SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2005

The Committee presents its Fourth Report of 2005 to the Senate.

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

AusLink (National Land Transport) Bill 2004

Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005

Medical Indemnity Legislation Amendment Act 2005

AusLink (National Land Transport) Bill 2004

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2005.* The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 28 April 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2005

[Introduced in the House of Representatives on 9 December 2004. Portfolio: Transport and Regional Services]

The bill establishes a new framework for Australian Government funding of land transport infrastructure. It requires the Minister to determine a National Land Transport Network, consisting of nationally significant road and rail links.

The bill provides for funding of relevant projects and activities, and sets out the conditions that apply to Commonwealth funding and approval of AusLink projects. The bill also extends funding for the Roads to Recovery Program until 30 June 2009.

Parliamentary scrutiny of the exercise of legislative power

One of the key principles underlying the work of the Scrutiny of Bills Committee is that Parliament properly carry out its legislative function. Parliament should not inappropriately delegate its legislative power to the Executive and, where it does delegate legislative powers, Parliament must address the question of how much oversight it should maintain over the exercise of the delegated power.

The criterion in standing order 24(1)(a)(v) requires that the Committee draw to the attention of the Senate provisions which seek to delegate legislative power but fail to provide for the proper auditing of its use.

One area in which a bill may insufficiently subject the exercise of delegated power to parliamentary scrutiny is in giving a power to make subordinate legislation which is not to be tabled in the Parliament or, where tabled, is free from the risk of disallowance. These issues are directly raised where a provision declares that an instrument (that appears to be legislative in character) is ***not*** a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. That Act, which commenced on 1 January 2005, provides the general framework for the registration, tabling, disallowance and 'sunsetting' of legislative instruments. It also provides means to exclude specific instruments from aspects of the tabling and disallowance regime.

This bill raises, across a variety of provisions, the question of the adequacy of parliamentary oversight of delegated legislation. These are addressed below. One difficulty the Committee has found in considering this legislation is that, in a number of areas, there is little provided by way of explanation to justify the exclusion of instruments from the usual tabling and disallowance regime. As a general rule, the Committee would expect the explanatory memorandum accompanying a bill to provide sufficient explanation to enable the Committee and, indeed, the Parliament to assess the need for such an exclusion.

Legislative Instruments Act – Disallowance and sunset provisions Subclause 5(4)

Subclause 5(1) requires the Minister to determine, in writing, a National Land Transport Network. Subclause 5(4) provides that such a determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but goes on to provide that neither section 42 of that Act (which relates to the disallowance of legislative instruments) nor Part 6 (which relates to the sunsetting of such instruments) applies to the instrument.

The explanatory memorandum seeks to justify this exemption by noting that the 'composition of the Network to be covered by the initial determination has been the subject of inter-governmental consultation, and subsequent policy consideration and wide dissemination by the Government' and for that reason would be inappropriate to be subject to disallowance.

The Committee considers that the level of consultation described in the explanatory memorandum is appropriate, given the complexity the task of determining a national transport network and the number of competing interests involved. The Committee does not, however, see this as necessarily precluding parliamentary scrutiny of the ministerial determination, especially given the breadth of the discretion involved and given that the Minister, in exercising this discretion, would clearly be exercising legislative power. The Committee considers that this provision may be regarded as insufficiently subjecting the exercise of legislative power to parliamentary scrutiny, but **leaves for the Senate as a whole** the question of whether the proposal to exclude this determination from the usual disallowance and sunset regime is appropriate

The Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I am happy to respond to the Committee's request for further clarification of why certain provisions are excluded from the operations of the *Legislative Instruments Act 2003.* I have set out comments against those subclauses the Committee has identified as requiring further consideration.

Subclause 5(4)

I note the Committee's referral to the Senate as a whole, consideration of whether my determination of the National Land Transport Network should be exempted from the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003.* The AusLink White Paper, released in June 2004, identifies the proposed network and the Australian Government's intention that the initial network form the basis for its long term investment in land transport infrastructure.

As indicated in the Explanatory Memorandum, the network to be initially determined has been the subject of consultation with State and Territory Governments. The initial network also reflects the outcome of consultations across a broader range of stakeholders. Projects to be funded must be on the network (clause 10). The Australian Government and the States and Territories are planning and committing funds for the first five-year period on the basis of the agreed network. Moreover the defined network will form the basis of the proposed corridor strategies that will inform future investment. Subjecting the determination of the

National Land Transport Network to disallowance provisions would remove certainty and could potentially halt the programme.

Parliament will have the opportunity to scrutinise the Commonwealth's intended overall investment in the AusLink National Land Transport Network through the budgetary process from the 2005 Budget onwards, as is currently the case.

Although the Committee did not specifically seek the Minister's advice on this issue, the Committee thanks the Minister for this response. In its commentary on this provision the Committee noted that the extent of consultation described in the explanatory memorandum – and now in the Minister's response – seemed appropriate. The Committee also notes the Minister's contention that 'Subjecting the determination … to disallowance provisions would remove certainty and could potentially halt the programme.'

As a matter of principle, however, the Committee draws attention to provisions that preclude parliamentary oversight of the exercise of legislative power. The broad discretion given to the Minister to determine the national transport network involves an exercise of legislative power. By seeking to exempt the determination from the operation of the Legislative Instruments Act the bill precludes parliamentary scrutiny of this exercise of legislative power. This remains the case regardless of the extent of consultation, agreements with state and territory governments and ministerial undertakings.

The Committee, as is its practice, makes no final recommendation but **leaves for the Senate as a whole** the question of whether the proposal to exclude this determination from the usual disallowance and sunset regime is appropriate.

The Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Legislative Instruments Act – Application
Various clauses

A large number of provisions in the bill state that an instrument to be made by the Minister is ***not*** a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The provisions are contained in subclauses 9(2), 17(4), 24(3), 25(5), 26(4), 27(4), 29(2), 35(4), 37(4), 43(4), 46(6), 53(2), 59(4), 61(4), 67(4), 76(4), 78(4), 85(4), 89(5) and 91(4).

In each case, the explanatory memorandum says no more than is contained in the relevant subclause and gives no reason for this exclusion. The instrument referred to in each of those subclauses must, presumably, be of a legislative character. In the absence of these provisions, each instrument would be a legislative instrument, and, as such, subject to scrutiny by the Regulations and Ordinances Committee and to disallowance by the Senate. As noted above, the Committee would generally expect the explanatory memorandum to set out the justification for such provisions. In the absence of that explanation, the Committee **seeks the Minister's advice** as to the reason for all these exclusions from the *Legislative Instruments Act*.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> The determinations to be made under these subclauses concern approvals, variations and revocations at the project or programme level. The decisions made under the relevant clauses are administrative, rather than legislative, in character. Accordingly, the instruments are of a kind that would not be regarded as legislative instruments.
>
> The relevant provisions in the Bill are intended simply to make this clear. Subsections 7(1)(b)(i) and 7(1)(b)(ii) of the *Legislative Instruments Act 2003* specifically recognise the insertion of provisions in other legislation which declare instruments not to be legislative instruments for purposes of the *Legislative Instruments Act 2003.*

The Committee thanks the Minister for this response and particularly for his assurance that ‘decisions made under the relevant clauses are administrative, rather than legislative, in character’.

The Committee, after the introduction of this bill, set out its approach to declarations of this kind, including its expectation that provisions of this nature be adequately explained in the explanatory memorandum to the bill: *Second Report of 2005*.

The Committee makes no further comment on these provisions.

Legislative Instruments Act – Disallowance and sunset provisions
Subclauses 27(4), 44(4), 68(4), 86(4) and 90(6)

Various provisions in this bill permit the Minister to determine conditions that apply to the provision of funding for various transport projects. However, in each case the clause concludes by providing that any ‘instrument determining, varying or revoking conditions is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but neither section 42 [relating to disallowance] nor Part 6 [relating to sunsetting] of that Act applies to the instrument.’ The provisions containing this standard form exclusion are subclauses 27(4), 44(4), 68(4), 86(4) and 90(6).

In each case the explanatory memorandum says no more than ‘Conditions specified in ministerial determinations would be in the nature of contractual conditions between contracting parties. Accordingly, exemption from the disallowance provisions and sunsetting provisions of the *Legislative Instruments Act 2003* is considered appropriate.’ The Committee **seeks from the Minister** a fuller explanation for these instruments, which are declared to be legislative in character, not being subject to oversight and (if necessary) disallowance by the Senate.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

Determinations under these subclauses make provisions for setting, and subsequent variations and revocations of, conditions between funder and funding recipient where no funding agreement exists.

The conditions are in the nature of contractual arrangements and it is open to a funding recipient not to accept them. Disallowance in these cases could delay payments to, and create uncertainty for, funding recipients. Where comparable conditions are included in a funding agreement, for which the Bill also provides, they are outside the ambit of the *Legislative Instruments Act 2003.* Accordingly, exemption from the disallowance and sunsetting provisions is considered appropriate.

The Senate Rural and Regional Affairs and Transport Committee is currently conducting an inquiry into the AusLink (National Land Transport) Bill. The Department of Transport and Regional Services has provided a submission to, and appeared twice before, the Committee to provide information on AusLink to the Committee and to address concerns that Senators have raised during that process.

I trust the above explanations and the information provided by the Department satisfy the Senate's concerns.

The Committee thanks the Minister for this response.

The Committee makes no further comment on these provisions.

Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2005.* The Minister for Fisheries, Forestry and Conservation responded to the Committee's comments in a letter dated 28 April 2005. A copy of the letter is attached to this report.

In considering the bill, the Committee identified four matters that clearly fall within its terms of reference and noted the action it had taken with respect to the insertion of equivalent provisions into other legislation. The provisions deal with the immunity of officers from prosecution; detention merely on suspicion; searches without warrant; and strip searches without warrant. The Committee considers that the provisions may trespass upon personal rights and liberties but, in accordance with its usual practice, left for the Senate as a whole the question of whether they did so *unduly*. Although the Committee did not seek further information on these matters they are addressed in the Minister's response.

The Committee *did* seek further information in respect of one additional matter, relating to the declaration of various instruments not the 'legislative instruments'.

Accordingly, all five matters are set out below.

Extract from Alert Digest No. 2 of 2005

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Fisheries, Forestry and Conservation]

The bill amends the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984*, and the *Migration Act 1958* to implement a consistent regime for the investigation and detention of suspected illegal foreign fishers. According to the explanatory memorandum, this will 'ensure that breaches of illegal foreign fishing offences can be managed with significantly improved efficiency.'

The bill will provide consistency between the Torres Strait Fisheries Act and the Fisheries Management Act in relation to illegal foreign fishing arrangements. The bill will also insert into those Acts provisions, similar to those in the Migration Act:

- declaring that an officer controlling a boat is not unlawfully restraining the liberty of any of the people that are on the boat;
- dealing with the detention of people suspected of committing illegal foreign fishing offences and provisions for searching and screening detainees and carrying out identification tests.

The bill will also amend provisions in the Torres Strait Fisheries Act and the Fisheries Management Act for the protection of officers performing duties under those Acts. The offences of assaulting, resisting or obstructing an officer, or using abusive or threatening language against an officer, will be amended to provide consistency between the two Acts and to extend coverage to all people performing duties under either Act rather than just officers.

The bill will also amend the Migration Act to ensure that the enforcement visa regime applies consistently to illegal foreign fishing offences under both the Fisheries Management Act and the Torres Strait Fisheries Act.

Prohibition on instituting proceedings
Schedule 1, items 1 and 2

Items 1 and 2 of Schedule 1 to this bill, respectively, would insert a new subsection 84(1BA) in the *Fisheries Management Act 1991* and a new subsection 42(2AAA) in the *Torres Strait Fisheries Act 1984*. The effect of each of these new provisions is to grant immunity from both civil and criminal proceedings for officers who, in the exercise of powers under the respective Acts, restrain the liberty of a person on a boat. Expressed another way, these provisions prohibit the institution of proceedings for restraints on the liberty of persons on board a detained ship.

The Committee usually views such provisions with concern. According to the explanatory memorandum, these provisions are similar to subsection 245F(8A) of the *Migration Act 1958* and subsection 185(3AAA) of the *Customs Act 1901*. These subsections were inserted into those Acts by the *Border Protection (Validation and Enforcement Powers) Act 2001*, introduced into the Parliament in the wake of the Tampa affair.

The Committee commented on the bill for that Act in its *Alert Digest No. 11 of 2001* and sought information from the Minister in respect of these provisions, among others. The Committee's deliberations and the Minister's response are contained in the Committee's *First Report of 2002*, in which the Committee continued to draw these provisions to the attention of the Senate, notwithstanding that the Act had already commenced.

While these provisions clearly trespass on the personal rights of those who may be detained, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

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

Relevant extract from the response from the Minister

The Committee has noted that the Bill will insert subsection 84(IB) into the *Fisheries Management Act 1991* (FMA) and subsection 42(2AAA) into the *Torres Strait Fisheries Act 1984* (TSFA), which will prevent civil or criminal proceedings from being taken after certain powers are exercised by officers which could lead to a restraint on a person's liberty.

These two new subsections directly relate to specific, existing powers in the FMA and TSFA where, if an officer has reasonable grounds to believe that a boat was used or is intended to be used to commit an illegal foreign fishing offence, the officer may detain, tow or require a boat to be moved to a specified place in Australia.

The two new subsections are necessary to ensure that officers are protected in the lawful exercise of their duties. The Australian Government believes it is inappropriate to allow litigation to compromise lawful actions that are aimed at protecting Australia's sovereign right to protect both its borders and its fisheries resources.

The Bill does not purport to affect the jurisdiction of the High Court under section 75 of the Constitution and, as such, it does not provide a blanket exclusion from judicial supervision.

Although the Committee did not specifically seek the Minister's advice on this issue, the Committee thanks the Minister for this response.

The Committee notes the Minister's contention that the provisions are 'necessary to ensure that officers are protected in the lawful exercise of their duties' and that 'it is inappropriate to allow litigation to compromise lawful actions'. If officers are carrying out their duties in a *lawful* manner it is difficult for the Committee to see why officers need more protection than is offered by that inherent lawfulness.

The Committee also notes that the provision 'is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution'. The Minister observes that the bill therefore 'does not provide a blanket exclusion from judicial supervision'. The Committee notes, however, that the effect of these provisions is to ensure that the legality of actions by the Commonwealth and its officers can only be tested in the High Court. The Committee considers that further explanation of the need to restrict judicial supervision to this extent is warranted.

In any case, as noted in the introduction, while the Committee considers that these provisions trespass on personal rights and liberties, it **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

The Committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Legislative Instruments Act – Declarations
Schedule 1, items 13 and 20

Proposed new subclauses 7(5), 11(3) and 17(5) of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, and proposed new subclauses 7(5), 11(3) and 17(5) of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, each declare various instruments not to be legislative instruments. The effect of the various subclauses is to remove the respective instruments from parliamentary scrutiny.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. (See the Committee's *Second Report of 2005* under the heading 'Legislative Instruments Act – Declarations'.)

It appears that in each case the respective subclause is merely declaratory. However, the explanatory memorandum does not indicate the reason for the inclusion of the various provisions. The Committee therefore **seeks the Minister's advice** as to whether those subclauses are indeed no more than declaratory (and included for the avoidance of doubt) and, if so, whether it would have been appropriate to include that information in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> The Committee is correct in its assumption that proposed new subclauses 7(5), 11(3) and 17(6) of both new Schedule 1A of the FMA and new Schedule 2 of the TSFA, are merely declaratory.
>
> In all these cases, the instrument is not a legislative instrument because it does not have the character of a legislative instrument, as specified by the *Legislative Instruments Act 2003*. The instruments do not determine, or alter the content of, the law. Rather, they apply the law as set in the relevant provisions. These clauses were inserted into the Bill for the avoidance of doubt.
>
> This information was not included in the explanatory memorandum for the Bill because at the time that the explanatory memorandum was drafted, the inclusion of such information was not routine or considered necessary. I understand that the inclusion of this information in explanatory memoranda has since become common practice.

The Committee thanks the Minister for this response and particularly for his assurance that the instruments in question are not legislative in character.

As the Minister notes, drafting practices have developed since the introduction of this bill. The Committee set out its approach to declarations of this kind, including its expectation that provisions of this nature be adequately explained in the explanatory memorandum to the bill: *Second Report of 2005*.

The Committee makes no further comment on these provisions.

Detention on suspicion
Schedule 1, items 13 and 20

Proposed new clause 8 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, and proposed new clause 8 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, would permit an authorised officer to detain a person 'in Australia or a Territory for the purpose of determining during the period of detention whether or not to charge the person with an offence.' According to the explanatory memorandum:

> This power is restricted by the requirement that it can only be used to detain people where the officer has reasonable grounds to believe that the person is not an Australian citizen or resident and that the person was on a foreign boat when it was used in the commission of an offence against one of the sections outlined in new subsection 8(1).

The general rule at common law is that a police officer may detain a person only for the purpose of arresting him or her for an offence and that, in the absence of statutory provisions, the police have no power to detain suspects while they seek evidence of the commission of an offence.

The Committee usually views such provisions with concern. The proposed clause 8 and related provisions substantially replicate provisions currently contained in sections 84 and 84A of the *Fisheries Management Act 1991* (particularly in paragraph 84(1)(ia)). Those provisions were inserted by the *Border Protection Legislation Amendment Act 1999*. The Committee commented on the relevant provisions of the bill for that Act and sought advice from the Minister. The Committee's deliberations and the Minister's advice are contained in the Committee's *Eighteenth Report of 1999* at pages 441 to 443.

While these provisions clearly trespass on the personal rights of those who may be detained, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

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

Relevant extract from the response from the Minister

The Committee has also commented on the new clause 8 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA, which provides officers with the power to detain suspected illegal foreign fishers.

The Committee notes that this power substantially replicates section 84(1)(ia) of the FMA, which has provided fisheries officers with the power to detain suspected illegal foreign fishers since 1999. The detention power will, however, be new to the TSFA, and will provide a consistent detention regime between the fisheries legislation.

The detention power is necessary for officers to effectively investigate and prosecute illegal foreign fishing offences. Many of these offences occur a significant distance from the coastline and without the capacity to detain these fishers on suspicion of an offence, the Australian Government would have little or no chance to effectively investigate offences. This is because there are difficulties and safety risks in obtaining evidence at sea. These include, for example, the relative availability of interpreters and risks involved with conducting searches of the boat, charts and logbooks in open and sometimes turbulent waters. Additionally, lengthy investigations into the activities of each boat could be time consuming and would waste expensive patrol time unnecessarily, with the consequence that less illegal fishing boats could be apprehended.

The Australian Government would effectively be put in a position where it was unable to take action against illegal foreign fishers who are threatening the sustainability of our fish stocks.

It is also worth noting that the period of detention is limited. In most cases, the detention period is limited to 168 hours (7 days). However, Papua New Guinean nationals or residents or persons on Papua New Guinean flagged boats in the Torres Strait Protected Zone who are suspected of committing an offence, can only be detained for 72 hours (3 days), which is in accordance with the *Torres Strait Treaty* between Australia and Papua New Guinea.

Although the Committee did not specifically seek the Minister's advice on this issue, the Committee thanks the Minister for this response.

As noted in the introduction, while these provisions clearly trespass on personal rights and liberties, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

The Committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Detention on suspicion – search without warrant
Schedule 1, items 13, 20, 21 and 28

Proposed new clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, proposed new clause 15 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, proposed new paragraph 84(1)(aaa) of the *Fisheries Management Act 1991*, to be inserted by item 21 of Schedule 1, proposed new subsection 87H(2A) of the *Fisheries Management Act 1991*, to be inserted by item 26 of Schedule 1 and proposed new paragraph 42(1)(aa) of the *Torres Strait Fisheries Act 1984*, to be inserted by item 28 of Schedule 1, would permit an authorised officer to conduct a search of a detainee and his or her clothing without a warrant, but on the basis of the officer's reasonable suspicion of various matters.

The proposed clause substantially replicates paragraph 84(1)(ic) of the *Fisheries Management Act 1991* and, according to the explanatory memorandum, 'corresponds closely to section 252 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.' The original provision in the fisheries legislation is also discussed in the Committee's *Eighteenth Report of 1999* at pages 441 to 443.

While these provisions clearly trespass on the personal rights of those who may be subject to such a search, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

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

Relevant extract from the response from the Minister

The Committee has also noted that the Bill provides search provisions for the FMA and TSFA. As the Committee notes, these provisions substantially replicate existing search powers in the FMA and *the Migration Act 1958,* which also do not require a warrant.

These searches are necessary to ensure the safety of detainees and other people (such as officers or interpreters) and also to ensure that illegal foreign fishing offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence. Recent occasions where searches have been conducted (under existing powers in the FMA) have found quantities of shark fin, GPS equipment and syringes hidden on detainees. Additionally, there is a risk that knives which are commonly used in fishing operations could be easily concealed and used as a weapon against officers or other detainees.

New clause 15 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA will provide a consistent approach in immigration facilities, where people under fisheries detention and other people under immigration detention may be held in the same location. It is essential that the personal safety of detainees, detention officers and officers in these premises are not compromised by different security standards and that good order in detention facilities is maintained. Searches under new clause 15 must be undertaken by an authorised officer.

New paragraph 84(1)(aaa) of the FMA and new paragraph 42(1)(aa) of the TSFA will allow officers at sea to search for items which may constitute evidence or may endanger other persons. These powers will prevent the possibility of people on board suspected illegal foreign fishing vessels from concealing evidence or dangerous items on their person (or throwing them overboard) and from bringing them into detention facilities, which would put detainees and officers at risk.

New subsection 87H(2A) will also allow officers at sea to search for items which may endanger other persons. These provisions apply to boats of the nationality of a party of the United Nations *Fish Stocks Agreement.* These provisions will help ensure the safety of officers while on board these boats.

Although the Committee did not specifically seek the Minister's advice on this issue, the Committee thanks the Minister for this response.

As noted in the introduction, while these provisions clearly trespass on personal rights and liberties, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

The Committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Detention on suspicion – search without warrant
Schedule 1, items 13 and 20

Proposed new clause 17 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1 and proposed new clause 17 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, would empower an authorised officer to conduct a strip search, without a warrant, of a detainee, in order to determine whether there are weapons or other implements on the person.

According to the explanatory memorandum, these clauses 'closely correspond to section 252A of the *Migration Act 1958'*.

While these provisions clearly trespass on the personal rights of those who may be subject to such a search, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

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

Relevant extract from the response from the Minister

The Committee has also made a comment on the new clause 17 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA. These provisions will allow authorised officers to conduct strip searches without a warrant.

Strip searches are considered to be a measure of last resort and are subject to appropriate authorisation and strict safeguards. High level authorisation for each strip search must be obtained from either the Managing Director of Australian Fisheries Management Authority, one of the senior executive officers (i.e. the Secretary or one of the Deputy Secretaries) of the Australian Government Department of Agriculture, Fisheries and Forestry or a magistrate.

A strip search may only be authorised in circumstances where there are reasonable grounds to suspect that the detainee is hiding a weapon or other thing capable of inflicting bodily injury or being used to escape from detention. In these circumstances, it is clearly essential that the detainee be appropriately searched to ensure both their safety and the safety of other people in the detention facility.

Strip searches are subject to very stringent rules and limitations aimed at protecting the welfare and dignity of the detainee. A strip search may only be carried out by a specially authorised officer of the same sex as the detainee.

This Bill does not authorise the search of body cavities and ensures that no more clothing is removed than is necessary to recover the hidden item. In practice, this means that strip searches could involve no more than the removal of a jacket or the detainee's shoes and socks.

These provisions are consistent with those in the *Migration Act 1958* and it is important that detained fishers should be subject to the same level of searching and screening procedures as other detainees that may be housed in the same facility.

I hope this information is of assistance to the Committee's important work. Please do not hesitate to contact me if you have further queries in relation to the Bill.

Although the Committee did not specifically seek the Minister's advice on this issue, the Committee thanks the Minister for this response.

As noted in the introduction, while these provisions clearly trespass on personal rights and liberties, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

The Committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Medical Indemnity Legislation Amendment Act 2005

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 2 of 2005*. The Minister for Health and Ageing has responded to those comments in a letter dated 26 April 2005.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2005

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Health and Ageing]

According to the explanatory memorandum, the bill amends existing medical indemnity legislation to 'give effect to improvements identified through consultations with the medical indemnity insurance industry, the medical profession and the Health Insurance Commission'.

The amendments deal with the administration of the Run-off Cover Scheme (amending some definitions, eligibility criteria and notification provisions), the Exceptional Claims Scheme and the High Cost Claim Scheme. They also create a High Cost Claims Protocol allowing for payments associated with incidents notified by practitioners.

The bill also:

- aligns arrangements for the Incurred But Not Reported Indemnity Scheme with similar provisions in other payments schemes; and
- amends Division 4 of the *Medical Indemnity Act 2002* to enable the Minister to formulate schemes to provide assistance to medical practitioners through other bodies which are not subject to the *Insurance Act 1973*.

Retrospectivity
Schedule 1, items 1 to 5, 9, 13 and 14

By virtue of items 2, 6 and 8 in the table to subclause 2(1) of this bill, the amendments proposed in items 1 to 5, item 9 and items 13 and 14 of Schedule 1 would commence on 1 July 2004, immediately after the commencement of Schedule 1 to the *Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Act 2004*. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.

In this case, regrettably, the explanatory memorandum gives no indication of whether this retrospectivity is beneficial or prejudicial to those to whom the legislation applies although, in respect of item 2, the explanatory memorandum indicates that 'it is *not intended* that the amendments have a retrospective impact on criminal sanctions within the *Medical Indemnity Act 2002*' (emphasis added).

The Committee **seeks the Minister's advice** regarding this retrospectivity and the reason for the explanatory memorandum failing to provide that information.

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

Relevant extract from the response from the Minister

> The purpose of the Bill is to refine aspects of a number of medical indemnity programs so as to improve their various operations in ways which are beneficial to medical indemnity providers and/or doctors. In some circumstances it was considered prudent to have these beneficial amendments apply retrospectively to the start of a particular scheme. Such an effect would provide for a better operation of the relevant scheme.
>
> I am conscious of the general proposition that where provisions are retrospective in their application they should not result in a detriment to those they affect. Officers of my Department have worked closely with the relevant areas of the Attorney-

General's Department to ensure that this is the result for those provisions which have a retrospective commencement date in this Bill.

This is certainly the case for those amendments set out in Schedule 1, items 1 to 5, 13 and 14 of the Bill. These amendments affect aspects of the Run-off Cover Scheme (ROCS) and are designed to improve both the expression of the Australian Government's commitments under the ROCS and its operation. Having these provisions commence retrospectively from 1 July 2004, the original commencement of the ROCS, ensures a uniform benefit is conferred on all doctors who were or have become eligible for the ROCS from that date.

The Committee thanks the Minister for this response and for the assurance that the amendments that operate retrospectively 'are beneficial to medical indemnity providers and/or doctors'.

In the circumstances, the Committee makes no further comment on these provisions.

Retrospective commencement
Schedule 3, items 5 to 7, 15 and 16

By virtue of items 17 and 22 in the table to subclause 2(1) of this bill, the amendments proposed in items 5 to 7 and 15 and 16 of Schedule 3 would commence respectively on 1 January 2003, immediately after the commencement of the *Medical Indemnity Act 2002* and on 5 December 2003, immediately after the commencement of the *Medical Indemnity Amendment Act 2003*. Regrettably, again, the explanatory memorandum gives no indication of whether this retrospectivity is beneficial or prejudicial to those to whom the legislation applies.

The Committee **seeks the Minister's advice** regarding this retrospectivity and the reason for the explanatory memorandum failing to provide that information.

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

Relevant extract from the response from the Minister

Similarly, the amendments set out in Schedule 3, items 5 to 7, 15 and 16 are intended to improve and clarify the operation of technical aspects of the High Cost Claims Scheme and the Exceptional Claims Scheme respectively. The retrospective commencement dates for these amendments will ensure that all claimants under these schemes benefit equally from the changes.

These issues of retrospectivity were not dealt with overtly in the Explanatory Memorandum as the amendments were self-evidently beneficial from the context set by the introductory paragraphs of the document. Similarly, the amendments set out in Schedule 1, item 7 and Schedule 3, items 1, 4, 10, 11, 13 and 14 are directly linked to the new requirements of the *Legislative Instruments Act 2003.* Again, the need for retrospectivity appears self-evident and so no further explanation was included.

I note the Committee's views on its preference that matters of retrospectivity be dealt with explicitly in the Explanatory Memorandum of Bills. I will ensure that officers of my Department take account of this view when preparing such documents in the future.

I trust that this information is of assistance.

The Committee thanks the Minister for this response and for the assurance that the retrospective amendments 'will ensure that all claimants under these schemes benefit equally from the changes'. While the Minister assures that Committee that the amendments were 'self-evidently beneficial' from the information provided in the explanatory memorandum, it was beyond the skills of the Committee to interpret that document with quite so much confidence as the Minister has been able to muster.

In the circumstances, the Committee makes no further comment on these provisions.

Robert Ray
Chair

The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader of The Nationals

RECEIVED
28 APR 2005
Senate Standing C'ttee for the Scrutiny of Bills

Reference: 2005030086

Senator Robert Ray
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

28 APR 2005

Dear ~~Senator~~ Ray Robert

Thank you for your Committee's letter of 10 February 2005 concerning the AusLink (National Land Transport) Bill 2004.

I am happy to respond to the Committee's request for further clarification of why certain provisions are excluded from the operations of the *Legislative Instruments Act 2003*. I have set out comments against those subclauses the Committee has identified as requiring further consideration.

Subclause 5(4)

I note the Committee's referral to the Senate as a whole, consideration of whether my determination of the National Land Transport Network should be exempted from the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003*. The AusLink White Paper, released in June 2004, identifies the proposed network and the Australian Government's intention that the initial network form the basis for its long term investment in land transport infrastructure.

As indicated in the Explanatory Memorandum, the network to be initially determined has been the subject of consultation with State and Territory Governments. The initial network also reflects the outcome of consultations across a broader range of stakeholders. Projects to be funded must be on the network (clause 10). The Australian Government and the States and Territories are planning and committing funds for the first five-year period on the basis of the agreed network. Moreover the defined network will form the basis of the proposed corridor strategies that will inform future investment. Subjecting the determination of the National Land Transport Network to disallowance provisions would remove certainty and could potentially halt the programme.

Parliament will have the opportunity to scrutinise the Commonwealth's intended overall investment in the AusLink National Land Transport Network through the budgetary process from the 2005 Budget onwards, as is currently the case.

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Subclauses 9(2), 17(4), 24(3), 25(5), 26(4), 29(2), 35(4), 37(4), 43(4), 46(6), 53(2), 59(4), 61(4), 67(4), 76(4), 78(4), 85(4), 89(4) and 91(4)

The determinations to be made under these subclauses concern approvals, variations and revocations at the project or programme level. The decisions made under the relevant clauses are administrative, rather than legislative, in character. Accordingly, the instruments are of a kind that would not be regarded as legislative instruments.

The relevant provisions in the Bill are intended simply to make this clear. Subsections 7(1)(b)(i) and 7(1)(b)(ii) of the *Legislative Instruments Act 2003* specifically recognise the insertion of provisions in other legislation which declare instruments not to be legislative instruments for purposes of the *Legislative Instruments Act 2003*.

Subclauses 27(4), 44(4), 68(4), 86(4) and 90(6)

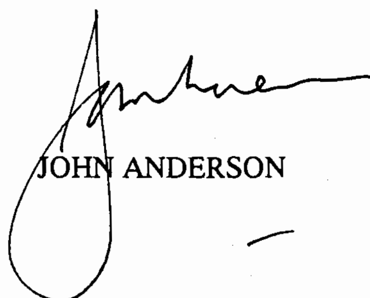
Determinations under these subclauses make provisions for setting, and subsequent variations and revocations of, conditions between funder and funding recipient where no funding agreement exists.

The conditions are in the nature of contractual arrangements and it is open to a funding recipient not to accept them. Disallowance in these cases could delay payments to, and create uncertainty for, funding recipients. Where comparable conditions are included in a funding agreement, for which the Bill also provides, they are outside the ambit of the *Legislative Instruments Act 2003*. Accordingly, exemption from the disallowance and sunsetting provisions is considered appropriate.

The Senate Rural and Regional Affairs and Transport Committee is currently conducting an inquiry into the AusLink (National Land Transport) Bill. The Department of Transport and Regional Services has provided a submission to, and appeared twice before, the Committee to provide information on AusLink to the Committee and to address concerns that Senators have raised during that process.

I trust the above explanations and the information provided by the Department satisfy the Senate's concerns.

Yours sincerely



JOHN ANDERSON

Senator the Hon. Ian Macdonald

Parliament House Canberra ACT 2600 Ph: 02 6277 7270 Fax: 02 6273 7096

Minister for Fisheries, Forestry and Conservation

RECEIVED

4 MAY 2005

Senate Standing C'ttee for the Scrutiny of Bills

28 APR 2005

Senator the Hon Robert Ray
Chair of the Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

On 10 March 2005, Mr Richard Pye, Secretary to the Standing Committee for the Scrutiny of Bills (the Committee), wrote to my senior advisor, informing him that the Committee had made a number of comments regarding the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 (the Bill) in the Scrutiny of Bills Alert Digest No. 2 of 2005 (9 March 2005). I would like to convey my responses to these comments, which I would appreciate being included in any report to the Senate.

Prohibition on Instituting Proceedings (Schedule 1, items 1 and 2)

The Committee has noted that the Bill will insert subsection 84(IB) into the *Fisheries Management Act 1991* (FMA) and subsection 42(2AAA) into the *Torres Strait Fisheries Act 1984* (TSFA), which will prevent civil or criminal proceedings from being taken after certain powers are exercised by officers which could lead to a restraint on a person's liberty.

These two new subsections directly relate to specific, existing powers in the FMA and TSFA where, if an officer has reasonable grounds to believe that a boat was used or is intended to be used to commit an illegal foreign fishing offence, the officer may detain, tow or require a boat to be moved to a specified place in Australia.

The two new subsections are necessary to ensure that officers are protected in the lawful exercise of their duties. The Australian Government believes it is inappropriate to allow litigation to compromise lawful actions that are aimed at protecting Australia's sovereign right to protect both its borders and its fisheries resources.

The Bill does not purport to affect the jurisdiction of the High Court under section 75 of the Constitution and, as such, it does not provide a blanket exclusion from judicial supervision.

Legislative Instruments Act – Declarations (Schedule 1, items 13 and 20)

The Committee is correct in its assumption that proposed new subclauses 7(5), 11(3) and 17(6) of both new Schedule 1A of the FMA and new Schedule 2 of the TSFA, are merely declaratory.

In all these cases, the instrument is not a legislative instrument because it does not have the character of a legislative instrument, as specified by the *Legislative Instruments Act 2003.* The instruments do not determine, or alter the content of, the law. Rather, they apply the law as set in the relevant provisions. These clauses were inserted into the Bill for the avoidance of doubt.

This information was not included in the explanatory memorandum for the Bill because at the time that the explanatory memorandum was drafted, the inclusion of such information was not routine or considered necessary. I understand that the inclusion of this information in explanatory memoranda has since become common practice.

Detention on Suspicion (Schedule 1, items 13 and 20)

The Committee has also commented on the new clause 8 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA, which provides officers with the power to detain suspected illegal foreign fishers.

The Committee notes that this power substantially replicates section 84(1)(ia) of the FMA, which has provided fisheries officers with the power to detain suspected illegal foreign fishers since 1999. The detention power will, however, be new to the TSFA, and will provide a consistent detention regime between the fisheries legislation.

The detention power is necessary for officers to effectively investigate and prosecute illegal foreign fishing offences. Many of these offences occur a significant distance from the coastline and without the capacity to detain these fishers on suspicion of an offence, the Australian Government would have little or no chance to effectively investigate offences. This is because there are difficulties and safety risks in obtaining evidence at sea. These include, for example, the relative availability of interpreters and risks involved with conducting searches of the boat, charts and logbooks in open and sometimes turbulent waters. Additionally, lengthy investigations into the activities of each boat could be time consuming and would waste expensive patrol time unnecessarily, with the consequence that less illegal fishing boats could be apprehended.

The Australian Government would effectively be put in a position where it was unable to take action against illegal foreign fishers who are threatening the sustainability of our fish stocks.

It is also worth noting that the period of detention is limited. In most cases, the detention period is limited to 168 hours (7 days). However, Papua New Guinean nationals or residents or persons on Papua New Guinean flagged boats in the Torres Strait Protected Zone who are suspected of committing an offence, can only be detained for 72 hours (3 days), which is in accordance with the *Torres Strait Treaty* between Australia and Papua New Guinea.

Detention on Suspicion – Search without a warrant (Schedule 1, items 13, 20, 21 and 28)

The Committee has also noted that the Bill provides search provisions for the FMA and TSFA. As the Committee notes, these provisions substantially replicate existing search powers in the FMA and the *Migration Act 1958*, which also do not require a warrant.

These searches are necessary to ensure the safety of detainees and other people (such as officers or interpreters) and also to ensure that illegal foreign fishing offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence. Recent occasions where searches have been conducted (under existing powers in the FMA) have found quantities of shark fin, GPS equipment and syringes hidden on detainees. Additionally, there is a risk that knives which are commonly used in fishing operations could be easily concealed and used as a weapon against officers or other detainees.

New clause 15 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA will provide a consistent approach in immigration facilities, where people under fisheries detention and other people under immigration detention may be held in the same location. It is essential that the personal safety of detainees, detention officers and officers in these premises are not compromised by different security standards and that good order in detention facilities is maintained. Searches under new clause 15 must be undertaken by an authorised officer.

New paragraph 84(1)(aaa) of the FMA and new paragraph 42(1)(aa) of the TSFA will allow officers at sea to search for items which may constitute evidence or may endanger other persons. These powers will prevent the possibility of people on board suspected illegal foreign fishing vessels from concealing evidence or dangerous items on their person (or throwing them overboard) and from bringing them into detention facilities, which would put detainees and officers at risk.

New subsection 87H(2A) will also allow officers at sea to search for items which may endanger other persons. These provisions apply to boats of the nationality of a party of the United Nations *Fish Stocks Agreement*. These provisions will help ensure the safety of officers while on board these boats.

Detention on Suspicion – Strip search without a warrant (Schedule 1, items 13 and 20)

The Committee has also made a comment on the new clause 17 of both the new Schedule 1A of the FMA and the new Schedule 2 of the TSFA. These provisions will allow authorised officers to conduct strip searches without a warrant.

Strip searches are considered to be a measure of last resort and are subject to appropriate authorisation and strict safeguards. High level authorisation for each strip search must be obtained from either the Managing Director of Australian Fisheries Management Authority, one of the senior executive officers (i.e. the Secretary or one of the Deputy Secretaries) of the Australian Government Department of Agriculture, Fisheries and Forestry or a magistrate.

A strip search may only be authorised in circumstances where there are reasonable grounds to suspect that the detainee is hiding a weapon or other thing capable of inflicting bodily injury or being used to escape from detention. In these circumstances, it is clearly essential that the detainee be appropriately searched to ensure both their safety and the safety of other people in the detention facility.

Strip searches are subject to very stringent rules and limitations aimed at protecting the welfare and dignity of the detainee. A strip search may only be carried out by a specially authorised officer of the same sex as the detainee.

This Bill does not authorise the search of body cavities and ensures that no more clothing is removed than is necessary to recover the hidden item. In practice, this means that strip searches could involve no more than the removal of a jacket or the detainee's shoes and socks.

These provisions are consistent with those in the *Migration Act 1958* and it is important that detained fishers should be subject to the same level of searching and screening procedures as other detainees that may be housed in the same facility.

I hope this information is of assistance to the Committee's important work. Please do not hesitate to contact me if you have further queries in relation to the Bill.

Yours sincerely

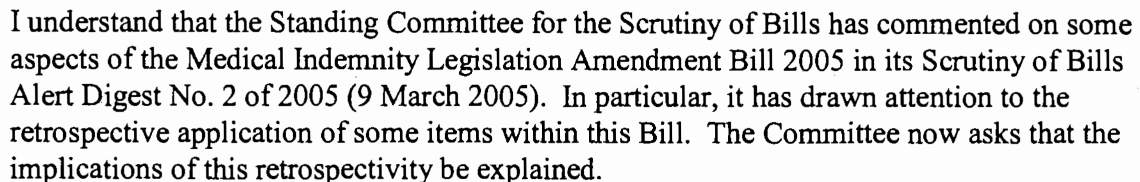
Ian Macdonald

THE HON TONY ABBOTT MP
MINISTER FOR HEALTH AND AGEING
Leader of the House of Representatives

RECEIVED
28 APR 2005
Senate Standing C'ttee for the Scrutiny of Bills

Senator Robert Ray
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray



I understand that the Standing Committee for the Scrutiny of Bills has commented on some aspects of the Medical Indemnity Legislation Amendment Bill 2005 in its Scrutiny of Bills Alert Digest No. 2 of 2005 (9 March 2005). In particular, it has drawn attention to the retrospective application of some items within this Bill. The Committee now asks that the implications of this retrospectivity be explained.

The purpose of the Bill is to refine aspects of a number of medical indemnity programs so as to improve their various operations in ways which are beneficial to medical indemnity providers and/or doctors. In some circumstances it was considered prudent to have these beneficial amendments apply retrospectively to the start of a particular scheme. Such an effect would provide for a better operation of the relevant scheme.

I am conscious of the general proposition that where provisions are retrospective in their application they should not result in a detriment to those they affect. Officers of my Department have worked closely with the relevant areas of the Attorney-General's Department to ensure that this is the result for those provisions which have a retrospective commencement date in this Bill.

This is certainly the case for those amendments set out in Schedule 1, items 1 to 5, 13 and 14 of the Bill. These amendments affect aspects of the Run-off Cover Scheme (ROCS) and are designed to improve both the expression of the Australian Government's commitments under the ROCS and its operation. Having these provisions commence retrospectively from 1 July 2004, the original commencement of the ROCS, ensures a uniform benefit is conferred on all doctors who were or have become eligible for the ROCS from that date.

Similarly, the amendments set out in Schedule 3, items 5 to 7, 15 and 16 are intended to improve and clarify the operation of technical aspects of the High Cost Claims Scheme and the Exceptional Claims Scheme respectively. The retrospective commencement dates for these amendments will ensure that all claimants under these schemes benefit equally from the changes.

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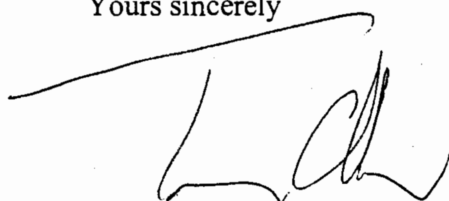
These issues of retrospectivity were not dealt with overtly in the Explanatory Memorandum as the amendments were self-evidently beneficial from the context set by the introductory paragraphs of the document. Similarly, the amendments set out in Schedule 1, item 7 and Schedule 3, items 1, 4, 10, 11, 13 and 14 are directly linked to the new requirements of the *Legislative Instruments Act 2003*. Again, the need for retrospectivity appears self-evident and so no further explanation was included.

I note the Committee's views on its preference that matters of retrospectivity be dealt with explicitly in the Explanatory Memorandum of Bills. I will ensure that officers of my Department take account of this view when preparing such documents in the future.

I trust that this information is of assistance.

Yours sincerely



TONY ABBOTT

2 6 APR 2005