
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## FOURTH REPORT

## OF

## 2006

**21 June 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

## FOURTH REPORT OF 2006

The Committee presents its Fourth Report of 2006 to the Senate.

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

Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006

Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 *

Law Enforcement Integrity Commissioner Bill 2006 *

Renewable Energy (Electricity) Amendment Bill 2006

* Although these bills have not yet been introduced into the Senate, the Committee may report on its proceedings in relation to the bills, under standing order 24(9).

# Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 5 of 2006*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 20 June 2006. A copy of the letter is attached to this report.

## *Relevant extract from Alert Digest No. 5 of 2006*

Introduced into the House of Representatives on 31 May 2006
Portfolio: Families, Community Services and Indigenous Affairs

### Background

This bill amends the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Aboriginal and Torres Strait Islander Act 2005* to:

- expedite and clarify certain processes related to exploration and mining on Aboriginal land;
- permit the leasing of Aboriginal land and the mortgaging of leases; provide for long term leases over townships on Aboriginal land and provide for low interest loans and other incentives and assistance to prospective home owners;
- foster the devolution of decision making to local Aboriginal communities, including delegation of Land Council powers to regional groups and clarify provisions for the establishment of new Land Councils;
- provide funding to Land Councils on the basis of workloads rather than a guaranteed funding formula and require bodies to specify the purpose of payments made to Aboriginal people;
- dispose of land claims which cannot be heard or finalised or which are clearly inappropriate to grant.

The bill also contains application and transitional provisions.

**Commencement on Proclamation**
**Schedule 1**

Items 3, 5, 7, 17, 21, 25, 29, 31 and 33 in the table to subclause 2(1) of this bill provide for some of the amendments proposed in Schedule 1 to commence on Proclamation. The Committee notes that the bill makes no provision for the amendments either to commence in any event or not to commence at all at some specified time.

Parliamentary Counsel Drafting Direction No. 1.3 states that:

As a general rule, a restriction should be placed on the period within which an Act, or a provision of an Act, may be proclaimed. The commencement clause should specify either a period, or a date, after Royal Assent after which:

- the Act commences, if it has not already commenced by proclamation; or
- the Act is taken to be repealed, if a Proclamation has not been made by that time.

If the specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum.

The explanatory memorandum seeks to justify these commencement provisions, at paragraph 2, on the ground that the relevant amendments are intended to come into force at the same time as complementary Northern Territory legislation. However, as currently expressed, the Executive is given a completely unfettered discretion to decide if and when the various amendments will come into force. The Committee **seeks the Minister's advice** as to whether it would be possible to include a further provision in the various items in the table to subclause 2(1) providing a specified time at which the amendments will come into force in any event or be taken to be repealed.

*Pending the Minister's advice, 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*

> The committee has sought my advice in relation to the commencement dates for a number of the amendments being made by the Bill. The amendments in question relate to the exploration and mining provisions of the *Aboriginal Land Rights*

*(Northern Territory) Act 1976* (ALRA) and are intended to commence at the same time as complementary Northern Territory legislation. Because it is not possible to anticipate when the Northern Territory legislation will be enacted it is not practicable to specify a date by which the amendments should commence or be taken to be repealed. Doing so could result in a situation where the amendments commence before the necessary Northern Territory legislation is enacted or where the Northern Territory legislation is enacted without the relevant Commonwealth provisions being in force (having been repealed). In either case, the intended reforms related to exploration and mining on Aboriginal land in the Northern Territory would be incomplete.

The Committee thanks the Minister for this response. The Committee notes that the timetable for the completion of complementary Northern Territory legislation is uncertain.

The Committee continues to have concerns with the uncertainty arising out of the use of open-ended commencement provisions. Where a six-month period is said to be impractical, the Committee likes to see another period, such as a period of 12 months, specified. The Committee therefore continues to **seek the Minister's advice** as to whether the bill might provide for these amendments to be repealed if they have not commenced within 12 months of assent. The Committee notes that any provision that the Minister were to incorporate in this bill now, providing for the ultimate commencement or automatic repeal of the amendments in question, could always be subsequently amended by Parliament if the need arose.

## Delegation of power to a person
## Schedule 1, item 202

Proposed new subsection 76(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to be inserted by item 202 of Schedule 1 to this bill, would allow the Minister to delegate 'to a person any of the Minister's functions or powers under Part II, III, V, VI or VII' of that Act. This would therefore give the Minister an unfettered discretion to determine who a delegate might be, without reference to any relevant attributes or qualifications. The explanatory memorandum, at paragraph 190, merely notes this provision and makes no comment on the unfettered nature of the Minister's discretion.

The Committee notes that the new subsection 76(1) is in the same terms, in this respect, as the existing subsection 76(1), and that it may have been thought that the Ministerial discretion requires no justification. However, the existing provision was enacted when the Act was first passed, in 1976, before the Committee had been established. The Committee **seeks the Minister's advice** as to whether the proposed new subsection 76(1) could include some specification of the attributes and qualities which a person must possess before being appointed a delegate.

*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) of the Committee's terms of reference.*

## *Relevant extract from the response from the Minister*

> The committee has also sought my advice about amendments related to the delegation of powers under the ALRA, and has expressed concern that new subsection 76(1) of the ALRA does not include any specification of the attributes and qualities which a person must possess before being appointed a delegate. As indicated in the Committee Secretary's letter, new subsection 76(1) is in the same terms as in the existing ALRA in this respect and no consideration was given to amending it. However I will obtain further advice on the issues raised by the Committee and consider whether amendments should be made to meet the Committee's concerns.

The Committee thanks the Minister for this response. The Committee notes the Minister's intention to seek further advice in relation to this delegation of power and give consideration to whether amendments could be made to meet the Committee's concerns.

# Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 5 of 2006*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter received on 20 June 2006. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 5 of 2006*

Introduced into the House of Representatives on 25 May 2006
Portfolio: Families, Community Services and Indigenous Affairs

### Background

This bill amends the *A New Tax System (Family Assistance) Act 1999*, the *Family Assistance*, the *Social Security and Veterans' Affairs Legislation Amendment (2005 Budget and Other Measures) Act 2006*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Veterans' Entitlements Act 1986*, the *Family Law Act 1975*, the *A New Tax System (Family Assistance) (Administration) Act 1999* and the *Child Support (Assessment) Act 1989* to:

- increase the lower income threshold for family tax benefit Part A;
- extend the family tax benefit Part A large family supplement to include families with three or more children;
- introduce a maintenance income credit to enable parents to access their unused maintenance income free area from previous years to offset late child support payments;
- amend income test rules for family tax benefit Part B where a secondary earner returns to work after the birth of a child;

- extend eligibility for utilities allowance to persons receiving mature age, widow or partner allowance;
- extend carer payments to carers of severely disabled children under 16 years of age;
- allow immediate family members to establish a special disability trust to provide for the current and future care of family members with severe disabilities;
- enable the establishment of a special disability trust for the care of a severely disabled person to not effect the social security or veteran's entitlements payments of the recipient or family member donors;
- provide for an immediate non-taxable payment (exempt from means testing) to Australians affected by a disaster;
- amend the definition of 'income tax refund' to include refundable tax offsets and make technical amendments in relation to income estimates; and
- make technical amendments consequential on family law changes relating to shared parental responsibility.

The bill also amends the *Family Law Act 1975* to implement changes to the governance arrangements of the Australian Institute of Family Studies in response to the recommendations of the Review of the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig Review).

## Retrospective commencement
## Schedule 11

Item 11 in the table to subclause 2(1) of this bill provides for the amendment proposed in Schedule 11 to commence retrospectively on 1 July 2002. The explanatory memorandum notes, on page 72, that the amendment is intended to reflect 'the intended policy and existing administration', but does not indicate whether the retrospective commencement of this amendment will adversely affect any person. The Committee **seeks the Minister's advice** regarding the effect of this restrospectivity.

*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 Committee has sought my advice on whether anyone will be disadvantaged by the retrospective commencement of this measure.

Schedule 11 of the Bill amends the definition of "income tax refund" in the family assistance law to include tax refunds that arise from refundable tax offsets. This amendment commences retrospectively, on 1 July 2002.

This amendment corrects a technical deficiency in the definition so that it reflects the intended policy. The amendment also reflects how the provision has been administered by the Australian Taxation Office and Centrelink, since the commencement of recovery of family tax benefit debts from income tax refunds in July 2002, consistent with intended policy.

Any available tax refunds that arose from refundable tax offsets would already have been applied towards repayment of family tax benefit debts, so the enactment of this change will not have any practical adverse effect on customers with a debt.

The Committee thanks the Minister for this response, but regrets that this explanation was not included in the explanatory memorandum.

# Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 4 of 2006*. The Minister for Justice and Customs responded to the Committee's comments in a letter dated 19 June 2006. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 4 of 2006*

Introduced into the House of Representatives on 29 March 2006
Portfolio: Attorney-General

### Background

This bill amends the *Australian Federal Police Act 1979*, to provide for a new complaints and professional standards regime within the Australian Federal Police (AFP), and the *Ombudsman Act 1976*, to align the Ombudsman's administrative review role over the AFP with the role it has in relation to other Australian government agencies. The bill also repeals the *Complaints (Australian Federal Police Act) 1981* and makes consequential amendments to the *Australian Federal Police Act 1979* and 7 other Acts.

### Legislative Instruments Act – determinations and directions Schedule 1, item 27 and Schedule 1, item 28

Various provisions in this bill would declare certain determinations and directions to be given under the *Australian Federal Police Act 1979* not to be legislative instruments. Proposed new subsection 35(2), to be inserted by item 27 of Schedule 1, provides for the Commissioner to determine, in writing, that a consultant or independent contractor is to be an AFP appointee. Subsection 35(3) provides that such a determination is not a legislative instrument.

Proposed new section 40VB outlines the manner in which an investigation or inquiry is to be conducted and provides for directions to be given to the investigator by the head of a unit (subsection 40VB(3)), the Commissioner (subsection 40VB(5)) or the Minister (subsection 40VB(7)). Proposed new subsection 40VB(8) provides that such directions are not legislative instruments.

Proposed new section 40VE provides for an investigator to give directions to an AFP appointee for the purposes of an investigation or inquiry. Subsection 40VE(10), to be inserted by item 28 of Schedule 1, provides that such a direction is not a legislative instrument.

In each case, it appears that the determinations or directions are not legislative in character, and that therefore the above provisions are no more than declaratory. However, the explanatory memorandum is silent on the character of each determination or direction. 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 of the law (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 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

The Committee therefore **seeks the Attorney-General's advice** as to whether these provisions are no more than declaratory and, if so, whether it would have been appropriate to include this information in the explanatory memorandum.

*Pending the Attorney-General'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*

> In respect of the Committee's comments on proposed new subsections 35(3), 40VB(8) and 40VE(10) of the *Australian Federal Police Act 1979* (the AFP Act), it is not considered that these proposed new subsections breach principle 1(a)(v) of the Committee's terms of reference. The determinations and directions to which these subsections relate are not legislative in character. In providing that these

determinations and directions are not legislative instruments the subsections are no more than declaratory.

This information should have been included in the explanatory memorandum.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

## Abrogation of the privilege against self-incrimination
## Schedule 1, item 28

Proposed new paragraph 40VE(3)(b) of the *Australian Federal Police Act 1979*, to be inserted by item 28 of Schedule 1, would abrogate the privilege against self-incrimination for an AFP appointee who has been given a direction by a person investigating an allegation of serious misconduct or corruption by an AFP employee, or conducting a ministerially directed inquiry.

At common law people can decline to answer a question on the grounds that their reply might tend to incriminate them. Legislation which interferes with this common law entitlement trespasses on personal rights and liberties. The Committee has been prepared to accept such an abrogation of the privilege if any information obtained as both a direct *and* indirect consequence of the provision of the information is not admissible in evidence against the person required to give that information.

In this case, subsection 40VE(4) provides that 'the information, the production of the document, record or thing, the answer to the question or the evidence obtained by doing that thing, is not admissible in evidence against the AFP appointee in any civil or criminal proceedings.' It is not clear to the Committee whether subsection 40VE is intended to also provide a level of protection to information or evidence which is obtained as an indirect consequence of the abrogation of the privilege. While the explanatory memorandum states on page 18 that 'the production of information or evidence obtained from the AFP appointee is not admissible in evidence', it is silent on the question of derivative use immunity. The Committee therefore **seeks the Attorney-General's advice** as to whether subsection 40VE(4) provides that information or evidence obtained as an indirect consequence of the abrogation of the privilege against self-incrimination is not admissible in evidence against the person required to give that information.

If derivative use immunity has not been extended in this case, the Committee **seeks the Attorney-General's advice** as to the reason for this and whether it would have been appropriate to include this information in the explanatory memorandum.

*Pending the Attorney-General'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*

In respect of the Committee's comments on proposed new subsections 40VE(3) and (4) of the AFP Act, subsection 40VE(4) does not provide for derivative-use immunity. This reflects the current terms of subsection 7(6) of the *Complaints (Australian Federal Police) Act 1981* (the Complaints Act). I submit that it is appropriate that the current policy should be maintained in the new legislation that replaces the Complaints Act.

The criminal law policy of the Australian Government, as published in my Departments *Guide to framing Commonwealth offences, civil penalties and enforcement powers,* provides that if legislation abrogates the privilege against self-incrimination, both use and derivative-use immunity should normally apply. However, this legislation is an exceptional case.

The reliability of AFP employees (including both sworn members and other police staff) is critical to the effectiveness of law enforcement. It is important not only that misconduct be identified and, where it is serious enough to justify such action, that the persons responsible be removed from the Australian Federal Police, but also that it is clear to AFP employees who might be tempted to commit criminal offences that, in such cases, there is a high risk of successful prosecution. Moreover, in many cases, there will be no independent witnesses to the suspected conduct. In such cases admissions that are themselves inadmissible may be an indispensable step in identifying other evidence to establish the guilt of the person concerned.

In light of these considerations I submit that the public interest in those charged with the investigation of misconduct within the AFP having full and effective investigatory powers, and in prosecuting authorities being able, in any subsequent court proceedings, to use against the person any incriminating material identified as a result of the evidence given to those investigators, outweighs the merits of affording full protection to self-incriminatory material. The proposed provision is comparable to subsections 30(4) and (5) of the *Australian Crime Commission Act 2002* and section 68 of the *Australian Securities and Investments Commission Act 1989.*

It would have been appropriate to include this information in the explanatory memorandum.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

# Law Enforcement Integrity Commissioner Bill 2006

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 4 of 2006*. The Minister for Justice and Customs responded to the Committee's comments in a letter dated 19 June 2006. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 4 of 2006*

Introduced into the House of Representatives on 29 March 2006
Portfolio: Attorney-General

### Background

This bill provides for the establishment of the Office of the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI), an independent body with powers to prevent, detect and investigate corruption within Australian Government law enforcement agencies.

The Integrity Commissioner will be a judge or experienced legal practitioner appointed by the Governor-General and will have the power to investigate corruption issues using a combination of inquiry and investigative powers to assemble evidence to support prosecutions. The Integrity Commissioner will also be able to refer certain matters to another agency for investigation and to then manage, oversee or review that investigation where appropriate.

The bill provides for the Integrity Commissioner to inform the Minister, the head of the agency concerned, the complainant and the subject of the investigation as to the initiation, progress and outcomes of an investigation. The Integrity Commissioner will also have the power to make recommendations for disciplinary or employment action and may also report to the Prime Minister and Parliament if he or she believes that there is a failure by the head of an agency to take adequate remedial action.

The bill provides for the investigation of complaints of corruption issues within the ACLEI, including the Integrity Commissioner, and for the Minister to authorise a special external investigation into an ACLEI corruption issue.

## Abrogation of the privilege against self-incrimination
## Subclauses 80(1) and 96(1)

Subclauses 80(1) and 96(1) would abrogate the privilege against self-incrimination in relation to public inquiries and investigations carried out by the Integrity Commissioner. The Committee recognises that good administration might, in certain circumstances, necessitate the obtaining of information which can only be obtained, or best be obtained, by forcing someone to answer questions or produce documents or things. However, the Committee generally holds the view that the loss of a person's common law right to silence in these circumstances should be balanced by a prohibition against *both* the direct *and* indirect use of the forced disclosure.

Subclauses 80(2) and 96(2) provide for indemnity with regard to information *directly* given to the Integrity Commissioner where, prior to producing information, documents or things, a staff member of a law enforcement agency claims that doing so may incriminate or expose them to a penalty. In these circumstances the information, documents or things will not be admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. Subsections 80(4) and 96(4) provide that this immunity will not apply in the case of proceedings for offences in relation to hearings, confiscation proceedings, proceedings relating to the obstruction of Commonwealth public officials or disciplinary proceedings.

However, the Committee notes that this immunity does not appear to extend to any information which the Commissioner may obtain as an *indirect* consequence of the information, document or thing being provided. Unfortunately, the explanatory memorandum does not address this question of derivative use immunity. The Committee therefore **seeks the Attorney-General's advice** as to the reason why derivative use immunity has not been extended in this case and whether this information should have been included in the explanatory memorandum.

*Pending the Attorney-General'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*

In respect of the Committee's comments on subclauses 80(1) and 96(l), I confirm that neither subclause provides for derivative-use immunity.

The criminal law policy of the Australian Government, as published in my Department's *Guide to framing Commonwealth offences, civil penalties and enforcement powers,* provides that if legislation abrogates the privilege against self-incrimination, both use and derivative-use immunity should normally apply. However, this legislation is an exceptional case.

The integrity of people performing law enforcement functions is critical to the effectiveness of, and public confidence in, law enforcement. It is important not only that such corrupt conduct as does occur be detected but also that there be strong deterrents to corrupt conduct. These need to include not only the prospect of loss of employment in an appropriate case but also a high risk of successful prosecution. Moreover, it is in the nature of corruption that, in many cases, there will be no independent witnesses to the suspected conduct. In such cases admissions that are themselves inadmissible may be an indispensable step in identifying other evidence to establish the guilt of the person concerned.

In light of these considerations I submit that the public interest in the Integrity Commissioner having full and effective investigatory powers, and in prosecuting authorities being able, in any subsequent court proceedings, to use against the person any incriminating material identified as a result of evidence given to the Integrity Commissioner under compulsion, outweighs the merits of affording full protection to self-incriminatory material. The proposed provision is comparable to subsections 30(4) and (5) of the *Australian Crime Commission Act 2002* and section 68 of the *Australian Securities and Investments Commission Act 1989.*

This information should have been included in the explanatory memorandum.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

**Abrogation of legal professional privilege**
**Subclauses 80(5) and 96(5)**

There is a long-standing principle that professional communications between a person and his or her legal adviser should be confidential. The Committee closely examines legislation which removes or diminishes this right.

Subclauses 80(5) and 96(5) of this bill would abrogate the right to claim legal professional privilege in relation to public inquiries and investigations carried out by the Integrity Commissioner, although clause 95 would permit a legal practitioner to claim legal professional privilege for communications made by or to the practitioner in his or her capacity as such a practitioner. Unfortunately the explanatory memorandum does not explain the reason for this abrogation of legal professional privilege, and the Committee therefore **seeks the Attorney-General's advice.**

*Pending the Attorney-General'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 Committee seeks my advice as to the reason for the abrogation of legal professional privilege in subclauses 80(5) and 96(5) of the Bill.

The abrogation of legal professional privilege in these provisions is of a qualified character. It extends only to legal advice given to a Minister or Commonwealth government agency and to communications between Commonwealth officers and other persons or bodies that are subject to the privilege. In other words, it does not override legal professional privilege if it attaches to communications not involving the Commonwealth. The abrogation is further qualified by subclauses 80(6) and 96(6), which provide that a claim of legal professional privilege in relation to information, a document or a thing that must be given or produced because of subclause 80(5) or 96(5) is not otherwise affected.

The purpose of these provisions is to ensure that Commonwealth agencies and their officers provide the fullest possible assistance to the Integrity Commissioner in the conduct of investigations and public inquiries into corruption issues and that the sorts of restrictions that would otherwise apply to the disclosure of official information should not generally preclude disclosure of relevant information to the Integrity Commissioner. If a public interest that would be prejudiced by disclosure of particular matter to or by the Integrity Commissioner is so significant that it outweighs the public interest in full investigation of, or dissemination of information about, a corruption issue, the Attorney-General may issue a certificate under clause 149 of the Bill to prohibit that disclosure. The protection afforded by subclauses 80(6) and 96(6) should eliminate one of the major reasons why a Commonwealth agency might wish to relay on a claim of legal professional privilege in its dealings with the Integrity Commissioner.

I submit that the limited abrogation of legal professional privilege by subclauses 80(5) and 96(5) is justified by the need to ensure the most effective possible investigation of suspected corruption in Commonwealth law enforcement. I note that there are comparable provisions in subsections 7A(1B), 8(2B) and 9(4) of the *Ombudsman Act 1976.*

The Committee thanks the Minister for this response.

**Legislative Instruments Act – Direction**
**Subclause 140(5)**

Subclause 140(6) provides that a direction given by the Integrity Commissioner under subclause 140(5) is not a legislative instrument. Such a direction appears not to be legislative in character and therefore the provision appears to be no more than declaratory of the law. However, where a provision specifies that an instrument is not a legislative instrument, the Committee expects the explanatory memorandum to explain whether the provision is merely declaratory, and included to clarify that the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act, or whether the provision expresses a policy intention to exempt an instrument that is legislative in character. Unfortunately the explanatory memorandum does not address this question and the Committee therefore seeks the **Attorney-General's advice** as to the character of a direction under subclause 140(5) and whether it would have been appropriate to include this information in the explanatory memorandum.

*Pending the Attorney-General'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*

In respect of the Committee's comments on subclause 140(5) of the Bill, it is not considered that this clause breaches principle 1(a)(v) of the Committee's terms of

reference. A direction given under this subsection is not legislative in character. In providing that such a direction is not a legislative instrument, the subsection is no more than declaratory. It would have been appropriate to include this information in the explanatory memorandum.

I hope the Committee will find these comments of assistance.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

# Renewable Energy (Electricity) Amendment Bill 2006

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 3 of 2006*. The Minister for the Environment and Heritage responded to the Committee's comments in a letter dated 17 May 2006. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 3 of 2006*

Introduced into the House of Representatives on 2 March 2006
Portfolio: Environment and Heritage

### Background

This bill amends the *Renewable Energy (Electricity) Act 2000* to implement the Government's response to a 2003 independent statutory review to make changes to improve market transparency and business certainty.

The bill:

- amends and clarifies procedures for the creation, claim and surrender of renewable energy certificates;
- provides for provisional accreditation of proposed generation projects and establishes timeframes for the consideration of applications for accreditation of generators;
- allows for the publication of additional data and information relevant to investment decisions;
- provides increased opportunities for bioenergy and solar energy technologies by amending procedures and expanding the range of eligible installations;
- ensures only one entity is made liable in relation to the purchase of electricity; and

- allows the Renewable Energy Regulator (the Regulator) to vary the energy acquisition and shortfall statements and baselines for accredited power stations, to gather information in relation to monitoring and compliance, and to suspend an accredited power station.

**Legislative Instruments Act - Declarations**
**Schedule 1, item 57**

Item 57 of Schedule 1 would add a new subsection 22(2) to the Principal Act, under which regulations made for the purpose of the existing subsection 22(1) might empower the Regulator to make written determinations in relation to the number of renewable energy certificates able to be created for a particular solar water heater installation. Unfortunately, the explanatory memorandum merely restates the provisions of the bill (on page 25) and does not indicate whether such a written determination would be legislative in character or administrative. If such a determination were to be legislative in character, it would appear that the proposed new subsection 22(2) would allow for sub-delegation of legislative power, and would not subject the exercise of such sub-delegation to any scrutiny by the Parliament. The Committee **seeks the Minister's advice** on the nature of these written determinations of the Regulator.

*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*

> You have sought my advice on the nature of written determinations of the Renewable Energy Regulator (the Regulator) proposed by new subsection 22(2) (inserted by Item 57 of Schedule 1 of the Bill). The intention of this amendment is to provide clarity to manufacturers of solar water heaters regarding the methodology that is used by the Regulator when determining the number of certificates that can be created for a particular installation of a solar water heater.
>
> New subsection 22(2) will enable regulations made for the purposes of subsection 22(1) of the *Renewable Energy (Electricity) Act 2000* (the Act) to empower the Regulator to make written determinations setting out the method by which the number of certificates that can be created for a particular installation of a solar water heater is calculated.

The determinations of the Regulator referred to in the proposed new subsection 22(2) will determine the number of certificates. The determination will be made in accordance with guidelines to be specified in regulations. The principal document that will form the basis of the calculations, which is to be specified in the regulations, is the Australian Standard AS 4234. The calculation for determining the number of certificates that can be created for a particular installation of a solar water heater is technical. The Standard, together with other guidelines published by the Regulator (which will also be specified in regulations), set out the methodology for this calculation in comprehensive detail and leave no room for the discretion of the Regulator. I have been advised that there is no sub-delegation of power as the Regulator will be performing these calculations strictly in accordance with the guidelines which will be specified in the regulations.

I am also advised that as the Regulator is merely applying the law in a particular context, and not determining the content of the law, the written determinations of the Regulator pursuant to new proposed subsection 22(2) would not be legislative instruments for the purposes of the *Legislative Instruments Act 2003* (LIA).

The Committee thanks the Minister for this response and for clarifying that the determinations provided for in subsection 22(2) are not legislative in character. The Committee reiterates its expectation that provisions of this nature be adequately explained in the explanatory memorandum to the bill.

## Legislative Instruments Act - Declarations
## Schedule 1, item 100

Proposed new subsections 44(5), 44(6), 44(7) and 44(8) of the principal Act provide for the payment of a fee for the surrender of renewable energy certificates within a period of 28 days from an entity receiving a notice from the Regulator following the lodgement of an energy acquisition statement. Proposed new subsection 44(9), to be inserted by item 100 of Schedule 1, declares that such a notice, provided for under proposed new subsection 44(6), is not a legislative instrument. It would appear that such a notice is not of a legislative character, and therefore proposed new subsection 44(9) is no more than declaratory. However, while the explanatory memorandum clarifies the purpose of the notice (on page 33), it does not clarify whether the proposed new subsection is declaratory of the existing position. The Committee **seeks the Minister's advice** whether the proposed new subsection is merely declaratory.

*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*

You have also sought my advice on whether the proposed new subsection 44(9) (inserted by Item 100 of Schedule 1 of the Bill) is declaratory. The purpose of this new subsection is to confirm that the written notice of the Regulator under the proposed new subsection 44(6) is not a legislative instrument for the purposes of the LIA.

In this regard, the notice referred to in new subsection 44(6) would be provided by the Regulator only once all of the conditions specified in section 44 and 45 regarding the surrender of certificates have been satisfied. The Regulator would be specifying the number of certificates to be surrendered by a liable entity for a particular year, and the fee that is payable by the liable entity in respect of the surrender of those certificates based on the fact that the relevant statutory conditions have been fulfilled. As such, the notice provided by the Regulator under the new subsection 44(6) is not a legislative instrument within the meaning of section 5 of the LIA because the Regulator will not be determining or altering the content of the law.

I trust that the above addresses your concerns.

The Committee thanks the Minister for this response and reiterates its expectation that provisions of this nature be adequately explained in the explanatory memorandum to the bill.

Robert Ray
Chair

# The Hon Mal Brough MP
## Minister for Families, Community Services and Indigenous Affairs
### Minister Assisting the Prime Minister for Indigenous Affairs

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



Dear Senator Ray

I refer to a letter of 15 June to my Senior Adviser from the Scrutiny of the Senate Standing Committee for the Scrutiny of Bills drawing my attention to comments made by the Committee in relation the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (the Bill).

The committee has sought my advice in relation to the commencement dates for a number of the amendments being made by the Bill. The amendments in question relate to the exploration and mining provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and are intended to commence at the same time as complementary Northern Territory legislation. Because it is not possible to anticipate when the Northern Territory legislation will be enacted it is not practicable to specify a date by which the amendments should commence or be taken to be repealed. Doing so could result in a situation where the amendments commence before the necessary Northern Territory legislation is enacted or where the Northern Territory legislation is enacted without the relevant Commonwealth provisions being in force (having been repealed). In either case, the intended reforms related to exploration and mining on Aboriginal land in the Northern Territory would be incomplete.

The committee has also sought my advice about amendments related to the delegation of powers under the ALRA, and has expressed concern that new subsection 76(1) of the ALRA does not include any specification of the attributes and qualities which a person must possess before being appointed a delegate. As indicated in the Committee Secretary's letter, new subsection 76(1) is in the same terms as in the existing ALRA in this respect and no consideration was given to amending it. However I will obtain further advice on the issues raised by the Committee and consider whether amendments should be made to meet the Committee's concerns.

Yours sincerely

MAL BROUGH

# The Hon Mal Brough MP
## Minister for Families, Community Services and Indigenous Affairs
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Senator R Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600



Dear Senator

The Scrutiny of Bills Alert Digest No. 5 of 2006 includes comment on the retrospective effect of the amendment made by Schedule 11 to the *Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006* (the Bill). The Committee has sought my advice on whether anyone will be disadvantaged by the retrospective commencement of this measure.

Schedule 11 of the Bill amends the definition of "income tax refund" in the family assistance law to include tax refunds that arise from refundable tax offsets. This amendment commences retrospectively, on 1 July 2002.

This amendment corrects a technical deficiency in the definition so that it reflects the intended policy. The amendment also reflects how the provision has been administered by the Australian Taxation Office and Centrelink, since the commencement of recovery of family tax benefit debts from income tax refunds in July 2002, consistent with intended policy.

Any available tax refunds that arose from refundable tax offsets would already have been applied towards repayment of family tax benefit debts, so the enactment of this change will not have any practical adverse effect on customers with a debt.

Yours sincerely

MAL BROUGH

SENATOR THE HON. CHRISTOPHER ELLISON
Minister for Justice and Customs
Senator for Western Australia
Manager of Government Business in the Senate



MC06/7684
MC06/7700
MC06/7701

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

19 JUN 2006

Dear Senator Robert,

Your Committee Secretary wrote to the Attorney-General's office on 11 May 2006 to draw attention to comments, in the Committee's Alert Digest No 4 of 2006, on the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 and the Law Enforcement Integrity Commissioner Bill 2006. As the Minister with responsibility within the Attorney-General's portfolio for law enforcement matters, I offer the following responses to these comments.

**Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006**

*Legislative Instruments Act—determinations and directions*
*Schedule 1, item 27 and Schedule 1, item 28*

In respect of the Committee's comments on proposed new subsections 35(3), 40VB(8) and 40VE(10) of the *Australian Federal Police Act 1979* (the AFP Act), it is not considered that these proposed new subsections breach principle 1(a)(v) of the Committee's terms of reference. The determinations and directions to which these subsections relate are not legislative in character. In providing that these determinations and directions are not legislative instruments the subsections are no more than declaratory. This information should have been included in the explanatory memorandum.

*Abrogation of the privilege against self-incrimination*
*Schedule 1, item 28*

In respect of the Committee's comments on proposed new subsections 40VE(3) and (4) of the AFP Act, subsection 40VE(4) does not provide for derivative-use immunity. This reflects the current terms of subsection 7(6) of the *Complaints (Australian Federal Police) Act 1981* (the

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Complaints Act). I submit that it is appropriate that the current policy should be maintained in the new legislation that replaces the Complaints Act.

The criminal law policy of the Australian Government, as published in my Department's *Guide to framing Commonwealth offences, civil penalties and enforcement powers*, provides that if legislation abrogates the privilege against self-incrimination, both use and derivative-use immunity should normally apply. However, this legislation is an exceptional case.

The reliability of AFP employees (including both sworn members and other police staff) is critical to the effectiveness of law enforcement. It is important not only that misconduct be identified and, where it is serious enough to justify such action, that the persons responsible be removed from the Australian Federal Police, but also that it is clear to AFP employees who might be tempted to commit criminal offences that, in such cases, there is a high risk of successful prosecution. Moreover, in many cases, there will be no independent witnesses to the suspected conduct. In such cases admissions that are themselves inadmissible may be an indispensable step in identifying other evidence to establish the guilt of the person concerned.

In light of these considerations I submit that the public interest in those charged with the investigation of misconduct within the AFP having full and effective investigatory powers, and in prosecuting authorities being able, in any subsequent court proceedings, to use against the person any incriminating material identified as a result of the evidence given to those investigators, outweighs the merits of affording full protection to self-incriminatory material. The proposed provision is comparable to subsections 30(4) and (5) of the *Australian Crime Commission Act 2002* and section 68 of the *Australian Securities and Investments Commission Act 1989*.

It would have been appropriate to include this information in the explanatory memorandum.

**Law Enforcement Integrity Commissioner Bill 2006**

*Abrogation of the privilege against self-incrimination*
*Subclauses 80(1) and 96(1)*

In respect of the Committee's comments on subclauses 80(1) and 96(1), I confirm that neither subclause provides for derivative-use immunity.

The criminal law policy of the Australian Government, as published in my Department's *Guide to framing Commonwealth offences, civil penalties and enforcement powers*, provides that if legislation abrogates the privilege against self-incrimination, both use and derivative-use immunity should normally apply. However, this legislation is an exceptional case.

The integrity of people performing law enforcement functions is critical to the effectiveness of, and public confidence in, law enforcement. It is important not only that such corrupt conduct as does occur be detected but also that there be strong deterrents to corrupt conduct. These need to include not only the prospect of loss of employment in an appropriate case but also a high risk of successful prosecution. Moreover, it is in the nature of corruption that, in many cases, there will be no independent witnesses to the suspected conduct. In such cases admissions that are themselves inadmissible may be an indispensable step in identifying other evidence to establish the guilt of the person concerned.

In light of these considerations I submit that the public interest in the Integrity Commissioner having full and effective investigatory powers, and in prosecuting authorities being able, in any subsequent court proceedings, to use against the person any incriminating material identified as a result of evidence given to the Integrity Commissioner under compulsion, outweighs the merits of affording full protection to self-incriminatory material. The proposed provision is comparable to subsections 30(4) and (5) of the *Australian Crime Commission Act 2002* and section 68 of the *Australian Securities and Investments Commission Act 1989*.

This information should have been included in the explanatory memorandum.

*Abrogation of legal professional privilege*
*Subclauses 80(5) and 96(5)*

The Committee seeks my advice as to the reason for the abrogation of legal professional privilege in subclauses 80(5) and 96(5) of the Bill.

The abrogation of legal professional privilege in these provisions is of a qualified character. It extends only to legal advice given to a Minister or Commonwealth government agency and to communications between Commonwealth officers and other persons or bodies that are subject to the privilege. In other words, it does not override legal professional privilege if it attaches to communications not involving the Commonwealth. The abrogation is further qualified by subclauses 80(6) and 96(6), which provide that a claim of legal professional privilege in relation to information, a document or a thing that must be given or produced because of subclause 80(5) or 96(5) is not otherwise affected.

The purpose of these provisions is to ensure that Commonwealth agencies and their officers provide the fullest possible assistance to the Integrity Commissioner in the conduct of investigations and public inquiries into corruption issues and that the sorts of restrictions that would otherwise apply to the disclosure of official information should not generally preclude disclosure of relevant information to the Integrity Commissioner. If a public interest that would be prejudiced by disclosure of particular matter to or by the Integrity Commissioner is so significant that it outweighs the public interest in full investigation of, or dissemination of information about, a corruption issue, the Attorney-General may issue a certificate under clause 149 of the Bill to prohibit that disclosure. The protection afforded by subclauses 80(6) and 96(6) should eliminate one of the major reasons why a Commonwealth agency might wish to relay on a claim of legal professional privilege in its dealings with the Integrity Commissioner.

I submit that the limited abrogation of legal professional privilege by subclauses 80(5) and 96(5) is justified by the need to ensure the most effective possible investigation of suspected corruption in Commonwealth law enforcement. I note that there are comparable provisions in subsections 7A(1B), 8(2B) and 9(4) of the *Ombudsman Act 1976*.

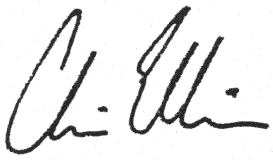
*Legislative Instruments Act—direction*
*Subclause 140(5)*

In respect of the Committee's comments on subclause 140(5) of the Bill, it is not considered that this clause breaches principle 1(a)(v) of the Committee's terms of reference. A direction given under this subsection is not legislative in character. In providing that such a direction is not a legislative instrument, the subsection is no more than declaratory. It would have been appropriate to include this information in the explanatory memorandum.

I hope the Committee will find these comments of assistance.

The action officer for this matter in the Attorney-General's Department is Michael Manning, who can be contacted on 6250 6795.

Yours sincerely



**CHRIS ELLISON**
**Senator for Western Australia**

**SENATOR THE HON IAN CAMPBELL**
Minister for the Environment and Heritage
Senator for Western Australia



Senator Robert Ray
Chairman
Senate Standing Committee for the Scrutiny of Bills
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17 MAY 2006

Dear ~~Senator Ray~~ Robert,

Thank you for the letter of 30 March 2006 seeking my advice regarding certain provisions in the Renewable Energy (Electricity) Amendment Bill 2006 (the Bill).

In particular, you have sought my advice on the nature of written determinations of the Renewable Energy Regulator (the Regulator) proposed by new subsection 22(2) (inserted by Item 57 of Schedule 1 of the Bill). The intention of this amendment is to provide clarity to manufacturers of solar water heaters regarding the methodology that is used by the Regulator when determining the number of certificates that can be created for a particular installation of a solar water heater.

New subsection 22(2) will enable regulations made for the purposes of subsection 22(1) of the *Renewable Energy (Electricity) Act 2000* (the Act) to empower the Regulator to make written determinations setting out the method by which the number of certificates that can be created for a particular installation of a solar water heater is calculated.

The determinations of the Regulator referred to in the proposed new subsection 22(2) will determine the number of certificates. The determination will be made in accordance with guidelines to be specified in regulations. The principal document that will form the basis of the calculations, which is to be specified in the regulations, is the Australian Standard AS 4234. The calculation for determining the number of certificates that can be created for a particular installation of a solar water heater is technical. The Standard, together with other guidelines published by the Regulator (which will also be specified in regulations), set out the methodology for this calculation in comprehensive detail and leave no room for the discretion of the Regulator. I have been advised that there is no sub-delegation of power as the Regulator will be performing these calculations strictly in accordance with the guidelines which will be specified in the regulations.

I am also advised that as the Regulator is merely applying the law in a particular context, and not determining the content of the law, the written determinations of the Regulator pursuant to new proposed subsection 22(2) would not be legislative instruments for the purposes of the *Legislative Instruments Act 2003* (LIA).

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You have also sought my advice on whether the proposed new subsection 44(9) (inserted by Item 100 of Schedule 1 of the Bill) is declaratory. The purpose of this new subsection is to confirm that the written notice of the Regulator under the proposed new subsection 44(6) is not a legislative instrument for the purposes of the LIA.

In this regard, the notice referred to in new subsection 44(6) would be provided by the Regulator only once all of the conditions specified in section 44 and 45 regarding the surrender of certificates have been satisfied. The Regulator would be specifying the number of certificates to be surrendered by a liable entity for a particular year, and the fee that is payable by the liable entity in respect of the surrender of those certificates based on the fact that the relevant statutory conditions have been fulfilled. As such, the notice provided by the Regulator under the new subsection 44(6) is not a legislative instrument within the meaning of section 5 of the LIA because the Regulator will not be determining or altering the content of the law.

I trust that the above addresses your concerns.

Yours sincerely

IAN CAMPBELL