencies, are required by section 16 of the Privacy Act not to do an act, or engage in a practice, that breaches an Information Privacy Principle (IPP). The IPPs regulate, amongst other things, the way in which government agencies collect, store, use and disclose personal information. The proposed changes to the Act would have the effect of authorising the collection of personal information for the purpose of IPP 2. In addition, IPP 4 will ensure that the Minister and the Department will be obliged to ensure that the record is protected by such security safeguards as it is reasonable in the circumstances to ensure that the record is not lost, used, modified, disclosed, accessed in an unauthorised manner or otherwise misused. Additionally the *Plain English Guidelines to Information Privacy Principles* requires most federal agencies, including the Department, to handle information consistently with the 11 IPPs.

Any destruction of personal information carried out by the Department will be done in accordance with the Archives Act.

To provide further information on the statements contained within the Explanatory Memorandum, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. As this Bill seeks to lawfully collect information (which may include personal information), this Bill, in conjunction with the Privacy Act, will not unlawfully interfere with a person's privacy.

As the legitimate policy purposes for the information sharing provisions will be to improve the decision making for application, administrative compliance, suspension and revocation for the FEE-HELP and VET FEE-HELP programs, this will be consistent with the aims and objectives of the ICCPR as this will promote the right to education. The Bill will therefore not be arbitrary and will be consistent with the right to privacy.

Additionally the Bill will promote the protection of any personal information collected in the information sharing provisions through the offence provisions in Division 179 and Division 14 of Schedule 1A to the Act as it is currently in force. These Divisions operate to provide that the unauthorised disclosure or access of personal information will be an offence. The penalty for this offence is 2 years imprisonment.

Given the strength of these penalty provisions, the Bill promotes the protection of the personal information that may be collected within the information sharing provisions.

I trust the information provided is helpful.

Yours sincerely

[redacted]

CHRIS EVANS

28.10.12

THE HON JASON CLARE MP
Minister for Home Affairs
Minister for Justice

MC12/14718

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letter dated 10 October 2012 regarding the Law Enforcement Integrity Legislation Amendment Bill 2012. I note that following the Committee's preliminary examination of this Bill the Committee now seeks my clarification on a range of matters. I have provided further information on the issues raised below.

I note also that the Committee has raised concerns regarding the adequacy of the statement of compatibility with human rights contained within the Bill's explanatory memorandum. I intend to revise the statement of compatibility to address the issues raised by the Committee prior to the introduction of the Bill into the Senate.

Integrity testing

Whether the use of intercept evidence in integrity testing operations is compatible with the right to a fair trial in article 14 of the International Covenant on Civil and Political Rights (ICCPR)

The Committee notes that there is no inherent human rights objection to the use of intercept evidence in criminal trials, and that overall compatibility with the right to a fair trial will depend on whether a fair balance is struck between the public interest in not disclosing sensitive information and the defendant's right to the disclosure of evidence that might assist their defence.

I consider that any use of intercept evidence in criminal proceedings arising from an integrity testing operation will be compatible with the right to a fair trial in article 14 of the ICCPR. Where the evidence is intended to be used in proceedings it will be made available to the defendant. The court will retain the discretion to exclude evidence should it appear to limit the defendant's ability to obtain a fair trial.

What, if any, interaction the proposed scheme would have with entrapment laws

Integrity testing operations will not constitute 'entrapment'. Entrapment is where a person is induced to commit an offence that they would not otherwise have committed. Integrity

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testing operations will be designed to ensure that the subject of a test is provided with an equal opportunity to pass or fail the test, rather than be induced to fail the test.

Furthermore, if the outcome of an integrity test is sought to be used as evidence for criminal proceedings, the court will retain the discretion to exclude the evidence if it considers that it was obtained through entrapment.

The lack of explicit provision in the Bill for independent oversight by the Ombudsman

The Committee correctly notes that the Bill does not establish a new role for the Ombudsman in relation to integrity testing operations. The Ombudsman will continue to have an oversight role in relation to covert powers that agencies will use in conducting of integrity testing, including controlled operations, surveillance devices and the use of telecommunications interception information. This oversight role is as follows:

- The *Crimes Act 1914* requires the Ombudsman to inspect the controlled operations records of agencies to determine the extent of compliance by the agency with the requirements of the relevant provisions of the Crimes Act. The Ombudsman must also submit a report to me, as the responsible Minister, each year on the outcome of this oversight, which must be tabled in Parliament. The Ombudsman also receives six-monthly reports from agencies containing details of all controlled operations authorised in the preceding six months.
- Under the *Surveillance Devices Act 2004* agencies must report to the Attorney-General on each surveillance device warrant or authorisation. Agencies are required to keep records of warrants and authorisations, and also records of where information obtained is either used or communicated. This will include where warrants are issued for the purposes of integrity testing and where information is used in an integrity testing operation. The Ombudsman must inspect these records and report to the Attorney-General at six monthly intervals. This report must be tabled in Parliament.
- Under the *Telecommunications (Interception and Access) Act 1979* agencies are required to keep records of all occasions where intercepted information is used or communicated. This would include occasions where it is used or communicated for integrity testing purposes. These records must be inspected by the Ombudsman at least twice each year, and the Ombudsman must report to the Attorney-General on this each year.

I consider that these arrangements will provide a sufficient level of oversight by the Ombudsman of the conduct of integrity testing. As the Committee has noted the Bill includes a range of other oversight mechanisms for integrity testing. Agencies will be required to notify the Integrity Commissioner as soon as practicable after the authorisation of each integrity test. Where integrity testing is authorised to investigate a 'corruption issue' (as defined in the *Law Enforcement Integrity Commissioner Act 2006*) the oversight role for the Integrity Commissioner in relation to the conduct of corruption investigations by agencies set out in that Act will continue to apply.

The Bill will also require that each agency report to me as the responsible minister every 12 months on the number of integrity tests authorised and the nature of suspected criminal activity at which each test was targeted.

Expansion of ACLEI jurisdiction

Whether the immunity provided by the Law Enforcement Integrity Commissioner Act 2006 *to restrict the use of answers given in relation to compulsory questioning includes both a use and derivative use immunity*

While the Bill expands the range of Commonwealth agencies in which the Integrity Commissioner can investigate corruption, it does not alter the powers available to the Integrity Commissioner to do so. The immunity provided by section 80 and section 96 of the *Law Enforcement Integrity Commissioner Act 2006*, in relation to self-incriminatory information compelled from a witness, is a 'use' immunity and not a 'derivative use' immunity. This has been the case since the establishment of the office of Integrity Commissioner in 2006.

Customs – drug and alcohol screening tests

The lack of safeguards in the bill for conducting testing, including the absence of controls for the types of tests that could be ordered, given the tests could reveal a range of information about the person which is unrelated to the purposes of screening.

The introduction of drug and alcohol testing will be part of a broader Drug and Alcohol Management Program put in place by Customs and Border Protection. It is intended that this program will meet the Australian standards for drug and alcohol testing and will include an education component to ensure Customs and Border Protection workers are aware of their responsibilities and rights. Customs and Border Protection is currently working with staff and their representatives to develop policies that are transparent, fair and consistent and allow the agency to ensure integrity.

It is intended that the Customs and Border Protection Drug and Alcohol Management Program will implement current 'best practice' to meet the Australian standards. These standards (Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (AS/NZS 4308:2008)) are reflected in the anticipated arrangements set out below.

In the absence of a positive test, it is expected that details of Customs workers subject to drug and alcohol testing will only be accessible to:

- members of the Drug and Alcohol Management Program team
- the laboratory technicians analysing the collected samples, and
- the Medical Review Officer.

In relation to drug testing procedures it is intended that each sample will only be identified by a reference number, therefore neither the laboratory staff nor the Medical Review Officer will know the identities of the persons being tested until such time the Medical Review Officer verifies a sample has returned a 'positive' test. Prior to a test being it is anticipated that only members of the Drug and Alcohol Management Program will be able to match a reference number to an individual staff member.

It is intended that prior to action being taken by Customs and Border Protection, the person being tested will have an opportunity to discuss the results with the Medical Review Officer. This information will be used by the Medical Review Officer in determining whether a

verified positive result is within acceptable parameters considering any declaration made by the individual being tested.

It is intended that any other information revealed about the person during this process will only be transmitted to Customs and Border Protection where it is determined the information is likely to cause a significant hazard to the workplace and where it has a direct relationship to the individual's functions and potential integrity. An example may include where a worker in a designated 'use of force' position has not declared they are taking medications that the Medical Review Officer considers may impact on their ability to use a firearm.

In relation to alcohol testing procedures, it is anticipated that Customs and Border Protection will use evidentiary breath analysing instruments which are recognised by Australian courts. This will ensure the integrity of the results.

The absence of a threshold trigger for exercising power in section 16C. By contract, the power in 16B requires 'reasonable suspicion' before it can be exercised, and the power in section 16D is triggered by the occurrence of particular incidents.

The Bill will provide for three categories of drug and alcohol testing. These include:

- Intelligence led (targeted) Testing – testing as the result of an allegation (section 16B)
- Mandatory Testing – random testing across the workforce to ensure compliance with Customs and Border Protection integrity standards (section 16C)
- Certain Incident Testing – testing of persons involved in certain incidents (section 16D)

It is correct that testing under section 16C will not rely on a threshold 'trigger' in the same way that testing under the other provisions will. Section 16C provides for the implementation of random testing, to which every Customs and Border Protection employee will be subject.

The ability to have a randomised approach is essential to ensure that Customs and Border Protection remains drug and alcohol free and will support an effective internal control framework. The reliance on 'triggers' – which will rely on both a Customs and Border Protection worker performing a certain act and other workers being able to recognise particular behaviours does not ensure this goal is met. The reliance on triggers means an incident will have already occurred by the time Customs and Border Protection identifies there is a problem. Section 16C will allow Customs and Border Protection to proactively manage potential integrity issues, strengthening the internal control framework.

The potential for the definition of 'prohibited drug' to be overly broad and in particular the absence of any specific criteria that the CEO must consider before specifying a drug as a 'prohibited drug' under section 16H.

I note the concern of the Committee, however, I also note that it is not always appropriate to be overly prescriptive in primary legislation. I believe the benefits of providing a definition are outweighed by the risks arising from evolving and changing nature of the drug environment. For example, The United Nations Office of Drugs and Crime reports in the 2012 World Drug Report:

> new psychoactive synthetic substances that mimic the effects of controlled substances and are chemically engineered to remain outside international control continues to evolve rapidly, with new substances being identified in the market.

and;

> in recent years, the market for new psychoactive substances has evolved rapidly. Unprecedented numbers and varieties of new psychoactive substances... are appearing on the market.

These examples highlight how new drugs and their variants are continually entering the market. I consider that providing a definition of 'prohibited drug' will confine the ability of Customs and Border Protection to meet the challenges presented by new drugs and will undermine the ability of the agency to maintain a drug free workplace. Defining the term 'prohibited drug' by legislative instrument will provide a lawful and flexible mechanism to allow the CEO of Customs and Border Protection to respond quickly to this ever-changing environment.

Further, this instrument is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the CEO will be subject to oversight by Parliament.

Further information on the safeguards that are applicable with regard to the use and disclosure of information collected.

As previously mentioned, it is intended that the information collected under the Drug and Alcohol Management Program will be subject to a number of safeguards, including the following:

- workers subject to testing will be identified by a reference number.
- access to the information collected as part of the drug and alcohol testing will be restricted to staff involved in the management of the Drug and Alcohol Management Program (as the area responsible for the management of the program, the selection of staff and facilitators between Customs and Border Protection and the persons performing the drug and alcohol testing), and
- the information will only be used by, or disclosed to, other workers/agencies in accordance with the Information Privacy Principles in section 14 of the *Privacy Act 1988* (Privacy Act).

In addition, it is anticipated that the information collected by the medical review officer will be treated as 'medical-in-confidence' until such time the Medical Review Officer verifies a test as being 'positive'. At this time only the relevant information (that is, the results of a positive test and any information that the person is likely to cause a significant hazard to the workplace and where it has a direct relationship to the individual's functions and potential integrity) will be released to the Professional Standards Coordination Unit. This information will subsequently be treated in accordance with the Privacy Act and existing information management guidelines.

In addition, the information released to Customs and Border Protection as part of this process will not include any information a worker may provide to the Medical Review Officer as mitigation of the positive result. This information will be retained by the Medical Review Officer and will be treated as 'medical-in-confidence'. The medical provider is also required to comply with the requirements under the Privacy Act in collecting, using and disclosing personal information.

It is anticipated that the Medical Review Officer will only be able to provide information relating to the detection of other substances to the Professional Standards Coordination Unit if he/she forms the opinion that the substances detected are likely to present a significant hazard to the workplace. This will be the case for designated positions (such as 'use of force' positions) where the use of drugs may present a workplace hazard and should have already been declared by the worker.

Whether these measures could lead to discrimination on the basis of an actual or perceived disability, contrary to article 26 of ICCPR and article 27 of the Convention on the Rights of Persons with Disabilities.

Customs and Border Protection has a responsibility under Commonwealth and State legislation to ensure that employees are not subjected to behaviour that may constitute unlawful harassment, discrimination or victimisation. Customs and Border Protection is committed to providing a work environment that is safe, fair and free from harassment, discrimination or bullying. All Customs workers have a responsibility to ensure that harassment is not tolerated.

This Bill does not limit the obligations of Customs and Border Protection under the existing Commonwealth and State legislation, related to equal opportunity, discrimination or harassment. In addition to legislation, inappropriate conduct may be a breach of the Australian Public Service Code of Conduct.

Customs – declaration of 'serious misconduct'

Whether a dismissal would be subject to any alternative review on its merits; and if not the reasons for considering that judicial review would be sufficient to remedy any flaws in the original decision making process.

The proposed power to make a declaration of serious misconduct only applies once a person has been dismissed and is separate to the dismissal process. The new power provided in the Bill does not alter or reduce the obligation on the agency to accord the person fair process when determining whether or not they have breached the Code of Conduct, and if they have, whether they should be dismissed as a sanction for that breach.

The declaration does not impact legal rights provided by other legislation or the common law, such as a General Protections claim under Part 3-1 of the *Fair Work Act*, claims under anti-discrimination legislation or judicial review (including under the *Administrative Decisions (Judicial Review) Act 1977*.

Whether the requirement to provide the worker with a copy of the declaration under s 15(A)6 would include information on the grounds for the declaration; and if not, what impact this might have on the effectiveness of judicial review.

The power to issue the declaration only applies in the 24 hours after dismissal. As part of the dismissal process the affected employee will receive notice of the ground(s) for his or her dismissal. Additionally, the employee receives written details of the allegations as part of the investigation process, the opportunity to respond to those allegations, as well as the opportunity to respond to the decision maker's finding and the proposed sanction of dismissal. This is part of the existing procedural requirements mandated by the *Public Service Act 1999* for determining breaches of the Code of Conduct.

It is anticipated that the agency's procedures will be amended to provide that where a sanction delegate is considering termination of employment as a sanction for misconduct, the delegate will also be required to consider whether or not the matter is one for which it may be appropriate for the CEO to consider a declaration of serious misconduct if the delegate does terminate employment. If a matter for which a delegate proposes termination of employment as the appropriate sanction is, in the delegate's view, also a matter that may warrant the making of a declaration, then the procedures will require that the delegate indicate this to the employee as part of the correspondence that goes to the employee from the delegate asking the employee to 'show cause' as to why his or her employment should not be terminated.

Without pre-judging the issue of sanction, this correspondence would outline the reasons why, in the delegate's view, if the sanction of dismissal is imposed that dismissal would warrant a referral to the CEO for consideration of a declaration of misconduct. This ensures that, in responding to the 'show cause' letter, the employee understands the not only the implications of the potential sanction but also understands that the delegate considers that the case may satisfy the criteria for the making of a declaration of serious misconduct such that the employee can address that issue as well as providing any mitigating information going to why dismissal is not an appropriate sanction in the circumstances.

Whether the measures will be subject to any independent oversight, other than the requirement to report to the Minister under s15A(7)

As noted in my second reading speech, Customs and Border Protection will put in place arrangements for a panel of persons independent of the CEO to advise the CEO on each occasion use of the power is being considered. The role of the panel would be to advise the CEO whether or not a written declaration of serious misconduct is appropriate, given the details of particular dismissal, the legislative criteria and the connection necessary to the agency's law enforcement functions.

Customs – orders by CEO

Examples of the types of situations contemplated where the objective of the measures might be frustrated by the inclusion of a derivative use immunity in new section 4C.

The intention of the power for the CEO to impose mandatory reporting requirements is to promote full disclosure by Customs workers of misconduct which they observe or are involved in, so that action can be taken against Customs workers involved in corruption. It is important that Customs be able to act on and undertake further investigations in relation to information obtained under these powers.

The effect of a derivative use immunity would be to ensure that any information derived by Customs, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure. Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions. If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person.

Whether consideration has been given to applying a narrower abrogation of the right against self-incrimination, for example, by retaining a derivative use immunity for evidence that could have been obtained without compelling the person to speak, but allowing other compelled evidence (such as results of drug tests and documents) to remain admissible.

The Bill provides for the CEO to be able to make orders about mandatory reporting as well as other matters regarding the administration of Customs and Border Protection. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. It was considered that the current provision provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting Customs and Border Protection and the privilege against self-incrimination.

I thank the Committee for its consideration of this Bill and trust that this information is of use in any further consideration.

The action officer for this matter in the Attorney-General's Department is [redacted] who can be contacted on [redacted]

Yours sincerely

[redacted]

Jason Clare

29 OCT 2012

THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT

12/5914

12 NOV 2012

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins Mary

I am writing to address issues raised by the Parliamentary Joint Committee on Human Rights in its Sixth Report of 2012 in relation to the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012.

The Committee has sought clarification as to whether an evidential burden would be an alternative way to achieve the purpose of proposed sections 372.1A and 376.3, which would impose a legal burden on a defendant to rebut the presumption that a carriage service was used in relation to those offences.

The Committee has also sought further information in relation to several aspects of the proposed amendments to the *Crimes (Superannuation Benefits) Act 1989* and *Australian Federal Police Act 1979*, which relate to superannuation orders.

Identity crime offences; false identity and air travel

The Committee has sought my views on whether it would be possible to impose an evidential burden, rather than a legal burden, on a defendant to rebut the presumption that a carriage service was used in relation to the offences in proposed section 372.1A and proposed section 376.3.

The presumptions apply where the prosecution is able to prove beyond reasonable doubt a specific element of the offences. In relation to proposed section 372.1A, the prosecution must prove that the person dealt in or obtained identification information. In relation to proposed section 376.3, the prosecution must prove that an air passenger ticket was obtained. If the prosecution does so, the effect of the presumption is that it is presumed that a person used a carriage service to do so, unless the defendant proves to the contrary.

The presumption places a legal burden on the defendant. This is consistent with section 13.4 of the Criminal Code Act 1995, which provides for the imposition of a legal burden of proof on a defendant where a law expressly creates a presumption that the matter exists unless the contrary is proven. In accordance with section 13.5 of the Criminal Code, a legal burden on the defendant must be discharged on the balance of probabilities.

The Committee has sought my views as to whether an evidential burden may offer a less restrictive alternative for achieving the provision's purpose. In my view, the use of an evidential burden would negate the value of including the presumption in the first place.

In accordance with subsection 13.3(6) of the Criminal Code, an evidential burden can be discharged by adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. An evidential burden does not displace the burden on the prosecution to prove a matter beyond a reasonable doubt, but rather acts to defer the burden. In the case of the offence in proposed section 372.1A, the defendant could potentially discharge the evidential burden simply by giving testimony that he or she did not use a carriage service. The burden would then fall back on the prosecution to disprove that matter beyond a reasonable doubt.

This would not avoid the practical problems encountered by law enforcement agencies in proving beyond a reasonable doubt that a carriage service was used to engage in the criminal conduct. Examples of the challenges faced by law enforcement agencies are set out at pages 6 and 42 of the Explanatory Memorandum for the Bill.

Superannuation forfeiture and recovery orders

The *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979* provide for the forfeiture and recovery of employer funded superannuation benefits that are payable, or have been paid, to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months' imprisonment. This legislative scheme has been in place since 1989.

Part 3 of Schedule 3 of the Bill amends the Crimes (Superannuation Benefits) Act and the Australian Federal Police Act (AFP Act) to clarify the operation of a long-standing legislative scheme to ensure that all employees who are convicted of corruption offences and sentenced to more than 12 months' imprisonment will be subject to the forfeiture and recovery of their employer funded superannuation.

The Committee believes that the amendments would expand the operation of the existing scheme and potentially involves substantial financial detriment for individuals and their dependents. The Committee has asked for further information about why it is necessary to clarify the existing law; whether the amendments have a retrospective effect; whether the amendments are consistent with the right to social security; whether the amendments amount to a disproportionate limitation on rights; and whether the affected individuals will be notified and have the opportunity to be heard before a forfeiture or recovery order is made.

The impetus for these amendments was the decision of the decision of the New South Wales Supreme Court in *Director of Public Prosecutions (Cth) v Della-Vedova* (2010) 75 NSWLR 602. In that case, the defendant was employed by the Commonwealth for three separate and distinct periods of employment. The defendant was convicted of two corruption offences,

which were both committed during the third period of Commonwealth employment. The court held that a superannuation order could not be made in relation to employer funded superannuation benefits paid in relation to a person for separate and distinct periods of Commonwealth employment that preceded the commission of the offences that gave rise to the making of the superannuation order.

If the legislation is not amended, it may apply less favourably to those employees who have one continuous period of employment as opposed to those who have had several separate periods of employment. For example, upon committing a corruption offence, a person with one long and continuous period of employment may have a superannuation order made against all their employer funded superannuation benefits. In contrast, a person with separate periods of employment may have a superannuation order made only in respect of the employer funded superannuation benefits that accrued during the period in which they committed the corruption offence. These amendments will ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee.

Prior to this case, it was thought that the existing scheme applied equally to employees who have one continuous period of employment, as well as to those who have had several separate periods of employment. Therefore, my view is that Commonwealth employees who committed a corruption offence prior to the commencement of the amendments, and are convicted and sentenced to more than 12 months' imprisonment, would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme.

It is very important that all employees are treated equally, regardless of whether they have one continuous period of employment or several separate periods of employment. This supports the implementation of a clear public policy objective of ensuring that superannuation benefits are not paid from public monies to Commonwealth employees convicted of corruption offences committed in the course of their employment.

The amendments are not retrospective. The amendments will apply to offences that were committed before or after commencement, but only if an application for a superannuation order is made in relation to those offences on or after the commencement date. This does not amount to an infringement of the prohibition on retrospective criminal laws, or laws imposing greater punishments than those which would have been available at the time the acts were done.

In relation to the Committee's concerns about the right to social security, the right to privacy (including the rights of family and children) and disproportionality, the amendments will not affect these rights.

The right to social security requires that a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Neither the amendments nor the existing legislative scheme limits a person's access to social security benefits, payments for medical benefits and hospital services (Medicare) or associated schemes.

Further, in relation to the protection of the home and family, and the rights of family and children, I note that if a person suffers financial detriment as a result of being convicted of serious corruption offences and losing their employer funded superannuation contributions as a result, this does not preclude the person from working in other employment or accessing social security benefits.

Under the existing scheme, a court cannot take into account the effect of a forfeiture or recovery order on a family or children, or determine that only a proportion of employer funded contributions should be forfeited or recovered. However, the existing scheme does not amount to a disproportionate limitation on rights. The purpose of the existing scheme is to provide a strong financial disincentive to ensure that the consequences of serious criminal activity, such as official corruption, are less attractive. Minor offences are effectively outside the scope of the scheme, which only operates where a person is sentenced to more than 12 months' imprisonment in relation to a corruption offence. It is a matter for the sentencing court to determine the person's level of culpability and the seriousness of the offence. The employee's own superannuation contributions (and interest on that sum) cannot be subject to forfeiture or recovery.

The amendments do not affect the notification arrangements under the existing scheme. Before I authorise the Commonwealth Director of Public Prosecution (CDPP) to make an application to a court for a superannuation order, as a matter of administrative practice, my Department notifies affected individuals about proposed forfeiture or recovery action and seeks their responses. Further, the CDPP is required to take reasonable steps to give written notice to the person in respect of whom the superannuation order is sought. The person may also make submissions to the court about applications for a superannuation order. The court's decision is subject to the usual avenues of appeal available from that court. Superannuation orders are automatically revoked if the person's conviction is later quashed, or the person's sentence is reduced or otherwise changed so that it no longer meets the condition precedent of 12 months' imprisonment.

For the reasons outlined above, I consider the approach set out in the amendments to be appropriate. The amendments do not significantly expand the operation of the existing scheme, but rather ensure that the scheme will apply equally to all employees in accordance with the long-standing public policy objective of deterring official corruption.

I hope this information assist the Committee.

Yours in friendship

[redacted]

NICOLA ROXON

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

26 NOV 2012

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letter of 31 October 2012 in relation to the Fair Entitlements Guarantee Bill 2012 (the Bill).

I note that the letter seeks clarification on several matters set out in the Parliamentary Joint Committee on Human Rights' (the Committee's) Sixth Report of 2012 and trust that this response addresses the Committee's concerns.

Right to Privacy – clauses 42 to 45

The Committee has sought advice about whether consideration should be given to including express privacy obligations for contractors in the Bill. Clause 42 of the Bill permits the Department of Education, Employment and Workplace Relations to disclose personal information about an employer or employee to a person who is contracted by the Commonwealth for the purposes of passing on payments made under the Act to recipients. In practice, such contractors will almost always be large professional organisations, for example, accounting firms and firms specialising in insolvency.

As noted in the statement of compatibility with human rights, contractors will be bound by the relevant privacy clauses in their contracts. In addition, contractors will hold professional obligations and may also have obligations under the National Privacy Principles in the *Privacy Act 1988.*

It is considered a contractor's contractual obligations, together with their professional regulation and obligations under the *Privacy Act 1988*, will constitute adequate safeguards to prevent the arbitrary use of personal information. As such, it is not considered necessary to include express privacy obligations for contractors in the legislation.

The Committee has also sought advice about why the Bill does not explicitly prohibit the unauthorised disclosure of personal information. Clauses 42 to 45 of the Bill specify the parties to which personal information may be disclosed and the purposes for which such disclosure may take place. Importantly, any disclosure of personal information made under the Bill would be covered by the Information Privacy Principles or if applicable may be covered by National Privacy Principles in the *Privacy Act 1988.* As these principles prohibit

the unauthorised disclosure of personal information, it is not considered necessary to include express provisions prohibiting the unauthorised disclosure of personal information in the Bill.

Rights to Social Security and Non-discrimination – clauses 11 to 13

The Committee has requested advice about the compatibility of clauses 11, 12 and 13 of the Bill with the right to social security in article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) and the right to non-discrimination in article 26 of the International Covenant on Civil and Political Rights (the ICCPR). The rights to social security and non-discrimination are not absolute rights and can be subjected to permissible limits.

Clauses 11 to 13 of the Bill exclude certain persons from being eligible to receive an advance limiting rights to social security and non-discrimination for those persons. Set out below are explanations about the objectives of each clause, and why the exclusions from eligibility are reasonable, necessary and proportionate to those objectives.

Clause 11

Subclause 11(1) of the Bill provides a person who is an 'excluded employee' for the purposes of section 556 of the *Corporations Act 2001* will not be eligible for an advance under the Act. This encompasses an employee who, at any time in the 12 months prior to the winding up, was a director, spouse of a director, or a relative of a director of the employer being wound up. Subclause 11(2) of the Bill provides that a relative, spouse or de facto partner of an employer who is or was bankrupt under the *Bankruptcy Act 1966* is not eligible for an advance. Subclause 11(3) of the Bill provides a similar exclusion for relative, spouse or de facto partner of a partner in a partnership.

Clause 11 of the Bill excludes the abovementioned persons from receiving an advance to prevent a person who had a direct relationship with the director, employer or partner of a business from financially benefiting from the wind up or bankruptcy of a business. This approach reflects the policy intent of section 556 of the *Corporations Act 2011* and is consistent with principles of good corporate governance. Further, in the absence of such a provision, the Bill would authorise payments for entitlements that are not payable to such persons in winding up proceedings.

It is considered consistency with corporations law is a legitimate objective and excluding directors, employers and partners or their spouses, de facto partners or relatives from receiving an advance under the Bill is reasonable, necessary and proportionate to that objective.

Clause 12

Clause 12 of the Bill provides that a person is not eligible for an advance where the Secretary is satisfied that:

- a person had been engaged under other arrangements (such as a contractor) and transfers to employment within 6 months of the end of the employment or the appointment of an insolvency practitioner for the employer; and
- it was reasonable to expect at the start of that employment that the employer would not be able to meet the employer's obligations under the terms and conditions of that employment for the actual duration and end of that employment.

Clause 12 prevents employers from employing a person solely for the purposes of ensuring that a person will be eligible for an advance under the Act. Importantly, subclause 12(1)(c) ensures that a person is excluded from receiving an advance only where it was 'reasonable' to expect that the employer would not be able to continue employing the person under the same terms and conditions beyond the end of their employment. As such, this clause pursues a legitimate objective as it prevents an employer from undermining the Act through employment arrangements which are established solely for the purpose of receiving an advance. It is considered that excluding persons employed under such arrangements from receiving an advance is reasonable, necessary and proportionate to that objective.

Clause 13

Clause 13 of the Bill provides that a person is not eligible for an advance if their former employer was within the scope of the Special Employee Entitlements Scheme for Ansett group employees (SEESA). SEESA was established to provide financial assistance to Ansett group employees whose employment was terminated on or after 12 September 2001. It enabled former employees to receive unpaid wages, annual leave, long service leave, pay in lieu of notice and up to a maximum of eight weeks of their redundancy entitlement.

Clause 13 excludes this class of persons from receiving an advance under the Act to prevent such persons from receiving financial assistance from two analogous schemes or selecting a scheme that would provide the most favourable outcome. In this way, clause 13 ensures that the payment of financial assistance for Ansett group employees is equitable. In addition, this clause preserves the status quo under the General Employee Entitlements and Redundancy Scheme (GEERS). As such, it is considered that clause 13 pursues a legitimate objective and excluding persons who fall within the scope of SEESA from receiving an advance under the Bill is reasonable, necessary and proportionate to that objective.

I trust the information provided is helpful.

Regards

[redacted]

BILL SHORTEN

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
MINISTER ASSISTING THE PRIME MINISTER ON DIGITAL PRODUCTIVITY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

31 OCT 2012

Dear Mr Harry Jenkins

Broadcasting Services (Simulcast Period End Date – Remote Licence Areas) Determination 2012

Thank you for your letter of 12 September 2012 concerning the statement of compatibility with human rights (SOC) accompanying the above determination.

The Australian Communications and Media Authority (ACMA), which made the determination, has advised that the reference to an Australian reservation to Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) is incorrect and was made in error.

The ACMA advises that it takes its compliance with matters related to human rights very seriously and regrets the error. The ACMA confirms that the above determination engages the human rights and freedoms protected by Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 19(2) of the ICCPR. Article 15(1) of the ICESCR protects the right of everyone to take part in cultural life. Article 19(2) of the ICCPR protects freedom of expression, including the right to seek, receive and impart information and ideas of all kinds, and the means of their dissemination. I am advised that the determination is compatible with those human rights.

The ACMA advises that the effect of the determination is that broadcasters must cease transmitting services in analog mode in the remote licence areas and only digital transmissions are permitted after that time. The ACMA further advises that the change in the transmission mode does not limit the fundamental rights to freedom of expression and cultural participation, as the viewer continues to have access to broadcasting services. This change to digital mode is part of a progressive switchover from analog to digital television services across Australia, which will deliver spectrally more efficient and higher quality transmissions that will enhance the viewer experience.

Parliament House, CANBERRA ACT 2600 | **Tel** 02 6277 7480 | **Fax** 02 6273 4154 | **Email** minister@dbcde.gov.au

I trust this information addresses the Committee's concerns. Thank you for bringing those concerns to my attention.

Yours sincerely

[redacted]

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

19 OCT 2012

Harry
Dear Chair

Thank you for your letter of 10 October 2012 concerning the statement of compatibility with human rights for the *Coal Mining Industry (Long Service Leave) Legislation Amendment Regulation 2012* ('the Regulation').

In your letter, you seek clarification on the regulation's compatibility with article 7 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').

Background to the Regulation

The background to the Regulation is that on 1 January 2012, the *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011* ('the Amendment Act') commenced. The Amendment Act established a statutory long service scheme for all eligible employees in the black coal mining industry where previously the long service leave scheme in that industry had been awards-based or agreement-based.

Prior to the Amendment Act, an employee in the black coal mining industry could generally only have a break in service in that industry of 3 months before losing any period of qualifying service they had completed prior to their break of more than 3 months. Although in some circumstances, an employee could have a break of more than 3 months without losing their prior qualifying service, this was often discretionary and was not a right.

From 1 January 2012, because of the Amendment Act, an employee in the black coal mining industry can have a break in service in that industry of up to 8 years without losing their prior qualifying service.

Schedule 5 of the 2011 Amendment Act contained transitional provisions which allowed eligible employees, and former eligible employees to claim for periods of qualifying service between 1 January 2000 and 31 December 2011, if the periods of qualifying service were not separated by a break of 8 years or more from another period of qualifying service.

Effect of the Regulation

For the Coal Mining Industry (Long Service Leave Funding) Corporation ('the Corporation') to recognise the qualifying service as provided for by Item 3 of Schedule 5 of the Amendment Act, former eligible employees were required to provide the Corporation with certain information before 30 September 2012 (or such later date as prescribed by the regulations). The 31 March 2013 is now prescribed by clause 4 of the Regulation.

The Corporation is then required to calculate and notify the person of the records the Corporation has on the person's long service leave entitlement on or before 31 December 2012 (or such later date as prescribed by the regulations). The 30 June 2013 is now prescribed by clause 6 the Regulation.

In practice, this allows former eligible employees an additional 6 months to apply for recognition of their prior qualifying service, and, consequentially, the Corporation an additional 6 months to notify former eligible employees of the records it had relating to their long service leave entitlements.

The Corporation was also required by item 6 of Schedule 5 of the Amendment Act to calculate and notify eligible employees of the records the Corporation has on the person's long service leave entitlement on or before 30 September 2012 (or such later date as prescribed by the regulations). The 30 March 2013 is now prescribed by clause 5 the Regulation.

The changes in date provided for by the Regulation do not affect an eligible employee or former eligible employee's entitlement to long service leave.

Finally, the Corporation is given an additional 9 months to seek actuarial advice on the sufficiency of the Coal Mining Industry (Long Service Leave) Fund, to allow time for the data in the employer returns due 28 July 2013 to be incorporated in the request for actuarial advice.

These extensions were necessary because it was realised by the Corporation that the calculation and notification process would take longer than originally expected, and the extension in time would allow for the process to be carried out correctly and comprehensively. It is also reasonable to extend the time by 6 months as the employee's entitlement is not affected by the delay. Further, the employees did not have the new entitlement until the commencement of the Amendment Act on 1 January 2012. That is, the employees would not have had a reliance on or expectation of the entitlement given by the Amendment Act until 1 January 2012 at the earliest.

Article 7 of ICESCR

The Regulation supports the Amendment Act in its object, among others, of providing minimum entitlements and rights in respect of long service for eligible employees. Further, the Regulation gives former eligible employees an extra 6 months in which to apply to the Corporation to recognise their service as provided for by the Amendment Act. Consequently, it is reasonable that the Corporation is allowed an extra 6 months to calculate and notify them of their entitlements as recorded by the Corporation.

By extending the time available for employees to lodge applications to the Corporation, the Regulation promotes a person's right to enjoyment of just and favourable conditions of work, and in particular, periodic holidays with pay, as contained in article 7 of the ICESCR.

Because the Corporation is permitted to take an extra 6 months in addition to the time provided for in the Amendment Act to notify an existing eligible employee of their long service leave entitlement as recorded by the Corporation, the possibility that some employees will miss this opportunity to qualify for long service leave is reduced. This also promotes a person's right to enjoyment of just and favourable conditions of work, and in particular, periodic holidays with pay, as contained in article 7 of the ICESCR.

I trust the information provided is helpful.

Regards

[redacted]

BILL SHORTEN

29 OCT 2012

Appendix 2

Full list of Legislative Instruments registered with FRLI 17 October–16 November 2012

Legend: C – *Comments made*; D – *Deferred consideration* * – *Advisory Letter*.

Instrument Name	**FRLI ID**	
Accountability Amendment Principles 2012 (No. 1)	F2012L02060	-
Allocation Amendment Principles 2012 (No. 1)	F2012L02055	-
Amendment - List of Specimens taken to be Suitable for Live Import (29/10/2012)	F2012L02168	*
Amendment of List of Exempt Native Specimens - Coral Reef Fin Fish Fishery (12/10/2012)	F2012L02100	*
Amendment of List of Exempt Native Specimens - Deep Water Fin Fish Fishery (17/10/2012)	F2012L02066	*
Amendment of Statement of Principles concerning malignant neoplasm of the prostate No. 77 of 2012	F2012L02076	-
Amendment of Statement of Principles concerning malignant neoplasm of the prostate No. 78 of 2012	F2012L02077	-
ASIC Class Order [CO 12/1209]	F2012L02157	*
ASIC Class Order [CO 12/1367]	F2012L02109	*
ASIC Class Rule Waiver [CW 12-1520]	F2012L02106	*
Australia New Zealand Food Standards Code - Standard 1.4.2 - Maximum Residue Limits Amendment Instrument No. APVMA 10, 2012	F2012L02068	-
Australian Prudential Regulation Authority (confidentiality) determination No. 20 of 2012	F2012L02090	*
Australian Renewable Energy Agency Determination No. 2 of 2012	F2012L02170	-
Australian Research Council Act 2001 - Industrial Transformation Research Hubs - Funding Rules for funding commencing in 2012	F2012L02155	-
Australian Research Council Act 2001 - Industrial Transformation Training Centres - Funding Rules for funding commencing in 2013	F2012L02156	-
Broadcasting Services (Digital-Only Local Market Areas for Remote Central and Eastern Australia TV1 and Remote Central and Eastern Australia TV2) Determination (No. 1) 2012	F2012L02108	-
Broadcasting Services (Digital-Only Local Market Areas for Tasmania TV1) Determination (No. 3) 2012	F2012L02140	-

Instrument Name	FRLI ID	
CASA 320/12 - Authorisation and permission - helicopter winching operations	F2012L02050	*
CASA 341/12 - Direction - flight time limitations for helicopter mustering operations	F2012L02139	*
CASA 356/12 - Instructions - use of Global Navigation Satellite System (GNSS)	F2012L02141	-
CASA 364/12 - Direction - number of cabin attendants (National Jet Systems)	F2012L02169	-
CASA ADCX 023/12 - Revocation of Airworthiness Directives	F2012L02065	*
CASA EX154/12 - Exemption - flight in Class D airspace within 16 kilometres of an aerodrome	F2012L02067	*
CASA EX156/12 - Exemption - from standard take-off and landing minima - Thai Airways	F2012L02064	*
CASA EX159/12 - Exemption - certified aerodrome operators	F2012L02072	*
CASA EX163/12 - Exemption - recency requirements for night flying (Virgin Australia International Airlines Pty Ltd)	F2012L02146	*
CASA EX164/12 - Exemption - use of radiocommunication systems in firefighting operations (Western Australia)	F2012L02174	*
CASA OAR 140/12 - Determination of airspace and controlled aerodromes etc	F2012L02181	-
CASA OAR 141/12 - Designation of air routes - Determination of conditions for use of air routes	F2012L02180	-
Certification, Quality of Care and Sanctions Amendment Principles 2012	F2012L02062	-
Community Care Subsidy Amendment Principles 2012 (No. 1)	F2012L02056	-
Community Visitors Grant Amendment Principles 2012 (No. 1)	F2012L02059	-
Competition and Consumer (Tobacco) Amendment Information Standard 2012 (No. 1)	F2012L02145	-
Competition and Consumer Act 2010 - Consumer Protection Notice No. 5 of 2012 - Imposition of Permanent Ban on Small, High Powered Magnets	F2012L02171	-
Currency (Perth Mint) Determination 2012 (No. 2)	F2012L02052	-
Customs Amendment Regulation 2012 (No. 8)	F2012L02159	-
Defence Determination 2012/57, Army - targeted rank and employment category completion bonus	N/A	*

Instrument Name	FRLI ID	
Defence Determination 2012/58, Post index and Army bonus - amendment	N/A	*
Defence Determination 2012/59, District allowance - amendment	N/A	*
Defence Determination 2012/60, Living-in, maternity leave and transfer allowance - amendment	N/A	*
Defence Determination 2012/62, Additional risk insurance and deployment allowance - amendment	N/A	*
Defence Determinatipn 2012/61, International campaign allowance - amendment	N/A	*
Environment Protection and Biodiversity Conservation (Ashmore Reef National Nature Reserve) Amendment Proclamation 2012 (No. 1)	F2012L02186	-
Environment Protection and Biodiversity Conservation (Cartier Island Marine Reserve) Amendment Proclamation 2012 (No. 1)	F2012L02187	-
Environment Protection and Biodiversity Conservation (Commonwealth Marine Reserves) Proclamation 2012	F2012L02188	-
Environment Protection and Biodiversity Conservation (Mermaid Reef Marine National Nature Reserve) Amendment Proclamation 2012 (No. 1)	F2012L02183	-
Environment Protection and Biodiversity Conservation (Ningaloo Marine Park - Commonwealth Waters) Amendment Proclamation 2012 (No. 1)	F2012L02184	-
Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Proclamation 2012	F2012L02158	-
Environment Protection and Biodiversity Conservation Declared State or Territory Declaration 2012	F2012L02160	*
Federal Financial Relations (General Purpose Financial Assistance) Determination No. 43 (October 2012)	F2012L02070	-
Financial Management and Accountability Act 1997 Determination 2012/28 – Section 32 (Transfer of Functions from NNTT to FEDCA)	F2012L02112	-
Financial Management and Accountability Amendment Regulation 2012 (No. 8)	F2012L02091	*

Instrument Name	FRLI ID	
Food Standards (Application A1038 – Irradiation of Persimmons) Variation	F2012L02175	-
Greenhouse and Energy Minimum Standards (Air Conditioners and Heat Pumps) Determination 2012	F2012L02129	-
Greenhouse and Energy Minimum Standards (Ballasts for Fluorescent Lamps) Determination 2012	F2012L02133	-
Greenhouse and Energy Minimum Standards (Close Control Air Conditioners) Determination 2012	F2012L02124	-
Greenhouse and Energy Minimum Standards (Clothes Washing Machines) Determination 2012	F2012L02117	-
Greenhouse and Energy Minimum Standards (Digital Television Set-top Boxes) Determination 2012	F2012L02116	-
Greenhouse and Energy Minimum Standards (Dishwashers) Determination 2012	F2012L02119	-
Greenhouse and Energy Minimum Standards (Double-capped Fluorescent Lamps) Determination 2012	F2012L02127	-
Greenhouse and Energy Minimum Standards (Electric Water Heaters) Determination 2012	F2012L02125	-
Greenhouse and Energy Minimum Standards (External Power Supplies) Determination 2012	F2012L02120	-
Greenhouse and Energy Minimum Standards (Household Refrigerating Appliances) Determination 2012	F2012L02126	-
Greenhouse and Energy Minimum Standards (Incandescent Lamps for General Lighting Services) Determination 2012	F2012L02122	-
Greenhouse and Energy Minimum Standards (Liquid-chilling Packages Using the Vapour Compression Cycle) Determination 2012	F2012L02123	-
Greenhouse and Energy Minimum Standards (Power Transformers) Determination 2012	F2012L02135	-
Greenhouse and Energy Minimum Standards (Refrigerated Display Cabinets) Determination 2012	F2012L02131	-
Greenhouse and Energy Minimum Standards (Registration Fees) Instrument 2012	F2012L02134	-
Greenhouse and Energy Minimum Standards (Rotary Clothes Dryers) Determination 2012	F2012L02121	-

Instrument Name	FRLI ID	
Greenhouse and Energy Minimum Standards (Self-ballasted Compact Fluorescent Lamps for General Lighting Services) Determination 2012	F2012L02132	-
Greenhouse and Energy Minimum Standards (Television) Determination 2012	F2012L02115	-
Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2012	F2012L02128	-
Greenhouse and Energy Minimum Standards (Transformers and Electronic Step-down Converters for ELV Lamps) Determination 2012	F2012L02130	-
Health Insurance (Allied Health Services) Amendment Determination 2012 (No. 4)	F2012L02095	-
Health Insurance (Bone Densitometry) Determination 2012	F2012L02098	-
Health Insurance (Cleft Lip and Cleft Palate services) Determination 2012	F2012L02113	-
Health Insurance (Diagnostic Imaging Capital Sensitivity) Amendment Determination 2012 (No. 2)	F2012L02097	-
Health Insurance (Diagnostic Imaging Services Table) Regulation 2012	F2012L02093	-
Health Insurance (Endovenous Laser Therapy) Determination 2012 (No. 2)	F2012L02063	-
Health Insurance (General Medical Services Table) Amendment Regulation 2012 (No. 4)	F2012L02103	-
Health Insurance (General Medical Services Table) Regulation 2012	F2012L02101	-
Health Insurance (Gippsland and South Eastern New South Wales Mobile MRI Service and Rockhampton, Bundaberg and Gladstone Mobile MRI Service) Determination 2012	F2012L02118	-
Health Insurance (Midwife and Nurse Practitioner) Amendment Determination 2012 (No. 1)	F2012L02099	-
Health Insurance (Pathology Services Table) Regulation 2012	F2012L02094	-
Health Workforce Australia (Eligibility) Instrument 2012 (No. 1)	F2012L02069	-
High Court Rules 2004 (Amendment) (November 2012)	F2012L02165	-
Higher Education Provider Approval No. 11 of 2012	F2012L02166	-
Higher Education Provider Approval No. 12 of 2012	F2012L02167	-
Higher Education Provider Guidelines 2012	F2012L02136	-

Instrument Name	FRLI ID	
Higher Education Support Act 2003 - Amendment No. 12 to the Commonwealth Grant Scheme Guidelines No. 1 (16/10/2012)	F2012L02105	-
Higher Education Support Act 2003 - Revocation of Approval as a VET Provider (Minister for Employment, Higher Education and Skills (SA))	F2012L02189	-
Higher Education Support Act 2003 - VET Provider Approval (No. 22 of 2012)	F2012L02071	-
Higher Education Support Act 2003 - VET Provider Approval (No. 23 of 2012)	F2012L02177	-
Insurance Contracts Amendment Regulation 2012 (No. 2)	F2012L02163	-
Licence Area Plan - Remote and Regional Western Australia Analog Television - Variation No. 1 of 2012	F2012L02176	-
Marine Order 21, issue 8	F2012L02149	C
Marine Order 50, issue 6	F2012L02150	*
Marine Orders Part 34 Amendment 2012 (No. 1)	F2012L02148	*
Migration Act 1958 - Determination under section 175A - Eligible Passports - October 2012	F2012L02053	-
Migration Regulations 1994 - Specification under paragraph 1222(3)(aa) - Class of Persons - November 2012	F2012L02162	-
Military Justice (Interim Measures) (Remuneration and Entitlements) Amendment Regulation 2012 (No. 2)	F2012L02092	*
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2012 (No. 9) (No. PB 96 of 2012)	F2012L02107	-
National Health (Immunisation Program - Designated Vaccines) Variation Determination 2012 (No. 2)	F2012L02185	-
National Health (Remote Aboriginal Health Services Program) Special Arrangements Amendment Instrument 2012 (No. 3) (No. PB 102 of 2012)	F2012L02153	*
National Health (Residential Medication Chart) Amendment Determination 2012 (No. 2) (No. PB 101 of 2012)	F2012L02154	*
National Health (Weighted average disclosed price - interim supplementary disclosure cycle) Amendment Determination 2012 (No. 2) (No. PB 98 of 2012)	F2012L02147	-
Paid Parental Leave Amendment Rules 2012 (No. 1)	F2012L02054	-

Instrument Name	FRLI ID	
Primary Industries Legislation Amendment Regulation 2012 (No. 2)	F2012L02088	-
Primary Industries Legislation Amendment Regulation 2012 (No. 3)	F2012L02089	-
Private Health Insurance (Benefit Requirements) Amendment Rules 2012 (No. 6)	F2012L02111	-
Private Health Insurance (Benefit Requirements) Amendment Rules 2012 (No. 7)	F2012L02114	-
Private Health Insurance (Benefit Requirements) Amendment Rules 2012 (No. 8)	F2012L02151	-
Private Health Insurance (Complying Product) Amendment Rules 2012 (No. 8)	F2012L02137	-
Privileges and Immunities Legislation Amendment Determination 2012 (No. 1)	F2012L02096	-
Professional Standards Scheme Legislation Amendment Regulation 2012 (No. 1)	F2012L02102	-
Radiocommunications (Datacasting Transmitter Licence Allocation) Revocation Determination 2012	F2012L02172	-
Radiocommunications (Spectrum Access Charges - 800 MHz Band) Determination 2012 (No. 2)	F2012L02173	-
Remuneration Tribunal (Members' Fees and Allowances) Amendment Regulation 2012 (No. 1)	F2012L02164	*
Remuneration Tribunal Determination 2012/22- Remuneration and Allowances for Holders of Public Office and Specified Statutory Offices	F2012L02104	*
Resale Royalty Right for Visual Artists (Format of Notice of Commercial Resale) Determination (No. 1) 2012	F2012L02110	*
Residential Care Grant Amendment Principles 2012 (No. 1)	F2012L02061	-
Residential Care Subsidy Amendment Principles 2012 (No. 3)	F2012L02057	-
Safety Rehabilitation and Compensation Act 1988 - Section 34D - Variation of Criteria for Approval or Renewal of Approval as a Workplace Rehabilitation Provider (Rehabilitation Program Provider) (17/10/2012)	F2012L02075	*
Safety, Rehabilitation and Compensation Act 1988 - Section 34E - Variation of Operational Standards for Workplace Rehabilitation Providers (Rehabilitation Program Providers) (17/10/2012)	F2012L02074	*

Instrument Name	FRLI ID	
Safety, Rehabilitation and Compensation Act 1988 - Section 34S - Approval of Form of Application for Approval as a Workplace Rehabilitation Provider (Rehabilitation Program Provider) (17/10/2012)	F2012L02079	*
Safety, Rehabilitation and Compensation Act 1988 - Section 34S - Approval of Form of Application for Renewal of Approval as a Workplace Rehabilitation Provider (Rehabilitation Program Provider) (17/10/2012)	F2012L02078	*
Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1)	F2012L02182	D
Social Security (Administration) (Schooling Requirements - Person Responsible) Specification 2012	F2012L02179	D
Statement of Principles concerning acute lymphoblastic leukaemia No. 75 of 2012	F2012L02087	-
Statement of Principles concerning acute lymphoblastic leukaemia No. 76 of 2012	F2012L02086	-
Statement of Principles concerning giant cell arteritis No. 71 of 2012	F2012L02082	-
Statement of Principles concerning giant cell arteritis No. 72 of 2012	F2012L02083	-
Statement of Principles concerning myeloma No. 69 of 2012	F2012L02081	-
Statement of Principles concerning myeloma No. 70 of 2012	F2012L02080	-
Statement of Principles concerning solar keratosis No. 73 of 2012	F2012L02084	-
Statement of Principles concerning solar keratosis No. 74 of 2012	F2012L02085	-
Stronger Futures in the Northern Territory (Food Security Areas) Rule 2012	F2012L02073	D
Superannuation (CSS) (Eligible Employees - Exclusion) Amendment Declaration 2012 (No. 2)	F2012L02144	-
Superannuation (CSS) (Eligible Employees - Inclusion) Amendment Declaration 2012 (No. 2)	F2012L02138	-
Superannuation (PSS) Membership Inclusion Amendment Declaration 2012 (No. 2)	F2012L02143	-
Tertiary Education Quality and Standards Agency (Register) Guidelines Amendment 2012	F2012L02152	*
Therapeutic Goods Amendment Regulation 2012 (No. 3)	F2012L02161	*

Instrument Name	FRLI ID	
Therapeutic Goods Information (Outcomes of Compliance Reviews of Listed Complementary Medicines) Specification 2012	F2012L02142	-
User Rights Amendment Principles 2012 (No. 4)	F2012L02058	-
Western Tuna and Billfish Fishery Total Allowable Commercial Catch Determination 2013	F2012L02178	-

Appendix 3

Outstanding responses to letters seeking further information

OUTSTANDING RESPONSES TO LETTERS SEEKING FURTHER INFORMATION

Bills

Bill name	Sponsor	Report #	Letter Sent
Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012	Bandt	1	22/08/2012
Renewable Energy (Electricity) Amendment (Excessive Noise from Wind Farms) Bill 2012)	Madigan/Xenophon	1	22/08/2012
Tax Laws Amendment (2012 Measures No. 4) Bill 2012	Treasurer	1	22/08/2012
Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012	SEWPAC	3	19/09/2012
Competition and Consumer Amendment (Australian Food Labelling) Bill 2012	Bandt	5	10/10/2012
Competition and Consumer Amendment (Australian Food Labelling) Bill 2012 [No. 2]	Milne	5	10/10/2012
Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012	Treasurer	5	10/10/2012
Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012	Treasurer	5	10/10/2012
Tax Law Amendment (2012 Measures No. 5) Bill 2012	Treasurer	5	10/10/2012
Regulatory Powers (Standard Provisions) Bill 2012	Attorney-General	6	31/10/2012
Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012	Hanson-Young	6	31/10/2012
Superannuation Legislation Amendment (New Zealand Arrangement) Bill 2012	Treasurer	6	31/10/2012
Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 and a related bill	Assistant Treasurer	6	31/10/2012

Legislative Instruments

Instrument name and FRLI ID	Sponsor	Report #	Letter Sent
Defence Determination 2012/33, Salary, bonuses, allowances, relocation, housing and meals – amendment [N/A]	Defence	2	12/09/2012
Superannuation Industry (Supervision) Amendment Regulation 2012 (No. 2) [F2012L01654]	Treasurer	2	12/09/2012
Customs Act 1901 - CEO Directions No. 1 of 2012 [F2012L01684]	Attorney-General	3	19/09/2012
Emergency Management Ordinance 2012 (CI) [F2012L02038] and Emergency Management Ordinance (CKI) [F2012L02040]	Regional Australia	6	31/10/2012