SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2007

13 June 2007

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator J Adams (Deputy Chair)
Senator G Barnett
Senator A McEwen
Senator A Murray
Senator S Parry

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

SIXTH REPORT OF 2007

The Committee presents its Sixth Report of 2007 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:

Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007

Food Standards Australia New Zealand Amendment Bill 2007

Forestry Marketing and Research and Development Services Bill 2007

Gene Technology Amendment Bill 2007

Health Insurance Amendment (Diagnostic Imaging Accreditation) Bill 2007

Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007

Liquid Fuel Emergency Amendment Bill 2007

Native Title Amendment (Technical Amendments) Bill 2007

Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Bill 2007

Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 22 May 2007.

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.

Relevant extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 29 March 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

This bill amends the *Child Support (Assessment) Act 1989*, the *Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Act 2006*, the *Child Support (Registration and Collection) Act 1988*, the *Family Law Act 1975*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *A New Tax System (Family Assistance) Act 1999*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986* to:

- clarify and refine the operation of the child support scheme;
- transfer to primary child support legislation provisions currently contained in regulations relating to overseas maintenance arrangements;
- clarify the meaning of a number of terms and the impact of maintenance income on the family tax benefit (FTB);

- provide for the baby bonus to be paid in 13 fortnightly instalments to claimants under 18 years of age and require registration of birth as a condition of eligibility for the baby bonus;
- allow the usual 13 week period for full payment of FTB while temporarily outside of Australia to be extended for members of the Australian Defence Force and certain Australian Federal Police who are deployed overseas as part of their duties and remain overseas for longer then 13 weeks;
- ensure that a remote area allowance is payable for each FTB child and regular care child of a person from 1 July 2008;
- provide a discretion to extend the assets test exemption for proceeds from the sale of a person's principal home, from 12 months to up to 24 months in certain circumstances, and to extend the current 12 months absence from the principal home rule for absences of up to 24 months, in relation to people who have suffered loss of, or damage to, their homes; and
- make various amendments of a minor or technical nature to the social security law and child support Acts.

The bill also contains application, consequential and technical provisions and a transitional provision relating to court orders made before 1 July 2008 (item 21).

Strict liability
Schedule 1, item 20

Proposed new subsection 4(4) of the *Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Act 2006*, to be inserted by item 20 of Schedule 1, would declare the offence created by subsection 4(3) to be an offence of strict liability. The Committee generally draws to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence the Committee considers that the reasons for its imposition should be clearly set out in the explanatory memorandum that accompanies the bill.

Unfortunately the explanatory memorandum, while describing the broad thrust of the amendment (pages 8-9), does not refer to the fact that the offence is to be one of strict liability. Consequently, there is no indication of whether Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was taken into consideration in determining whether strict criminal liability was necessary in these circumstances.

The Committee **seeks the Minister's advice** whether strict liability is justified in these circumstances and whether the *Guide* was taken into account in framing this provision.

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

Relevant extract from the response from the Minister

The Scrutiny of Bills Alert Digest No. 5 of 2007 includes comment on the imposition of an offence of strict liability by item 20 Schedule 1 to the Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007 (the bill). The Committee has sought my advice on whether strict liability is justified in these circumstances and whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was taken into account in framing this provision.

I draw your attention to page 35 of the explanatory memorandum, under the heading 'Child support offence provisions', which acknowledges that the offence created is one of strict liability, and explains that this offence is similar to that already applying to other provisions allowing the Child Support Registrar to seek information, such as that at section 120 of the *Child Support (Registration and Collection) Act 1988* (the Registration and Collection Act).

The comparison with existing similar provisions of the Registration and Collection Act make it clear that strict liability is an appropriate basis for the offence because of:

- the difficulty the prosecution would have in proving fault (especially knowledge or intention) in this case;
- the fact that the offence is minor; and
- the fact that the offence does not involve dishonesty or other serious imputation affecting the person's reputation.

The Committee thanks the Minister for this response and notes that it would have been helpful if this explanation had been provided in the explanatory memorandum notes on item 20.

Food Standards Australia New Zealand Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Parliamentary Secretary to the Minister for Health and Ageing responded to the Committee's comments in a letter dated 30 May 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the Senate on 28 March 2007
Portfolio: Health and Ageing

Background

This bill amends the *Food Standards Australia New Zealand Act 1991* and the *Agricultural and Veterinary Chemicals Code Act 1994* to implement changes to the regulatory framework of Food Standards Australia New Zealand (FSANZ). The bill:

- removes the 'one size fits all' approach for developing or amending food standards, allowing FSANZ to assess applications and proposals differently depending on their nature and scope;
- aligns the policy setting processes of the Australia and New Zealand Food Regulation Ministerial Council (the Council) and the standard development and approval process of FSANZ;
- aligns the processes for setting of Maximum Residue Limits of the Australian Pesticides and Veterinary Medicines Authority and of FSANZ;
- recognises the potential need to develop urgent standards due to unforeseen negative impacts on trade;
- removes the option for the Council to request a second review of a draft standard or variation, subject to changes to the Food Treaty between Australia and New Zealand; and

- creates a process for expert scientific assessment of future high level health claims.

The bill also contains application, consequential and transitional provisions.

Legislative Instruments Act—disallowance and sunset provisions Schedule 1, items 16 and 74 and Schedule 3, item 5

Various provisions of this bill propose that Ministerial declarations are legislative instruments, but that neither section 42 of the *Legislative Instruments Act 2003* (which provides for disallowance of such an instrument), nor Part 6 of that Act (which provides for sunsetting), apply to such a declaration. The relevant provisions of the *Food Standards Australia New Zealand Act 1991* are:

- proposed new subsection 3B(4) of the Act, to be inserted by item 16 of Schedule 1;
- proposed new subsection 23(4) of the Act, to be inserted by item 74 of Schedule 1;
- proposed new subsections 87(8), 97(6) and 106(6) of the Act, all to be inserted by item 74 of Schedule 1; and
- proposed new section 94 of the Act, to be inserted by item 5 of Schedule 3.

Where a provision specifies that a legislative instrument is not to be subject to the usual disallowance and/or sunsetting regime set out in the *Legislative Instruments Act* 2003, the Committee would expect the explanatory memorandum to explain the reason for exempting these instruments. Unfortunately the explanatory memorandum does not make any reference to these subsections or section and, consequently, no reason is provided for their inclusion.

A possible explanation is provided at page 19 of the explanatory memorandum which, when discussing the amendments proposed by items 20 and 22, neither of which contain amendments in the form of the provisions referred to above, states that 'instruments issued by the [Australia New Zealand Food] Authority are generally legislative instruments (but are not subject to disallowance or sun setting because of the bi-national nature of the scheme).' The Committee **seeks the Minister's advice** whether this is the explanation for each of the above provisions (and if not, what is the explanation) and whether it would be useful to readers to include an explanation in the explanatory memorandum in respect of each of these provisions.

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 Parliamentary Secretary

Thank you for your letter of 10 May 2007, requesting further advice regarding a number of matters included in the Food Standards Australia New Zealand (Amendment) Bill 2007 which was introduced into the Senate on 28 March 2007. I provide the following answers to the Senate Scrutiny of Bills Committee's queries.

Legislative Instruments Act - disallowance and sunset provisions Schedule 1, items 16 and 74 and Schedule 3, item 5

The Committee is seeking advice regarding the reasons certain instruments (described in Schedule 1 proposed new subsections 3B(4), 23(4), 87(8) 97(6) and 106(6) and proposed new section 94 of the Bill) are not to be subject to section 42 of the *Legislative Instruments Act 2003* (the LIA) which provides for disallowance and Part 6 of the LIA which provides for sunsetting.

The effect of applying section 42 and Part 6 of the LIA to these instruments would be that the Australian Parliament could unilaterally disallow a standard relating to food that has been agreed by Ministers representing the Australian Government, the New Zealand Government and governments of each of the States and Territories. This would undermine the co-operative nature of the scheme and would be contrary to the international Treaty established between Australia and New Zealand.

I confirm that the fact that the food regulation scheme involves the Commonwealth and 'one or more States' and New Zealand is the explanation for the instruments not being subject to disallowance and sunsetting.

I will endeavour to add the supplementary explanation, given above, in respect to each of the abovementioned provisions in a supplementary Explanatory Memorandum for the Bill.

The Committee thanks the Parliamentary Secretary for this comprehensive response and for undertaking to include a further explanation of the provisions in a supplementary explanatory memorandum.

Legislative Instruments Act—declarations
Schedule 1, item 74 and Schedule 3, item 5

Various provisions of this bill propose that instruments made by various bodies are not legislative instruments. The relevant provisions are proposed subsections 86(4), 103(3) and 111(4) of the *Food Standards Australia New Zealand Act 1991*, to be inserted by item 74 of Schedule 1, and proposed subsection 88(2) of the same Act, to be inserted by item 5 of Schedule 3.

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 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. Unfortunately, the explanatory memorandum does not make any reference to these subsections and it is unclear to the reader the reasons for their inclusion. The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for substantive exemptions and whether it would be possible to include this information, together with a rationale for any substantive exemptions, in the explanatory memorandum.

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

Relevant extract from the response from the Parliamentary Secretary

> The Committee has sought advice regarding various provisions of the bill relating to instruments that are not legislative instruments. The Committee enquired whether these provisions are declaratory in nature or provide for substantive exemptions from the operation of the LIA.
>
> I confirm that these provisions are declaratory and are included for the avoidance of doubt.

The instrument described in proposed subsection 111(4) (a direction by the Authority prohibiting or restricting the publication of evidence in the course of a public hearing) is not legislative in nature and is therefore not a legislative instrument in accordance with the definition of legislative instruments in section 5 of LIA.

The types of decisions described in proposed subsections 86(4), 103(3) and 88(2) are made by the Australian and New Zealand Food Regulation Ministerial Council whose powers are independent of Commonwealth legislation. These decisions are not made in the exercise of a power delegated by the Parliament and are therefore not legislative instruments in accordance with the definition of legislative instruments in section 5 of LIA.

I will endeavour to add the supplementary explanation, given above, in respect to each of the abovementioned provisions in a supplementary Explanatory Memorandum for the Bill.

The Committee thanks the Parliamentary Secretary for this comprehensive response and for undertaking to include a further explanation of the provisions in a supplementary explanatory memorandum.

'Henry VIII' clause
Schedule 1, item 76

Proposed new subsection 112(6) of the *Food Standards Australia New Zealand Act 1991*, to be inserted by item 76 of Schedule 1, is a 'Henry VIII' clause as it would enable regulations to modify all, or specified provisions of, part 3 of the Act. 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.

The explanatory memorandum, at page 41, seeks to justify this provision on the grounds that the whole of proposed section 112 'retains the current requirement by replacing the current section 36A'. While this may be the case, it does not provide the reader with an understanding of why a 'Henry VIII' clause was considered necessary. The Committee **seeks the Minister's advice** as to why it was considered necessary to be able to modify Part 3 of the *Food Standards Australia New Zealand Act 1991* by regulations, rather than by making amendments to the primary legislation as required, and whether this explanation could be included in the explanatory memorandum.

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 Parliamentary Secretary

> The Committee highlighted an issue with the proposed new subsection 112(6) of the Bill. The clause is a provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation.
>
> Subsection 112(6) has retained an existing capacity provided in section 36A from the *Food Standards Australia New Zealand Act 1991*.
>
> Following consultation with FSANZ it appears that the provision has never been utilized and there are no existing regulations to this effect. As the provision is somewhat antiquated and in light of the concerns highlighted by the Committee I intend to remove subsection 112(6) from the Bill.

The Committee thanks the Parliamentary Secretary for this response and for undertaking to remove subsection 112(6) from the bill.

Forestry Marketing and Research and Development Services Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Fisheries, Forestry and Conservation responded to the Committee's comments in a letter received on 8 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 29 March 2007
Portfolio: Fisheries, Forestry and Conservation

Background

Introduced with the Forestry Marketing and Research and Development Services (Transitional and Consequential Provisions) Bill 2007, this bill replaces the Forest and Wood Products Research and Development Corporation (FWPRDC) with a forestry industry services company to provide marketing and promotion, research and development and other industry services to the forestry industry.

The bill provides the Minister with the power to enter into a funding contract with a company to enable it to receive and administer levies and state grower contractual payments, collected by the Commonwealth for industry promotion, research and development, and the Commonwealth's matching funding for research and development expenditure. The Minister may then declare the company with which the contract is made to be the industry services body.

Insufficient scrutiny of contract
Subclause 8(1)

Subclause 8(1) permits the Minister, on behalf of the Commonwealth, to enter into a contract with a company yet to be formed, under which the Commonwealth would make 'forestry service payments' and 'matching payments' (as defined in the bill) to the company.

The explanatory memorandum indicates that one reason for setting up such a contract is that the company will replace the FWPRDC, (a Commonwealth statutory authority), because that Corporation is unable to undertake marketing and promotion activities. The proposed new company would have such a power.

Subclause 8(6) obliges the Minister to table a copy of the contract 'in each House of the Parliament within 15 sitting days of that House after the day on which the contract was entered into', thereby giving Senators and Members notice of the terms of the contract. However, such a contract is not subject to any other sort of review by any parliamentary committee nor is it subject to disallowance. Given the contract will replace the existing legislative and administrative provisions which govern the FWPRDC, the Committee **seeks the Minister's advice** whether subclause 8(1) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

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

Currently, the statutory authority known as the Forest and Wood Products Research and Development Corporation (FWPRDC) is governed by administrative provisions in existing legislation - the *Commonwealth Authorities and Companies Act 1997* and the *Primary Industries and Energy Research and Development Act 1989.*

Under the new arrangements, the new forestry industry-owned company will be limited by guarantee under the *Corporations Act 2001* and will replace the FWPRDC. Therefore the new company will be subject to governance arrangements and accountable to its members under Corporations law and the Australian Securities and Investments Commission.

In addition, the new arrangements will also include a funding contract between the Commonwealth and the new forestry industry-owned company. This funding contract will require accountability to the Commonwealth for compliance with the terms of the contract.

The funding contract has been modelled on existing contracts between the Commonwealth and industry-owned companies currently operating in the dairy, egg, red meat, wool, pork and horticulture industries. These funding contracts have been designed to provide assurances that the funds provided to the industry-

owned companies are spent only for the purpose for which they were appropriated by Parliament. The funding contracts with the industry-owned companies are kept under review and are updated as required to reflect emerging best practices in accounting for the expenditure of public monies and in response to the findings of the periodic performance reviews.

Since the funding contract of the new forestry industry-owned company is very similar to those of the other industry-owned companies which have not been the subject of Parliamentary scrutiny, there is no precedent for making it available to Parliament for scrutiny before the contract is entered into by the company and the Commonwealth.

The funding contract is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003,* and is therefore not required to be tabled for review or disallowance by the Parliament. However, the Forestry Marketing and Research and Development Services Bill 2007 has provided for the finalised funding contract and any future amendments to be tabled in Parliament to allow for more accountability to Parliament.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Clause 12

Clause 12 gives the Minister the power, in effect, to terminate the contract between the Commonwealth and the company that is the industry services body if (among other reasons) the Minister 'has reasonable grounds to believe' either that the company has contravened this measure, or the terms of the contract, or that the company has failed to comply with its own constitution. The bill does not provide any grounds for challenge to the exercise of this discretion. The Committee **seeks the Minister's advice** whether it might be appropriate to include some mechanism of review of the exercise of this discretion.

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

Clause 12(1) of the Forestry Marketing and Research and Development Services Bill 2007 provides that the Minister may declare in writing that the company ceases to be the industry services body (ISB) in the event one of the circumstances listed occurs.

Declaration as an ISB enables the ISB to receive levies and Government matching of research and development expenditure under a funding contract with the Commonwealth. This funding contract is the key link with the Commonwealth, providing the vehicle for the provision and management of the funds. As the key element, it is appropriate that the funding contract provide the ISB with the opportunity to 'show cause' why the Minister should not terminate the funding contract. If the funding contract were to be terminated there would be no reason for the ISB's existence as it would have no entitlement to levy or matching Commonwealth research and development funds.

There is also the requirement under section 11(1) that a funding contract be in place. The circumstances under which the Minister may declare that the ISB ceases to be an ISB largely mirror the funding contract in relation to the termination of the funding contract. Accordingly, they do not require a review mechanism as this is already appropriately addressed in the funding contract.

Subclauses 12(1)(b) to (g), and the corresponding termination provisions in the funding contract, are also intended to address fundamental changes to circumstances or operations of the company that put at risk the effective management of public money. In such circumstances it would be entirely appropriate for the Minister to declare that the company cease to be the ISB.

If the company disagrees with the termination of the funding contract and the associated declaration, it has legal mechanisms available for review of the decision.

This approach is similar to the suspension and termination clauses in arrangements between the Commonwealth and other industry-owned companies.

The Committee thanks the Minister for this response but **seeks the Minister's further advice** regarding the nature of the 'legal mechanisms' that are available to the company if it disagrees with the termination of the funding contract.

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.

Non-reviewable decisions
Subclause 13(1)

Subclause 13(1) gives the Minister the power to issue a direction to the industry services body, with which that body must comply (refer subclause 13(2)), if the Minister is satisfied as to various matters specified in subparagraphs 13(1)(a)(i) and (ii), and if the Minister has given the body 'an adequate opportunity to discuss with the Minister the need for the proposed direction and the impact of compliance with [notification provisions in] subsections (3) and (4) on the body's commercial activities'. The bill does not provide any grounds for challenge to the exercise of this discretion. The Committee **seeks the Minister's advice** whether it might be appropriate to include some mechanism of review of the exercise of this discretion.

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

Under subclause 13(1), the Minister may give a written direction to the industry services body only in the event of urgent or exceptional circumstances. Given the significant nature of the circumstances under which the Minister can give a written direction (for example, in Australia's national interest), together with the requirements for assessment of the financial implications and adequate opportunity for discussions between the Minister and the directors of the company, it is not appropriate for a further avenue of review to be available.

Subclause 13(1) follows the approach used in a number of other agricultural industry acts such as the *Egg Industry Service Provision Act 2002* and the *Pig Industry Act 2001.*

A written direction under this provision is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003.* Therefore there is no need for it to be tabled for review or disallowance by the Parliament.

Thank you for bringing the Senate Scrutiny of Bills Committee's comments to my attention. I trust that this information is of assistance to the Committee.

The Committee thanks the Minister for this response but **seeks the Minister's further advice** regarding what avenues may be open to the industry services body in circumstances where the body disagrees with the direction provided by the Minister under subclause 13(1), even after discussions have occurred between the Minister and the company directors.

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.

Gene Technology Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Parliamentary Secretary to the Minister for Health and Ageing responded to the Committee's comments in a letter dated 29 May 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the Senate on 28 March 2007
Portfolio: Health and Ageing

Background

This bill amends the *Gene Technology Act 2000* to implement a number of recommendations from the 'Statutory Review of the *Gene Technology Act 2000* and the Gene Technology Agreement 2001'. The bill:

- provides emergency powers, giving the minister the ability to expedite the approval of dealing with a genetically modified organism (GMO) in an emergency;
- combines the Gene Technology Ethics Committee and the Gene Technology Community Consultative Committee into a single advisory committee - the Gene Technology Ethics and Community Consultative Committee - and outlines the membership, remuneration and procedures for the Committee;
- revises the process for the initial consideration of licence applications;
- introduces a new category of licence to distinguish between licences for a limited and controlled release of a GMO, and licences for intentional release;
- clarifies the circumstances in which licence variations can be made;

- clarifies the circumstances under which the Regulator can direct a licence-holder, or a person covered by a licence, to comply with the Act or Regulations; and

- authorises the Regulator to grant a temporary permit to persons who find themselves inadvertently dealing with an unlicensed GMO, for the purpose of appropriately disposing of that organism.

The bill also contains technical provisions.

Non-reviewable discretion
Schedule 1, part 3, item 39

Proposed new section 50A of the *Gene Technology Act 2000*, to be inserted by item 39, in part 3 of Schedule 1 to this bill, would give the Gene Technology Regulator a discretion to determine whether an application for a licence under the legislation is for a limited and controlled release of genetically modified organisms. If the Regulator is so satisfied, the applicant would not need to satisfy such a rigorous risk assessment process as is the case with an unlimited release. However, the exercise by the Regulator of the discretion to determine the nature of such a release does not appear to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*. The Committee **seeks the Minister's advice** whether the exercise of that discretion should be 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 Parliamentary Secretary

> I refer to the letter of 10 May 2007 from Ms Cheryl Wilson, Secretary of the Standing Committee for the Scrutiny of Bills, seeking a response to the comments of the Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Gene Technology Amendment Bill 2007 in the *Scrutiny of Bills Alert Digest No. 5 of 2007*.

The Committee has sought advice as to whether amendments contained in the Gene Technology Amendment Bill 2007 (the Bill), which grant the Gene Technology Regulator (the Regulator) certain discretions, should be subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

In relation to the exercise of the Regulator's discretion via Schedule 1, part 3, item 39 (proposed section 50A) of the Bill to determine whether an application for release of a genetically modified organism (GMO) should be subject to the less onerous limited and controlled release assessment process or not, the Committee asked whether this should be open to review by the Administrative Appeals Tribunal (AAT).

To include the Regulator's discretion in allowing or not allowing an application to proceed by way of the limited and controlled release category as a reviewable decision under the *Gene Technology Act 2000* would be inconsistent with the current list of reviewable decisions. These all provide review of final substantive decisions; for example to refuse to issue a licence, to impose a condition, to vary a condition, or to refuse to declare certain information to be confidential commercial information. These final substantive decisions are conceptually different from a decision made in the course of considering an application.

The discretion exercised under section 50A is made as part of the process of deciding on a licence. In this sense it is very similar to a decision by the Regulator to seek more information. In many circumstances the decision to seek further information will extend the time limit since the period during which the Regulator awaits the requested information does not count for purposes of the statutory assessment period. There is no provision to afford merits review to the existing discretionary decision by the Regulator to seek more information, and I believe section 50A decisions should be consistent with this.

Furthermore, the logistics of merits review would ultimately defeat the notional purpose of the review, which in most cases would be to resolve objections to the prolonged rather than attenuated assessment period. Reviews take time, and it is arguable that a contested review process would of itself prolong the decision-making period beyond the time saved by any successful argument in favour of the shortened assessment.

The Committee thanks the Parliamentary Secretary for this comprehensive response.

Non-reviewable discretion
Schedule 1, part 6, item 56

Proposed new section 40A of the *Gene Technology Act 2000*, to be inserted by item 56, in part 6 of Schedule 1 to this bill, would give the Gene Technology Regulator a discretion to determine whether a person has come into possession of a genetically modified organism inadvertently.

If the Regulator is satisfied that such is the case, he or she may, with the agreement of that person, treat the latter as having made an inadvertent dealings application. However, the exercise by the Regulator of the discretion to determine how the person came into possession of the organism does not appear to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*. The Committee **seeks the Minister's advice** whether the exercise of that discretion should be 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 Parliamentary Secretary

> The Committee has also sought advice as to whether, in relation to Item 56 (proposed section 40A), the exercise of the Regulator's discretion to grant an inadvertent dealings licence should be subject to merits review.
>
> The proposed inadvertent dealings licence will allow the Regulator to grant a temporary permit to a person who finds himself or herself inadvertently dealing with an unlicensed GMO. The licence will be issued to the person for the purposes of disposing of the GMO in a manner which protects the health and safety of people and the environment.
>
> It is notable that the Regulator requires the agreement of the person being treated as having made an inadvertent dealings application; therefore, there is no need for any review rights for that person. A person who does not agree to an inadvertent licence will be on notice that they are dealing with a GMO without a licence from the point at which he or she is aware that the organism is genetically modified. Refusal to agree to the licence is tantamount to proceeding to deal with

the GMO in contravention of criminal provisions. Normal rights associated with defending criminal charges would apply. Therefore, there is no sensible place in this construct for a merits review provision.

I hope that this addresses the concerns that the Committee has with the Bill.

The Committee thanks the Parliamentary Secretary for this comprehensive response.

Health Insurance Amendment (Diagnostic Imaging Accreditation) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 12 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 29 March 2007
Portfolio: Health and Ageing

Background

This bill amends the *Health Insurance Act 1973* to establish a legislative framework for the introduction of an accreditation scheme for practices providing diagnostic imaging services covered by the Radiology Quality and Outlays Memorandum of Understanding and to allow for the introduction of accreditation schemes for other diagnostic imaging services in the future.

The bill also contains application and transitional provisions.

Wide delegation of power
Schedule 1, item 11

Proposed new subsection 23DZZIAA(5) of the *Health Insurance Act 1973*, to be inserted by item 11 of Schedule 1, would permit the Minister to delegate any power or function conferred on him or her under proposed new subsection 23DZZIAA(1) to 'an officer within the meaning of section 131' of that Act. The explanatory memorandum notes that an officer, for these purposes, includes an officer or acting officer in the Department of Health and Ageing, the Chief Executive Officer of Medicare Australia or an employee of Medicare Australia.

The Committee has consistently drawn attention to legislation which allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Where such delegations are made, the Committee considers that an explanation of why these broad delegations are considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum gives no reason for this extremely wide range of persons to whom Ministerial powers and functions may be delegated. The Committee **seeks the Minister's advice** as to the reason for this wide power of delegation and whether it should be limited in some way.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Proposed new section 23DZZIAA provides for the Minister to establish diagnostic imaging accreditation schemes through a legislative instrument. The legislative instrument will contain the rules for the operation of these schemes and cover such things as:

- how diagnostic imaging practice sites become accredited;
- the accreditation standards;
- when accreditation expires, how it may be renewed and when the renewal takes effect;
- the circumstances under which accreditation may be revoked or varied; and
- the obligations of approved accreditors to inform the Minister about the operation of the scheme.

The accreditation arrangements, which the legislative instruments will reflect, is currently being finalised by the radiology industry and profession in consultation with the Government. It can, however, be expected to contain provisions that will impose administrative obligations on the Minister. For example, the legislative instrument may provide for the Minister to seek prescribed information from time-to-time from approved accreditors about the operation of the scheme. The instrument may also require the Minister to formally notify practices that their accreditation status has been recorded on the Diagnostic Imaging Register (commonly known as the Location Specific Practice Number Register), pursuant to proposed new provision 23DZZIAB.

Generally, these types of administrative powers and functions would not adversely affect the rights, interests or obligations of anyone and are of a kind which would most appropriately be performed by officers at a relatively junior level in the Department or Medicare Australia.

Proposed subsection 23DZZIAA(5) allows the necessary flexibility in determining the appropriate level of officer in these agencies to whom these functions and powers can be delegated.

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

Wide delegation of power
Schedule 1, subitem 12(6)

Subitem 12(6) of Schedule 1 would permit the Minister to delegate, either to the Secretary of the Department or to an Australian Public Service employee in the Department, the Minister's power to designate a person with whom notices for the registration of diagnostic imaging premises may be lodged. The Committee has consistently drawn attention to legislation which allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Where such delegations are made, the Committee considers that an explanation of why this broad delegation is considered necessary should be included in the explanatory memorandum. In this instance the explanatory memorandum, while noting this subitem, does not provide any rationale for the wide power of delegation given to the Minister by it. The Committee **seeks the Minister's advice** as to the reason for this wide power of delegation and whether it should be limited in some way.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

By way of background, Item 12 of the Bill contains the transitional arrangements which will apply to diagnostic imaging practice sites in operation before 1 July 2008.

In summary, these arrangements provide that as long as the practice site is registered for accreditation with a designated person before 1 July 2008, services rendered by the practice will continue to be eligible for Medicare benefits. This will be until such time as the site goes through the accreditation process or until the date by which it must apply for accreditation under subitem (3) of the transitional arrangements.

Designated persons will be determined by a legislative instrument pursuant to subitem 12(5). As noted in the Explanatory Memorandum under subitem 12(1), it is intended that the designated persons will be the organisations approved as accreditation providers for the scheme to avoid unnecessary administrative burdens for practices.

The transitional arrangements in Item 12 do not amend, and therefore do not become part of the Act. Subitem 12(6) is necessary to allow the making of the legislative instrument to be delegated by me in accordance with the general principles contained in section 131 of that Act. The one exception is that I would not be able to delegate this power to officers in Medicare Australia.

The power that I would be able to delegate is merely the power to specify the designated persons with whom notices under subitem 12(1) can be lodged. As mentioned, it is envisaged that these persons will be the approved accrediting organisation(s).

Such designated persons will have no discretion to determine whether or not a particular diagnostic imaging practice obtains 'deemed accreditation'. Hence the task of identifying the relevant 'designated persons' will not adversely affect the rights, liberties or obligations of diagnostic imaging service providers and their patients.

In addition, any instrument made by a delegate is still a legislative instrument, subject to legislative instrument processes, including the requirement that it be scrutinised by the Parliament as a disallowable instrument.

I trust that this information is of assistance.

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

Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 12 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 29 March 2007
Portfolio: Health and Ageing

Background

This bill amends the *Health Insurance Act 1973*, the *Medicare Australia Act 1973* and the *Veterans' Entitlements Act 1986* to replace existing prohibitions on the payment of Medicare benefits between providers and requesters of pathology and diagnostic imaging services with new provisions to:

- prohibit certain practices in relation to the rendering of pathology and diagnostic imaging services, including prohibiting inducements between requesters and providers of those services;
- prevent payments for pathology and diagnostic imaging services that do not benefit patients;
- encourage competition between pathology/diagnostic imaging providers on the basis of quality of service provided and cost to patients; and
- provide for an expanded range of penalties.

The bill also contains application, saving and transitional provisions.

Retrospective effect
Schedule 2, subitems 2 and 3

It appears that the effect of subitems 2 and 3 of Schedule 2 is to validate anything done under the *Health Insurance (Pathology Services) Regulations 1989*. If that is the case, the items would have retrospective effect. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The Committee notes that the explanatory memorandum merely repeats the substance of the terms of subitems 2 and 3, and does not provide any further explanation for their inclusion in this bill. The Committee **seeks the Minister's advice** whether the items do indeed have a retrospective effect and, if so, whether these will have an adverse effect on any person.

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

Relevant extract from the response from the Minister

I would like to address the Committee's concerns about the retrospective effect of subitems 2 and 3 of Schedule 2 of the Bill, and whether it will adversely affect any person.

Schedule 2 of the Bill was inserted as a result of uncertainty regarding the validity of regulation 4 of the Health Insurance (Pathology Services) Regulations 1989 (the Regulations).

Regulation 4 prescribes certain content requirements relating to requests for pathology services. Section 23DP of the *Health Insurance Act 1973* (the Act) requires pathology requests to be made in accordance with "the approved form". However, section 16A of the Act, which sets out the requirements for determining an entitlement to Medicare benefits for pathology services, does not envisage either "prescribed" or "approved" pathology request forms. Hence, it is unclear that the Act provides authority for the making of regulation 4 and, consequently, its effect is uncertain.

Schedule 2 of the Bill is designed to address this uncertainty, not only by amending subsection 16A(4) of the Act to provide clear authority for the Regulations to prescribe requirements for written pathology requests (subitem 1), but also to

backdate the effect of the amendment to support regulation 4 from the day that the Regulations were first made (subitem 3). If subitem 3 was not included in the Bill, the uncertainty as to the validity and effect of regulation 4 in the period before the commencement of Schedule 2 of the Bill would remain. The inconvenience and cost that could result from such uncertainty, given that a challenge to the validity or operation of regulation 4 may need to be resolved by a court, is likely to outweigh any detrimental affect on any person as a result of the retrospective operation.

The provisions in Schedule 2 of the Bill make it clear that the consequence of failure to comply with the requirements of regulation 4 is that no Medicare benefit is payable for the pathology service. This reflects the way that Medicare Australia has administered the requirements of regulation 4.

It is unlikely that the retrospective effect of the provisions would adversely affect any person unless claims for Medicare benefits have been refused (or other action taken) as a result of failure to comply with the requirements of regulation 4, or there has been a challenge to the validity or operation of regulation 4. Medicare Australia has advised that neither circumstance has occurred since the Regulations were first made.

I trust that this advice allays any concerns about the provisions trespassing unduly on personal rights and liberties.

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

Liquid Fuel Emergency Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Industry, Tourism and Resources responded to the Committee's comments in a letter dated 31 May 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 28 March 2007
Portfolio: Industry, Tourism and Resources

Background

This bill amends the *Liquid Fuel Emergency Act 1984* to implement recommendations of the 2004 'ACIL Tasman Review of the *Liquid Fuel Emergency Act 1984'* The changes aim to improve the administrative and economic efficiency of the Australian Government's national liquid fuel emergency response arrangements.

The bill also contains transitional provisions.

Legislative Instrument Act—declarations
Schedule 1, items 14, 15 and 21

Various provisions proposed to be inserted in the *Liquid Fuel Emergency Act 1984* by various items in Schedule 1 would permit the Minister to make instruments which are stated not to be legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The enabling provisions are:

- proposed new subsections 10(2) and 11(2), to be inserted by item 14;
- proposed new subsections 12(4), 13(8) and 14A(2), to be inserted by item 15; and

- proposed new subsections 17(3), 18(5), 19(4) and 20(3), to be inserted by item 21.

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 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision

In respect of proposed new subsections 10(2) and 11(2), the explanatory memorandum states, at pages 37 and 38 respectively, that the instruments are 'not intended to be legislative instruments', for the purpose, apparently, of enabling the instruments to take effect 'immediately, rather than having to wait until the [relevant] instrument is registered.' With regard to all of the other subsections referred to, the explanatory memorandum merely states that the relevant instrument 'is not a legislative instrument.' The Committee **seeks the Minister's advice** whether the above mentioned provisions are declaratory in nature or provide for substantive exemptions and whether it would be possible to include this information, together with a rationale for any substantive exemptions, in the explanatory memorandum.

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

Relevant extract from the response from the Minister

> I note the concerns that were raised by the Senate Standing Committee for the Scrutiny of Bills in its Alert Digest on 9 May 2007, and I trust that the following information will be of assistance to you.
>
> The Committee has sought advice concerning the provisions proposed by Items 14, 15 and 21 of the Bill, which provide the Minister (or their delegate) with the power to make instruments which are stated not to be legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The Committee asks whether these provisions have been inserted to remove doubt as to the nature of the instruments, or

whether they provide for substantive exemptions and are therefore legislative in character.

The proposed sub-sections of the Bill are as follows:

- 10(2) states that an instrument identifying a bulk customer is not a legislative instrument;
- 11(2) states that an instrument identifying an essential user is not a legislative instrument;
- 13(8) states that an instrument which approves (or requires specific amendments to) a relevant fuel industry corporation's bulk allocation procedure is not a legislative instrument;
- 14A(2) states that an instrument which directs a relevant fuel industry corporation to make statistics available to the Minister is not a legislative instrument;
- 17(3) states that an instrument which directs a relevant fuel industry corporation to maintain petroleum reserves is not a legislative instrument;
- 18(5) states that an instrument which directs the transfer of fuel from one location to another is not a legislative instrument;
- 19(4) states that an instrument which directs a relevant fuel industry corporation to make a specific quantity of fuel available for purchase by a specific person or persons is not a legislative instrument; and
- 20(3) states that an instrument which directs a relevant fuel industry corporation to produce or refine a specific quantity of liquid fuel is not a legislative instrument.

All of these provisions are intended to be declaratory and have been included for the avoidance of doubt. In each case the instrument is simply an administrative tool that will give effect to the broader purposes of the *Liquid Fuel Emergency Act 1984* (the Act). The decision-maker does not perform a legislative function, as they must use these instruments in accordance with the specific terms of the Act itself or by complying with the relevant Guidelines issued under sub-sections 10(4), 11(5), 13(3), 14A(4), 17(5) or 20(5). I note that Guidelines are not referred to under sections 18 or 19 because their use would be unnecessary - the terms of those sections provide sufficient guidance to a decision-maker as to what matters must be taken into account in making their decision.

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

Legislative Instruments Act—disallowance and sunset provisions
Schedule 1, items 15 and 21

Various provisions proposed to be inserted in the *Liquid Fuel Emergency Act 1984* by various items in Schedule 1 would permit the Minister to make instruments which are legislative in character, but neither section 42 of the *Legislative Instruments Act 2003* (which provides for disallowance of such an instrument), nor Part 6 of that Act (which provides for sunsetting), would apply to them. The enabling provisions are:

- proposed new subsections 13(2) and 14(2), to be inserted by item 15; and
- proposed new subsections 21(5), 22(5), 23(5) and 24(5), to be inserted by item 21.

Where a provision exempts instruments that are legislative in nature from the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003*, the Committee would expect the explanatory memorandum to include a full explanation justifying the need for the provision.

In respect of proposed new subsection 13(2), the explanatory memorandum (page 40) cites section 42 of the *Legislative Instruments Act 2003* and explains that the 'effect of this amendment is that a direction to a relevant fuel industry corporation to develop bulk allocation procedures can not be disallowed by the Parliament and will remain in force until revoked by the Minister.' However the explanatory memorandum does not provide any reason for why a direction given under subsection 13(1) of the *Liquid Fuel Emergency Act 1984* needs to be exempted from the provisions of section 42 and Part 6 of the *Legislative Instruments Act 2003*. In respect of all of the other proposed subsections referred to above, the explanatory memorandum states merely that the relevant instrument 'can not be disallowed by the Parliament and will remain in force until revoked by the Minister', but in no instance is the reason for this provision provided.

The Committee notes that one possible explanation for these clauses is that they are merely declaratory and included to remind the reader that under item 41 in the table to subsection 44(2) of the *Legislative Instruments Act 2003*, 'Ministerial directions to any person or body' are legislative instruments that are not subject to disallowance. Similarly, under item 46 in the table to subsection 54(2) of the Act, such Ministerial directions are also not subject to sunsetting. It is not clear from the explanatory memorandum, however, whether these references have been included for the avoidance of doubt or whether they are in fact creating substantive exemptions.

The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for substantive exemptions and whether it would be possible to include this information, together with a rationale for any substantive exemptions, in the explanatory memorandum.

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

The Committee further notes that in respect to each of these provisions the proposed new section of the bill also refers to the Minister making guidelines by legislative instrument. The Committee **seeks the Minister's confirmation** that these guidelines will be subject to the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003.*

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

Relevant extract from the response from the Minister

The Committee has also sought advice concerning the provisions proposed by Items 15 and 21 (being proposed sub-sections 13(2), 14(2), 21(5), 22(5), 23(5) and 24(5)). These sub-sections provide that a direction:

- to develop a bulk allocation procedure under sub-section 13(1);
- to maintain statistical information under sub-section 14(1);

- to require a corporation to make specific quantities of fuel available for purchase under subsection 21(1) in accordance with an approved bulk allocation procedure;
- to require a relevant person to make specific quantities of fuel available for purchase under sub-section 22(1) in accordance with a specified bulk allocation procedure;
- to regulate or prohibit the supply of fuel by a corporation under sub-section 23(1); or
- to regulate or prohibit the supply of fuel by a relevant person under sub-section 24(1),

will not be subject to disallowance or sunsetting under the provisions of section 42 or Part 6 of the *Legislative Instruments Act 2003.* As the Committee has noted, "Ministerial directions to any person or body" are not subject to disallowance or sunsetting by virtue of the tables under sub-section 44(2) and sub-section 54(2) of the *Legislative Instruments Act 2003.* The proposed new sub-sections in the Bill are intended to be declaratory and have been included for the avoidance of doubt. I can confirm for the Committee that all of the Guidelines which are issued under the Act are legislative instruments and will be subject to disallowance by the Parliament.

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

Wide delegation of power
Schedule 1, item 88

Proposed new subsection 49(1) of the *Liquid Fuel Emergency Act 1984*, to be inserted by item 88 of Schedule 1, would permit the Minister to delegate all or any of his or her powers or functions (other than those powers or functions listed in the four paragraphs in the subsection) to 'a person'. Proposed new subsection 49(2) would permit that delegate to sub-delegate 'any of those powers or functions' to 'another person'. In neither case does the relevant subsection state any attributes or qualifications to be possessed by the delegate or sub-delegate, thereby granting the Minister and his or her delegate an unfettered discretion to determine to whom to delegate powers and functions.

The Committee has consistently drawn attention to legislation which allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Where such delegations are made, the Committee considers that an explanation of why such broad delegations are considered necessary should be included in the explanatory memorandum. In this instance the explanatory memorandum provides no explanation as to why this extremely wide power of delegation is considered necessary. The Committee **seeks the Minister's advice** as to the reason for this wide power of delegation and whether it should be limited in some way.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee has sought advice concerning proposed sub-section 49(1) under Item 88 of the Bill, which would permit the Minister to delegate certain powers and/or functions to "a person". Proposed sub-section 49(2) would permit that delegate to sub-delegate any of those powers or functions to "another person".

In the event of a national liquid fuel emergency, the types of powers which can be delegated include the identification of bulk customers and essential users (sections 10 and 11), as well as the power to direct companies to maintain reserves (sections 12 and 17), to issue directions to transfer fuel (section 18), to make fuel available for purchase (section 19), to direct refinery output (section 20), to direct allocations to bulk customers (sections 21 and 22) and to regulate or prohibit the sale of fuel (sections 23 and 24).

Practically, fuel industry corporations will assess which of their customers meet the threshold requirements for bulk customer identification under section 10 and its Guidelines. In most cases they will provide this information to the Minister (or their delegate), who will in turn formally notify the customer of their status. This is clearly a time-consuming task best undertaken immediately preceding or in the early stages of a disruption. However, if the disruption evolves swiftly, or if the circumstances prevent the ready identification of bulk customers by a centralised delegate, the Government may choose to also delegate the power more widely to State and Territory Government officials.

The power to identify essential users is most likely to be delegated to State and Territory Government officials, as there will inevitably be variation in the severity of

a national liquid fuel emergency in different jurisdictions. Further, as the State and Territory Governments are the providers of most emergency and other essential services, these officials will be best placed to assess the needs of essential users within their own jurisdiction.

The power to direct companies to maintain reserves has a twofold purpose: to provide a source of fuel in times of need, and to assist Australia to meet its commitment to the International Energy Agency to hold the equivalent of 90 days of net oil imports. In almost all cases, this power will be retained by the Minister because of the potentially international character of the power and the need to have a nationally coordinated approach.

The power to direct the transfer of fuel is designed to ensure that the Government is able to move sufficient stocks from a place of excess supply to a place where supply is scarce. The power to direct the making of fuel available for purchase is similar, in that it allows the Government to make fuel available for purchase in specific quantities by a person that has otherwise failed to gain access to necessary fuel. In most cases, it is expected that the normal operation of the market will make the exercise of these powers unnecessary. However, concurrent disasters (such as a cyclone) may mean that demand for fuel is much higher in some locations or affects some fuel users (or relevant fuel industry corporations) more acutely than others. It can be expected that these powers would be most appropriately exercised by the Minister or an Australian, State or Territory Government official, depending on the nature of the disruption and what will be the most efficient response.

The powers to direct refinery output, to direct allocations to bulk customers and to regulate or prohibit the sale of fuel are all likely to be exercised in a nationally uniform manner. As a result, these powers are unlikely to be delegated beyond Australian Government officials.

In all cases, when deciding to delegate their powers or agree to a further sub-delegation, the Minister should take into account the potential for a conflict of interest to affect the exercise of a power by a prospective delegate, whether the delegate is capable of appropriately exercising the power, and to consider whether the delegation will facilitate the most effective and efficient management of the national liquid fuel emergency. Furthermore, powers which are delegated will typically be restricted to the jurisdiction of the delegate; for example, the New South Wales Government could not issue a direction to transfer fuel from Queensland to New South Wales.

I do not believe that these should be formal requirements of the legislation, as the specific circumstances of a future national liquid fuel emergency remain inherently uncertain. The phrases in the proposed sub-sections refer to “a person” because the variety of powers which may be delegated should not all be exercised by the same type of person in every situation. I do not wish to unduly restrict the capacity of the Government to respond in the manner which it deems appropriate at the time.

In any event, the exercise of the delegated power must comply with Guidelines established under the relevant section of the Act and which remain subject to

Parliamentary scrutiny. With regard to the power to further sub-delegate a power, proposed sub-section 49(3) states that a delegation under sub-section 49(2) has no effect unless it is done with the Minister's agreement. On this basis, the Minister is able to retain sufficient control over the extent and type of delegations which take place during a national liquid fuel emergency.

I trust that these responses will be sufficient to address the Committee's concerns.

The Committee thanks the Minister for this comprehensive response.

Native Title Amendment (Technical Amendments) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 31 May 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 29 March 2007
Portfolio: Attorney-General

Background

This bill amends the *Native Title Act 1993*, the *Native Title Amendment Act 2007* and the *Native Title Amendment Act 1998* to implement a number of the changes to the native title system announced by the Attorney–General on 7 September 2005. These changes are aimed at improving existing processes for resolving native title claims, improving the effectiveness of representative Aboriginal and Torres Strait Islander bodies and encouraging the effective functioning of prescribed bodies corporate, the bodies established to manage native title once it is recognised.

Schedule 1 contains numerous minor and technical amendments to clarify existing provisions and provide for revised processes for making and resolving native title claims.

Schedule 2 further amends provisions governing representative Aboriginal and Torres Strait Islander bodies to: repeal inoperative provisions; ensure that representative bodies are not subject to provisions of the *Commonwealth Authorities and Companies Act 1997;* revise the process for reviewing decisions by representative bodies not to provide assistance to Aboriginal and Torres Strait Islander persons; and clarify the process for transferring documents from a former representative body to its replacement.

Schedule 3 clarifies the replacement of prescribed bodies corporate at the initiation of the common law holders and implements a number of recommendations from the Prescribed Bodies Corporate Report that was released by the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs in October 2006.

Schedule 4 makes technical amendments consequential to the *Legislative Instruments Act 2003.*

The bill also contains application and transitional provisions.

Retrospective application
Schedule 1, item 91

Item 134 of Schedule 1 provides that the amendment proposed to be made by item 91 of Schedule 1 applies to applications made to the Federal Court under section 61 of the *Native Title Act 1993,* for either a native title determination or a compensation determination, 'regardless of whether the application is made before or after the commencing day.' Item 134 may therefore permit the retrospective application of the amendment to be made by item 91.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum (paragraph 1.384, page 65) states that 'the amendments in item 91 [will] apply in relation to applications made under section 61 of the Native Title Act, regardless of whether the application is made before or after the commencing day' and that this 'would be consistent with the application provisions for item 35 of Schedule 2 of the Native Title Amendment Bill 2006', which has not yet commenced. However, the explanatory memorandum does not indicate whether this possibly retrospective application would adversely affect any person. The Committee **seeks the Attorney-General's advice** whether the retrospective application of the amendment proposed to be made by item 91 of Schedule 1 will have an adverse effect on any person.

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 Attorney-General

> Item 91 of the Bill makes an amendment to section 87A of the *Native Title Act 1993*. Section 87A enables a determination of native title to be made over part of a claim area where some, but not all parties to the claim, consent. The provision was inserted by the *Native Title Amendment Act 2007*. Item 82 of the 2007 Act provides that section 87A applies to all claims, regardless of whether the claim was made before or after the commencing day. I consider this is appropriate as section 87A is designed to facilitate the resolution of claims by consent.
>
> The amendment in item 91 of this Bill makes an amendment to section 87A and will *broaden* the category of persons who must consent before a determination can be made under section 87A. The application of this amendment to all claims, regardless of whether the claim was made before or after the commencing day, will therefore not have an adverse effect on any person. Furthermore, as section 87A already applies to claims made prior to commencement of the 2007 Act, I consider it appropriate that the amendment made by the Bill apply to all claims, regardless of when they were filed. This will ensure all parties to existing claims gain the benefit of the amendment made by item 91.

The Committee thanks the Attorney-General for this response.

Legislative Instruments Act—declarations
Schedule 3, item 7

Proposed new subsection 60AC(4) of the *Native Title Act 1993*, to be inserted by item 7 of Schedule 3, would provide that an opinion given by the Registrar of Aboriginal and Torres Strait Islander Corporations 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 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the explanatory memorandum (paragraph 3.21, page 79) merely restates that the 'Registrar's opinion is not a legislative instrument'. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, 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 Attorney-General

> Proposed new subsection 60AC(4), to be inserted by item 7 of Schedule 3, would provide that an opinion given by the Registrar of Aboriginal Corporations in relation to fees charged by a prescribed body corporate is not a legislative instrument. This provision is merely declaratory and is included for the avoidance of doubt. The Registrar's opinion is not of a legislative character as it does not determine or alter the content of the law. If any Government amendments are moved in the Senate, I will include this information in the explanatory material.
>
> I am copying this letter to the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, given his portfolio responsibility for parts of the Native Title Act in relation to prescribed bodies corporate.

The Committee thanks the Attorney-General for this response and for the assurance that an explanation will be included in the explanatory memorandum if Government amendments to this bill are moved in the Senate.

Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2007*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter dated 1 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2007

Introduced into the House of Representatives on 28 March 2007
Portfolio: Veterans' Affairs

Background

This bill amends the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*, the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to make changes to Veterans' Affairs administrative practices, align the *Veterans' Entitlements Act 1986* with the *Social Security Act 1991* and make minor changes to certain income support regimes. The bill also contains application and saving provisions and a number of minor and technical amendments.

Retrospective application
Schedule 1, items 70 and 71

Item 84 of Schedule 1 would provide that the amendments proposed in items 70 and 71 of the same Schedule 'apply in respect of a claim for social security pension bonus that is made before, on or after the commencement' of item 84.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The Committee notes that the explanatory memorandum (page 30) does no more than repeat, in slightly different language, the terms of item 84, and does not explain whether this possibly retrospective application will have an adverse effect on any person.

As item 70 provides for a Defence Force Income Support Allowance bonus to be payable to the legal representative of a person after that person has died, even if the claim had not been determined at the time of the person's death, it is likely that this retrospectivity will benefit people, however, this is not entirely clear. As such, the Committee **seeks the Minister's advice** whether this possibly retrospective application will have an adverse effect on any person.

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 raised concerns about the retrospective application of the provisions and questioned whether they will have an adverse effect on any person.

Clauses 70 and 71 make amendments to section 118NH of the *Veterans' Entitlements Act 1986* (VEA) to provide for the payment of DFISA bonus to the legal representative of a person who has made a claim for a social security pension bonus that has not been determined at the time of the death of the person. The amendments to section 118NH provide for the DFISA bonus to be payable to the legal representative of the deceased claimant in the circumstances where the claim for the social security pension bonus is subsequently granted.

The purpose of the amendments is beneficial and makes provision for the payment of DFISA bonus to the legal representative of the deceased claimant in similar circumstances as are currently allowed for pension bonuses payable under the social security law and the VEA. Therefore the retrospective application of the amendments to claims for a pension bonus made before the commencement of the amendments will be beneficial in all cases.

The amendments will not disadvantage or adversely affect any person.

I trust the information I have provided is of assistance to the Committee.

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

Robert Ray
Chair

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

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Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
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22 MAY 2007

Dear ~~Senator~~ Robert

The Scrutiny of Bills Alert Digest No. 5 of 2007 includes comment on the imposition of an offence of strict liability by item 20 Schedule 1 to the Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007 (the bill). The Committee has sought my advice on whether strict liability is justified in these circumstances and whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was taken into account in framing this provision.

I draw your attention to page 35 of the explanatory memorandum, under the heading 'Child support offence provisions', which acknowledges that the offence created is one of strict liability, and explains that this offence is similar to that already applying to other provisions allowing the Child Support Registrar to seek information, such as that at section 120 of the *Child Support (Registration and Collection) Act* 1988 (the Registration and Collection Act).

The comparison with existing similar provisions of the Registration and Collection Act make it clear that strict liability is an appropriate basis for the offence because of:

- the difficulty the prosecution would have in proving fault (especially knowledge or intention) in this case;
- the fact that the offence is minor; and
- the fact that the offence does not involve dishonesty or other serious imputation affecting the person's reputation.

Yours sincerely

MAL BROUGH

SENATOR THE HON BRETT MASON

Parliamentary Secretary to the Minister for Health and Ageing

Senator Ray
Chair, Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100, Parliament House
Canberra ACT 2600

Dear Senator,

Thank you for your letter of 10 May 2007, requesting further advice regarding a number of matters included in the Food Standards Australia New Zealand (Amendment) Bill 2007 which was introduced into the Senate on 28 March 2007. I provide the following answers to the Senate Scrutiny of Bills Committee's queries.

Legislative Instruments Act – disallowance and sunset provisions
Schedule 1, items 16 and 74 and Schedule 3, item 5

The Committee is seeking advice regarding the reasons certain instruments (described in Schedule 1 proposed new subsections 3B(4), 23(4), 87(8) 97(6) and 106(6) and proposed new section 94 of the Bill) are not to be subject to section 42 of the *Legislative Instruments Act 2003* (the LIA) which provides for disallowance and Part 6 of the LIA which provides for sunsetting.

The effect of applying section 42 and Part 6 of the LIA to these instruments would be that the Australian Parliament could unilaterally disallow a standard relating to food that has been agreed by Ministers representing the Australian Government, the New Zealand Government and governments of each of the States and Territories. This would undermine the co-operative nature of the scheme and would be contrary to the international Treaty established between Australia and New Zealand.

I confirm that the fact that the food regulation scheme involves the Commonwealth and 'one or more States' and New Zealand is the explanation for the instruments not being subject to disallowance and sunsetting.

I will endeavour to add the supplementary explanation, given above, in respect to each of the abovementioned provisions in a supplementary Explanatory Memorandum for the Bill.

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Legislative Instruments Act – declarations
Schedule 1, item 74 and Schedule 3, item 5

The Committee has sought advice regarding various provisions of the bill relating to instruments that are not legislative instruments. The Committee enquired whether these provisions are declaratory in nature or provide for substantive exemptions from the operation of the LIA.

I confirm that these provisions are declaratory and are included for the avoidance of doubt.

The instrument described in proposed subsection 111(4) (a direction by the Authority prohibiting or restricting the publication of evidence in the course of a public hearing) is not legislative in nature and is therefore not a legislative instrument in accordance with the definition of legislative instruments in section 5 of LIA.

The types of decisions described in proposed subsections 86(4), 103(3) and 88(2) are made by the Australian and New Zealand Food Regulation Ministerial Council whose powers are independent of Commonwealth legislation. These decisions are not made in the exercise of a power delegated by the Parliament and are therefore not legislative instruments in accordance with the definition of legislative instruments in section 5 of LIA.

I will endeavour to add the supplementary explanation, given above, in respect to each of the abovementioned provisions in a supplementary Explanatory Memorandum for the Bill.

'Henry VIII' clause
Schedule 1, item 76

The Committee highlighted an issue with the proposed new subsection 112(6) of the Bill. The clause is a provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation.

Subsection 112(6) has retained an existing capacity provided in section 36A from the *Food Standards Australia New Zealand Act 1991*.

Following consultation with FSANZ it appears that the provision has never been utilized and there are no existing regulations to this effect. As the provision is somewhat antiquated and in light of the concerns highlighted by the Committee I intend to remove subsection 112(6) from the Bill.

Yours sincerely

Brett Mason

30 MAY 2007

SENATOR THE HON ERIC ABETZ
Minister for Fisheries, Forestry and Conservation
Manager of Government Business in the Senate
Liberal Senator for Tasmania

Senator Robert Ray
Senator for Victoria
Committee Chair
Senate Scrutiny of Bills Committee
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PO Box 6100
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Dear Senator Ray

I refer to a letter of 10 May 2007 from Ms Cheryl Wilson, Secretary of the Senate Scrutiny of Bills Committee, regarding making a response to the comments contained in the Scrutiny of Bills *Alert Digest No. 5 of 2007* (9 May 2007) concerning the Forestry Marketing and Research and Development Services Bill 2007 for which I have portfolio responsibility.

My responses to the comments contained in the *Alert Digest* are set out below.

Insufficient scrutiny of contract
Subclause 8(1)

Currently, the statutory authority known as the Forest and Wood Products Research and Development Corporation (FWPRDC) is governed by administrative provisions in existing legislation – the *Commonwealth Authorities and Companies Act 1997* and the *Primary Industries and Energy Research and Development Act 1989.*

Under the new arrangements, the new forestry industry-owned company will be limited by guarantee under the *Corporations Act 2001* and will replace the FWPRDC. Therefore the new company will be subject to governance arrangements and accountable to its members under Corporations law and the Australian Securities and Investments Commission.

In addition, the new arrangements will also include a funding contract between the Commonwealth and the new forestry industry-owned company. This funding contract will require accountability to the Commonwealth for compliance with the terms of the contract.

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The funding contract has been modelled on existing contracts between the Commonwealth and industry-owned companies currently operating in the dairy, egg, red meat, wool, pork and horticulture industries. These funding contracts have been designed to provide assurances that the funds provided to the industry-owned companies are spent only for the purpose for which they were appropriated by Parliament. The funding contracts with the industry-owned companies are kept under review and are updated as required to reflect emerging best practices in accounting for the expenditure of public monies and in response to the findings of the periodic performance reviews.

Since the funding contract of the new forestry industry-owned company is very similar to those of the other industry-owned companies which have not been the subject of Parliamentary scrutiny, there is no precedent for making it available to Parliament for scrutiny before the contract is entered into by the company and the Commonwealth.

The funding contract is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003,* and is therefore not required to be tabled for review or disallowance by the Parliament. However, the Forestry Marketing and Research and Development Services Bill 2007 has provided for the finalised funding contract and any future amendments to be tabled in Parliament to allow for more accountability to Parliament.

Non-reviewable decisions
Clause 12

Clause 12(1) of the Forestry Marketing and Research and Development Services Bill 2007 provides that the Minister may declare in writing that the company ceases to be the industry services body (ISB) in the event one of the circumstances listed occurs.

Declaration as an ISB enables the ISB to receive levies and Government matching of research and development expenditure under a funding contract with the Commonwealth. This funding contract is the key link with the Commonwealth, providing the vehicle for the provision and management of the funds. As the key element, it is appropriate that the funding contract provide the ISB with the opportunity to 'show cause' why the Minister should not terminate the funding contract. If the funding contract were to be terminated there would be no reason for the ISB's existence as it would have no entitlement to levy or matching Commonwealth research and development funds.

There is also the requirement under section 11(1) that a funding contract be in place. The circumstances under which the Minister may declare that the ISB ceases to be an ISB largely mirror the funding contract in relation to the termination of the funding contract. Accordingly, they do not require a review mechanism as this is already appropriately addressed in the funding contract.

Subclauses 12(1)(b) to (g), and the corresponding termination provisions in the funding contract, are also intended to address fundamental changes to circumstances or operations of the company that put at risk the effective management of public money. In such circumstances it would be entirely appropriate for the Minister to declare that the company cease to be the ISB.

If the company disagrees with the termination of the funding contract and the associated declaration, it has legal mechanisms available for review of the decision.

This approach is similar to the suspension and termination clauses in arrangements between the Commonwealth and other industry-owned companies.

Non-reviewable decisions
Subclause 13(1)

Under subclause 13(1), the Minister may give a written direction to the industry services body only in the event of urgent or exceptional circumstances. Given the significant nature of the circumstances under which the Minister can give a written direction (for example, in Australia's national interest), together with the requirements for assessment of the financial implications and adequate opportunity for discussions between the Minister and the directors of the company, it is not appropriate for a further avenue of review to be available.

Subclause 13(1) follows the approach used in a number of other agricultural industry acts such as the *Egg Industry Service Provision Act 2002* and the *Pig Industry Act 2001*.

A written direction under this provision is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Therefore there is no need for it to be tabled for review or disallowance by the Parliament.

Thank you for bringing the Senate Scrutiny of Bills Committee's comments to my attention. I trust that this information is of assistance to the Committee.

Yours sincerely

ERIC ABETZ

SENATOR THE HON BRETT MASON

Parliamentary Secretary to the Minister for Health and Ageing

Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2000

Dear Senator Ray

Gene Technology Amendment Bill 2007

I refer to the letter of 10 May 2007 from Ms Cheryl Wilson, Secretary of the Standing Committee for the Scrutiny of Bills, seeking a response to the comments of the Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Gene Technology Amendment Bill 2007 in the *Scrutiny of Bills Alert Digest No. 5 of 2007*.

The Committee has sought advice as to whether amendments contained in the Gene Technology Amendment Bill 2007 (the Bill), which grant the Gene Technology Regulator (the Regulator) certain discretions, should be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

In relation to the exercise of the Regulator's discretion via Schedule 1, part 3, item 39 (proposed section 50A) of the Bill to determine whether an application for release of a genetically modified organism (GMO) should be subject to the less onerous limited and controlled release assessment process or not, the Committee asked whether this should be open to review by the Administrative Appeals Tribunal (AAT).

To include the Regulator's discretion in allowing or not allowing an application to proceed by way of the limited and controlled release category as a reviewable decision under the *Gene Technology Act 2000* would be inconsistent with the current list of reviewable decisions. These all provide review of final substantive decisions; for example to refuse to issue a licence, to impose a condition, to vary a condition, or to refuse to declare certain information to be confidential commercial information. These final substantive decisions are conceptually different from a decision made in the course of considering an application.

The discretion exercised under section 50A is made as part of the process of deciding on a licence. In this sense it is very similar to a decision by the Regulator to seek more information. In many circumstances the decision to seek further information will extend the time limit since the period during which the Regulator awaits the requested information does not count for purposes of the statutory assessment period. There is no provision to afford merits review to the existing discretionary decision by the Regulator to seek more information, and I believe section 50A decisions should be consistent with this.

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Furthermore, the logistics of merits review would ultimately defeat the notional purpose of the review, which in most cases would be to resolve objections to the prolonged rather than attenuated assessment period. Reviews take time, and it is arguable that a contested review process would of itself prolong the decision-making period beyond the time saved by any successful argument in favour of the shortened assessment.

The Committee has also sought advice as to whether, in relation to Item 56 (proposed section 40A), the exercise of the Regulator's discretion to grant an inadvertent dealings licence should be subject to merits review.

The proposed inadvertent dealings licence will allow the Regulator to grant a temporary permit to a person who finds himself or herself inadvertently dealing with an unlicensed GMO. The licence will be issued to the person for the purposes of disposing of the GMO in a manner which protects the health and safety of people and the environment.

It is notable that the Regulator requires the agreement of the person being treated as having made an inadvertent dealings application; therefore, there is no need for any review rights for that person. A person who does not agree to an inadvertent licence will be on notice that they are dealing with a GMO without a licence from the point at which he or she is aware that the organism is genetically modified. Refusal to agree to the licence is tantamount to proceeding to deal with the GMO in contravention of criminal provisions. Normal rights associated with defending criminal charges would apply. Therefore, there is no sensible place in this construct for a merits review provision.

I hope that this addresses the concerns that the Committee has with the Bill. If you require further clarification, please contact Ms Linda Addison, First Assistant Secretary, Regulatory Policy and Governance Division on 6289 8227.

Yours sincerely Best wishes,

Brett Mason

29 MAY 2007

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

12 JUN 2007

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

Dear Senator Ray

Thank you for the Standing Committee's letter of 10 May 2007 drawing my attention to comments contained in the Alert Digest No 5 of 2007 on the Health Insurance Amendment (Diagnostic Imaging Accreditation) Bill 2007.

The Committee's concerns relate to the delegation of power and functions provided for in:

- proposed new subsection 23DZZIAA(5) of the *Health Insurance Act 1973* (the Act) as described in Item 5 of Schedule 1 to the Bill; and
- subitem 6 of Item 12 of Schedule 1 to the Bill.

You are seeking comments on the need for the wide delegation of powers under those provisions. This specifically relates to whether they may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a) (ii) of the Committee's Terms of Reference.

I will comment on each of the provisions in turn.

Proposed new subsection 23DZZIAA(5) in Item 11 of Schedule 1

Proposed new section 23DZZIAA provides for the Minister to establish diagnostic imaging accreditation schemes through a legislative instrument. The legislative instrument will contain the rules for the operation of these schemes and cover such things as:

- how diagnostic imaging practice sites become accredited;
- the accreditation standards;
- when accreditation expires, how it may be renewed and when the renewal takes effect;
- the circumstances under which accreditation may be revoked or varied; and
- the obligations of approved accreditors to inform the Minister about the operation of the scheme.

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The accreditation arrangements, which the legislative instruments will reflect, is currently being finalised by the radiology industry and profession in consultation with the Government. It can, however, be expected to contain provisions that will impose administrative obligations on the Minister. For example, the legislative instrument may provide for the Minister to seek prescribed information from time-to-time from approved accreditors about the operation of the scheme. The instrument may also require the Minister to formally notify practices that their accreditation status has been recorded on the Diagnostic Imaging Register (commonly known as the Location Specific Practice Number Register), pursuant to proposed new provision 23DZZIAB.

Generally, these types of administrative powers and functions would not adversely affect the rights, interests or obligations of anyone and are of a kind which would most appropriately be performed by officers at a relatively junior level in the Department or Medicare Australia.

Proposed subsection 23DZZIAA(5) allows the necessary flexibility in determining the appropriate level of officer in these agencies to whom these functions and powers can be delegated.

Subitem 6 of Item 12 of Schedule 1

By way of background, Item 12 of the Bill contains the transitional arrangements which will apply to diagnostic imaging practice sites in operation before 1 July 2008.

In summary, these arrangements provide that as long as the practice site is registered for accreditation with a designated person before 1 July 2008, services rendered by the practice will continue to be eligible for Medicare benefits. This will be until such time as the site goes through the accreditation process or until the date by which it must apply for accreditation under subitem (3) of the transitional arrangements.

Designated persons will be determined by a legislative instrument pursuant to subitem 12(5). As noted in the Explanatory Memorandum under subitem 12(1), it is intended that the designated persons will be the organisations approved as accreditation providers for the scheme to avoid unnecessary administrative burdens for practices.

The transitional arrangements in Item 12 do not amend, and therefore do not become part of the Act. Subitem 12(6) is necessary to allow the making of the legislative instrument to be delegated by me in accordance with the general principles contained in section 131 of that Act. The one exception is that I would not be able to delegate this power to officers in Medicare Australia.

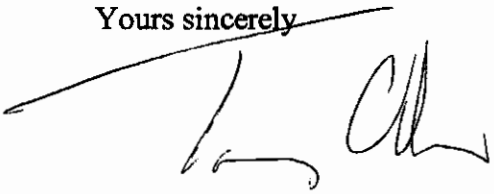
The power that I would be able to delegate is merely the power to specify the designated persons with whom notices under subitem 12(1) can be lodged. As mentioned, it is envisaged that these persons will be the approved accrediting organisation(s).

Such designated persons will have no discretion to determine whether or not a particular diagnostic imaging practice obtains 'deemed accreditation'. Hence the task of identifying the relevant 'designated persons' will not adversely affect the rights, liberties or obligations of diagnostic imaging service providers and their patients.

In addition, any instrument made by a delegate is still a legislative instrument, subject to legislative instrument processes, including the requirement that it be scrutinised by the Parliament as a disallowable instrument.

I trust that this information is of assistance.

Yours sincerely



TONY ABBOTT

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

12 JUN 2007

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

Dear Senator Ray

Thank you for the Committee's comments on the Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007 (the Bill), contained in the Scrutiny of Bills *Alert Digest No 5 of 2007*.

I would like to address the Committee's concerns about the retrospective effect of subitems 2 and 3 of Schedule 2 of the Bill, and whether it will adversely affect any person.

Schedule 2 of the Bill was inserted as a result of uncertainty regarding the validity of regulation 4 of the Health Insurance (Pathology Services) Regulations 1989 (the Regulations).

Regulation 4 prescribes certain content requirements relating to requests for pathology services. Section 23DP of the *Health Insurance Act 1973* (the Act) requires pathology requests to be made in accordance with "the approved form". However, section 16A of the Act, which sets out the requirements for determining an entitlement to Medicare benefits for pathology services, does not envisage either "prescribed" or "approved" pathology request forms. Hence, it is unclear that the Act provides authority for the making of regulation 4 and, consequently, its effect is uncertain.

Schedule 2 of the Bill is designed to address this uncertainty, not only by amending subsection 16A(4) of the Act to provide clear authority for the Regulations to prescribe requirements for written pathology requests (subitem 1), but also to backdate the effect of the amendment to support regulation 4 from the day that the Regulations were first made (subitem 3). If subitem 3 was not included in the Bill, the uncertainty as to the validity and effect of regulation 4 in the period before the commencement of Schedule 2 of the Bill would remain. The inconvenience and cost that could result from such uncertainty, given that a challenge to the validity or operation of regulation 4 may need to be resolved by a court, is likely to outweigh any detrimental affect on any person as a result of the retrospective operation.

The provisions in Schedule 2 of the Bill make it clear that the consequence of failure to comply with the requirements of regulation 4 is that no Medicare benefit is payable for the pathology service. This reflects the way that Medicare Australia has administered the requirements of regulation 4.

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It is unlikely that the retrospective effect of the provisions would adversely affect any person unless claims for Medicare benefits have been refused (or other action taken) as a result of failure to comply with the requirements of regulation 4, or there has been a challenge to the validity or operation of regulation 4. Medicare Australia has advised that neither circumstance has occurred since the Regulations were first made.

I trust that this advice allays any concerns about the provisions trespassing unduly on personal rights and liberties.

Yours sincerely

TONY ABBOTT

The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

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CANBERRA ACT 2600

31 MAY 2007

Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
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Dear Chairman Robert

Thank you for your letter of 10 May 2007 concerning the *Liquid Fuel Emergency Amendment Bill 2007* (the Bill). I note the concerns that were raised by the Senate Standing Committee for the Scrutiny of Bills in its Alert Digest on 9 May 2007, and I trust that the following information will be of assistance to you.

The Committee has sought advice concerning the provisions proposed by Items 14, 15 and 21 of the Bill, which provide the Minister (or their delegate) with the power to make instruments which are stated not to be legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The Committee asks whether these provisions have been inserted to remove doubt as to the nature of the instruments, or whether they provide for substantive exemptions and are therefore legislative in character.

The proposed sub-sections of the Bill are as follows:

- 10(2) states that an instrument identifying a bulk customer is not a legislative instrument;
- 11(2) states that an instrument identifying an essential user is not a legislative instrument;
- 13(8) states that an instrument which approves (or requires specific amendments to) a relevant fuel industry corporation's bulk allocation procedure is not a legislative instrument;
- 14A(2) states that an instrument which directs a relevant fuel industry corporation to make statistics available to the Minister is not a legislative instrument;
- 17(3) states that an instrument which directs a relevant fuel industry corporation to maintain petroleum reserves is not a legislative instrument;
- 18(5) states that an instrument which directs the transfer of fuel from one location to another is not a legislative instrument;
- 19(4) states that an instrument which directs a relevant fuel industry corporation to make a specific quantity of fuel available for purchase by a specific person or persons is not a legislative instrument; and
- 20(3) states that an instrument which directs a relevant fuel industry corporation to produce or refine a specific quantity of liquid fuel is not a legislative instrument.

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All of these provisions are intended to be declaratory and have been included for the avoidance of doubt. In each case the instrument is simply an administrative tool that will give effect to the broader purposes of the *Liquid Fuel Emergency Act 1984* (the Act). The decision-maker does not perform a legislative function, as they must use these instruments in accordance with the specific terms of the Act itself or by complying with the relevant Guidelines issued under sub-sections 10(4), 11(5), 13(3), 14A(4), 17(5) or 20(5). I note that Guidelines are not referred to under sections 18 or 19 because their use would be unnecessary – the terms of those sections provide sufficient guidance to a decision-maker as to what matters must be taken into account in making their decision.

The Committee has also sought advice concerning the provisions proposed by Items 15 and 21 (being proposed sub-sections 13(2), 14(2), 21(5), 22(5), 23(5) and 24(5)). These sub-sections provide that a direction:

- to develop a bulk allocation procedure under sub-section 13(1);
- to maintain statistical information under sub-section 14(1);
- to require a corporation to make specific quantities of fuel available for purchase under sub-section 21(1) in accordance with an approved bulk allocation procedure;
- to require a relevant person to make specific quantities of fuel available for purchase under sub-section 22(1) in accordance with a specified bulk allocation procedure;
- to regulate or prohibit the supply of fuel by a corporation under sub-section 23(1); or
- to regulate or prohibit the supply of fuel by a relevant person under sub-section 24(1),

will not be subject to disallowance or sunsetting under the provisions of section 42 or Part 6 of the *Legislative Instruments Act 2003*. As the Committee has noted, "Ministerial directions to any person or body" are not subject to disallowance or sunsetting by virtue of the tables under sub-section 44(2) and sub-section 54(2) of the *Legislative Instruments Act 2003*. The proposed new sub-sections in the Bill are intended to be declaratory and have been included for the avoidance of doubt. I can confirm for the Committee that all of the Guidelines which are issued under the Act are legislative instruments and will be subject to disallowance by the Parliament.

The Committee has sought advice concerning proposed sub-section 49(1) under Item 88 of the Bill, which would permit the Minister to delegate certain powers and/or functions to "a person". Proposed sub-section 49(2) would permit that delegate to sub-delegate any of those powers or functions to "another person".

In the event of a national liquid fuel emergency, the types of powers which can be delegated include the identification of bulk customers and essential users (sections 10 and 11), as well as the power to direct companies to maintain reserves (sections 12 and 17), to issue directions to transfer fuel (section 18), to make fuel available for purchase (section 19), to direct refinery output (section 20), to direct allocations to bulk customers (sections 21 and 22) and to regulate or prohibit the sale of fuel (sections 23 and 24).

Practically, fuel industry corporations will assess which of their customers meet the threshold requirements for bulk customer identification under section 10 and its Guidelines. In most cases they will provide this information to the Minister (or their delegate), who will in turn formally notify the customer of their status. This is clearly a time-consuming task best undertaken immediately preceding or in the early stages of a disruption. However, if the disruption evolves swiftly, or if the circumstances prevent the ready identification of bulk customers by a centralised delegate, the Government may choose to also delegate the power more widely to State and Territory Government officials.

The power to identify essential users is most likely to be delegated to State and Territory Government officials, as there will inevitably be variation in the severity of a national liquid fuel emergency in different jurisdictions. Further, as the State and Territory Governments are the providers of most emergency and other essential services, these officials will be best placed to assess the needs of essential users within their own jurisdiction.

The power to direct companies to maintain reserves has a twofold purpose: to provide a source of fuel in times of need, and to assist Australia to meet its commitment to the International Energy Agency to hold the equivalent of 90 days of net oil imports. In almost all cases, this power will be retained by the Minister because of the potentially international character of the power and the need to have a nationally coordinated approach.

The power to direct the transfer of fuel is designed to ensure that the Government is able to move sufficient stocks from a place of excess supply to a place where supply is scarce. The power to direct the making of fuel available for purchase is similar, in that it allows the Government to make fuel available for purchase in specific quantities by a person that has otherwise failed to gain access to necessary fuel. In most cases, it is expected that the normal operation of the market will make the exercise of these powers unnecessary. However, concurrent disasters (such as a cyclone) may mean that demand for fuel is much higher in some locations or affects some fuel users (or relevant fuel industry corporations) more acutely than others. It can be expected that these powers would be most appropriately exercised by the Minister or an Australian, State or Territory Government official, depending on the nature of the disruption and what will be the most efficient response.

The powers to direct refinery output, to direct allocations to bulk customers and to regulate or prohibit the sale of fuel are all likely to be exercised in a nationally uniform manner. As a result, these powers are unlikely to be delegated beyond Australian Government officials.

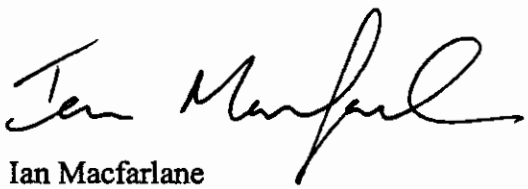
In all cases, when deciding to delegate their powers or agree to a further sub-delegation, the Minister should take into account the potential for a conflict of interest to affect the exercise of a power by a prospective delegate, whether the delegate is capable of appropriately exercising the power, and to consider whether the delegation will facilitate the most effective and efficient management of the national liquid fuel emergency. Furthermore, powers which are delegated will typically be restricted to the jurisdiction of the delegate; for example, the New South Wales Government could not issue a direction to transfer fuel from Queensland to New South Wales.

I do not believe that these should be formal requirements of the legislation, as the specific circumstances of a future national liquid fuel emergency remain inherently uncertain. The phrases in the proposed sub-sections refer to "a person" because the variety of powers which may be delegated should not all be exercised by the same type of person in every situation. I do not wish to unduly restrict the capacity of the Government to respond in the manner which it deems appropriate at the time.

In any event, the exercise of the delegated power must comply with Guidelines established under the relevant section of the Act and which remain subject to Parliamentary scrutiny. With regard to the power to further sub-delegate a power, proposed sub-section 49(3) states that a delegation under sub-section 49(2) has no effect unless it is done with the Minister's agreement. On this basis, the Minister is able to retain sufficient control over the extent and type of delegations which take place during a national liquid fuel emergency.

I trust that these responses will be sufficient to address the Committee's concerns.

Yours sincerely



Ian Macfarlane

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

07/335, MC07/12561

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

31 MAY 2007

Dear Senator

I refer to a letter of 10 May 2007 from Ms Cheryl Wilson, Secretary of the Standing Committee, to my office in relation to the Native Title Amendment (Technical Amendments) Bill 2007 (the Bill). Ms Wilson notes the comments made by the Committee in relation to the Bill in Alert Digest No 5 of 2007.

Item 91 of Schedule 1

Item 91 of the Bill makes an amendment to section 87A of the *Native Title Act 1993*. Section 87A enables a determination of native title to be made over part of a claim area where some, but not all parties to the claim, consent. The provision was inserted by the *Native Title Amendment Act 2007*. Item 82 of the 2007 Act provides that section 87A applies to all claims, regardless of whether the claim was made before or after the commencing day. I consider this is appropriate as section 87A is designed to facilitate the resolution of claims by consent.

The amendment in item 91 of this Bill makes an amendment to section 87A and will *broaden* the category of persons who must consent before a determination can be made under section 87A. The application of this amendment to all claims, regardless of whether the claim was made before or after the commencing day, will therefore not have an adverse effect on any person. Furthermore, as section 87A already applies to claims made prior to commencement of the 2007 Act, I consider it appropriate that the amendment made by the Bill apply to all claims, regardless of when they were filed. This will ensure all parties to existing claims gain the benefit of the amendment made by item 91.

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Item 3 of Schedule 7

Proposed new subsection 60AC(4), to be inserted by item 7 of Schedule 3, would provide that an opinion given by the Registrar of Aboriginal Corporations in relation to fees charged by a prescribed body corporate is not a legislative instrument. This provision is merely declaratory and is included for the avoidance of doubt. The Registrar's opinion is not of a legislative character as it does not determine or alter the content of the law. If any Government amendments are moved in the Senate, I will include this information in the explanatory material.

I am copying this letter to the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, given his portfolio responsibility for parts of the Native Title Act in relation to prescribed bodies corporate.

The action officer for this matter in my Department is Kirsten Law who can be contacted on (02) 6250 6676.

Yours sincerely

Philip Ruddock

The Hon Bruce Billson MP
Minister for Veterans' Affairs
Minister Assisting the Minister for Defence
Federal Member for Dunkley

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

Dear Senator Ray

I refer to the Committee's letter of 10 May 2007 concerning comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest (No. 5 of 2007) of 9 May 2007, relating to clause 84 of Schedule 1 of the Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Bill (the Bill) providing for the retrospective application of clauses 70 and 71 of the Bill.

The Committee has raised concerns about the retrospective application of the provisions and questioned whether they will have an adverse effect on any person.

Clauses 70 and 71 make amendments to section 118NH of the *Veterans' Entitlements Act 1986* (VEA) to provide for the payment of DFISA bonus to the legal representative of a person who has made a claim for a social security pension bonus that has not been determined at the time of the death of the person. The amendments to section 118NH provide for the DFISA bonus to be payable to the legal representative of the deceased claimant in the circumstances where the claim for the social security pension bonus is subsequently granted.

The purpose of the amendments is beneficial and makes provision for the payment of DFISA bonus to the legal representative of the deceased claimant in similar circumstances as are currently allowed for pension bonuses payable under the social security law and the VEA. Therefore the retrospective application of the amendments to claims for a pension bonus made before the commencement of the amendments will be beneficial in all cases.

The amendments will not disadvantage or adversely affect any person.

I trust the information I have provided is of assistance to the Committee.

Yours sincerely

Bruce Billson

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