SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair
Senator M Bishop (Deputy Chair)
Senator A McEwen
Senator A Murray
Senator the Hon J Troeth

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

THIRD REPORT OF 2008

The Committee presents its Third Report of 2008 to the Senate.

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

Communications Legislation Amendment (Miscellaneous Measures) Bill 2008

Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

Communications Legislation Amendment (Miscellaneous Measures) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2008*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter dated 13 May 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2008

Introduced into the Senate on 12 March 2008
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* to provide the Australian Communications and Media Authority (ACMA) with the discretion to consider late applications for renewal of community broadcasting licences, in exceptional circumstances. The bill:

- provides that late applications may only be considered if the application is made prior to the time the licence is due to expire, is accompanied by a statement of reasons for the lateness, and ACMA considers that there are exceptional circumstances that warrant the consideration of the late application;

- specifies the circumstances that ACMA must have regard to in deciding whether there are exceptional circumstances; and

- provides for a community broadcasting licence to remain in force if ACMA, in considering a late application, has been unable to make a decision before the expiry date of the licence.

The bill also contains application provisions.

Lack of merits review
Schedule 1, item 3

Proposed new subsection 90(1C) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, would give the ACMA a discretion to consider a late application for the renewal of a community broadcasting licence, but the bill makes no provision for the holder of such a licence to seek merits review, under the *Administrative Appeals Tribunal Act 1975*, of a decision to refuse to consider such a late application.

The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. In this instance, the Committee notes that the explanatory memorandum (page 6) seeks to justify this lack of merits review on the basis that the 'existing legislative regime does not provide for ACMA decisions regarding whether to exercise its discretion to renew a community broadcasting licence under subsection 90(1) to be subject to review by the Administrative Appeals Tribunal. Given that ACMA's substantive decisions on licence renewal are not subject to merit review, it is appropriate for ACMA's preliminary decisions on whether to consider a late application should be similarly excluded from merits review.'

In the circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

The *Communications Legislation Amendment (Miscellaneous Measures) Bill 2008* amends the *Broadcasting Services Act 1992* to provide the Australian Communications and Media Authority (ACMA) with the discretion to consider late applications for the renewal of community broadcasting licences where ACMA considers there are exceptional circumstances.

Lack of merits review

I note the Committee's comments that item 3 of Schedule 1 does not make provision for the holder of a community broadcasting licence to seek merits review, under the *Administrative Appeals Tribunal Act 1975* of a decision to refuse to consider such a late application.

The proposed new subsection 90(1C) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, would give ACMA the discretion to consider late applications for the renewal of a community broadcasting licence.

The *Alert Digest* appropriately acknowledges the explanation in the explanatory memorandum to the bill, which states (page 6) that given ACMA's substantive decisions on licence renewal are not subject to merits review, it is appropriate for ACMA's preliminary decisions on whether to consider a late application should be similarly excluded from merits review. I note that the Committee makes no further comment on this provision.

The Committee thanks the Minister for this response.

Personal rights and liberties
Schedule 1, item 3

Proposed new subsection 90(1F) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, provides that if ACMA decides to consider a late application, but does not make a decision on the application within 26 weeks after receiving it, the Authority 'is taken to have made, at the end of that 26-week period, a decision under section 91 to refuse to renew the licence.' The Committee notes that the explanatory memorandum (page 5) seeks to justify this provision by asserting that the 'combined effect of new subsections 90(1E) and 90(1F) is to ensure that the ACMA has appropriate time to consider the licensee's performance in serving the community before deciding whether to renew the licence.'

The Committee further notes, however, that the combined effect of the new subsections would also appear to be that a community broadcaster could be refused licence renewal not because of any fault on the part of the licence holder, but rather because the ACMA had failed to make a decision within the allotted timeframe.

The Committee **seeks the Minister's advice** on this matter, including whether there are any further reasons, not included in the explanatory memorandum, for this provision.

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

Relevant extract from the response from the Minister

The proposed new subsection 90(1F) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, provides that if ACMA decides to consider a late application, but does not make a decision on the application within 26 weeks after receiving it, the Authority 'is taken to have made, at the end of that 26 week period, a decision under section 91 to refuse to renew the licence'.

I note that the Committee was concerned that the new subsection would appear to provide that a community broadcaster could be refused licence renewal not because of any fault on the part of the licence holder, but rather because ACMA had failed to make a decision within the allotted time frame.

The Committee requested further advice on this provision, including whether there are any further reasons, not included in the explanatory memorandum, for this provision.

Firstly, it should be noted that the objective of these measures is to enhance the rights of community broadcaster licensees. The Australian Government recognises that community broadcasters face a range of pressures on their time and they are often largely staffed by volunteers. In these circumstances, the bill provides additional flexibility for ACMA to extend the deadline for consideration of licence renewals, subject to certain conditions.

However, in establishing this additional flexibility the Government must strike a balance between the rights of individual licence holders in having a flexible renewals process; the interest of the efficient management of the radio frequency spectrum, which is a valuable community resource; and the rights of other prospective community broadcast licence holders in having certainty as to the conclusion of the decision making process with respect to licence renewals.

It is submitted that this balance is appropriately struck by providing ACMA with a clear discretion to consider late applications for the renewal of community broadcasting licences. If ACMA accepts a late licence renewal application, proposed subsection 91(1E) provides certainty for licensees by allowing the licence to remain in force after its expiry date until ACMA makes a decision. This ensures that the broadcaster does not inadvertently breach the *Broadcasting Services Act 1992* by providing an unlicensed service while awaiting ACMA's decision. However, ACMA must make a timely decision about whether to renew the licence. As a result, the proposed subsection gives ACMA 26 weeks within

which to make its decision. This enables spectrum planning decisions affecting the licensee's frequency or licence area to proceed with certainty from that date.

I am advised that ACMA currently takes far less than 26 weeks to make a decision. Accordingly, there is a low risk of a decision taking longer under the arrangements proposed by this bill. Therefore, I do not believe the proposed arrangements trespass on a person's rights or liberties.

In these circumstances I consider that the proposed amendment strikes a reasonable balance between protecting the rights of licensees and of providing certainty for the community broadcasting licensing process as a whole.

Thank you for writing to me concerning this matter.

The Committee thanks the Minister for this response.

Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 2008*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 17 March 2008.

In its *Second Report of 2008*, the Committee sought further advice from the Minister in relation to why secondary arrangements were considered not to be subject to judicial review. The Minister has responded in a letter dated 14 April 2008. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 20 March 2008, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 1 of 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Workplace Relations Act 1996*, along with a number of other Acts, to give effect to key Government election commitments and to begin the transition to a new workplace relations system. The bill:

- prevents Australian Workplace Agreements (AWA) being made after the commencement of the Act;

- creates an Individual Transitional Employment Agreement (ITEA), which can be made up until 31 December 2009 between an employee and an employer that employed at least one employee on an individual employment agreement at 1 December 2007;

- replaces the 'fairness test' with a no-disadvantage test for both ITEAs and collective agreements;

- introduces a number of changes relating to the circumstances in which workplace agreements commence operation;

- repeals provisions allowing unilateral termination of collective agreements and empowers the Australian Industrial Relations Commission (AIRC) to terminate a collective agreement on application; and

- introduces a new Part 10A dealing with award modernisation.

The bill also contains application, consequential and transitional provisions.

Ousting of judicial review
Schedule 2, Item 9

Proposed new subsection 576ZA(1) provides that a modern award or an order varying an award:

(a) is final and conclusive; and
(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
(c) is not subject to prohibition, mandamus or injunction in any court or any account.

This is a privative clause that appears to limit the ability of those affected by a modern award, or an order varying an award, to seek judicial review. The Committee is of the view that ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with the law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role. We ignore the doctrine of separation of power at our peril.

In this instance, the Committee notes that the explanatory memorandum does not seek to provide a justification for the proposed ousting of judicial review, other than stating that it would 'protect the validity of modern awards and orders varying modern awards'. The Committee **seeks the advice of the Minister** on the proposed operation of this privative clause, including: whether it goes further than the established practice in respect of industrial awards; whether it will allow for judicial review of secondary instruments, such as employer/employee agreements, created under a modern award; and whether the privative clause applies to all modern awards or only those created in the Northern Territory.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister dated 17 March 2008

Thank you for your facsimile of 13 March 2008, drawing my attention to the Standing Committee's comments on the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, contained in the Scrutiny of Bills *Alert Digest No. 1 of 2008* (12 March 2008).

The Committee has sought advice on the intended operation of the privative clause in section 576ZA of the Bill, which provides that that awards and award related orders are final and conclusive and not subject to review, and raise some specific questions.

The purpose of section 576ZA is to provide certainty for employers and employees by ensuring that awards made by the Australian Industrial Relations Commission are not subject to court challenge. Awards provide fundamental conditions of employment and employers and employees subject to awards need to be confident of the permanency of the rights and conditions contained in them.

Section 576ZA does not affect the rights of parties to seek judicial review in the High Court as provided for under the Constitution.

The Committee asks whether section 576ZA reflects established practice in relation to awards. In fact, section 576ZA reflects very longstanding practice. A version of this provision has existed in Australian industrial legislation since 1904 when the Conciliation and Arbitration Act 1904 was passed.

The Committee has sought advice on whether section 576ZA will apply to all modern awards, or whether it is limited to awards that apply in the Northern Territory. In keeping with current practice, the provision will apply to all modern awards.

In response to the Committee's query about judicial review of secondary instruments created under awards, such as employer/employee flexibility agreements, I do not consider that this type of flexibility arrangement would be subject to judicial review. However, this is not a consequence of section 576ZA.

I trust the Committee finds this information useful.

The Committee thanks the Minister for this prompt response, but notes that it would have been helpful if this information had been included in the explanatory memorandum. The Committee also **seeks the Minister's further advice** as to why it is considered that secondary arrangements would not be subject to judicial review.

Relevant extract from the further response from the Minister dated 14 April 2008

The Committee previously sought advice on the operation of the privative clause in section 576ZA of the Bill, which provides that award and award related orders are final and conclusive and not subject to review. In my letter of 17 March 2008, I advised that this clause is intended to provide certainty for employers and employees, and reflects long established practice in relation to awards made under Australian industrial relations law.

In my previous letter, I also indicated that I did not consider that secondary instruments created under the authority of modern awards, such as employer/employee flexibility arrangements, would be subject to judicial review (although this is not a consequence of section 576ZA). The Committee has now sought further advice as to why it is considered that these secondary arrangements would not be subject to judicial review.

The privative clause in section 576ZA applies to modern awards and orders varying modern awards made by the Australian Industrial Relations Commission during the award modernisation process. From 1 January 2010, when the new workplace relations system is fully operational, modern awards will enable an employer and an individual employee to agree on arrangements that suit their needs, within the framework provided by the flexibility clause.

These secondary instruments will be made by the parties after 1 January 2010 under the authority of a modern award. As they will not be awards or orders varying

awards made by the Commission, the privative clause in section 576ZA would not apply these instruments.

Secondary instruments of this kind made between an employer and an employee within the framework established by the modern award would not involve the exercise of Commonwealth executive power. As such, the making of such arrangements would not be subject to judicial review.

I trust the Committee finds this information useful.

The Committee thanks the Minister for this comprehensive response.

Chris Ellison
Chair

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

Senator Chris Ellison
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

13 MAY 2008

Dear Senator Ellison

Scrutiny of Bills *Alert Digest No 2 of 2008* (19 March)

I refer to the letter from the Standing Committee (the Committee) for the Scrutiny of Bills, dated 20 March 2008, which drew attention to the Scrutiny of Bills *Alert Digest No 2 of 2008* (19 March) in which two issues were raised concerning the *Communications Legislation Amendment (Miscellaneous Measures) Bill 2008.*

The *Communications Legislation Amendment (Miscellaneous Measures) Bill 2008* amends the *Broadcasting Services Act 1992* to provide the Australian Communications and Media Authority (ACMA) with the discretion to consider late applications for the renewal of community broadcasting licences where ACMA considers there are exceptional circumstances.

Lack of merits review

I note the Committee's comments that item 3 of Schedule 1 does not make provision for the holder of a community broadcasting licence to seek merits review, under the *Administrative Appeals Tribunal Act 1975* of a decision to refuse to consider such a late application.

The proposed new subsection 90(1C) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, would give ACMA the discretion to consider late applications for the renewal of a community broadcasting licence.

The *Alert Digest* appropriately acknowledges the explanation in the explanatory memorandum to the bill, which states (page 6) that given ACMA's substantive decisions on licence renewal are not subject to merits review, it is appropriate for ACMA's preliminary decisions on whether to consider a late application should be similarly excluded from merits review. I note that the Committee makes no further comment on this provision.

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Personal rights and liberties

The proposed new subsection 90(1F) of the *Broadcasting Services Act 1992*, to be inserted by item 3 of Schedule 1, provides that if ACMA decides to consider a late application, but does not make a decision on the application within 26 weeks after receiving it, the Authority 'is taken to have made, at the end of that 26 week period, a decision under section 91 to refuse to renew the licence'.

I note that the Committee was concerned that the new subsection would appear to provide that a community broadcaster could be refused licence renewal not because of any fault on the part of the licence holder, but rather because ACMA had failed to make a decision within the allotted time frame.

The Committee requested further advice on this provision, including whether there are any further reasons, not included in the explanatory memorandum, for this provision.

Firstly, it should be noted that the objective of these measures is to enhance the rights of community broadcaster licensees. The Australian Government recognises that community broadcasters face a range of pressures on their time and they are often largely staffed by volunteers. In these circumstances, the bill provides additional flexibility for ACMA to extend the deadline for consideration of licence renewals, subject to certain conditions.

However, in establishing this additional flexibility the Government must strike a balance between the rights of individual licence holders in having a flexible renewals process; the interest of the efficient management of the radio frequency spectrum, which is a valuable community resource; and the rights of other prospective community broadcast licence holders in having certainty as to the conclusion of the decision making process with respect to licence renewals.

It is submitted that this balance is appropriately struck by providing ACMA with a clear discretion to consider late applications for the renewal of community broadcasting licences. If ACMA accepts a late licence renewal application, proposed subsection 91(1E) provides certainty for licensees by allowing the licence to remain in force after its expiry date until ACMA makes a decision. This ensures that the broadcaster does not inadvertently breach the *Broadcasting Services Act 1992* by providing an unlicensed service while awaiting ACMA's decision. However, ACMA must make a timely decision about whether to renew the licence. As a result, the proposed subsection gives ACMA 26 weeks within which to make its decision. This enables spectrum planning decisions affecting the licensee's frequency or licence area to proceed with certainty from that date.

I am advised that ACMA currently takes far less than 26 weeks to make a decision. Accordingly, there is a low risk of a decision taking longer under the arrangements proposed by this bill. Therefore, I do not believe the proposed arrangements trespass on a person's rights or liberties.

In these circumstances I consider that the proposed amendment strikes a reasonable balance between protecting the rights of licensees and of providing certainty for the community broadcasting licensing process as a whole.

Thank you for writing to me concerning this matter.

Yours sincerely

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Senator the Hon Chris Ellison
Chair of Committee
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the letter of 20 March 2008 from Ms Cheryl Wilson on behalf of the Senate Standing Committee for the Scrutiny of Bills, inviting a response to comments contained in the Committee's *Second Report of 2008* concerning the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008.

The Committee previously sought advice on the operation of the privative clause in section 576ZA of the Bill, which provides that award and award related orders are final and conclusive and not subject to review. In my letter of 17 March 2008, I advised that this clause is intended to provide certainty for employers and employees, and reflects long established practice in relation to awards made under Australian industrial relations law.

In my previous letter, I also indicated that I did not consider that secondary instruments created under the authority of modern awards, such as employer/employee flexibility arrangements, would be subject to judicial review (although this is not a consequence of section 576ZA). The Committee has now sought further advice as to why it is considered that these secondary arrangements would not be subject to judicial review.

The privative clause in section 576ZA applies to modern awards and orders varying modern awards made by the Australian Industrial Relations Commission during the award modernisation process. From 1 January 2010, when the new workplace relations system is fully operational, modern awards will enable an employer and an individual employee to agree on arrangements that suit their needs, within the framework provided by the flexibility clause.

These secondary instruments will be made by the parties after 1 January 2010 under the authority of a modern award. As they will not be awards or orders varying awards made by the Commission, the privative clause in section 576ZA would not apply these instruments.

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Secondary instruments of this kind made between an employer and an employee within the framework established by the modern award would not involve the exercise of Commonwealth executive power. As such, the making of such arrangements would not be subject to judicial review.

I trust the Committee finds this information useful.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

14 APR 2008