



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2006

9 August 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

FIFTH REPORT OF 2006

The Committee presents its Fifth 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

Education Services for Overseas Students Legislation Amendment
(2006 Measures No. 1) Bill 2006 *

- * Although this bill has 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*.

In its *Fourth Report of 2006*, the Committee sought further advice from the Minister regarding commencement on proclamation. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 7 July 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.

Relevant extract from the further response from the Minister

The Committee has expressed its continued concern about open ended commencement provisions for the amendments related to exploration and mining and sought my advice about whether the Bill might provide for those amendments to be repealed if they have not commenced within 12 months of Royal Assent. The Committee has suggested that any provision for ultimate commencement or automatic repeal of the amendments in question could be amended by Parliament if necessary.

I do not consider that it would be desirable, in terms of efficient legislative processes, to proceed in the manner proposed by the Committee. It is not practicable to specify a date by which the amendments should commence or be taken to be repealed because it is not possible to anticipate when the Northern Territory legislation will be enacted. I therefore consider that the current proclamation provisions for the amendments should remain in the Bill.

The Committee thanks the Minister for this further response. The Committee remains concerned at the uncertainty which arises from the use of open ended commencement provisions. For this reason, the Committee continues to draw 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.

Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2006*. The Minister for Education, Science and Training responded to the Committee's comments in a letter dated 12 July 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 31 May 2006
Portfolio: Education, Science and Training

Background

This bill amends the *Education Services for Overseas Students Act 2000* to implement recommendations of the review required by section 176A of that Act in relation to the:

- application of the 'fit and proper' test to registered providers;
- clarification of obligations in relation to the receipt of course money and the provision of refunds;
- automatic suspension of the registration of a provider for failure to pay the Annual Registration Charge and removal of a suspension upon payment of outstanding amounts; and
- extension of the Secretary's authority to provide access to student information to include Tuition Assurance Schemes.

The bill also amends the *Education Services for Overseas Students (Registration Charges) Act 1977* to require a provider to pay an initial registration charge before registration. The bill contains application and saving provisions.

Retrospective application

Schedule 1, items 9 to 12

Subitem 37(2) of Schedule 1 would apply the amendments proposed by items 9 to 12 of Schedule 1 to events occurring before, as well as after, commencement, and therefore possibly retrospectively. 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.

Items 9 to 12 will amend subsection 17(1) of the principal Act to enlarge the obligations of a registered provider of educational services to overseas students. The existing subsection 17(1) obliges such a provider, as soon as practicable after the provider becomes aware of the facts, to inform the Secretary to the Department of certain types of conduct engaged in by an associate of the provider, under the sanction that a failure to so advise the Secretary may cause the Minister to take action against the provider. The proposed amendments to subsection 17(1) in this bill would oblige a registered provider to inform the Secretary of the commission of the same types of conduct by a ‘high managerial agent’ of the provider, as soon as practicable after becoming aware thereof. It appears that the effect of subitem 37(2) is that, if a provider of educational services had, prior to the commencement of subitem 37(2), become aware of relevant conduct committed by a high managerial agent, the provider will be obliged, as soon as practical after commencement, to inform the Secretary of that conduct, and failure to do so may result in the Minister taking action against the provider. The Committee notes that this application provision may trespass unduly on the personal rights of the providers of educational services and **seeks the Minister’s advice** whether it is necessary for subitem 37(2) to apply to knowledge gained by a provider before this measure commences.

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

In response to the Committee’s concern that proposed items 9 and 12 of the Bill may have a retrospective application, I provide the following comments:

- Schedule 1, proposed items 9 and 12 will amend, inter alia, subsection 17(1) of the *Education Services for Overseas Students Act 2000* (the ESOS Act) to require registered providers that teach international students, to inform the

Secretary of the Department of Education, Science and Training (DEST) of any conduct outlined in section 17 with regard to those now defined as “high managerial agents”. “High managerial agents” are defined in item 1 of the Bill.

- Sub-item 37(2) is an application which clarifies that the registered provider must inform the Secretary of DEST, if the provider was aware at some time before the commencement of the Bill that the high managerial agent was breaching the requirements of section 17. For example, if the registered provider became aware 6 weeks before the Bill commenced that a high managerial agent had been convicted of an offence under the ESOS Act, they would need to inform the Secretary once the Bill commenced.
- By requiring registered providers to report on information they are already aware of in regard to a high managerial agent, State authorities and the Commonwealth will be better placed to make decisions about removing those people already in the industry that bring the reputation of Australia’s fourth largest export industry into disrepute, thus ensuring only quality education courses are provided to international students studying in Australia. This is a key aim of the ESOS legislative framework.
- If the proposed items were not made retrospective, there is nothing in the ESOS Act to require the provider to inform DEST of people they know are already acting or have acted in a non bona fide manner. This creates a gap in the operation of the legislation.
- The proposed items will not apply to any former employees/staff of the registered provider who would have been defined as high managerial agents.
- These items do not affect the obligation of registered providers to notify the Secretary of DEST of breaches, as currently required under section 17.

In summary, I do not consider that the items unduly trespass on personal rights and liberties. The effect of the proposed items is that if a registered provider is aware of a particular matter before the commencement of the Bill, that matter must now be reported once the Bill has commenced. The items do not extend the range of matters which trigger the requirement to report to the Secretary, the substantive obligations remain the same. The only change that will result is that the range of people that the registered provider must report to the Secretary about has expanded.

The Committee thanks the Minister for this response.

Robert Ray
Chair



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17 JUL 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

Parliament House
CANBERRA ACT 2600

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

- 7 JUL 2006

Dear Senator Ray

I refer to a letter of 21 June to my Senior Adviser from the Secretary of the Senate Standing Committee for the Scrutiny of Bills drawing my attention to comments made by the Committee in its report on the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (the Bill).

The Committee has expressed its continued concern about open ended commencement provisions for the amendments related to exploration and mining and sought my advice about whether the Bill might provide for those amendments to be repealed if they have not commenced within 12 months of Royal Assent. The Committee has suggested that any provision for ultimate commencement or automatic repeal of the amendments in question could be amended by Parliament if necessary.

I do not consider that it would be desirable, in terms of efficient legislative processes, to proceed in the manner proposed by the Committee. It is not practicable to specify a date by which the amendments should commence or be taken to be repealed because it is not possible to anticipate when the Northern Territory legislation will be enacted. I therefore consider that the current proclamation provisions for the amendments should remain in the Bill.

Yours sincerely

MAL BROUGH



The Hon Julie Bishop MP
Minister for Education, Science and Training
Minister Assisting the Prime Minister for Women's Issues

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19 JUL 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

12 JUL 2006

Dear *Robert* Senator Ray

Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Bill 2006

I refer to a letter from the Secretary to your Committee to my Senior Advisor dated 15 June 2006 concerning certain provisions of the Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Bill 2006 (the Bill).

In response to the Committee's concern that proposed items 9 and 12 of the Bill may have a retrospective application, I provide the following comments:

- Schedule 1, proposed items 9 and 12 will amend, inter alia, subsection 17(1) of the *Education Services for Overseas Students Act 2000* (the ESOS Act) to require registered providers that teach international students, to inform the Secretary of the Department of Education, Science and Training (DEST) of any conduct outlined in section 17 with regard to those now defined as "high managerial agents". "High managerial agents" are defined in item 1 of the Bill.
- Sub-item 37(2) is an application which clarifies that the registered provider must inform the Secretary of DEST, if the provider was aware at some time before the commencement of the Bill that the high managerial agent was breaching the requirements of section 17. For example, if the registered provider became aware 6 weeks before the Bill commenced that a high managerial agent had been convicted of an offence under the ESOS Act, they would need to inform the Secretary once the Bill commenced.

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- If the proposed items were not made retrospective, there is nothing in the ESOS Act to require the provider to inform DEST of people they know are already acting or have acted in a non bona fide manner. This creates a gap in the operation of the legislation.
- The proposed items will not apply to any former employees/staff of the registered provider who would have been defined as high managerial agents.
- These items do not affect the obligation of registered providers to notify the Secretary of DEST of breaches, as currently required under section 17.

In summary, I do not consider that the items unduly trespass on personal rights and liberties. The effect of the proposed items is that if a registered provider is aware of a particular matter before the commencement of the Bill, that matter must now be reported once the Bill has commenced. The items do not extend the range of matters which trigger the requirement to report to the Secretary, the substantive obligations remain the same. The only change that will result is that the range of people that the registered provider must report to the Secretary about has expanded.

Yours sincerely



JULIE BISHOP

