SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2007

20 June 2007

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2007

20 June 2007

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

SEVENTH REPORT OF 2007

The Committee presents its Seventh 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:

Australian Centre for International Agricultural Research Amendment Bill 2007

Communications Legislation Amendment (Content Services) Bill 2007

Fisheries Legislation Amendment Bill 2007

Forestry Marketing and Research and Development Services Bill 2007

Higher Education Legislation Amendment (2007 Budget Measures) Bill 2007

Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Australian Centre for International Agricultural Research Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Foreign Affairs responded to the Committee's comments in a letter dated 19 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 10 May 2007
Portfolio: Foreign Affairs

Background

This bill amends the *Australian Centre for International Agricultural Research Act 1982* to implement the outcome of an assessment of the Australian Centre for International Agricultural Research (ACIAR) against the recommendations of the *Review of Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Review).

The bill:

- replaces the Board of Management of the Centre with a seven member Commission for International Agricultural Research and authorises the appointment of commissioners, the termination of commissioners in certain circumstances, and the payment of remuneration and allowances to commissioners;

- abolishes the position of Director and creates a new position of Chief Executive Officer, who will be directly accountable to the Minister for the administrative and financial management of the Centre; and

- retains the Policy Advisory Council (PAC) but ensures no duplication of membership between the Commission and the PAC.

The bill also contains transitional provisions.

Wide delegation of power
Schedule 1, item 36

Proposed new section 41 of the *Australian Centre for International Agricultural Research Act 1982*, to be inserted by item 36 of Schedule 1, would permit the Minister to delegate to 'any person' all or any of the Minister's functions or powers under that Act. The Committee has consistently drawn attention to legislation which allows delegations to a large class of persons, with little or no specificity as to their qualifications or attributes.

In this instance, the explanatory memorandum (page 11) seeks to justify this very wide power of delegation on the basis that 'there may be circumstances where it would not be appropriate for the Minister to delegate those functions or powers to the [Chief Executive Officer of the Centre].' While the Committee recognises that this may be the case, it remains concerned that the solution adopted is to allow delegation to 'any person' rather than to attempt to limit the power to delegate in some way by identifying the various classes of persons, for example, CEO, Commissioner etc, to whom such delegations might reasonably be made. The Committee **seeks the Minister's advice** whether this very wide power of delegation 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

I refer to the letter received by my office from the Secretary of the Senate Standing Committee for the Scrutiny of Bills ('the Committee') on 14 June 2007 drawing my attention to Scrutiny of Bills *Alert Digest No. 6 of 2007* concerning the Australian Centre for International Agricultural Research Amendment Bill 2007 ('the Bill').

In the Alert Digest, the Committee seeks my advice on whether item 36 of the Bill, which repeals section 41 of the *Australian Centre for International Agricultural Research Act 1982* ('the Act) and substitutes that section with a new provision concerning delegations, should be limited in some way.

I advise that the power of the delegation in item 36 of the Bill is no wider than the existing delegation in section 41 of the current Act. The reference to "a person" in

section 41 of the Act is not qualified and therefore is not limited to a particular class of persons. Under that section therefore, the responsible Minister would be entitled to delegate any of his powers under this Act to "any person". Item 36 of the Bill as drafted therefore reflects section 41. Furthermore, the ability to delegate to 'any person' provides the Minister with flexibility to ensure that any of his powers are delegated to a person with the requisite skills and experience, which could be to a person working within the organisation, or elsewhere within the foreign affairs portfolio.

I therefore consider that the new delegation provision does not need to be limited.

The Committee thanks the Minister for this response. However, the Committee considers that the fact that the existing power of delegation under section 41 of the current Act is not limited to a particular class of persons does not justify a similar provision under item 36 of the bill. The Committee reiterates its concern that this provision gives the Minister a completely unfettered discretion to delegate his or her powers, which is not subject to review in any way by the Parliament. If, as the Minister asserts, the delegate would be an employee within the Australian Centre for International Agricultural Research or elsewhere within the foreign affairs portfolio, the Committee **seeks the Minister's further advice** as to whether these limitations could be included in the bill.

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.

Communications Legislation Amendment (Content Services) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Communications, Information Technology and the Arts responded to the Committee's comments in a letter dated 19 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 10 May 2007
Portfolio: Communications, Information Technology and the Arts

Background

This bill amends the *Australian Communications and Media Authority Act 2005*, the *Broadcasting Services Act 1992*, the *Criminal Code Act 1995*, the *Export Market Development Grants Act 1997*, the *Freedom of Information Act 1982*, the *Interactive Gambling Act 2001*, the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to provide for the regulation of content services delivered over a range of devices, such as mobile phones, and for new types of content provided over the Internet.

The bill:

- provides that content that is, or potentially would be, rated X18+ and above must not be delivered or made available to the public and access to material that is likely to be rated R18+ must be subject to appropriate age verification mechanisms;
- provides that, as a general rule, where content is provided by means of a content service that is operated on a commercial basis, and is likely to be classified MA 15+ or above, access must only be made available subject to appropriate age verification mechanisms;

- prohibits electronic editions of publications such as books and magazines which have been classified 'Restricted-Category 1', 'Restricted Category 2' or 'Refused Classification';

- provides for the Australian Communications and Media Authority (ACMA) to issue 'take down' notices for stored or static content, 'service-cessation' notices for live content and 'link deletion' notices for links to content, and to issue a notice to a content service provider to remove content that is substantially similar to content already the subject of a take-down notice;

- provides for civil or criminal penalties to be pursued where a content service provider fails to comply with a take-down notice, service cessation or link-deletion notice; and

- empowers the ACMA to determine industry standards where it considers that industry codes are deficient in ensuring that content services are provided in accordance with prevailing community standards.

The bill also contains application and transitional provisions and special transitional provisions.

Commencement on Proclamation
Schedule 2

Item 4 in the table to subclause 2(1) of this bill provides that Schedule 2 will commence on Proclamation, but must commence within 12 months of Assent in any event. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation. This is consistent with Paragraph 19 of Drafting Direction No. 1.3, which states that '[i]f the Specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum'.

In this instance the explanatory memorandum (page 28) records the effect of item 4 in the table to subclause 2(1), but does not provide an explanation for the commencement being delayed beyond 6 months after Assent. The Committee **seeks the Minister's advice** as to the reason for this extended delay in commencement and whether it would be possible to include the reason for the delay in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Bill provides that Schedule 2, which deals with the regulation of telephone sex services under the new scheme for the regulation of content services, will commence on proclamation, or in any event at the end of 12 months after the Act receives Royal Assent.

I note the Committee's advice that commencement provisions should generally not be longer than six months, and that advice is sought as to the reason for the extended delay in commencement and whether it would be possible to include the reason for the delay in the explanatory memorandum.

Telephone sex services are currently regulated through a genre-based framework outlined in Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997*. Following passage of the Content Services Bill, these services will be regulated as commercial content services under the new Schedule 7 provided by the Bill, however, it is necessary for various instruments and other regulatory instruments to be made before this transition can occur. The deferred commencement period will allow the Australian Communications and Media Authority time to ensure that all appropriate measures are in place. The existing Part 9A provisions will remain in force until that time.

Given the timing for passage of the Bill in the Winter Sittings it is not possible to include reason for the delay in the explanatory memorandum, however, I would hope that my response to the Committee would be sufficient to address any concerns.

The Committee thanks the Minister for this response. The Committee does not generally comment on delayed commencement of up to six months, as it considers that this provides sufficient time to allow for relevant delegated legislation to be drafted. The Committee **seeks the Minister's further advice** as to the reasons why the Australian Communications and Media Authority require 12 months to ensure that appropriate measures are in place to facilitate the transition of telephone sex services to the new regulatory regime.

Fisheries Legislation Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Fisheries, Forestry and Conservation responded to the Committee's comments in a letter dated 19 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 23 May 2007
Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Fisheries Levy Amendment Bill 2007, this bill amends the *Fisheries Administration Act 1991*, the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and the *Surveillance Devices Act 2004* to:

- streamline delegation powers of the Minister and the Torres Strait Protected Zone Joint Authority;
- improve the management of Australia's rights and obligations under the Torres Strait Treaty with Papua New Guinea;
- improve operational and administrative effectiveness and bolster compliance and enforcement procedures;
- enhance the monitoring of fishing activity and further deter illegal, unreported and unregulated fishing;
- clarify the role and functions of the Australian Fisheries Management Authority (AFMA);
- broaden the functions of the AFMA to enable it to collect information in addition to that required for the management of fisheries; and

- refine foreign fishing offences and strengthen forfeiture provisions to make it more difficult for foreign fishing boats to profit from illegally fishing in the Australian Fishing Zone.

Commencement more than six months after assent
Schedule 3, part 2

Item 4 in the table to subclause 2(1) of this bill provides that the amendments proposed in Part 2 of Schedule 3 will commence 12 months after Assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance the reference to Clause 2 in the explanatory memorandum states that 'Schedule 3 (sic - it should read part 2 of Schedule 3)… commences on 12 months and one day after royal assent' but provides no explanation for the delayed commencement. However, in reference to item 285, the explanatory memorandum (page 30) does provide a possible explanation of the delayed commencement by stating that 'the requirement to hold a licence would not commence for at least 12 months to permit further consultation on the form of licences that operators would hold under the new regime'. The Committee **seeks the Minister's advice** as to whether this is the reason for the delayed commencement and, if so, whether this explanation could be included in the explanatory memorandum notes on Clause 2, Commencement.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee has queried why the commencement of Schedule 3 Part 2 of the Bill will be delayed. There are two reasons for delayed commencement of this part of the Bill.

As outlined in the Explanatory Memorandum at Items 285 and 297, the Bill provides for new forms of licences to commence 12 months after Royal Assent. The delayed commencement will allow time for administrative systems to be put in place to support this new licensing framework. In addition, the delayed commencement will allow for the dissemination of information to industry about related offences before they come into effect.

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.

Strict liability
Schedule 2, item 5 and Schedule 2, item 7

Proposed new subsection 100B(1A) of the *Fisheries Management Act 1991*, to be inserted by item 5 of Schedule 2, and proposed new subsection 101AA(1A) of the same Act, to be inserted by item 7 of Schedule 2, apply strict criminal liability to the element of the location of a foreign fishing boat in the Australian Fishing Zone, contained in the offences in sections 100B and 101AA of that Act. The result of these proposed amendments is that, in a prosecution under either of those sections, the prosecution will only have to establish that fishers were in the territorial sea of Australia, not that they *intended* to be in such waters. The justification for imposing strict liability provided in the explanatory memorandum is that the 'Commonwealth Director of Public Prosecutions has not been able to prosecute people for these offences because there have been difficulties collecting sufficient evidence to prove that the people intended to be in the territorial sea.'

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 24) states that applying strict liability to a particular physical element of an offence (as is proposed in this instance) may be considered appropriate where there is "demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element." It is unclear to the Committee the extent to which the imposition of strict liability in these instances is consistent with the *Guide*, particularly as the offences in sections 100B and 101AA were created by legislation which commenced as recently as 23 June 2006.

The Committee **seeks the Minister's advice** whether the above *Guide* was consulted in the course of framing these amendments and, if so, what was the nature of the 'demonstrated evidence' and 'legitimate grounds' referred to in the *Guide*.

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

Relevant extract from the response from the Minister

The Committee has sought advice on the strict liability provisions in Schedule 2 and their consistency with the *Guide to framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). The Guide was consulted in framing the amendments to Sections 100B and 101AA of the *Fisheries Management Act 1991* (FM Act) and the Attorney-General's Department was involved in the development of these amendments.

Both the elements of 'demonstrated evidence' and 'legitimate grounds' outlined in the Guide were shown to exist.

As outlined in the Explanatory Memorandum, Commonwealth Director of Public Prosecutions (CDPP) has provided evidence that strict liability is required in order to make these provisions effective. The CDPP has not been able to prosecute the offences because of insufficient evidence to prove beyond a reasonable doubt that persons had the state of mind of intending to be in the territorial sea. The territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions. Consequently, it is highly unlikely that the person would enter the coordinates for the territorial sea into their technical navigational equipment. For this reason, it has not been possible to successfully prove that someone was intentionally in the territorial sea. The requirement to prove fault for the territorial sea aspect of the offences is therefore undermining the deterrent effect and the offence provisions are not operating as effectively as intended.

There are legitimate reasons for penalising persons lacking fault in respect of the territorial sea aspect of the offences. Sections 100B and 101AA of the FM Act are among the most serious foreign fishing offences in the FM Act because incursions into Australia's territorial sea are the deepest type of incursion into the Australian Fishing Zone (AFZ). Incursions into Australia's territorial sea pose serious threats to Australia's sovereign interests including, *inter alia*, risks to the fisheries resources that are targeted illegally by foreign fishers deep within the AFZ.

As noted in the Explanatory Memorandum, the amendments will not impose strict liability on all physical aspects of the offences and will allow the overall offence provisions (which attract custodial sentences) to remain offences in which fault must be proven. As such, the amendments will be consistent with the Guide in the respect of the requirement that strict liability offences should not attract custodial sentences. Overall, the amendments were framed in line with the requirements of the Guide and there is evidence and grounds to support the imposition of strict liability.

The Committee thanks the Minister for this response but remains concerned about the fairness of applying strict liability to the element of the location of a foreign fishing boat in the territorial sea of Australia when 'the territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions', thus making it virtually impossible for a foreign fishing boat to know whether or not it has entered the territorial sea. The Committee, according to its usual practice, **leaves it for the Senate as a whole** to determine whether these provisions *unduly trespass* on personal rights and liberties.

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.

Non-reviewable decisions
Schedule 3, item 180

Proposed new subsection 26(5) of the *Torres Strait Fisheries Act 1984*, to be inserted by item 160 of Schedule 3, would grant to the Minister a discretion to cancel or suspend a person's commercial fishing licence if either of two conditions specified in the proposed subsection is satisfied. There does not appear to be any provision for the holder of such a licence to seek merits review of the exercise of the Minister's discretion under the *Administrative Appeals Tribunal Act 1975*.

The Committee consistently draws attention to provisions that exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee **seeks the Minister's advice** whether the exercise of the discretion granted by proposed new subsection 26(5) is subject to some form of review, and if not, whether it should be.

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

Relevant extract from the response from the Minister

The Committee questioned whether the exercise of discretion under Schedule 3, Item 180 would or should be subject to some form of review. A number of provisions in the Bill confer a discretion on the Minister to issue or cancel a licence, including subsections 19(4A) and 19(4B) of Items 142, 145 and 165. These items will amend or expand existing discretions in the *Torres Strait Fisheries Act 1984* (the TSF Act) and will not create new rights dependent on the exercise of an administrator's discretion. In the interests of consistency in appeal rights, it would not be appropriate to have merits review of these proposed amendments and not of other discretionary powers in the TSF Act. However, my Department is currently considering the review mechanisms under the TSF Act with a view to developing a consistent approach with other fisheries legislation.

I hope this information satisfies your Committee's requirements.

The Committee thanks the Minister for this response and looks forward to the outcomes of the Department's deliberations on review mechanisms under the *Torres Strait Fisheries Act 1984* and other fisheries legislation.

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.

In its *Sixth Report of 2007*, the Committee sought further advice from the Minister in relation to non-reviewable decisions. The Minister has responded in a letter dated 19 June 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.

Extract from Sixth Report 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.

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 dated 8 June 2007

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.

Relevant extract from the further response from the Minister dated 19 June 2007

It is not appropriate for me to advise what legal mechanisms are available to the company. The actual legal mechanisms would depend on the particular factual circumstances in issue and it would be a matter for the company to obtain legal advice.

The Committee thanks the Minister for this further response, but notes that the Minister indicated in his response of 8 June 2007 that the company 'has legal mechanisms available for review of the decision'. The Committee would appreciate **the Minister's further advice** in general terms regarding the legal mechanisms to which he refers.

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 dated 8 June 2007

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.

Relevant extract from the further response from the Minister dated 19 June 2007

A written direction to the industry services body under subclause 13(1) is only to be made in the national interest in the event of urgent or exceptional circumstances. The legislation requires the Minister to take into account the financial implications of the direction on the industry services body and to hold discussions with the body before making such a direction. If after these discussions the minister gives the written direction, it is not considered appropriate for the industry services body to have further avenues available under this legislation.

Thank you for bringing the Senate Scrutiny of Bills Committee's further comments to my attention.

The Committee thanks the Minister for this further response.

Higher Education Legislation Amendment (2007 Budget Measures) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Education, Science and Training responded to the Committee's comments in a letter received on 19 June 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.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 24 May 2007
Portfolio: Education, Science and Training

Background

This bill amends the *Higher Education Support Act 2003* (HESA) to give effect to 2007-08 Budget measures. The bill:

- creates a new Diversity and Structural Adjustment Fund, which aims to promote structural changes by universities to support greater specialisation, diversity, and responsiveness to local labour market needs;

- revises the Commonwealth Grant Scheme (CGS) funding clusters and Commonwealth contribution amounts under specific sections of the HESA;

- sets the maximum student contribution amount for accounting, administration, economics and commerce units of study at the same amount as law, dentistry, medicine and veterinary science and provides for a transitional fund to compensate higher education providers for the change in funding arrangements for students studying these courses;

- provides for three year funding agreements and new CGS adjustment mechanisms from the 2009 grant year;

- removes restrictions on the proportion of domestic undergraduate fee-paying places in certain courses from 1 January 2008; and

- enables the expansion of the Commonwealth Scholarships programme.

The bill also amends the *Australian Research Council Act 2001* to reflect updated annual caps on funding.

The bill also contains application and transitional provisions.

Non-reviewable decisions
Schedule 2, item 5

Proposed new paragraph 33-17(1)(c) of the *Higher Education Support Act 2003*, to be inserted by item 5 of Schedule 2 to this bill, would grant to the Minister the discretion to decide whether a higher education provider has failed to meet the requirements in paragraphs (a) and (b) of that subsection. Those requirements are compliance by the higher education provider with the National Governance Protocols and with the Higher Education Workplace Relations Requirements. If the Minister decides that a particular higher education provider does not meet those requirements, the provider's basic grant amount will be reduced. There does not appear to be any provision for a higher education provider that is adversely affected by the Minister's decision to seek merits review of that decision under the *Administrative Appeals Tribunal Act 1975*.

The Committee consistently draws attention to provisions that exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee **seeks the Minister's advice** whether the exercise of the discretion granted by proposed new paragraph 33-17(1)(c) is subject to some form of review, and if not, whether it should be.

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

Relevant extract from the response from the Minister

Schedule 2, item 5 of the Bill repeals section 33-15 and proposes a new section 33-17 of the *Higher Education Support Act 2003*. Section 33-17 has the effect of providing for a reduction in funding to higher education providers that do not meet certain requirements. The reduction is calculated by reference to the amount that the provider would have received as an increase for meeting the requirements (under current section 33-15) using the funding clusters and Commonwealth contribution amounts that would have applied before the amendments in the Bill have effect. It continues the effect of current section 33-15. Decisions made under the current section 33-15 are not reviewable decisions.

Although these decisions are not subject to review by the Administrative Appeals Tribunal, they are not outside the scope of all review mechanisms. The *Administrative Decisions (Judicial Review) Act 1977* provides for judicial review of decisions made under an enactment. Decisions made under section 33-17 would, therefore, be reviewable under that Act.

I note that the Bill passed the Senate without amendment on 15 June 2007.

The Committee thanks the Minister for this response.

Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2006*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 19 June 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 28 May 2007
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Workplace Relations Act 1996*, the *Coal Mining Industry (Long Service Leave Funding) Act 1992* and the *Financial Management and Accountability Regulations 1997* to establish a fairness test to apply to workplace agreements lodged on or after 7 May 2007 and covering employees earning less than $75,000 per annum. The bill also establishes two new statutory agencies, the Workplace Authority and the Workplace Ombudsman, and a compliance framework to facilitate the effective operation of the fairness test.

The bill also contains application, consequential and transitional provisions.

Refer also to the Commentary on Amendments to Bills section of this Digest.

Non-reviewable decisions
Schedule 1, item 1

Proposed new subsections 346E(1) and (2) and 346F(1) and (2) of the *Workplace Relations Act 1996*, to be inserted by item 1 of Schedule 1, would oblige the Workplace Authority Director to determine whether an Australian Workplace Agreement or a collective agreement pass a 'fairness test', as defined in new section 346M of the same Act.

It appears that when the Director makes such a decision the agreement is binding on both parties. However, there does not appear to be any provision for a review of that decision, if an employer or an employee is dissatisfied with it.

The Committee consistently draws attention to provisions that exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee **seeks the Minister's advice** whether the determinations made by the Workplace Authority Director under proposed new subsections 346E(1) and (2) and 346F(1) and (2) should be subject to some form of review.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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

The Committee has sought my advice as to whether the determinations made by the Workplace Authority Directory under new subsections 346E(1) & (2) and 346F(1) & (2) should be subject to some sort of review.

I offer the following comments in response:

1. The Workplace Authority is not a tribunal and will have simple administrative, rather than adversarial, judicial processes.

2. The Workplace Authority will publish guidance material on the operation of the Test, and will offer pre-lodgement advice and assessments. These arrangements will provide parties with greater certainty when making agreements.

3. Once an agreement is lodged, both parties will be notified at various stages of the Fairness Test process.

4. In assessing an agreement, the Workplace Authority Director is empowered to contact both parties to discuss aspects of the agreement or obtain further information.

5. If an agreement does not pass the Fairness Test, both parties are notified - and provided with advice about how the agreement can be varied to make it fair.

6. The Authority will also have the administrative capacity to reconsider its decisions where errors are drawn to its attention. Prior to the 2006 changes, the former Office of the Employment Advocate had a policy that allowed scope for internal review of decisions in relation to its application of the no-disadvantage test where errors of law or fact were drawn to its attention. I am advised that the Workplace Authority intends to put in place a similar policy in the context of the Fairness Test.

These processes are designed to assist parties ensure that the agreements they have made are fair.

I hope this advice is of assistance to the Committee.

The Committee thanks the Minister for this response.

Robert Ray
Chair

THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

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

Dear Chair

I refer to the letter received by my office from the Secretary of the Senate Standing Committee for the Scrutiny of Bills ('the Committee') on 14 June 2007 drawing my attention to Scrutiny of Bills *Alert Digest No. 6 of 2007* concerning the Australian Centre for International Agricultural Research Amendment Bill 2007 ('the Bill').

In the Alert Digest, the Committee seeks my advice on whether item 36 of the Bill, which repeals section 41 of the *Australian Centre for International Agricultural Research Act 1982* ('the Act) and substitutes that section with a new provision concerning delegations, should be limited in some way.

I advise that the power of the delegation in item 36 of the Bill is no wider than the existing delegation in section 41 of the current Act. The reference to "a person" in section 41 of the Act is not qualified and therefore is not limited to a particular class of persons. Under that section therefore, the responsible Minister would be entitled to delegate any of his powers under this Act to "any person". Item 36 of the Bill as drafted therefore reflects section 41. Furthermore, the ability to delegate to 'any person' provides the Minister with flexibility to ensure that any of his powers are delegated to a person with the requisite skills and experience, which could be to a person working within the organisation, or elsewhere within the foreign affairs portfolio.

I therefore consider that the new delegation provision does not need to be limited.

Yours sincerely

Alexander Downer

SENATOR THE HON HELEN COONAN

Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

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

Dear Senator Ray

Communications Legislation Amendment (Content Services) Bill 2007

I refer to the Scrutiny of Bills *Alert Digest No. 6 of 2007* (13 June 2007) and the Committee's comments about the commencement provisions in relation to Schedule 2 of the Bill.

The Bill provides that Schedule 2, which deals with the regulation of telephone sex services under the new scheme for the regulation of content services, will commence on proclamation, or in any event at the end of 12 months after the Act receives Royal Assent.

I note the Committee's advice that commencement provisions should generally not be longer than six months, and that advice is sought as to the reason for the extended delay in commencement and whether it would be possible to include the reason for the delay in the explanatory memorandum.

Telephone sex services are currently regulated through a genre-based framework outlined in Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997*. Following passage of the Content Services Bill, these services will be regulated as commercial content services under the new Schedule 7 provided by the Bill, however, it is necessary for various instruments and other regulatory instruments to be made before this transition can occur. The deferred commencement period will allow the Australian Communications and Media Authority time to ensure that all appropriate measures are in place. The existing Part 9A provisions will remain in force until that time.

Given the timing for passage of the Bill in the Winter Sittings it is not possible to include reason for the delay in the explanatory memorandum, however, I would hope that my response to the Committee would be sufficient to address any concerns.

Yours sincerely

HELEN COONAN

Parliament House Canberra ACT 2600 **Telephone**: (02) 6277 7480 **Facsimile**: (02) 6273 4154 www.minister.dcita.gov.au

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

19 JUN 2007

Senator Robert Ray
Chairman
Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

Thank you for your letter of 14 June 2007 regarding the Fisheries Legislation Amendment Bill 2007 (the Bill). The Committee has asked for three matters to be clarified in relation to the Bill.

1. Delayed Commencement – Schedule 3 Part 2

The Committee has queried why the commencement of Schedule 3 Part 2 of the Bill will be delayed. There are two reasons for delayed commencement of this part of the Bill.

As outlined in the Explanatory Memorandum at Items 285 and 297, the Bill provides for new forms of licences to commence 12 months after Royal Assent. The delayed commencement will allow time for administrative systems to be put in place to support this new licensing framework. In addition, the delayed commencement will allow for the dissemination of information to industry about related offences before they come into effect.

2. Strict Liability Provisions – Schedule 2

The Committee has sought advice on the strict liability provisions in Schedule 2 and their consistency with the *Guide to framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). The Guide was consulted in framing the amendments to Sections 100B and 101AA of the *Fisheries Management Act 1991* (FM Act) and the Attorney-General's Department was involved in the development of these amendments.

Both the elements of 'demonstrated evidence' and 'legitimate grounds' outlined in the Guide were shown to exist.

As outlined in the Explanatory Memorandum, Commonwealth Director of Public Prosecutions (CDPP) has provided evidence that strict liability is required in order to

Parliament House, Canberra ACT 2600 Telephone 02 6277 7270 Facsimile 02 6273 7096

make these provisions effective. The CDPP has not been able to prosecute the offences because of insufficient evidence to prove beyond a reasonable doubt that persons had the state of mind of intending to be in the territorial sea. The territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions. Consequently, it is highly unlikely that the person would enter the coordinates for the territorial sea into their technical navigational equipment. For this reason, it has not been possible to successfully prove that someone was intentionally in the territorial sea. The requirement to prove fault for the territorial sea aspect of the offences is therefore undermining the deterrent effect and the offence provisions are not operating as effectively as intended.

There are legitimate reasons for penalising persons lacking fault in respect of the territorial sea aspect of the offences. Sections 100B and 101AA of the FM Act are among the most serious foreign fishing offences in the FM Act because incursions into Australia's territorial sea are the deepest type of incursion into the Australian Fishing Zone (AFZ). Incursions into Australia's territorial sea pose serious threats to Australia's sovereign interests including, *inter alia*, risks to the fisheries resources that are targeted illegally by foreign fishers deep within the AFZ.

As noted in the Explanatory Memorandum, the amendments will not impose strict liability on all physical aspects of the offences and will allow the overall offence provisions (which attract custodial sentences) to remain offences in which fault must be proven. As such, the amendments will be consistent with the Guide in the respect of the requirement that strict liability offences should not attract custodial sentences. Overall, the amendments were framed in line with the requirements of the Guide and there is evidence and grounds to support the imposition of strict liability.

3. Administrative Review - Schedule 3 Item 180

The Committee questioned whether the exercise of discretion under Schedule 3, Item 180 would or should be subject to some form of review. A number of provisions in the Bill confer a discretion on the Minister to issue or cancel a licence, including subsections 19(4A) and 19(4B) of Items 142, 145 and 165. These items will amend or expand existing discretions in the *Torres Strait Fisheries Act 1984* (the TSF Act) and will not create new rights dependent on the exercise of an administrator's discretion. In the interests of consistency in appeal rights, it would not be appropriate to have merits review of these proposed amendments and not of other discretionary powers in the TSF Act. However, my Department is currently considering the review mechanisms under the TSF Act with a view to developing a consistent approach with other fisheries legislation.

I hope this information satisfies your Committee's requirements.

Yours sincerely

ERIC ABETZ

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

19 JUN 2007

Senator Robert Ray
Senator for Victoria
Committee Chair
Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

Ms Cheryl Wilson, Secretary of the Senate Scrutiny of Bills Committee wrote to my Senior Advisor on 14 June 2007 seeking a response to the comments in the Scrutiny of Bills *Sixth Report of 2007* (13 June 2007) concerning the Forestry Marketing and Research and Development Services Bill 2007.

My responses to the comments in the Committee's *Sixth Report of 2007* (13 June 2007) are set out below.

Non-reviewable decisions
Clause 12

It is not appropriate for me to advise what legal mechanisms are available to the company. The actual legal mechanisms would depend on the particular factual circumstances in issue and it would be a matter for the company to obtain legal advice.

Non-reviewable decisions
Subclause 13(1)

A written direction to the industry services body under subclause 13(1) is only to be made in the national interest in the event of urgent or exceptional circumstances. The legislation requires the Minister to take into account the financial implications of the direction on the industry services body and to hold discussions with the body before making such a direction. If after these discussions the Minister gives the written direction, it is not considered appropriate for the industry services body to have further avenues available under this legislation.

Parliament House, Canberra ACT 2600 Telephone 02 6277 7270 Facsimile 02 6273 7096

Thank you for bringing the Senate Scrutiny of Bills Committee's further comments to my attention.

Yours sincerely

ERIC ABETZ

The Hon Julie Bishop MP

Minister for Education, Science and Training
Minister Assisting the Prime Minister for Women's Issues

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

Dear Senator Ray Robert

Higher Education Legislation Amendment (2007 Budget Measures) Bill 2007

I refer to the Committee Secretary's letter of 14 June 2007 to my office concerning comments made in the Scrutiny of Bills *Alert Digest No.6 of 2007* (13 June 2007) regarding Schedule 2, item 5 of the Higher Education Legislation Amendment (2007 Budget Measures) Bill 2007 (the Bill).

Schedule 2, item 5 of the Bill repeals section 33-15 and proposes a new section 33-17 of the *Higher Education Support Act 2003*. Section 33-17 has the effect of providing for a reduction in funding to higher education providers that do not meet certain requirements. The reduction is calculated by reference to the amount that the provider would have received as an increase for meeting the requirements (under current section 33-15) using the funding clusters and Commonwealth contribution amounts that would have applied before the amendments in the Bill have effect. It continues the effect of current section 33-15. Decisions made under the current section 33-15 are not reviewable decisions.

Although these decisions are not subject to review by the Administrative Appeals Tribunal, they are not outside the scope of all review mechanisms. The *Administrative Decisions (Judicial Review) Act 1977* provides for judicial review of decisions made under an enactment. Decisions made under section 33-17 would, therefore, be reviewable under that Act.

I note that the Bill passed the Senate without amendment on 15 June 2007.

Yours sincerely

Julie Bishop

JULIE BISHOP

Parliament House Canberra ACT 2600 • Telephone (02) 6277 7460 Facsimile (02) 6273 4116

Hon. **Joe Hockey** MP
Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service

Parliament House
Canberra ACT 2600
Australia
Telephone (61 2) 6277 7320
Facsimile (61 2) 6273 4115
www.joehockey.com
joe@joehockey.com

19 JUN 2007

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills

Dear Senator Ray Robert

Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Thank you for your letter of 14 June 2007 drawing to my attention comments about the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (the Bill) in the Committee's Scrutiny of Bills *Alert Digest No. 6 of 2007.*

The Committee has sought my advice as to whether the determinations made by the Workplace Authority Directory under new subsections 346E(1) & (2) and 346F(1) & (2) should be subject to some sort of review.

I offer the following comments in response:

1. The Workplace Authority is not a tribunal and will have simple administrative, rather than adversarial, judicial processes.

2. The Workplace Authority will publish guidance material on the operation of the Test, and will offer pre-lodgement advice and assessments. These arrangements will provide parties with greater certainty when making agreements.

3. Once an agreement is lodged, both parties will be notified at various stages of the Fairness Test process.

4. In assessing an agreement, the Workplace Authority Director is empowered to contact both parties to discuss aspects of the agreement or obtain further information.

5. If an agreement does not pass the Fairness Test, both parties are notified – and provided with advice about how the agreement can be varied to make it fair.

6. The Authority will also have the administrative capacity to reconsider its decisions where errors are drawn to its attention. Prior to the 2006 changes, the former Office of the Employment Advocate had a policy that allowed scope for internal review of decisions in relation to its application of the no-disadvantage test where errors of law or fact were drawn to its attention. I am advised that the Workplace Authority intends to put in place a similar policy in the context of the Fairness Test.

These processes are designed to assist parties ensure that the agreements they have made are fair.

I hope this advice is of assistance to the Committee.

Yours sincerely