SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2006

29 March 2006

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MEMBERS OF THE COMMITTEE

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

SECOND REPORT OF 2006

The Committee presents its Second Report of 2006 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:

Aged Care (Bond Security) Bill 2005

Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006

Telecommunications (Interception) Amendment Bill 2006

Workplace Relations Amendment (Work Choices) Act 2005

Aged Care (Bond Security) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2006*. The Minister for Ageing responded to the Committee's comments in a letter received on 23 March 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2006

Introduced into the House of Representatives on 8 December 2005
Portfolio: Ageing

Background

Introduced with the Aged Care Amendment (2005 Measures No. 1) Bill 2005 and the Aged Care (Bond Security) Levy Bill 2005, this bill establishes a scheme to guarantee the repayment of bond balances and interest, by the Commonwealth, to aged care residents if an approved provider of residential or flexible care services becomes insolvent.

Standing appropriations – Audit Report No. 15 of 2004-05
Clause 17

Clause 17 of this bill provides that any refund amounts are to be paid from the Consolidated Revenue Fund. This appears to be a special appropriation of the kind referred to by the Auditor-General in Audit Report No. 15 of 2004-05.

Standing appropriations enable entities to spend money from Commonwealth revenue, subject to meeting legislative criteria. Once enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. In light of Audit Report No. 15 of 2004-05, the Committee determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations under provisions 1(a)(iv) and (v) of its terms of reference.

As set out in its *Fourteenth Report of 2005*, the Committee looks to the explanatory memorandum to the bill for an explanation of the reason for the standing appropriation. In this case, the explanatory memorandum merely describes the content of the proposed section and does not advise the reader of the justification of the provision and the exclusion of the appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process. The Committee does not question the need to ensure the liabilities dealt with by this bill are properly met, only whether the use of a standing appropriation is appropriate.

Accordingly, the Committee **seeks from the Minister** an explanation justifying the inclusion of a standing appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) and 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 appreciate the opportunity to provide the Standing Committee for the Scrutiny of Bills with an explanation as to why a standing appropriation has been included in the bill.
>
> The bill establishes a scheme to guarantee the repayment of bond balances and interest to aged care recipients, if an approved provider of residential or flexible care services becomes insolvent.
>
> It is a fundamental tenet of the new scheme that in the event of provider insolvency, residents are repaid their bond balances without delay. A standing appropriation ensures this.
>
> An annual appropriation through the annual budget bills would require that an accurate estimation be made annually regarding the likely total cost to the Commonwealth resulting from insolvency events over the forthcoming twelve months. Currently, there are over 1,700 approved providers holding in excess of $4.2 billion in bonds. The average value of new bonds varies each year as does the average holding of individual providers. Some providers hold only a few thousand dollars in bonds, while others hold many millions. The lack of history of default events in Australia combined with the fluidity in bond holdings by individual

providers and providers collectively, means it is not possible to accurately estimate the likely cost to the Commonwealth as a result of provider insolvency in any future 12 month period.

In order to ensure that all residents' bonds could be repaid, any annual appropriation through the budget bills would need to be premised on an actuarially determined worst-case insolvency event scenario. The appropriation would be likely to be misleading, including to Parliament and the public, including because of regular underspends where no insolvency occurs in a given year.

By contrast, a standing appropriation will ensure that public money can be used for other purposes while ensuring certainty of repayment of bonds in the event of a default, and accountability to Parliament through the Portfolio Budget Statements and Annual Report.

I appreciate the opportunity to clarify the need for a standing appropriation in this instance.

The Committee thanks the Minister for this very full response. The Committee considers it would have been helpful if this information had been included in the explanatory memorandum.

Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 2006*. The Minister for Defence responded to the Committee's comments in a letter dated 24 March 2006.

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. 1 of 2006

Introduced into the Senate on 7 December 2005
Portfolio: Defence

Background

This bill amends Part IIIAAA of the *Defence Act 1903* to allow the use of Australian Defence Force (ADF) elements to protect states and territories against domestic violence and to protect Commonwealth interests where state and territory jurisdictions do not apply.

The bill:

- amends current call-out provisions to provide flexibility and speed with which the ADF could respond should Australia face a terrorist incident in limited or no notice circumstances;
- excises the restrictions on the use of Reserve forces in support of domestic security;
- addresses the identification of ADF members to enhance operational flexibility;
- reduces the notification requirement in circumstances where such broadcasts would jeopardise an operation;

- redefines ‘subject premises’ within the broader descriptor of ‘subject incidents’ to allow the ADF to operate in a mobile environment;
- allows for expedited call-out arrangements to deal with rapidly developing threats;
- empowers the Prime Minister, and in his or her absence, two other authorising Ministers, to make written or verbal call-out orders;
- allows the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers; and
- enables ‘call out’ of the ADF to respond to incidents or threats to Commonwealth interests in the air environment and offshore areas.

Trespass on personal rights and liberties
Schedule 1, item 15 and Schedule 3, item 2

Proposed new sections 51SE, 51SG, 51SJ and 51SK of the *Defence Act 1903*, to be inserted by item 15 of Schedule 1 to this bill, and proposed new section 51ST of the same Act, to be inserted by item 2 of Schedule 3, would give extensive powers to members of the Defence Force, including the use of force, to control the movement of persons, vessels or aircraft and to search property or persons without a warrant, under the command of the Chief of the Defence Force, if the Defence Force has been utilised in an offshore area. The Committee notes that there is a risk that these provisions may be regarded as trespassing on the personal rights and liberties of those people who are the subject of the exercise of such powers. In accordance with its practice, the Committee makes no final determination of this matter, but **leaves for the Senate as a whole** the question of whether these provisions unduly trespass upon personal rights and liberties.

The Committee draws Senators’ attention to these 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 letter drew attention to the comments of the Committee on three aspects of the Bill. I would like to address two of these matters for the Committee’s consideration and for inclusion in the Committee’s report to the Senate.

First, at page 16 of the Bills Digest, the Committee comments that proposed new sections 51SE, 51SG, 51SJ, 51SK and 51ST could be 'considered to trespass unduly on personal rights and liberties'.

It is envisaged that the powers in sections 51SE, 51SG, 51SJ, and 51SK, cited in the Bills Digest, would be used in limited circumstances in the event that call-out of the Australian Defence Force in an offshore area was required, for example, to deal with a terrorist incident. This might include a scenario where there was a requirement to board or capture a vessel to compel a master or crew member to hand over the manifest or other documents, which would show where dangerous goods or cargo were stored. Requiring a master or crew member to hand over such documents, would enable an assessment to be made whether they posed a threat to persons or a Commonwealth interest. It might also assist in neutralising any violence that was occurring.

The powers set out in section 51ST relate to the taking of measures against aircraft in a context where, for example, the aircraft was in the control of terrorists. This section takes into account the practical reality that any use of force against an aircraft in flight must be presumed to be at least likely to cause the aircraft to crash or be otherwise destroyed.

In relation to the two matters above, I am confident that the *Defence Act 1903* strikes a reasonable balance between the protection of individual interests, and dealing in a transparent and accountable manner with terrorist threats and incidents that could harm Australia's interests.

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, in considering this bill the Committee noted that there was a risk that these provisions may be regarded as trespassing on the personal rights and liberties of those people who are the subject of the exercise of such powers. However, in accordance with its practice, the Committee made no final determination of this matter, but **left for the Senate as a whole** the question of whether these provisions unduly trespass upon personal rights and liberties.

Legislative Instruments Act – Declarations
Schedule 6, item 14

Proposed new section 51XB of the *Defence Act 1903*, to be inserted by item 14 of Schedule 6 to this bill, declares that an 'order, authorisation or declaration made under [Part IIIAAA of the Act, as proposed to be amended by this bill] is not a legislative instrument.'

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. Unfortunately, in this case, the explanatory memorandum merely describes the content of the proposed section, and does not advise the reader whether it is no more than declaratory, or whether it is intended to create an exemption to the *Legislative Instruments Act 2003*. The Committee **seeks the Minister's advice** as to what is intended by this provision.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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

> Under section 51XB, orders, declarations or authorisations made under Part IIIAAA of the *Defence Act 1903*, are not legislative instruments. The existing section 51X of the *Defence Act 1903* provides for the tabling of orders and the reporting to Parliament of any utilisation of the Defence Force under an order. This ensures that there is sufficient and appropriate parliamentary scrutiny of the exercise of powers under the previous and amended legislative provisions.

The Committee thanks the Minister for this response. The Committee concludes from the Minister's response that the provision is declaratory. The Committee considers that it would have been helpful if this had been clearly stated in the explanatory memorandum.

Telecommunications (Interception) Amendment Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No.2 of 2006*. The Attorney-General has responded to the Committee's comments in a letter dated 15 March 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2006

Introduced into the House of Representatives on 16 February 2006
Portfolio: Attorney-General

Background

This bill amends the *Telecommunications (Interception) Act 1979* to implement recommendations of the *Report of the Review of the Regulation of Access to Communications* which was presented to the Parliament on 14 September last year, to:

- insert a warrant regime for access to stored communications held by a telecommunications carrier;
- enable interception of communications of a person known to communicate with the person of interest;
- enable interception of telecommunications services on the basis of the telecommunications device;
- remove the distinction between class 1 and class 2 offences for which telecommunications interception powers are available to law enforcement agencies; and
- remove the Telecommunications Interception Remote Authority Connection function currently exercised by the Australian Federal Police and transfer the associated warrant register function to the Department administering the legislation.

The bill will also amend the Act to:

- remove the exception to the definition of interception;
- clarify that employees of a carrier exercise authority under a telecommunications interception warrant when assisting law enforcement agencies in the execution of interception;
- include an additional permitted purpose for use and communication of lawfully obtained information in relation to the Victorian Office of Police Integrity; and
- update applicable reference to money laundering offences in New South Wales.

The bill also contains transitional and saving provisions.

Retrospective commencement
Schedule 6, items 3 and 8

By virtue of items 5 and 7 in the table to subclause 2(1) of this bill, the amendments proposed in items 1 and 3 of Schedule 6 would commence retrospectively immediately after the commencement of item 10 of Schedule 1 to the *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act 2005*. The explanatory memorandum states that the effect of these amendments will be to expand the circumstances in which the Victorian Office of Police Integrity may lawfully obtain intercepted information to include investigations under the *Whistleblowers Protection Act 2001* of Victoria.

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. In the Committee's view, where proposed legislation is to have retrospective effect, the explanatory memorandum should set out in detail the reasons retrospectivity is sought. However, the explanatory memorandum gives no indication of the reason for the amendments coming into force at the time proposed in subclause 2(1). The Committee **seeks the Attorney-General's advice** as to the reason for that date of commencement.

Pending the Attorney-General'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 Attorney-General

Items 1 and 3 of Schedule 6 of the Bill will expand the circumstances in which the Victorian Office of Police Integrity may lawfully receive intercepted information to include investigations under the *Whistleblowers Protection Act 2001*(Vic). Items 5 and 7 in the table to subclause 2(1) of the Bill provides that these amendments will commence immediately after the commencement of item 10 of Schedule 1 of the *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act 2003* (the amendment Act).

Schedule 1, Part 2 of the amendment Act, including item 10, proposes to make the Victorian Office of Police Integrity an eligible authority for the purposes of the Interception Act. I note that item 10 of Schedule 1 of the amendment Act has not commenced as those provisions are yet to be proclaimed due to ongoing work between my Department and the Victorian Government. As per subsection 2(1) of the amendment Act, I also note that if item 10 of Schedule 1 of the Act is not proclaimed within 12 months of that Act having received Royal Assent, that being 14 December 2006, item 10, along with items 1 and 3 of Schedule 6 of the Bill will be repealed as having never come into force.

The 12 month commencement period is necessary to give the Victorian Government sufficient time to enact legislation to change the oversight arrangements for the Office of Police Integrity to address concerns expressed by the Australian Government in relation to those arrangements. The proposed changes to those oversight arrangements will ensure that access to intercepted material by both the Office of Police Integrity and the Victorian Police are subject to independent oversight. As I have indicated above, these amendments to the *Telecommunications (Interception) Act 1979* in relation to the Office of Police Integrity will not commence at all if Victoria has not enacted the appropriate legislation within 12 months of Royal Assent.

Consequently, there is no retrospectivity in relation to items 1 and 3 of Schedule 6 of the Bill as item 10 of Schedule 1 of the amendment Act will commence on a day, in the future, to be fixed by Proclamation. This will not occur prior to the passage of the Bill.

The Committee thanks the Attorney-General for this detailed response. The Committee notes the Minister's explanation that the delay in commencement of the *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act 2003* means Items 1 and 3 of Schedule 6 of the bill will not apply retrospectively. However, the Committee remains concerned to ensure that, where legislation appears to apply to events occurring before commencement, the parliament has sufficient information available in the explanatory memorandum to determine the effect of the provisions.

Workplace Relations Amendment (Work Choices) Act 2005

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2005*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 23 March 2006.

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.

In considering this bill, the Committee identified four matters which fall within the Committee's terms of reference. Two of the matters related to the question of trespass on personal rights and liberties. In accordance with its usual practice, the Committee made no final determination on these matters and left for the Senate as a whole the question of whether the provisions trespassed *unduly* on personal rights and liberties. A third matter related to the delegation of legislative power. Again, the Committee made no final determination on the matter and left for the Senate as a whole the question of whether the delegation of power in this case was *inappropriate*. Although the Committee did not specifically seek the Minister's advice on these three matters, the Committee notes that they are addressed in the Minister's response.

The Committee did seek further information in respect of one additional matter, relating to non-reviewable decisions. All four matters are set out below.

Extract from Alert Digest No. 13 of 2005

Introduced into the House of Representatives on 2 November 2005
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Workplace Relations Act 1996* (the WR Act) to create a national workplace relations system based on the corporations power.

This bill establishes the Australian Fair Pay Commission and introduces the Australian Fair Pay and Conditions Standard to set out certain minimum conditions of employment. The bill makes changes to the operation of the awards system and to agreement-making processes, introduces a range of options for settling disputes and puts into place a range of transitional arrangements.

Personal rights and liberties
Schedule 1, item 71

Proposed new section 96D of the *Workplace Relations Act 1996*, to be inserted by item 71 of Schedule 1 to the bill (see page 163), would permit an entity which proposes to establish a business to make what is called an 'agreement' relating to the employment conditions of persons whom the entity might in the future employ.

However, in derogation of one of the fundamental principles of contract law, the bill makes no provision for a second party to this 'agreement'. It appears that the proposed new section permits a putative employer to decide unilaterally the terms under which it will enter into any future employment contracts. The Committee considers that this provision trespasses on personal rights and liberties. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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

You will recall that the Bill was introduced into the Senate on 10 November 2005. The Bill was debated on 28, 29 and 30 November and 1 and 2 December 2005. The Bill was then passed in the Senate on 2 December 2005 and received royal assent on 14 December 2005.

Section 96D - employer greenfields agreements

Section 96D of the *Workplace Relations Amendment (Work Choices) Act 2005* (**Work Choices Act**) allows an employer that is establishing a new business to make an agreement in writing and lodge that agreement with the Employment Advocate. Such an agreement is called an 'employer greenfields agreement'. Unlike other agreements, there is no requirement for employees to approve the agreement. This is necessary because an employer greenfields agreement may only be made where an

employer is establishing a new business (as defined in s.95B) before the employment of any of the persons who will be necessary for the normal operation of the business. It is only in these limited circumstances that this type of agreement will be available. Employees would indicate their acceptance of the terms and conditions of the employer greenfields agreement by accepting employment under the agreement.

Under s.101 of the Work Choices Act, employer greenfields agreements have a nominal expiry date of no more than 12 months from the date the agreement is lodged (as opposed to 5 years, as is the case with other types of agreements). After the nominal expiry date has passed employees may take protected industrial action in support of negotiations for a new agreement.

The Committee thanks the Minister for this response.

Personal rights and liberties
Schedule 1, item 113

Proposed new subsection 170CE(5E) of the *Workplace Relations Act 1996*, to be inserted by item 113 of Schedule 1 to the bill, would prevent an employee whose employment has been terminated in a harsh, unjust or unreasonable manner from applying to the Australian Industrial Relations Commission for relief on the arbitrary ground that, at the time of the dismissal, the employer employed fewer than 100 employees. The Committee considers that this provision may trespass on the personal rights and liberties of employees. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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

Schedule 1, item 113 - unfair dismissal

Subsection 170CE(5E) of the Work Choices Act provides that an employee may not make an application to the Australian Industrial Relations Commission alleging that the termination of his or her employment was harsh, unjust or unreasonable if, at the

relevant time, the employer and its related bodies corporate employed 100 employees or fewer.

Statutory remedies for unfair dismissal, in both State and federal jurisdictions have always been subject to various jurisdictional requirements and exclusions.

These exclusions seek to achieve balance in unfair dismissal laws. The Work Choices Act introduces the '100 employees or fewer' exclusion to further provide a further balance between protecting employee rights and encouraging job creation.

The Government will continue to protect all employees by providing a remedy for unlawful termination, which prohibits dismissal on discriminatory grounds, including on the basis of sex, race, religion, trade union membership, refusing to sign an AWA, family responsibilities, pregnancy, representing other employees, taking maternity leave and a range of other grounds.

The Committee thanks the Minister for this response.

Henry VIII clauses
Schedule 1, item 71

A Henry VIII clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

A number of provisions to be inserted by item 71 of Schedule 1 to the bill are 'Henry VIII' clauses, in that they would permit the terms of the *Workplace Relations Act 1996* to be amended, amplified or given more precise meaning by regulation rather than by subsequent primary legislation. The provisions are proposed new subsection 97(2), sections 100C and 101D, paragraph 116B(1)(m), and sections 117D and 117E.

The respective provisions clearly delegate legislative powers to the Executive. The Committee notes, however, that any regulation made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Regulations and Ordinances Committee. It is often the case that this level of scrutiny meets the concerns of the Committee and the Parliament.

In accordance with its usual practice, the Committee **leaves for the Senate as a whole** the question of whether these delegations of legislative power are *inappropriate*.

The Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Section 100C – Workplace agreement displaces certain Commonwealth laws

Section 100C of the Work Choices Act provides that a workplace agreement displaces prescribed conditions of employment specified in a Commonwealth law that is prescribed in the regulations. Section 100C replicates former s. 170LZ(4) and s.170VR(4) of the pre reform *Workplace Relations Act 1996* (**WR Act**). The section provides Commonwealth employers and employees with the flexibility to determine certain employment conditions in the workplace.

Any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny of the Regulations and Ordinance Committee.

Section 101D – Prohibited content

Section 101D of the Work Choices Act allows regulations to be made to specify matters that are prohibited content for the purposes of the Act. Any regulations made under s. 101D would identify the content that would be prohibited from being included in workplace agreements. The Government identified the matters that would be prohibited content in workplace agreements when it released the document "WorkChoices – A New Workplace Relations System" in 2005.

Any regulations made under s. 101D will be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny of the Regulations and Ordinance Committee.

Section 117D – prescribed preserved award terms – personal/carers leave
Section 117E – prescribed preserved award terms – parental leave

Sections 117D and 117E are part of a package of regulation-making powers in Part VI of the Work Choices Act which are envisaged to be enacted to protect and preserve key entitlements for new and existing award-reliant employees. Consistent with s.117B, the regulations would ensure that if an employee's preserved award provisions for annual leave, personal/carer's leave and/or parental leave are 'more generous' than the Australian Fair Pay and Conditions Standard (the Standard), they will continue to receive their award entitlement. The regulation-making powers in s. 117D and 117E are required to ensure that particular entitlements under preserved award terms are not lost in a comparison of entitlements under the Standard.

The regulations would provide that aspects of preserved award terms about personal/carer's leave under s. 117D (war service sick leave, infectious diseases sick leave and other like forms of sick leave) and parental leave under s. 117E (paid parental leave) would be treated as separate matters for the purpose of the 'more generous' test. The effect of this is that these aspects would not be included in the 'more generous' test. The effect of this is that these aspects would not be included in the 'more generous' comparison (because the standard does not make provision for these forms of leave) and would continue to operate.

Paragraph 116(1)(m) – award matters

Paragraph 116(1)(m) was removed from the Bill by Government amendment in the senate.

Clause 97(2) of Schedule 13 – preserved transitional award terms

Clause 97 of Schedule 13 would replicate the s. 117D and 117E for transitional award-reliant employees (other than those regulated by a Victorian reference award). Subclause 97(4) as it relates to subclause 97(2) ensures that the comparison of entitlements for the 'more generous' test does not result in employees losing access to certain elements of the Standard that are not generally part of the award framework – special maternity leave, the entitlement under section 94F to transfer to a safe job or to take paid leave, compassionate leave and unpaid carer's leave.

As the Committee notes, any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Regulations and Ordinances Committee.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Schedule 1, item 71

Proposed new section 112 of the *Workplace Relations Act 1996*, to be inserted by item 71 of Schedule 1 to the bill, would permit the Minister, by written declaration, to terminate a specified bargaining period, on being satisfied as to the various matters specified in paragraphs (a) to (c) of that proposed subsection. There is no indication in the explanatory memorandum whether the exercise of this discretion is subject to merits review by the Administrative Appeals Tribunal. The Committee **seeks the Minister's advice** as to whether the exercise of the discretion *is* subject to such review.

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

Section 112 – terminating a bargaining period

Section 112 of the Work Choices Act enables the Minister to issue declarations which have the effect of terminating a bargaining period. The Minister may only issue a declaration in cases of serious industrial action, subject to three key requirements. The first requirement is that the industrial action is occurring, or is threatened, impending or probable. The second requirement is that the industrial action is endangering the life, personal safety or heath or welfare of the Australian population, or causing significant damage to the Australian economy or an important part of it. The third requirement is that industrial action must also adversely affect the relevant employer.

This power is similar to powers available to state governments under their essential services legislation. The Minister will only be able to make directions that are reasonably directed to removing or reducing the threat.

The Committee has asked whether the Minister's declarations would be subject to merits review by the Administrative Appeals Tribunal (AAT). Decisions made under the Workplace Relations Act are generally not subject to merits review by the AAT and consistent with this approach, nor would the Minister's declarations under s. 112. Similarly, the equivalent powers of State governments are not subject to merits review.

The Committee thanks the Minister for this response, albeit that the bill has now passed both Houses. The Committee considers that, given the significance of this legislative proposal, a more timely response would have assisted both the Committee and the Parliament.

Robert Ray
Chair

Senator the Hon Santo Santoro
Senator for Queensland
Minister for Ageing

RECEIVED
23 MAR 2006
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Robert,

Dear ~~Senator~~ Ray

Thank you for drawing my attention to the comments contained in the *Scrutiny of Bills Alert Digest No 1 of 2006* (8 February 2006) about the Aged Care (Bond Security) Bill 2005.

I appreciate the opportunity to provide the Standing Committee for the Scrutiny of Bills with an explanation as to why a standing appropriation has been included in the bill.

The bill establishes a scheme to guarantee the repayment of bond balances and interest to aged care recipients, if an approved provider of residential or flexible care services becomes insolvent.

It is a fundamental tenet of the new scheme that in the event of provider insolvency, residents are repaid their bond balances without delay. A standing appropriation ensures this.

An annual appropriation through the annual budget bills would require that an accurate estimation be made annually regarding the likely total cost to the Commonwealth resulting from insolvency events over the forthcoming twelve months. Currently, there are over 1,700 approved providers holding in excess of $4.2 billion in bonds. The average value of new bonds varies each year as does the average holding of individual providers. Some providers hold only a few thousand dollars in bonds, while others hold many millions. The lack of history of default events in Australia combined with the fluidity in bond holdings by individual providers and providers collectively, means it is not possible to accurately estimate the likely cost to the Commonwealth as a result of provider insolvency in any future 12 month period.

In order to ensure that all residents' bonds could be repaid, any annual appropriation through the budget bills would need to be premised on an actuarially determined worst-case insolvency event scenario. The appropriation would be likely to be misleading, including to Parliament and the public, including because of regular underspends where no insolvency occurs in a given year.

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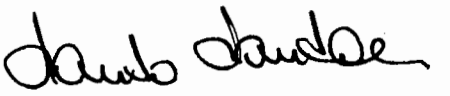
By contrast, a standing appropriation will ensure that public money can be used for other purposes while ensuring certainty of repayment of bonds in the event of a default, and accountability to Parliament through the Portfolio Budget Statements and Annual Report.

I appreciate the opportunity to clarify the need for a standing appropriation in this instance.

Yours sincerely



SANTO SANTORO
Senator for Queensland
Minister for Ageing

MINISTER FOR DEFENCE
THE HON DR BRENDAN NELSON MP

RECEIVED
2 MAR 2006
Senate Standing C'ttee
for the Scrutiny of Bills

24 MAR 2006

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

Dear ~~Senator~~ Robert Ray

I refer to the letter from Jeanette Radcliffe, Secretary of the Senate Standing Committee (the Committee) for the Scrutiny of Bills, of 9 February 2006. Attached to this letter was a copy of the Scrutiny of Bills Alert Digest (Bills Digest) No. 1 of 2006 (8 February 2006) concerning, among other legislation, the *Defence Legislation Amendment (Aid to the Civilian Authorities) Bill,* which received Royal Assent on 1 March 2006.

The letter drew attention to the comments of the Committee on three aspects of the Bill. I would like to address two of these matters for the Committee's consideration and for inclusion in the Committee's report to the Senate.

First, at page 16 of the Bills Digest, the Committee comments that proposed new sections 51SE, 51SG, 51SJ, 51SK and 51ST could be 'considered to trespass unduly on personal rights and liberties'.

It is envisaged that the powers in sections 51SE, 51SG, 51SJ, and 51SK, cited in the Bills Digest, would be used in limited circumstances in the event that call-out of the Australian Defence Force in an offshore area was required, for example, to deal with a terrorist incident. This might include a scenario where there was a requirement to board or capture a vessel to compel a master or crew member to hand over the manifest or other documents, which would show where dangerous goods or cargo were stored. Requiring a master or crew member to hand over such documents, would enable an assessment to be made whether they posed a threat to persons or a Commonwealth interest. It might also assist in neutralising any violence that was occurring.

The powers set out in section 51ST relate to the taking of measures against aircraft in a context where, for example, the aircraft was in the control of terrorists. This section takes into account the practical reality that any use of force against an aircraft in flight must be presumed to be at least likely to cause the aircraft to crash or be otherwise destroyed.

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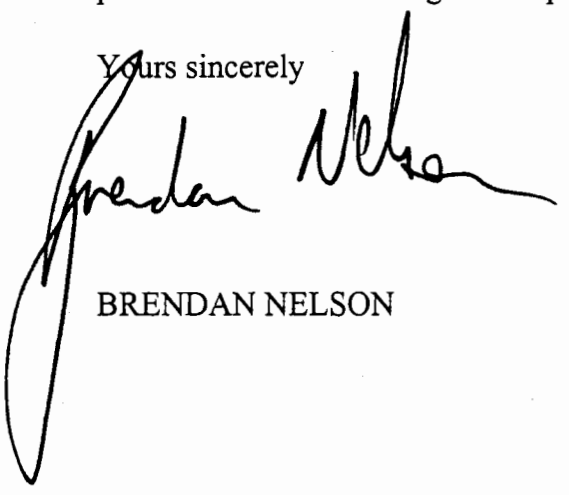
In relation to the two matters above, I am confident that the *Defence Act 1903* strikes a reasonable balance between the protection of individual interests, and dealing in a transparent and accountable manner with terrorist threats and incidents that could harm Australia's interests.

Secondly, at page 17 of the Bills Digest, the Committee comments that the proposed new section 51XB may be 'considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

Under section 51XB, orders, declarations or authorisations made under Part IIIAAA of the *Defence Act 1903,* are not legislative instruments. The existing section 51X of the *Defence Act 1903* provides for the tabling of orders and the reporting to Parliament of any utilisation of the Defence Force under an order. This ensures that there is sufficient and appropriate parliamentary scrutiny of the exercise of powers under the previous and amended legislative provisions.

Yours sincerely



BRENDAN NELSON

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

RECEIVED
17 MAR 2006
Senate Standing C'ttee
for the Scrutiny of Bills

06/629, MC06/3382

Senator R Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

15 MAR 2006

Dear Senator Ray

I refer to the letter from Ms Jeanette Radcliffe, Secretary of the Standing Committee for the Scrutiny of Bills dated 2 March 2006, in relation to the Telecommunications (Interception) Amendment Bill 2006 (the Bill).

Items 1 and 3 of Schedule 6 of the Bill will expand the circumstances in which the Victorian Office of Police Integrity may lawfully receive intercepted information to include investigations under the *Whistleblowers Protection Act 2001* (Vic). Items 5 and 7 in the table to subclause 2(1) of the Bill provides that these amendments will commence immediately after the commencement of item 10 of Schedule 1 of the *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act 2003* (the amendment Act).

Schedule 1, Part 2 of the amendment Act, including item 10, proposes to make the Victorian Office of Police Integrity an eligible authority for the purposes of the Interception Act. I note that item 10 of Schedule 1 of the amendment Act has not commenced as those provisions are yet to be proclaimed due to ongoing work between my Department and the Victorian Government. As per subsection 2(1) of the amendment Act, I also note that if item 10 of Schedule 1 of the Act is not proclaimed within 12 months of that Act having received Royal Assent, that being 14 December 2006, item 10, along with items 1 and 3 of Schedule 6 of the Bill will be repealed as having never come into force.

The 12 month commencement period is necessary to give the Victorian Government sufficient time to enact legislation to change the oversight arrangements for the Office of Police Integrity to address concerns expressed by the Australian Government in relation to those arrangements. The proposed changes to those oversight arrangements will ensure that access to intercepted material by both the Office of Police Integrity and the Victorian Police are subject to independent oversight. As I have indicated above, these amendments to the *Telecommunications (Interception) Act 1979* in relation to the Office of Police Integrity will not commence at all if Victoria has not enacted the appropriate legislation within 12 months of Royal Assent.

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Consequently, there is no retrospectivity in relation to items 1 and 3 of Schedule 6 of the Bill as item 10 of Schedule 1 of the amendment Act will commence on a day, in the future, to be fixed by Proclamation. This will not occur prior to the passage of the Bill.

The action officer for this matter in my Department is Maree Hume who can be contacted on 02 6250 6924.

Yours sincerely

Philip Ruddock

The Hon Kevin Andrews MP

Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service

RECEIVED
28 MAR 2006
Senate Standing C'ttee for the Scrutiny of Bills

Senator Brett Mason
Deputy Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Mason~~ Brett,

Thank you for the Committee's letter of 10 November 2005 drawing my attention to comments made about the Workplace Relations Amendment (Work Choices) Bill 2005 (the Bill) in the Scrutiny of Bills Alert Digest No. 13 of 2005. I apologise for the delay in responding.

You will recall that the Bill was introduced into the Senate on 10 November 2005. The Bill was debated on 28, 29 and 30 November and 1 and 2 December 2005. The Bill was then passed in the Senate on 2 December 2005 and received royal assent on 14 December 2005.

Please find attached my response to the Committee's particular concerns (Attachment A).

Yours sincerely

KEVIN ANDREWS

23 March 2006

Parliament House Canberra ACT 2600 Telephone (02) 6277 7320 Facsimile (02) 6273 4115

Personal rights and liberties

Section 96D - employer greenfields agreements

Section 96D of the *Workplace Relations Amendment (Work Choices) Act 2005* (**Work Choices Act**) allows an employer that is establishing a new business to make an agreement in writing and lodge that agreement with the Employment Advocate. Such an agreement is called an 'employer greenfields agreement'. Unlike other agreements, there is no requirement for employees to approve the agreement. This is necessary because an employer greenfields agreement may only be made where an employer is establishing a new business (as defined in s. 95B) before the employment of any of the persons who will be necessary for the normal operation of the business. It is only in these limited circumstances that this type of agreement will be available. Employees would indicate their acceptance of the terms and conditions of the employer greenfields agreement by accepting employment under the agreement.

Under s.101 of the Work Choices Act, employer greenfields agreements have a nominal expiry date of no more than 12 months from the date the agreement is lodged (as opposed to 5 years, as is the case with other types of agreements). After the nominal expiry date has passed employees may take protected industrial action in support of negotiations for a new agreement.

Schedule 1, item 113 – unfair dismissal

Subsection 170CE(5E) of the Work Choices Act provides that an employee may not make an application to the Australian Industrial Relations Commission alleging that the termination of his or her employment was harsh, unjust or unreasonable if, at the relevant time, the employer and its related bodies corporate employed 100 employees or fewer.

Statutory remedies for unfair dismissal, in both State and federal jurisdictions have always been subject to various jurisdictional requirements and exclusions.

These exclusions seek to achieve balance in unfair dismissal laws. The Work Choices Act introduces the '100 employees or fewer' exclusion to further provide a further balance between protecting employee rights and encouraging job creation.

The Government will continue to protect all employees by providing a remedy for unlawful termination, which prohibits dismissal on discriminatory grounds, including on the basis of sex, race, religion, trade union membership, refusing to sign an AWA, family responsibilities, pregnancy, representing other employees, taking maternity leave and a range of other grounds.

Henry VIII clauses

Section 100C - Workplace agreement displaces certain Commonwealth laws

Section 100C of the Work Choices Act provides that a workplace agreement displaces prescribed conditions of employment specified in a Commonwealth law that is prescribed in the regulations. Section 100C replicates former s. 170LZ(4) and s. 170VR(4) of the pre reform *Workplace Relations Act 1996* (**WR Act**). The section provides Commonwealth employers and employees with the flexibility to determine certain employment conditions in the workplace.

Any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny of the Regulations and Ordinance Committee.

Section 101D - Prohibited content

Section 101D of the Work Choices Act allows regulations to be made to specify matters that are prohibited content for the purposes of the Act. Any regulations made under s. 101D would identify the content that would be prohibited from being included in workplace agreements. The Government identified the matters that would be prohibited content in workplace agreements when it released the document "WorkChoices - A New Workplace Relations System" in 2005.

Any regulations made under s. 101D will be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny of the Regulations and Ordinance Committee.

Section 117D - prescribed preserved award terms - personal/ carers leave
Section 117E - prescribed preserved award terms - parental leave

Sections 117D and 117E are part of a package of regulation-making powers in Part VI of the Work Choices Act which are envisaged to be enacted to protect and preserve key entitlements for new and existing award-reliant employees. Consistent with s. 117B, the regulations would ensure that if an employee's preserved award provisions for annual leave, personal/carer's leave and/or parental leave are 'more generous' than the Australian Fair Pay and Conditions Standard (the Standard), they will continue to receive their award entitlement. The regulation-making powers in s. 117D and 117E are required to ensure that particular entitlements under preserved award terms are not lost in a comparison of entitlements under the Standard.

The regulations would provide that aspects of preserved award terms about personal/carer's leave under s. 117D (war service sick leave, infectious diseases sick leave and other like forms of sick leave) and parental leave under s. 117E (paid parental leave) would be treated as separate matters for the purpose of the 'more generous' test. The effect of this is that these aspects would not be included in the 'more generous' comparison (because the Standard does not make provision for these forms of leave) and would continue to operate.

Paragraph 116(1)(m) – award matters

Paragraph 116(1)(m) was removed from the Bill by Government amendment in the senate.

Clause 97(2) of Schedule 13 – preserved transitional award terms

Clause 97 of Schedule 13 would replicate the s. 117D and 117E for transitional award-reliant employees (other than those regulated by a Victorian reference award). Subclause 97(4) as it relates to subclause 97(2) ensures that the comparison of entitlements for the 'more generous' test does not result in employees losing access to certain elements of the Standard that are not generally part of the award framework – special maternity leave, the entitlement under section 94F to transfer to a safe job or to take paid leave, compassionate leave and unpaid carer's leave.

As the Committee notes, any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act* 2003 and to scrutiny by the Regulations and Ordinances Committee.

Non appealable decisions

Section 112 – terminating a bargaining period

Section 112 of the Work Choices Act enables the Minister to issue declarations which have the effect of terminating a bargaining period. The Minister may only issue a declaration in cases of serious industrial action, subject to three key requirements. The first requirement is that the industrial action is occurring, or is threatened, impending or probable. The second requirement is that the industrial action is endangering the life, personal safety or health or welfare of the Australian population, or causing significant damage to the Australian economy or an important part of it. The third requirement is that industrial action must also adversely affect the relevant employer.

This power is similar to powers available to state governments under their essential services legislation. The Minister will only be able to make directions that are reasonably directed to removing or reducing the threat.

The Committee has asked whether the Minister's declarations would be subject to merits review by the Administrative Appeals Tribunal (AAT). Decisions made under the Workplace Relations Act are generally not subject to merits review by the AAT and, consistent with this approach, nor would the Minister's declarations under s. 112. Similarly, the equivalent powers of State governments are not subject to merits review.