SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2007

8 August 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

EIGHTH REPORT OF 2007

The Committee presents its Eighth Report of 2007 to the Senate.

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

Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007

Australian Centre for International Agricultural Research Amendment Act 2007

Australian Citizenship Amendment (Citizenship Testing) Bill 2007*****

Communications Legislation Amendment (Content Services) Act 2007

Corporations Amendment (Insolvency) Bill 2007*****

Corporations Legislation Amendment (Simpler Regulatory System) Act 2007

Financial Sector Legislation Amendment (Restructures) Act 2007

Forestry Marketing and Research and Development Services Act 2007

International Trade Integrity Bill 2007*****

Judges' Pensions Amendment Bill 2007*****

Native Title Amendment (Technical Amendments) Act 2007

Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007

Telecommunications (Interception and Access) Amendment Bill 2007*****

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

Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 4 July 2007.

Although this 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: Families, Community Services and Indigenous Affairs

Background

This bill amends the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* to establish an office of Executive Director of Township Leasing to enter into and administer township leases (99 years) on Aboriginal land in the Northern Territory.

The bill provides for the appointment by the Governor-General of an Executive Director of Township Leasing for a term of up to five years and outlines the terms and conditions under which the Executive Director will hold office, the way in which the Executive Director may obtain the assistance of staff and consultants and reporting procedures.

The bill also contains technical provisions.

Delegation of legislative power
Schedule 1, item 1

Proposed new section 20S of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to be inserted by item 1 of Schedule 1 to this bill, would permit the Minister, if he or she is satisfied as to various matters and if various other conditions are met, to specify by legislative instrument, the day on which Part IIA of the Act (the whole of which is proposed to be inserted by this bill) is to be repealed. The explanatory memorandum seeks to justify this delegation of legislative power on the ground that it will ensure that 'there is no unnecessary expense incurred by having an Executive Director [of Township Leasing] in place when there is no further need for one.' The Committee considers that proposed new section 20S may inappropriately delegate legislative powers and **seeks the Minister's advice** as to why 'unnecessary expenses' could not be similarly avoided by allowing Parliament to repeal Part IIA of the Act if required.

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 first bill raised is the bill for what is now the *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007*. The Committee considers that proposed section 20S of the *Aboriginal Land Rights Act 1976* (the ALR Act) may inappropriately delegate legislative powers and seeks my advice on why any 'unnecessary expenses', incurred by having an Executive Director of Township Leasing in place when there is no further need for one (as mentioned in the explanatory memorandum), could not have been avoided by allowing Parliament to repeal new Part IIA of the ALR Act if required, rather than having this done by legislative instrument.
>
> It was the government's understanding that the Northern Territory Government would establish an entity to administer township leases before the first township lease was concluded. As this has not occurred and a township lease is likely to be finalised in relation to the township of Nguiu on the Tiwi Islands in July 2007, the government has decided to establish a statutory office to administer township leases. However, it remains the government's view that township leases would best be administered by the Northern Territory Government.

The ALR Act allows for the transfer of township leases from the Commonwealth to the Northern Territory. It would be the government's intention to transfer all township leases to the Northern Territory if and when the Northern Territory Government establishes an entity to hold township leases.

Should all township leases held by the Commonwealth be transferred to the Northern Territory, there would no longer be a need for an Executive Director of Township Leasing. At that point, the Minister could repeal Part IIA of the ALR Act. However, the Minister could take this action only if the Executive Director no longer has any functions to perform.

Allowing the Minister to repeal Part IIA ensures that repeal can occur as soon as there are no further functions for the Executive Director to perform. Leaving such a repeal until a bill could be drafted and considered by Parliament could result in a situation where the Executive Director continues to hold office for a considerable period (likely to be several months) without any continuing functions, thereby incurring ongoing costs for salary, office accommodation and the like. Given the limited circumstances in which the Minister can repeal Part IIA, it is considered appropriate for the Minister to have the power to make the repeal.

The Committee thanks the Minister for this comprehensive response.

Australian Centre for International Agricultural Research Amendment Act 2007

Introduction

The Committee dealt with the bill for this Act 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.

In its *Seventh Report of 2007*, the Committee sought further advice from the Minister regarding wide delegation of power. The Minister has responded in a letter received on 21 June 2007. A copy of the letter is attached to this report.

Although this bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Seventh Report 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 dated 19 June 2007

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.

Relevant extract from the further response from the Minister received on 21 June 2007

I would like to thank you and the members of the Senate Standing Committee for the Scrutiny of Bills ('the Committee') for your timely *Seventh Report of 2007* (dated 20 June 2007). The Committee has sought further advice on the power of delegation contained in Australia (sic) Centre for International Agricultural Research Amendment Bill 2007 ('the Bill'). In particular, the Committee has sought further advice as to whether my power of delegation under item 36 of the Bill could be limited to an employee within the Australian Centre for International Agricultural Research or elsewhere within the foreign affairs portfolio.

I have considered the Committee's views and advise that I do not wish to limit item 36 of the bill as suggested. I note the Committee's concerns that such a broad power 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. However, I draw to your attention that there are some precedents for this approach, including section 53 of the *Australian Citizenship Act 2007* and section 49 of the *Offshore Petroleum Act 2006*.

The Committee thanks the Minister for this further response. The Committee notes that in his original response of 19 June 2007 the Minister indicated that "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". Had the provision included these modifiers, i.e. allowed the Minister to delegate powers to a person 'with the requisite skills and experience' and/or 'working within the Australian Centre for International Agricultural Research' or the 'foreign affairs portfolio', the Committee would have been reassured. As it currently stands this provision permits the Minister to delegate his or her powers to whomever he or she thinks fit, regardless of the delegate's qualifications, experience or place of employment.

In addition, the Committee notes that the similarly wide power of delegation in section 53 of the *Australian Citizenship Act 2007* was a provision on which the Committee commented in *Alert Digest No. 14 of 2005*. On receiving the response from the Minister that any limitation on the width of the power of delegation 'would unreasonably limit the existing capacity of the Minister to pursue effective and efficient administration of the Act', the Committee responded, in its *First Report of 2006*, that 'the question of whether a completely unfettered discretion, as provided for by Clause 53, is justified, remains unanswered' and continued to draw that provision to the attention of Senators.

The Committee therefore continues to draw section 41 of the *Australian Centre for International Agricultural Research Amendment Act 2007* (which was inserted by item 36 of Schedule 1 of the bill) to the attention of Senators, 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.

Australian Citizenship Amendment (Citizenship Testing) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Immigration and Citizenship responded to the Committee's comments in a letter dated 11 July 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 30 May 2007
Portfolio: Immigration and Citizenship

Background

This bill amends the *Australian Citizenship Act 2007* to provide for the testing of prospective applicants for Australian citizenship by conferral. The bill:

- requires certain applicants for Australian citizenship by conferral to have successfully completed a citizenship test prior to making an application;
- outlines the general eligibility criteria for Australian citizenship; and
- provides that the fee prescribed for an application to become an Australian citizen may include a component that relates to the test or tests sat by the applicant.

Commencement on Proclamation
Schedule 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 1 will commence on Proclamation, with no time being specified within which the amendments must commence 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, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance the explanatory memorandum indicates that the Minister needs to have this broad discretion to determine the date of commencement of the amendments proposed by the bill on the basis that 'an unspecified period of time is required prior to commencement to implement arrangements for the test and any computer systems required to conduct the test and to ensure that applicants for Australian citizenship who will be required to complete the test have reasonable access to necessary information and testing facilities.' The Committee **seeks the Minister's advice** whether it would be possible to make the necessary arrangements within a fixed period after Assent and thereby limit the currently unfettered discretion granted to the Minister.

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

Commencement on Proclamation

Although I agree that in general it is preferable for proposed legislation to be more specific about when it will commence, in this case I do not believe that it is practical or appropriate to do so. As the Explanatory Memorandum indicates, an unspecified period for commencing the legislation is needed to ensure that when the new testing requirement comes into force all the necessary systems are in place and that potential applicants have proper access to the information and testing facilities they need to sit the test. If the legislation were to commence prematurely (by default) it would not only be counter productive, it would be unfair.

As you will be aware I have indicated that at this stage I am hopeful that the new testing regime will to (sic) come into force by 17 September 2007 and I am confident that my department is working hard to achieve that date. However, given the size of the undertaking and the practical complexities involved it would not be responsible of me to give any guarantees to that effect or to be more specific about when the legislation will commence. To give the Committee a sense of what is involved I note that before the legislation can commence, testing centres will need to be organised, fitted out and established in all 13 Departmental offices and in another 34 regional

centres across the country. Amendments will need to be made to the Australian Citizenship Regulations 2007 and associated changes to the Australian Citizenship Instructions and all relevant forms and business process maps. New and complex IT systems are currently being developed but will need to be finalised, tested and put in place. Similarly, resource materials supporting the citizenship test are also being prepared but need to be finalised and a full public information campaign needs to be launched so that potential applicants are fully aware of the new requirements and are given a proper opportunity to meet the new requirements.

In the circumstances I don't believe that it would be prudent to be more specific about when the legislation will commence.

The Committee thanks the Minister for this comprehensive response and notes the Minister's hope that the legislation will come into force by 17 September 2007.

Insufficient scrutiny of instrument and excluding merits review Schedule 1, item 5

Proposed new subsection 23A(7) of the *Australian Citizenship Act 2007*, to be inserted by item 5 of Schedule 1, states that a determination under new subsection 23A(1) is not a legislative instrument. The explanatory memorandum asserts that the reason for the inclusion of new subsection 23A(7) is that the Ministerial determination under new subsection 23A(1) 'is not of a legislative character.' The determination thus referred to is one under which the Minister is to approve a test, to be administered to applicants for Australian citizenship in order to determine whether they satisfy the eligibility criteria for citizenship, in proposed new paragraphs 21(2)(d), (e) and (f). The effect of this new subsection 23A(7) is that the test will not be subject to disallowance or sunsetting under the *Legislative Instruments Act 2003*.

Section 5 of the *Legislative Instruments Act 2003* defines a legislative instrument as follows:

'(1) Subject to sections 6, 7 and 9, a ***legislative instrument*** is an instrument in writing:

a) that is of a legislative character; and

b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right.'

If the determination of a proposed citizenship test is not of a legislative character, then it may be considered not to apply generally to a group of people, but is more of an administrative decision, tailored to a particular applicant for Australian citizenship. This view may be supported by the provision in new subsection 23A(6), that a determination may cover 'any … matter related to the test that the Minister thinks appropriate.' If the determination is taken to be an administrative decision to approve a test for a particular applicant, then there does not appear to be any provision in the bill for the determination to be subject to any form of merits review 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** as to the reasons for deciding that a determination under new subsection 23A(1) is not a legislative instrument and, if the determination is administrative in nature, whether the exercise of the power granted by proposed new subsection 23A(1) should be subject to review.

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

Relevant extract from the response from the Minister

Section 23A determination, not a legislative instrument

As I understand it, the Committee maintains that if, as was stated in the Explanatory Memorandum for the Bill, the Minister's determination under proposed section 23A is not of a legislative character ". . . it may be considered not to apply generally to a group of people, but is more of an administrative decision, tailored to a particular

applicant for Australian citizenship" (underlining mine). This view seems to be based on the Committee's reading of paragraph 5(2)(a) of the *Legislative Instruments Act 2003* (LI Act), which provides that an instrument is taken to be of a legislative character if, among other things, "it determines the law or alters the content of the law, rather than applying the law in a particular case".

It does not follow, however, that if an instrument does not determine the law or alter the content of the law it must be an instrument that applies the law in a particular case. An instrument that does not determine the law or alter the content of the law may nevertheless be an instrument that applies the law (or makes provision for its application) to a group of people. In my view it is clear that the power in section 23A (1) is a power to make a determination that applies generally and not in relation to a particular case or cases and therefore merits review is not appropriate.

Whatever the precise 'character' of a determination under proposed section 23A(l), the Government does not believe that such a determination, which will approve the content of the new citizenship test, should be subject to the disallowance provisions of the LI Act. In the Government's view this is likely to be a source of uncertainty and confusion, especially where potential applicants have sat and passed a test which is then disallowed. There may then be a question about whether such persons would need to resit the test in order to satisfy the general eligibility criteria.

The Committee thanks the Minister for this response and notes the Minister's assertion that a determination under proposed new section 23A, regardless of its character, should not be subject to the disallowance provisions of the *Legislative Instruments Act 2003* as this may be a 'source of uncertainty and confusion, especially where potential applicants have sat and passed a test which is then disallowed.'

The Committee notes, however, that if a determination were disallowed, subsection 45(1) of the *Legislative Instruments Act 2003* provides that the determination would be treated as if it had been repealed on the date that the disallowance motion takes effect, and section 15 ensures that anything done in pursuance of the determination would continue to be in force and effect up until the disallowance. In addition, the Committee considers that this perceived difficulty could be avoided completely by not allowing any applicant to sit the test determined under proposed new section 23A until such time as the period for disallowance has passed.

As such, the committee continues to draw Senators' attention to these 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.

Communications Legislation Amendment (Content Services) Act 2007

Introduction

The Committee dealt with the bill for this Act 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.

In its *Seventh Report of 2007*, the Committee sought further advice from the Minister in relation to delayed commencement. The Minister has responded in a letter received on 7 August 2007. A copy of the letter is attached to this report.

Although this bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Seventh Report 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 dated 19 June 2007

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.

Relevant extract from the further response from the Minister received on 7 August 2007

I refer to the Scrutiny of Bills Committee's Seventh Report of 2007 (20 June 2007) which discussed my response to issues raised by the Committee in its sixth report (13 June 2007) on the commencement provisions in relation to Schedule 2 of the Communication Legislation Amendment (Content Services) Bill 2007.

As you would be aware the legislation was passed by Parliament on 21 June 2007 and the *Communications Legislation Amendment (Content Services) Act 2007* (the Content Services Act) received Royal Assent on 20 July 2007.

Schedule 2 to the Content Services Act deals with the regulation of telephone sex services under the new scheme, by amending the *Broadcasting Services Act 1992* (BSA), the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Services Standards) Act 1999* (the CPSS Act). Telephone sex services are currently regulated under Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997* (sic).

Schedule 2 is to commence on a day to be fixed by Proclamation, or the first day after twelve months from the date of Royal Assent which would be 20 July 2008. When that happens, telephone sex services will be regulated by the new legislation as a type of content service. The regulatory settings in the new scheme will be different from the existing arrangements that apply to telephone sex services. For example, telephone sex service providers will in future be responsible for developing appropriate arrangements for inclusion in the codes of practice. However, until Schedule 2 commences the current arrangements in the CPSS Act will continue to apply.

The delayed commencement to Schedule 2 complements the provisions in the Content Services Act which require the Australian Communications and Media Authority (ACMA) to ensure that industry codes of practice are registered within six months of the commencement of Schedule 1 of the Content Services Act (Schedule 1 can commence at any time in the period up to six months after Royal Assent). In the mean time, it is important that the existing regulations pertaining to these services

under Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997* (sic) remain in force.

It is my expectation that ACMA intends to work with the various content services industry sectors, including the telephone sex service providers, to ensure that a code or codes of practice are in place at the time of the commencement of Schedule 1 or shortly thereafter. I would not expect the commencement of Schedule 2 to the Act to be delayed any longer than is necessary.

The Committee thanks the Minister for this further response.

Corporations Amendment (Insolvency) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Parliamentary Secretary to the Treasurer responded to the Committee's comments in a letter dated 6 August 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 31 May 2007
Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001*, the *Superannuation Guarantee (Administration) Act 1992* and the *Australian Securities and Investments Commission Act 2001* to implement measures aimed at modernising Australia's insolvency laws. The bill:

- provides enhanced protections for employee entitlements, improved information to creditors and removes unnecessary procedural requirements;
- introduces a statutory pooling process to facilitate the winding-up of related companies;
- clarifies the operation of the Superannuation Guarantee Charge in relation to employers under external administration;
- establishes an assetless administration fund to improve the quality of information forwarded to the Australian Securities and Investment Commission (ASIC) by insolvency practitioners and provides ASIC with enhanced powers to investigate the conduct of registered liquidators;

- establishes a new ASIC enforcement programme targeted at phoenix company behaviour;
- enhances the registration regime for insolvency practitioners and introduces more flexible disciplinary procedures; and
- makes a number of technical amendments aimed at enhancing the efficiency and cost effectiveness of the voluntary administration process.

The bill also contains transitional provisions.

Commencement on Proclamation
Schedule 1, items 49, 50 and 121 and Schedule 2, item 11

Items 3, 5 and 8 in the table to subclause 2(1) of this bill provide that the amendments proposed in items 49, 50, and 121, of Schedule 1, and the amendments proposed in item 11 of Schedule 2, will commence six months after the commencement of almost all of the other amendments proposed by this bill, which, in turn, are to commence on Proclamation, but within six months of Assent. Thus, the amendments referred to in items 3, 5 and 8 in the table to subclause 2(1) might not commence until 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. Unfortunately the explanatory memorandum, in referring to these amendments, provides no explanation for the delayed commencement. The Committee **seeks the Treasurer's advice** as to the reasons for these delayed commencements and whether it would be possible to include the reasons for the delay in the explanatory memorandum.

Pending the Treasurer'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's letter has been referred to me as I have portfolio responsibility for this matter.

The Committee noted certain provisions of the Bill that may be considered to delegate powers inappropriately (items 49, 50 and 121 of Schedule 1 and item 11 of Schedule 2) or trespass unduly on personal rights and liberties (subsection 161A(4), to be inserted by item 50 of Schedule 1, and item 121 of Schedule 1).

Items 49, 50 and 121 of Schedule 1

Items 49, 50 and 121 of Schedule 1 are related provisions. New section 157A, inserted by item 49, will permit liquidators, administrators, deed administrators and managing controllers to lodge an application with the Australian Securities and Investments Commission to change a company's name without the need for a special resolution of members, where they are satisfied it is in the interests of creditors as a whole to do so. New section 161A, inserted by item 50, will complement section 157A and provide that, if a change of name occurs during, or six months prior to, an external administration, the relevant company will be required to disclose its former, as well as its current, name on its public documents for the period of that administration or any subsequent liquidation. This will include public documents issued by an external administrator. Item 121 will provide a penalty for a contravention of section 161A.

The concern raised by the Committee was that these provisions commence six months after the commencement of the balance of the Bill.

These provisions commence six months after the commencement of the main provisions of the Bill to avoid any possible retrospective effects flowing from the new obligation to set out the company's former name on its public documents if a change of name takes effect within the six months before commencement of the external administration. If items 49, 50 and 121 took effect at the same time as the main provisions of the Bill, the law would effectively impose an obligation in relation to a change of name that occurred prior to the commencement of the Bill. The commencement arrangements for these new provisions provide certainty for persons potentially affected in that they limit the operation of the new requirements to changes that occur after the commencement of the Bill. Although the explanatory memorandum does not provide a precise explanation along these lines, this explanation is reasonably open to readers examining the amendments.

Item 11 of Schedule 2

Item 11 of Schedule 2 amends section 533 of the *Corporations Act 2001* (Corporations Act) which requires a liquidator to lodge a report about a matter (generally an offence) specified in paragraphs 533(l)(a)-(c) as soon as possible. Paragraph 533(1)(d) will additionally require the report to be lodged within six

months after a matter specified in paragraphs 533(1)(a)-(c) appears to have happened. The Committee expressed concern that these provisions will commence six months after the commencement of the balance of the Bill.

It is necessary for the amendment to commence six months after the commencement of the Bill to avoid retrospective application of the new requirement. If item 11 took effect at the same time as the main provisions of the Bill rather than six months after the commencement of the Bill, a liquidator could potentially be liable under the provision for being aware of a reportable matter that occurred prior to the commencement of the Bill. Although the explanatory memorandum does not provide a precise explanation along these lines, this explanation is also reasonably open to readers examining the amendments.

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

Strict liability
Schedule 1, item 50

Proposed new subsection 161A(4) of the *Corporations Act 2001*, to be inserted by item 50 of Schedule 1, would declare that an offence based on new subsections 161A(2) or (3) is an offence of strict liability. The Committee will generally draw 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 set out in the explanatory memorandum that accompanies the bill. The explanatory memorandum (paragraph 4.234) states only that these offence provisions are 'comparable to existing subsection 541(2)' of the *Corporations Act 2001*, and that 'several other offence provisions in the [Corporations] Act have similar penalties.'

The Committee notes that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 24) states that the application of strict liability to all physical elements of an offence is generally only considered appropriate where, among other matters, the offence is not punishable by imprisonment. But item 121 of Schedule 1 would increase the penalty for an offence against new subsection 161A(2) or (3) to 10 penalty units (currently $1,100) or imprisonment for three months or both. The Committee **seeks the Treasurer's advice** whether the imposition of strict liability is justified in these circumstances and the reasons for the apparent departure from the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Pending the Treasurer'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 Parliamentary Secretary

Subsection 161A(4) and item 121 of Schedule 1

New section 161A provides that a company that changes its name during, or six months prior to, an external administration must disclose its former, as well as its current, name on its public documents and negotiable instruments for the period of the administration or any subsequent liquidation: subsections 161A(2) and (3). Subsection 161A(4) will provide that an offence based on new subsection 161A(2) or (3) is an offence of strict liability. The penalty for an offence against new subsection 161A(2) or (3) is 10 penalty units (currently $1,100) or imprisonment for three months or both.

The concern expressed by the Committee was that subsection 161A(4) would make an offence based on new subsections 161A(2) or (3) an offence of strict liability and the reasons for doing so are not set out in the explanatory memorandum. The Committee was also concerned that item 121 imposes a term of imprisonment for an offence against subsection 161A(2) or (3) when Commonwealth guidelines state that the application of strict liability for an offence is only appropriate where the offence is not punishable by imprisonment.

The new offence provision is comparable to existing subsection 541(2), which makes an offence based on subsection 541(1) (which requires notification that a company is in liquidation) one of strict liability. Several other offence provisions in the Act such as sections 448C, 448D and 471A have similar penalties. It is also considered that a failure on the part of a company in external administration to set

out its former name on all its public documents and negotiable instruments may have serious consequences. It may mislead or disadvantage creditors who may not associate the new name with the company they have been dealing with.

It is acknowledged that criminal, civil and administrative sanctions in the Bill as well as in the Corporations Act may not be consistent with the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. The Government considers that a broad review of sanctions in the Corporations Act should be undertaken rather than making reforms on an ad hoc basis which may introduce inconsistencies and anomalies into the Corporations Act.

Accordingly, the Treasurer has instituted a broad review of sanctions in the Corporations Act. A discussion paper was released and made publicly available in March 2007. The review specifically addresses provisions that are inconsistent with the Government's criminal law policy, including the enactment of offences of strict liability and imprisonment for strict liability offences.

It is intended to consider the alignment of all penalties in the Corporations Act (including those in the Bill) with criminal law policy in the context of that review.

I trust this information will be of assistance to the Committee.

The Committee thanks the Parliamentary Secretary for this response and looks forward to the outcomes of the review of sanctions in the Corporations Act which is currently underway.

Corporations Legislation Amendment (Simpler Regulatory System) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2007*. The Parliamentary Secretary to the Treasurer responded to the Committee's comments in a letter dated 20 June 2007. A copy of the letter is attached to this report.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 24 May 2007
Portfolio: Treasury

Background

Introduced with the Corporations (Fees) Amendment Bill 2007 and the Corporations (Review Fees) Amendment Bill 2007, this bill amends the *Corporations Act 2001*, the *Income Tax Assessment Act 1936*, the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to implement some recommendations of the report of the Taskforce on Reducing the Regulatory Burden on Business and to incorporate proposals outlined in the Corporate and Financial Services Regulation Review Proposals Paper of November 2006. The amendments are aimed at simplifying and streamlining Australia's corporate and financial regulatory system.

The bill:

- simplifies company reporting obligations to reduce compliance costs;
- makes changes to the auditor independence provisions of the Corporations Act;

- removes certain requirements in relation to small transactions between public companies and related parties and allows delegation to the Australian Securities and Investments Commission (ASIC) of certain administrative functions;

- amends regulatory processes to facilitate corporate fundraising by various means;

- repeals provisions relating to telephone monitoring during takeover bids; and

- allows companies to electronically register company charges.

The bill also contains application, consequential, saving and transitional provisions and makes various other minor and technical amendments to the Corporations Act and related Acts.

Retrospective application
Items 8, 70, 94, 146 to 150 and 156 to 158

Item 230, in Part 6 of Schedule 1 to this bill, provides that the amendments proposed to be made by items 8, 70, 94, 146 to 150 and 156 to 158 'apply in relation to a Product Disclosure Statement that is lodged with ASIC whether the Statement is lodged before, on or after the day that the amendments commence.' Item 230 may therefore give some retrospective effect to the amendments referred to in that item.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. Unfortunately, the explanatory memorandum (paragraph 5.109) merely states that the 'amendments [relating to Replacement Product Disclosure Statements for stapled securities] apply to any Product Disclosure Statement lodged with ASIC at the time of commencement or thereafter' and does not indicate whether any retrospective application would be to the disadvantage of any person. The Committee **seeks the Treasurer's advice** whether this application provision is retrospective in effect, and, if so, whether that retrospectivity will have an adverse effect on any person.

Pending the Treasurer'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 Parliamentary Secretary

The Committee noted that certain amendments in the Bill 'apply in relation to a Product Disclosure Statement that is lodged with ASIC whether the Statement is lodged before, on or after the day that the amendments commence.' The Committee sought advice about whether the amendments were retrospective in effect and, if so, whether that retrospectivity will have an adverse effect on any person.

The amendments in question relate to Replacement Product Disclosure Statements for stapled securities. The amendments are designed to provide a more efficient method of correcting an error or omission in a Product Disclosure Statement. The changes brought about by the amendments relate to process only, and do not affect the substance of the disclosure that must be provided to consumers.

Although the amendments are retrospective in nature in that they allow an existing Product Disclosure statement to be corrected in the new manner, the changes have no impact on the personal rights and liberties of consumers to whom the document must be provided.

I trust this information will be of assistance to the Committee.

The Committee thanks the Parliamentary Secretary for this response.

Financial Sector Legislation Amendment (Restructures) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2007*. The Minister for Revenue and Assistant Treasurer responded to the Committee's comments in a letter dated 3 August 2007. A copy of the letter is attached to this report.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 24 May 2007
Portfolio: Treasury

Background

This bill amends the *Financial Sector (Transfers of Business) Act 1999* and the *Income Tax Assessment Act 1997* to facilitate the adoption of a non-operating holding company as the ultimate holding company of a financial group in Australia, with the aim of providing financial groups with greater flexibility in choosing a corporate structure to manage their risk exposures and comply with prudential requirements while retaining operational flexibility.

The bill also provides the Minister with the power to: approve and grant relief from specific statutory restrictions in the Corporations Act by issuing a restructure instrument that specifies the statutory provisions and the entities of a company group for which the relief applies; and approve the transfer of assets and liabilities between two bodies of a financial group to allow for the reorganisation of different types of activities into separate business lines.

The bill also makes consequential amendments to the *Australian Prudential Regulatory Authority Act 1998*, the *Financial Sector (Transfers of Business) Act 1999*, the *Income Tax Assessment Act 1997* and the *Life Insurance Act 1995* in relation to the consolidation membership and franking rules and the capital gains tax regime.

The bill also contains application and transitional provisions.

Excluding merits review
Schedule 1, item 14

Proposed new subsection 36C(1) of the *Financial Sector (Transfers of Business) Act 1999*, to be inserted by item 14 of Schedule 1, would grant to the Treasurer the discretion to decide whether the conditions specified in paragraphs (a), (b) and (c) of that subsection have been satisfied, thus permitting an authorised deposit-taking institution, a life insurance company or a general insurer to obtain approval to change its corporate structure and thereby facilitate a non-operating holding company being the ultimate holding company of a financial group. Such a change would both improve the group's flexibility and would have taxation advantages. However, there is no provision in the bill for the exercise by the Treasurer of this discretion to be subject to any form of merits review 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 Treasurer's advice** whether the exercise of the discretion granted by proposed new subsection 36C(1) should be subject to review.

Pending the Treasurer'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

In the Alert Digest the Committee considered aspects of new section 36C of the *Financial Sector (Business Transfer and Group Restructure) Act 1999*, inserted by Item 14 in Schedule 1 of the Financial Sector Legislation Amendment (Restructures) Bill 2007. Subsection 36C(1) enables the Minister to approve an application by a

financial group headed by an authorised deposit-taking institution, general insurer or life insurance company to restructure the group to incorporate a non-operating holding company as the ultimate holding company of the group in Australia, subject to the application meeting the conditions outlined in subsections 36C(1)(a), (b) and (c).

The Committee expressed concern that there is no provision in the Act for the exercise of this decision making power to be subject to any form of merits review under the *Administrative Appeals Tribunal Act 1975.* Accordingly, the Committee sought advice as to whether the exercise of the discretion granted by subsection 36C(1) should be subject to review.

As part of the Government's efforts to strengthen the prudential regulatory system, the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007 introduced on 21 June 2007 will expand the availability of merits review for appropriate administrative decisions. However, in relation to ministerial decisions that relate to the application of broad policy considerations or national interest issues, the Administrative Appeals Tribunal is not considered to be an appropriate forum for review. This position is in accord with Administrative Review Council guidelines. Decisions made under section 36C fall into this category, as they reflect a high level policy outcome regarding a number of issues outlined in subsection 36C(1), including the interests of depositors or policy owners and that of the financial sector as a whole.

Decisions made by the Minister under subsection 36C(1) will be reviewable under the *Administrative Decisions (Judicial Review) Act* 1977. Decisions will only affect prudentially regulated authorised deposit-taking institutions that are large sophisticated corporate entities. If a serious disagreement regarding a Minister's decision were to arise, the most appropriate judicial forum for its consideration would be the Federal Court.

The Act provides an internal review mechanism as part of the application process by requiring the Minister to supply written notice of a decision to an applicant. If refused, the Minister must accompany the decision with a statement outlining the reasons for any such refusal. The statement will outline how the matters in section 36(1) have not been met to the Minister's satisfaction. On the basis of information provided, an applicant may resubmit an application addressing the matters of concern identified in the written notice of the decision.

I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns. I trust this information will be of assistance to you.

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

Forestry Marketing and Research and Development Services Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 5 of 2007*. The Minister for Fisheries, Forestry and Conservation responded to the Committee's comments in a letter dated 8 June 2007.

In its *Sixth and Seventh Reports of 2007*, the Committee sought further advice from the Minister in relation to non-reviewable decisions. The Minister has responded to the Committee's latest comments in a letter dated 12 July 2007. A copy of the letter is attached to this report.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Seventh 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.

Relevant extract from the further response from the Minister dated 12 July 2007

I have taken further advice on the Committee's comments and can provide the following.

It is a matter for the company to obtain its own advice in relation to the legal mechanisms that may be available to it as it would depend on the particular factual circumstances at issue.

However, I have been advised that in general terms, it is possible, for example, that the company may challenge, whether by way of breach of statute or on administrative law principles, whether or not a declaration by the Minister under clause 12 of the bill was reasonable. This advice cannot be interpreted as legal advice.

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

The Committee thanks the Minister for this further response.

International Trade Integrity Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 16 July 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 7 of 2007

Introduced into the House of Representatives on 14 June 2007
Portfolio: Attorney-General

Background

This bill amends the *Charter of the United Nations Act 1945*, the *Customs Act 1901*, the *Criminal Code Act 1995* and the *Income Tax Assessment Act 1997* to implement the Australian Government's response to a number of recommendations of the Report of the Inquiry into certain Australian Companies in relation to the United Nations (UN) Oil-for-Food Programme (Cole Inquiry Report). The bill:

- creates new offences for individuals or corporations who engage in conduct that contravenes a UN sanction in force in Australia or who provide false or misleading information in connection with a UN sanction, or who import or export goods sanctioned by the UN without valid permission;
- requires a person who applies for a licence or other authorisation under a UN sanction enforcement law to retain all documentation relating to that application for five years;
- requires a person who is granted authorisation under a UN sanction enforcement law to retain all documentation relating to compliance with any conditions to which the authorisation is subject for five years;

- provides for approvals granted in respect of the exportation of UN-sanctioned goods to be invalidated if the application contains false or misleading information or omits any relevant matter;
- clarifies the circumstances in which a payment to a foreign public official is not a bribe; and
- aligns the definition of 'facilitation payment' in the *Income Tax Assessment Act 1997* with that in the *Criminal Code Act 1995*.

Absolute liability
Schedule 1, item 34

Proposed new subsection 233BABAB(2) and 233BABAC(2) of the *Customs Act 1901*, to be inserted by item 34 of Schedule 1, would impose absolute liability on individuals for the element of the offence created by subsection (1) contained in paragraph (1)(c). Proposed new subsection 233BABAB(9) and 233BABAC(9) of the *Customs Act 1901*, also to be inserted by item 34 of Schedule 1, would impose absolute liability on bodies corporate for the element of the offence created by subsection (6) contained in paragraph (6)(c).

The Committee will generally draw to Senators' attention provisions that create absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

In this instance the explanatory memorandum (paragraph 64) indicates that the imposition of absolute liability relates only to the question of whether goods were in fact prohibited from export or import under the Customs Act, and that the imposition of absolute liability for this element of the offence ensures that the prosecution does not have to prove that the offender had knowledge that the goods were prohibited from export or import – the effect of absolute liability being to render unavailable even a defence of honest and reasonable mistake of fact. The explanatory memorandum further asserts that the approach adopted here is 'consistent with the existing criminal offences in the Customs Act of importing or exporting Tier 1 and Tier 2 goods.'

In its *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation,* the Committee indicated that it believed that "strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply". The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 26) notes that this proposition 'accord[s] with the approach the Government has taken in recent years.' The Committee **seeks the Attorney-General's advice** whether the imposition of absolute criminal liability is justified in these circumstances and whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide.*

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

Relevant extract from the response from the Attorney-General

The Committee sought my advice as to whether the imposition of absolute criminal liability is justified in proposed sections 233BABAB and 233BABAC of the *Customs Act 1901* (the Act), in light of the Committee's views expressed in the *Sixth Report of 2002, Application of Absolute and Strict liability Offences in Commonwealth Legislation.* Proposed sections 233BABAB and 233BABAC impose absolute liability on the element of the offence that importation or exportation of UN-sanctioned goods was prohibited absolutely under the Act.

As the Committee highlighted, the Explanatory Memorandum states, at paragraph 64, that the application of absolute liability in these circumstances is consistent with existing provisions in the Act. Existing sections 233BAA and 233BAB create special offences for the importation or exportation of a limited range of goods termed 'Tier 1' and 'Tier 2' goods. Sections 233BAA and 233BAB apply absolute liability to the element of the offences that importation or exportation of goods was prohibited absolutely under the Act.

The offences in proposed sections 233BABAB and 233BABAC relate to a broader range of goods than sections 233BAA and 233BAB but create offences for substantially similar actions. Proposed sections 233BABAB and 233BABAC are also drafted in substantially similar terms to the existing sections and provide identical penalties to those attaching to the importation or exportation of Tier 2 goods.

I consider that the application of absolute liability in proposed sections 233BABAB and 233BABAC is justified to ensure consistency across similar offences within the Act. While the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) were considered when framing the offences, I consider it appropriate to depart from the general policy set out in the Guide in these circumstances.

In addition, I note that proposed sections 233BABAB and 233BABAC and existing sections 233BAA and 233BAB provide that strict liability applies to the physical element that an approval had not been obtained at the time of the importation or exportation. This means the defence of honest and reasonable mistake of fact would be available for this element of the new offences.

The Committee thanks the Attorney-General for this comprehensive response.

Strict liability
Schedule 1, item 34

Proposed new subsection 233BABAB(8) and 233BABAC(8) of the *Customs Act 1901*, to be inserted by item 34 of Schedule 1, would impose strict liability on bodies corporate for the elements of the offence created by subsection (6) contained in paragraphs (6)(a) and (6)(b). Those paragraphs refer to the following elements of the offence:

(a) the body corporate imported or exported goods;
(b) the goods were 'UN-sanctioned' goods.

The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill. In this instance the explanatory memorandum (paragraph 63) seeks to justify this imposition of strict liability on the grounds that '[t]he Government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions', however the explanatory memorandum does not indicate whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered in the framing of these offences.

The Committee **seeks the Attorney-General's advice** whether the matters listed at Part 4.5 of the Guide were taken into consideration in framing these offences of strict liability.

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

Relevant extract from the response from the Attorney-General

The Committee also requested my advice as to whether the matters listed at Part 4.5 of the Guide were considered when framing the strict liability offences applicable to bodies corporate under proposed sections 233BABAB and 233BABAC.

As the Committee highlighted, paragraph 63 of the Explanatory Memorandum states 'the Government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions'. Other similar offences in the Bill, detailed at paragraphs 19, 27 and 36 of the Explanatory Memorandum, are offences of strict liability in their application to bodies corporate and carry identical penalties to the offences under proposed sections 233BABAB and 233BABAC. The imposition of strict liability to those offences is in accordance with Recommendation 2 of the Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, which the Committee accepted.

As with the similar offences detailed in paragraphs 19, 27 and 36, the matters listed at Part 4.5 of the Guide were considered when framing the offences in proposed section 233BABAB and 233BABAC. The imposition of strict liability on bodies corporate in these proposed offences is consistent with Recommendation 2 and, for this reason, I consider it appropriate to depart from the general policy set out in the Guide.

The Committee thanks the Attorney-General for this comprehensive response.

Judges' Pensions Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 3 July 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 7 of 2007

Introduced into the House of Representatives on 14 June 2007
Portfolio: Attorney-General

Background

This bill amends the superannuation surcharge related provisions of the *Judges' Pensions Act 1968* to provide an alternate formula for calculating the pension entitlements of persons who hold office as judges of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and certain other office holders who are deemed to be judges for the purposes of the Act.

In addition the bill defines 'salary' for pension purposes and allows the trustee of the Judges' Pension Scheme to draw on an existing special appropriation to pay judges' surcharge debts to the Australian Tax Office as they retire. Once a debt is paid, it may be recovered from the former judge concerned under the formula or through commutation.

The bill also contains application and transitional provisions.

Retrospective application
Item 1 and items 2 to 7 and 8 to 12

Items 15, 16 and 17 of Schedule 1 provide that the amendments made by item 1, and by items 2 to 7 and 8 to 12 respectively, would apply to Judges' pensions regardless of when they have retired or will retire. The items are therefore to some extent retrospective in their application.

As a matter of practice the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. While the amendments referred to above do not appear to be prejudicial to Judges, the explanatory memorandum does not make it clear that this is the case. As such, the Committee **seeks the Attorney-General's advice** whether these application provisions might operate to the prejudice of any person.

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

Relevant extract from the response from the Attorney-General

Thank you for drawing to my attention comments contained in the Committee's Alert Digest 7 of 2007 on the Judges' Pensions Amendment Bill 2007.

I am please to confirm that the application provisions in the Bill which have a retrospective effect do not operate to the prejudice of any person.

The Committee thanks the Attorney-General for this response and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Native Title Amendment (Technical Amendments) Act 2007

Introduction

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

In its *Sixth Report of 2007*, the Committee noted the Attorney-General's assurance that an explanation would be included in the explanatory memorandum, in relation to the Legislative Instruments Act—declarations, should Government amendments to the bill be moved in the Senate.

The Committee has received further correspondence from the Attorney-General, dated 25 June 2007, advising that amendments in relation to this issue were made in the Senate on 14 June 2007. 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: 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.

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 dated 31 May 2007

> 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.

Relevant extract from the further response from the Attorney-General dated 25 June 2007

I refer to a letter of 14 June 2007 from Ms Cheryl Wilson, Secretary of the Standing Committee, to my office about the Native Title Amendment (Technical Amendments) Bill 2007 (the Bill). Ms Wilson advises that the Standing Committee's *Sixth Report of 2007* refers to my response to earlier comments made by the Standing Committee about the Bill.

The Standing Committee's Report notes in part my assurance that, if Government amendments to the Bill are moved in Parliament, further information would be included in the explanatory material about whether an opinion of the Registrar of Aboriginal and Torres Strait Islander Corporations about fees charged by a prescribed body corporate would be a legislative instrument.

As you may be aware, the Senate made amendments to a number of provisions in the Bill on 14 June 2007. Paragraph 3.12 of the supplementary explanatory memorandum to the Bill specifies that the Registrar of Aboriginal and Torres Strait Islander Corporations' opinion about whether fees may be charged by prescribed bodies corporate for negotiating certain agreements is not of a legislative character.

I am copying this letter to the Minister for Family, Community Services and Indigenous Affairs, the Honourable 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 advice and for implementing his commitment to amend the explanatory memorandum.

Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 4 July 2007. A copy of the letter is attached to this report.

Although this bill has passed both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 9 May 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

This bill amends the *Social Security Act 1991*, the *Veterans' Entitlements Act 1986*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, and the *Social Security (Administration) Act 1999* to give effect to measures announced in the 2007 Budget by:

- providing one-off payments to certain older Australians, veterans and carers;
- providing for a once-only compensation payment to certain veteran and civilian prisoners of war interned by enemy forces in Europe during World War Two, or their surviving widows or widowers;
- increasing the amount of funeral benefits payable in respect of veterans;
- increasing the rate of veterans' special rate and intermediate rate disability pensions; and

- extending the maximum backdating period in relation to claims for war widow or widower pensions from three to six months in certain circumstances.

In addition, the bill contains provisions that allow the relevant Ministers to establish administrative schemes to provide for one-off payments in circumstances where the statutory one-off payments regime does not produce an appropriate result.

The bill also contains application provisions.

This bill was passed by the Senate on 10 May 2007 and was assented to on 11 May 2007. Nevertheless, the committee provides the following comments for the information of the Senate.

Determination of important matters by regulation
Schedule 2, items 1 and 2, Schedule 4, item 1

Item 1 of Schedule 2 would grant to any of the Ministers administering provisions of the *Social Security Act 1991* a discretion to establish, by legislative instrument, a scheme under which one-off payments may be made to older Australians. Item 2 of the Schedule grants a similar discretion to the Minister for Veterans' Affairs. Similarly, item 1 of Schedule 4 grants, to the Minister administering Part 2.5 of the *Social Security Act 1991*, a discretion to establish a scheme under which one-off payments may be made to carers. Such schemes must relate to circumstances 'occurring in the financial year starting 1 July 2006' (paragraphs 1(2)(b) and 2(2)(b) of Schedule 2 and paragraph 1(2)(b) of Schedule 4 relate).

These schemes may deal with:

'a) the circumstances in which payments are to be made;

b) the amount of the payments;

c) what a person has to do to get a payment;

d) debt recovery …. ;

e) administrative matters, such as determination of entitlement and how and when payments will be made.'

The bill further provides for payments under these schemes 'to be made out of the Consolidated Revenue Fund, which is appropriated accordingly.' The only limits on the width of these discretions is that the respective Minister must, among other things, consider that the scheme established by the primary legislation proposed in this Act 'does not produce appropriate results' (see paragraphs 1(2)(a) and 2(2)(a) of Schedule 2 and paragraph 1(2)(a) of Schedule 4). The bill does not provide a definition of 'appropriate results'.

The Committee draws attention to provisions which may be considered to inappropriately delegate legislative powers of a kind that ought to be exercised by Parliament alone. In this instance the detail of these schemes, including for example, the eligibility criteria, the amount of the payment and how payments are to be made, is to be included in delegated legislation and the bill includes no limit on the amount of funds that can be appropriated to implement the schemes. The explanatory memorandum to the bill provides no explanation as to why it is considered necessary to include these 'schemes' in regulations.

In addition, while any legislative instrument made under these provisions would be subject to review by the Senate Standing Committee on Regulations and Ordinances, the Terms of Reference of that Committee do not encompass the question of whether a Minister has properly exercised a discretion in deciding to make the legislative instrument. It therefore appears that these provisions may make the rights of possible beneficiaries of such schemes unduly dependent upon non-reviewable decisions.

The Committee **seeks the Minister's advice** as to why it was considered necessary for Ministers to be able to determine these 'schemes' through delegated legislation, rather than by amending primary legislation. The Committee also **seeks the Minister's advice** whether there ought to be some limits placed on the funding that may be appropriated to implement these schemes and a means of reviewing the exercise of these discretions by the respective Ministers.

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 and 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 seeks my advice on why it was considered necessary to be able to determine certain one-off payment schemes by legislative instrument, whether there should be funding limits on these schemes and a means of reviewing the making of them, and why special (standing) appropriations were considered necessary for any schemes that may be made.

In commenting on these issues, I make the observation that this Act was the fourth consecutive occasion on which my portfolio's one-off payments Budget legislation has included essentially the same provisions, enabling an administrative scheme to be made by legislative instrument. The previous Acts were the:

- *Family Assistance Legislation Amendment (More Help for Families – One-off Payments) Act 2004 (the 2004 Act);*
- *Social Security Legislation Amendment (One-off Payments for Carers) Act 2005;* and
- *Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments to Increase Assistance for Older Australians and Carers and Other Measures) Act 2006.*

Each of the four Acts:

- provided extensive primary legislation for making the one-off payments, as well as a safety net allowing a scheme to be made, by legislative instrument, if it were to become apparent that the primary provisions did not produce an appropriate result in particular cases;
- included provision for any payments under such a scheme to be made by appropriation from the Consolidated Revenue Fund; and
- was passed in these terms by the Parliament.

In the event, only under the 2004 Act was a scheme made, in the form of the *Family Assistance (One-off Payments to Families and Carers) Scheme 2004*. This scheme went through the usual tabling and disallowance process in around August 2004, with no disallowance motions moved.

It is unlikely that the provisions in the other Acts, enabling a scheme to be made, will ever be used. This is consistent with the fact that the primary one-off payment provisions were intended to cover all the known situations in which payments should be made. A scheme would be made only to cover unusual and unforeseen situations that come within the spirit of the one-off payment measures but are not strictly covered by the primary legislation. Clearly, it would be impractical to include such situations in primary legislation.

Similarly, and given the very slight use made of the scheme-enabling provisions in the past, and the fact that any future use is unlikely and would be small in scale, it is not considered necessary to provide for any funding limits and formal review of any decision to make a scheme. The special (standing) appropriation mechanism is

appropriate to fund any such payments, consistent with the appropriation mechanism for one-off payments under the primary legislation and for payments generally under the family assistance law, social security law and *Veterans' Entitlements Act 1986*.

The tabling and disallowance process for any schemes made would give sufficient opportunity to address any issues arising.

Thank you for the opportunity to comment on these issues.

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

Special (Standing) Appropriations
Schedule 2, subitems 1(4) and 2(4) and Schedule 4, subitem 1(4)

Subitems 1(4) and 2(4) of Schedule 2 and subitem 1(4) of Schedule 4 would appropriate the Consolidated Revenue Fund for the money required to make payments under the schemes referred to in Schedule 2, items 1 and 2 and Schedule 4, item 1. In its *Fourteenth Report of 2005*, the Committee stated that:

'The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.'

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the explanatory memorandum (pages 8 and 15) merely re-states the words from the bill that 'payments under the administrative scheme would be made out of the Consolidated Revenue Fund.'

The Committee **seeks the Minister's advice** regarding why these special (standing) appropriations were considered necessary and whether an explanation should have been included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to these 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 and 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

> Similarly, and given the very slight use made of the scheme-enabling provisions in the past, and the fact that any future use is unlikely and would be small in scale, it is not considered necessary to provide for any funding limits and formal review of any decision to make a scheme. The special (standing) appropriation mechanism is appropriate to fund any such payments, consistent with the appropriation mechanism for one-off payments under the primary legislation and for payments generally under the family assistance law, social security law and *Veterans' Entitlements Act 1986*.

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

Telecommunications (Interception and Access) Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 12 July 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 7 of 2007

Introduced into the House of Representatives on 14 June 2007
Portfolio: Attorney-General

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979*, the *Australian Communications and Media Authority Act 2005*, the *Criminal Code Act 1995*, the *Intelligence Services Act 2001*, the *Telecommunications Act 1997* and the *Telecommunications (Interception) Amendment Act 2006* to implement further recommendations from the Report on the Review of the Regulation of Access to Communications by Anthony Blunn AO (the Blunn Report). This bill:

- transfers key security and law enforcement provisions from the *Telecommunications Act 1997* to the Telecommunications (Interception and Access) Act;
- creates a new two-tier access regime. The first tier encompasses the traditional access to existing telecommunications data and the second tier, which would be limited to a narrower range of agencies and require a higher threshold of authorisation, allows for access to future telecommunications data;
- broadens the offences for which interception warrants may be sought to include all child pornography offences;
- requires carriers and carriage service providers to ensure that communications carried over their telecommunications system are capable of being intercepted and also to prepare and submit an annual Interception Capability Plan;

- preserves existing cost allocation principles between the telecommunications industry and interception agencies associated with interception and delivery capability;
- creates offences for unlawful disclosure or use, including secondary use and disclosure, of telecommunications data;
- allows for the disclosure of lawfully stored communications information to other agencies; and
- allows the Attorney-General to authorise interception for developing and testing interception capabilities, subject to conditions.

The bill also contains application, consequential, saving and transitional provisions.

Excluding merits review
Schedule 1, item 12

Proposed new subsection 192(1) of the *Telecommunications (Interception and Access) Act 1979*, to be inserted by item 12 of Schedule 1 to the bill would permit the Communications Access Co-ordinator to 'exempt a specified person from all or any of the obligations imposed on the person under Division 1 in so far as those obligations relate to a *specified kind of telecommunications service*' [current author's emphasis]. Similarly, proposed new subsection 193(1) of the same Act, also to be inserted by item 12 of Schedule 1 to the bill, would permit the Australian Communications and Media Authority (ACMA) to 'exempt a specified person from all or any of the obligations imposed on the person under Division 1 in so far as those obligations relate to a *kind of telecommunications service that is a trial service*' [current author's emphasis].

These two new subsections appear to be very similar in nature and yet they are treated quite differently in terms of the *Legislative Instruments Act 2003*. New subsection 192(4) provides that 'the exemption given [under subsection 192(1)] is not a legislative instrument' and the explanatory memorandum (page 20) states that this is 'due to the sensitive nature of interception capability obligations.' The explanatory memorandum appears, therefore, to assume that the exemption is legislative in character, but should be shielded from Parliamentary review due to its sensitive nature.

In contrast, new subsection 193(5) provides that the 'exemption given under subsection (1) is not a legislative instrument' and the explanatory memorandum (page 21) indicates that this is because 'these exemptions are administrative in nature and apply only to individual carriers or carriage service providers.' In this instance, therefore, the explanatory memorandum appears to assume that the exemptions referred to in 193(1) are administrative in nature, rather than legislative.

The Committee **seeks the Minister's advice** regarding the reasons why, despite appearing to be very similar provisions, the exemption provided for under proposed new subsection 192(1) is considered to be legislative in character but the exemption provided for in proposed new subsection 193(1) is considered administrative in nature. In addition, the Committee **seeks the Minister's advice** whether, given it is administrative in nature, the exemption granted by the Australian Communications and Media Authority under subsection 193(1) should be subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

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 Attorney-General

Exemptions powers

The Committee queried why the Communications Access Co-ordinator's (the CAC) power to grant exemptions to interception capability obligations under new section 192 is treated differently to the Australian Communications and Media Authority's (ACMA) power to grant exemptions for trial services under new section 193.

These powers are in fact administratively identical although apply to different circumstances. Confusion may have been caused through the current drafting of the Explanatory Memorandum (the EM) as entries for the two exemptions powers focus on different aspects: the confidentiality requirements associated with new section 192, and the administrative nature of decisions under new section 193. In fact, both considerations apply to each exemption power.

I note that the Committee formed the view, based on the EM entry, that the CAC's exemption power is legislative in character and that the government's intention is to shield determinations under the section from Parliamentary review. This is not the intention of the sections as explained in the EM. I do not consider either of the exemption powers to be 'legislative in character', based on the definition in section 5

of the *Legislative Instruments Act* 2003, since they enable the CAC or AMCA respectively to exempt an individual carrier or carriage service provider from some limited part of a general legal obligation. Decisions made under these sections will not have any general effect of determining or altering the content of the law.

Similarly, as a further but separate consideration, these exemptions should not be publicly available as registered legislative instruments, since this knowledge would enable those seeking to evade lawful interception to ensure that they use communications methods that have been exempted from interception capability.

To clarify these matters, I intend to amend the EM. However, I note that the EM will not be tabled in Parliament until the completion of the current Senate Legal and Constitutional Affairs Committee inquiry into the Bill, which is due to report on 1 August 2007.

Merits review

The Committee sought advice regarding whether ACMA's power to grant exemptions for trial services under proposed section 193 should be subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

ACMA's power to grant exemptions is already subject to judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977.* For the Tribunal to also assess the merits of a decision not to exempt a particular telecommunications service from an interception capability would require the public examination of the operational importance of particular types of communications and/or particular categories of information associated with those communications. This would necessitate the provision of evidence pertaining to the telecommunications interception operations of agencies, and the limits of interception capability.

The Committee thanks the Attorney-General for this comprehensive response and for his commitment to amend the explanatory memorandum to clarify these matters.

Retrospective application
Schedule 2, item 7 and items 20 and 21

Items 23 and 25 of Schedule 2 would apply the amendments made by item 7 and items 20 and 21 of that Schedule respectively, to conduct engaged in, or proceedings instituted, before or after the commencement of the respective items.

As a matter of practice the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely effects any person other than the Commonwealth. Regrettably, the explanatory memorandum does not indicate whether the retrospective application of these amendments will operate to the detriment of any person and the Committee **seeks the Attorney-General's advice** in respect of this matter.

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

Relevant extract from the response from the Attorney-General

The committee also sought advice regarding whether the retrospective application of amendments made by item 7 and items 20 and 21 of Schedule 2 will have any adverse effects on any person. These items relate to child sex offences, a proceeding under the *Spam Act 2003* and a police disciplinary proceeding respectively.

I do not consider that any of these provisions will have any such adverse affects on an individual.

Item 7 inserts a new subsection deeming child pornography offences to be a 'serious offence' under the TIA Act, and enables warrants for telecommunication interception and stored communications to be sought in the investigation of all such offences. Item 23 states that warrants may be sought for the investigation of child pornography offences constituted by conduct occurring either before or after the commencement of item 7. This does not constitute 'retrospectivity' in the sense of creating penalties for past behaviour. Rather, once the provision comes into operation, it permits police investigating a child pornography offence to seek a warrant notwithstanding that the relevant acts may have been committed before the amendment.

Item 20 extends the operation of section 139, to permit lawfully accessed stored communication to be disclosed in connection to a proceeding under the Spam Act. Similarly, item 21 extends the proceedings for which disclosure of lawfully accessed stored communications information to another agency is permitted, to include police disciplinary proceedings.

Item 25 provides that these amendments to section 139 apply to proceedings commenced before or after the commencement of items 20 and 21. This means that where an agency has lawfully obtained a stored communication, it may disclose this information to assist in a proceeding, even though that proceeding commenced prior to these provisions coming into force.

These changes therefore have only limited retrospectivity. They create no additional offences, nor create additional coercive or covert investigative powers. These changes merely accept that once the amendments come into force, agencies that have in their possession information relevant to another agency's proceeding, they may pass that information to the agency, notwithstanding that the proceeding actually commenced at an earlier time. As such, I consider Items 23 and 35 to be routine and appropriate provisions that carry no adverse impact on individuals.

I trust that this letter satisfactorily clarifies the matters raised by the Committee.

The Committee thanks the Attorney-General for this comprehensive response.

Robert Ray
Chair

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

4 JUL 2007

Dear Senator Ray

The Scrutiny of Bills Alert Digest No. 6 of 2007 includes comment on two bills within my portfolio. The Committee has sought my advice on several aspects of the bills.

Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007

The first bill raised is the bill for what is now the *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007*. The Committee considers that proposed section 20S of the *Aboriginal Land Rights Act 1976* (the ALR Act) may inappropriately delegate legislative powers and seeks my advice on why any 'unnecessary expenses', incurred by having an Executive Director of Township Leasing in place when there is no further need for one (as mentioned in the explanatory memorandum), could not have been avoided by allowing Parliament to repeal new Part IIA of the ALR Act if required, rather than having this done by legislative instrument.

It was the government's understanding that the Northern Territory Government would establish an entity to administer township leases before the first township lease was concluded. As this has not occurred and a township lease is likely to be finalised in relation to the township of Nguiu on the Tiwi Islands in July 2007, the government has decided to establish a statutory office to administer township leases. However, it remains the government's view that township leases would best be administered by the Northern Territory Government.

The ALR Act allows for the transfer of township leases from the Commonwealth to the Northern Territory. It would be the government's intention to transfer all township leases to the Northern Territory if and when the Northern Territory Government establishes an entity to hold township leases.

Should all township leases held by the Commonwealth be transferred to the Northern Territory, there would no longer be a need for an Executive Director of Township Leasing. At that point, the Minister could repeal Part IIA of the ALR Act. However, the Minister could take this action only if the Executive Director no longer has any functions to perform.

Allowing the Minister to repeal Part IIA ensures that repeal can occur as soon as there are no further functions for the Executive Director to perform. Leaving such a repeal until a bill could be drafted and considered by Parliament could result in a situation where the Executive Director continues to hold office for a considerable period (likely to be several months) without any continuing functions, thereby incurring ongoing costs for salary, office accommodation and the like. Given the limited circumstances in which the Minister can repeal Part IIA, it is considered appropriate for the Minister to have the power to make the repeal.

Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007

The second bill upon which the Committee has commented is the bill for what is now the *Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007*. The Committee seeks my advice on why it was considered necessary to be able to determine certain one-off payment schemes by legislative instrument, whether there should be funding limits on these schemes and a means of reviewing the making of them, and why special (standing) appropriations were considered necessary for any schemes that may be made.

In commenting on these issues, I make the observation that this Act was the fourth consecutive occasion on which my portfolio's one-off payments Budget legislation has included essentially the same provisions, enabling an administrative scheme to be made by legislative instrument. The previous Acts were the:

- *Family Assistance Legislation Amendment (More Help for Families – One-off Payments) Act 2004* (the 2004 Act);
- *Social Security Legislation Amendment (One-off Payments for Carers) Act 2005*; and
- *Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments to Increase Assistance for Older Australians and Carers and Other Measures) Act 2006.*

Each of the four Acts:

- provided extensive primary legislation for making the one-off payments, as well as a safety net allowing a scheme to be made, by legislative instrument, if it were to become apparent that the primary provisions did not produce an appropriate result in particular cases;
- included provision for any payments under such a scheme to be made by appropriation from the Consolidated Revenue Fund; and
- was passed in these terms by the Parliament.

In the event, only under the 2004 Act was a scheme made, in the form of the *Family Assistance (One-off Payments to Families and Carers) Scheme 2004*. This scheme went through the usual tabling and disallowance process in around August 2004, with no disallowance motions moved.

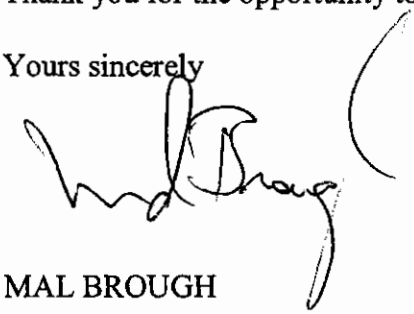
It is unlikely that the provisions in the other Acts, enabling a scheme to be made, will ever be used. This is consistent with the fact that the primary one-off payment provisions were intended to cover all the known situations in which payments should be made. A scheme would be made only to cover unusual and unforeseen situations that come within the spirit of the one-off payment measures but are not strictly covered by the primary legislation. Clearly, it would be impractical to include such situations in primary legislation.

Similarly, and given the very slight use made of the scheme-enabling provisions in the past, and the fact that any future use is unlikely and would be small in scale, it is not considered necessary to provide for any funding limits and formal review of any decision to make a scheme. The special (standing) appropriation mechanism is appropriate to fund any such payments, consistent with the appropriation mechanism for one-off payments under the primary legislation and for payments generally under the family assistance law, social security law and *Veterans' Entitlements Act 1986*.

The tabling and disallowance process for any schemes made would give sufficient opportunity to address any issues arising.

Thank you for the opportunity to comment on these issues.

Yours sincerely



MAL BROUGH

THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS
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Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
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Dear Senator Ray

I would like to thank you and the members of the Senate Standing Committee for Scrutiny of Bills ('the Committee') for your timely *Seventh Report of 2007* (dated 20 June 2007). The Committee has sought further advice on the power of delegation contained in Australia Centre for International Agricultural Research Amendment Bill 2007 ('the Bill'). In particular, the Committee has sought further advice as to whether my power of delegation under item 36 of the Bill could be limited to an employee within the Australian Centre for International Agricultural Research or elsewhere within the foreign affairs portfolio.

I have considered the Committee's views and advise that I do not wish to limit item 36 of the Bill as suggested. I note the Committee's concerns that such a broad power 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. However, I draw to your attention that there are some precedents for this approach, including section 53 of the *Australian Citizenship Act 2007* and section 49 of the *Offshore Petroleum Act 2006*.

Yours sincerely

Alexander Downer

The Hon Kevin Andrews MP

Minister for Immigration and Citizenship

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

Dear Senator Ray Robert.

I refer to the Committee's comments on the *Australian Citizenship Amendment (Citizenship Testing) Bill 2007*, in Alert Digest No. 6 of 2007 (13 June 2007) and advise as follows in relation to the matters that the Committee has raised.

Commencement on Proclamation

Although I agree that in general it is preferable for proposed legislation to be more specific about when it will commence, in this case I do not believe that it is practical or appropriate to do so. As the Explanatory Memorandum indicates, an unspecified period for commencing the legislation is needed to ensure that when the new testing requirement comes into force all the necessary systems are in place and that potential applicants have proper access to the information and testing facilities they need to sit the test. If the legislation were to commence prematurely (by default) it would not only be counter productive, it would be unfair.

As you will be aware I have indicated that at this stage I am hopeful that the new testing regime will to come into force by 17 September 2007 and I am confident that my department is working hard to achieve that date. However, given the size of the undertaking and the practical complexities involved it would not be responsible of me to give any guarantees to that effect or to be more specific about when the legislation will commence. To give the Committee a sense of what is involved I note that before the legislation can commence, testing centres will need to be organised, fitted out and established in all 13 Departmental offices and in another 34 regional centres across the country. Amendments will need to be made to the Australian Citizenship Regulations 2007 and associated changes to the Australian Citizenship Instructions and all relevant forms and business process maps. New and complex IT systems are currently being developed but will need to be finalised, tested and put in place. Similarly, resource materials supporting the citizenship test are also being prepared but need to be finalised and a full public information campaign needs to be launched so that potential

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applicants are fully aware of the new requirements and are given a proper opportunity to meet the new requirements.

In the circumstances I don't believe that it would be prudent to be more specific about when the legislation will commence.

Section 23A determination, not a legislative instrument

As I understand it, the Committee maintains that if, as was stated in the Explanatory Memorandum for the Bill, the Minister's determination under proposed section 23A is not of a legislative character "... it may be considered not to apply generally to a group of people, but is more of an administrative decision, tailored to a particular applicant for Australian citizenship" (underlining mine). This view seems to be based on the Committee's reading of paragraph 5(2)(a) of the *Legislative Instruments Act 2003* (LI Act), which provides that an instrument is taken to be of a legislative character if, among other things, "it determines the law or alters the content of the law, rather than applying the law in a particular case".

It does not follow, however, that if an instrument does not determine the law or alter the content of the law it must be an instrument that applies the law in a particular case. An instrument that does not determine the law or alter the content of the law may nevertheless be an instrument that applies the law (or makes provision for its application) to a group of people. In my view it is clear that the power in section 23A (1) is a power to make a determination that applies generally and not in relation to a particular case or cases and therefore merits review is not appropriate.

Whatever the precise 'character' of a determination under proposed section 23A(1), the Government does not believe that such a determination, which will approve the content of the new citizenship test, should be subject to the disallowance provisions of the LI Act. In the Government's view this is likely to be a source of uncertainty and confusion, especially where potential applicants have sat and passed a test which is then disallowed. There may then be a question about whether such persons would need to resit the test in order to satisfy the general eligibility criteria.

Yours sincerely

KEVIN ANDREWS
~~June 2007~~ 11-7-07

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 Committee's Seventh Report of 2007 (20 June 2007) which discussed my response to issues raised by the Committee in its sixth report (13 June 2007) on the commencement provisions in relation to Schedule 2 of the Communication Legislation Amendment (Content Services) Bill 2007.

As you would be aware the legislation was passed by Parliament on 21 June 2007 and the *Communications Legislation Amendment (Content Services) Act 2007* (the Content Services Act) received Royal Assent on 20 July 2007.

Schedule 2 to the Content Services Act deals with the regulation of telephone sex services under the new scheme, by amending the *Broadcasting Services Act 1992* (BSA), the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Services Standards) Act 1999* (the CPSS Act). Telephone sex services are currently regulated under Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997*.

Schedule 2 is to commence on a day to be fixed by Proclamation, or the first day after twelve months from the date of Royal Assent which would be 20 July 2008. When that happens, telephone sex services will be regulated by the new legislation as a type of content service. The regulatory settings in the new scheme will be different from the existing arrangements that apply to telephone sex services. For example, telephone sex service providers will in future be responsible for developing appropriate arrangements for inclusion in the codes of practice. However, until Schedule 2 commences the current arrangements in the CPSS Act will continue to apply.

The delayed commencement to Schedule 2 complements the provisions in the Content Services Act which require the Australian Communications and Media Authority (ACMA) to ensure that industry codes of practice are

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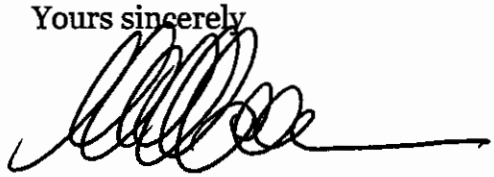
registered within six months of the commencement of Schedule 1 of the Content Services Act (Schedule 1 can commence at any time in the period up to six months after Royal Assent). In the mean time, it is important that the existing regulations pertaining to these services under Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1997* remain in force.

It is my expectation that ACMA intends to work with the various content services industry sectors, including the telephone sex service providers, to ensure that a code or codes of practice are in place at the time of the commencement of Schedule 1 or shortly thereafter. I would not expect the commencement of Schedule 2 to the Act to be delayed any longer than is necessary.

Yours sincerely



HELEN COONAN

THE HONOURABLE CHRIS PEARCE MP

Parliamentary Secretary to the Treasurer
Federal Member for Aston

06 AUG 2007

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

Dear Senator Ray

I refer to the Committee's letter of 14 June 2007 to the Treasurer concerning its comments on the Corporations Amendment (Insolvency) Bill 2007 (the Bill), contained in the Committee's *Alert Digest No. 6 of 2007*. The Committee's letter has been referred to me as I have portfolio responsibility for this matter.

The Committee noted certain provisions of the Bill that may be considered to delegate powers inappropriately (items 49, 50 and 121 of Schedule 1 and item 11 of Schedule 2) or trespass unduly on personal rights and liberties (subsection 161A(4), to be inserted by item 50 of Schedule 1, and item 121 of Schedule 1).

Items 49, 50 and 121 of Schedule 1

Items 49, 50 and 121 of Schedule 1 are related provisions. New section 157A, inserted by item 49, will permit liquidators, administrators, deed administrators and managing controllers to lodge an application with the Australian Securities and Investments Commission to change a company's name without the need for a special resolution of members, where they are satisfied it is in the interests of creditors as a whole to do so. New section 161A, inserted by item 50, will complement section 157A and provide that, if a change of name occurs during, or six months prior to, an external administration, the relevant company will be required to disclose its former, as well as its current, name on its public documents for the period of that administration or any subsequent liquidation. This will include public documents issued by an external administrator. Item 121 will provide a penalty for a contravention of section 161A.

The concern raised by the Committee was that these provisions commence six months after the commencement of the balance of the Bill.

These provisions commence six months after the commencement of the main provisions of the Bill to avoid any possible retrospective effects flowing from the new obligation to set out the company's former name on its public documents if a change of name takes effect within the six months before commencement of the external administration. If items 49, 50 and 121 took effect at the same time as the main provisions of the Bill, the law would effectively impose an obligation in relation to a change of name that occurred prior to the commencement of the Bill. The commencement arrangements for these new provisions provide certainty for persons potentially affected in that they limit the operation of the new requirements to changes that occur after the commencement of the Bill. Although the explanatory memorandum does not provide a precise explanation along these lines, this explanation is reasonably open to readers examining the amendments.

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Item 11 of Schedule 2

Item 11 of Schedule 2 amends section 533 of the *Corporations Act 2001* (Corporations Act) which requires a liquidator to lodge a report about a matter (generally an offence) specified in paragraphs 533(1)(a)-(c) as soon as possible. Paragraph 533(1)(d) will additionally require the report to be lodged within six months after a matter specified in paragraphs 533(1)(a)-(c) appears to have happened. The Committee expressed concern that these provisions will commence six months after the commencement of the balance of the Bill.

It is necessary for the amendment to commence six months after the commencement of the Bill to avoid retrospective application of the new requirement. If item 11 took effect at the same time as the main provisions of the Bill rather than six months after the commencement of the Bill, a liquidator could potentially be liable under the provision for being aware of a reportable matter that occurred prior to the commencement of the Bill. Although the explanatory memorandum does not provide a precise explanation along these lines, this explanation is also reasonably open to readers examining the amendments.

Subsection 161A(4) and item 121 of Schedule 1

New section 161A provides that a company that changes its name during, or six months prior to, an external administration must disclose its former, as well as its current, name on its public documents and negotiable instruments for the period of the administration or any subsequent liquidation: subsections 161A(2) and (3). Subsection 161A(4) will provide that an offence based on new subsection 161A(2) or (3) is an offence of strict liability. The penalty for an offence against new subsection 161A(2) or (3) is 10 penalty units (currently $1,100) or imprisonment for three months or both.

The concern expressed by the Committee was that subsection 161A(4) would make an offence based on new subsections 161A(2) or (3) an offence of strict liability and the reasons for doing so are not set out in the explanatory memorandum. The Committee was also concerned that item 121 imposes a term of imprisonment for an offence against subsection 161A(2) or (3) when Commonwealth guidelines state that the application of strict liability for an offence is only appropriate where the offence is not punishable by imprisonment.

The new offence provision is comparable to existing subsection 541(2), which makes an offence based on subsection 541(1) (which requires notification that a company is in liquidation) one of strict liability. Several other offence provisions in the Act such as sections 448C, 448D and 471A have similar penalties. It is also considered that a failure on the part of a company in external administration to set out its former name on all its public documents and negotiable instruments may have serious consequences. It may mislead or disadvantage creditors who may not associate the new name with the company they have been dealing with.

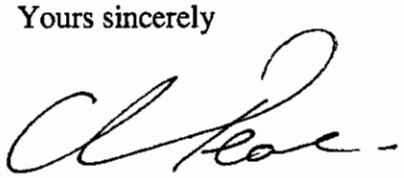
It is acknowledged that criminal, civil and administrative sanctions in the Bill as well as in the Corporations Act may not be consistent with the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. The Government considers that a broad review of sanctions in the Corporations Act should be undertaken rather than making reforms on an ad hoc basis which may introduce inconsistencies and anomalies into the Corporations Act.

Accordingly, the Treasurer has instituted a broad review of sanctions in the Corporations Act. A discussion paper was released and made publicly available in March 2007. The review specifically addresses provisions that are inconsistent with the Government's criminal law policy, including the enactment of offences of strict liability and imprisonment for strict liability offences.

It is intended to consider the alignment of all penalties in the Corporations Act (including those in the Bill) with criminal law policy in the context of that review.

I trust this information will be of assistance to the Committee.

Yours sincerely



CHRIS PEARCE

THE HONOURABLE CHRIS PEARCE MP

Parliamentary Secretary to the Treasurer
Federal Member for Aston

20 JUN 2007

RECEIVED
21 JUN 2007
Senate Standing C'ttee for the Scrutiny of Bills

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

Dear Senator Ray

I refer to the Committee's letter to the Treasurer of 14 June regarding the Committee's comments on the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 (the Bill), contained in the Committee's Alert Digest No. 6 of 2007. The letter was referred to me as I have portfolio responsibility for this matter.

The Committee noted that certain amendments in the Bill 'apply in relation to a Product Disclosure Statement that is lodged with ASIC whether the Statement is lodged before, on or after the day that the amendments commence.' The Committee sought advice about whether the amendments were retrospective in effect and, if so, whether that retrospectivity will have an adverse effect on any person.

The amendments in question relate to Replacement Product Disclosure Statements for stapled securities. The amendments are designed to provide a more efficient method of correcting an error or omission in a Product Disclosure Statement. The changes brought about by the amendments relate to process only, and do not affect the substance of the disclosure that must be provided to consumers.

Although the amendments are retrospective in nature in that they allow an existing Product Disclosure Statement to be corrected in the new manner, the changes have no impact on the personal rights and liberties of consumers to whom the document must be provided.

I trust this information will be of assistance to the Committee.

Yours sincerely

CHRIS PEARCE

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THE HON PETER DUTTON MP

MINISTER FOR REVENUE AND ASSISTANT TREASURER

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

03 AUG 2007

Dear Senator Ray

I am writing in response to the query raised in Alert Digest No. 6 of 2007 (13 June 2007) of the Senate Standing Committee for the Scrutiny of Bills relating to the *Financial Sector Legislation Amendment (Restructures) Act 2007* (the Act).

In the Alert Digest the Committee considered aspects of new section 36C of the *Financial Sector (Business Transfer and Group Restructure) Act 1999*, inserted by Item 14 in Schedule 1 of the Financial Sector Legislation Amendment (Restructures) Bill 2007. Subsection 36C(1) enables the Minister to approve an application by a financial group headed by an authorised deposit-taking institution, general insurer or life insurance company to restructure the group to incorporate a non-operating holding company as the ultimate holding company of the group in Australia, subject to the application meeting the conditions outlined in subsections 36C(1)(a), (b) and (c).

The Committee expressed concern that there is no provision in the Act for the exercise of this decision making power to be subject to any form of merits review under the *Administrative Appeals Tribunal Act 1975*. Accordingly, the Committee sought advice as to whether the exercise of the discretion granted by subsection 36C(1) should be subject to review.

As part of the Government's efforts to strengthen the prudential regulatory system, the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007 introduced on 21 June 2007 will expand the availability of merits review for appropriate administrative decisions. However, in relation to ministerial decisions that relate to the application of broad policy considerations or national interest issues, the Administrative Appeals Tribunal is not considered to be an appropriate forum for review. This position is in accord with Administrative Review Council guidelines. Decisions made under section 36C fall into this category, as they reflect a high level policy outcome regarding a number of issues outlined in subsection 36C(1), including the interests of depositors or policy owners and that of the financial sector as a whole.

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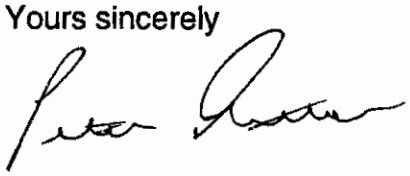
Decisions made by the Minister under subsection 36C(1) will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. Decisions will only affect prudentially regulated authorised deposit-taking institutions that are large sophisticated corporate entities. If a serious disagreement regarding a Minister's decision were to arise, the most appropriate judicial forum for its consideration would be the Federal Court.

The Act provides an internal review mechanism as part of the application process by requiring the Minister to supply written notice of a decision to an applicant. If refused, the Minister must accompany the decision with a statement outlining the reasons for any such refusal. The statement will outline how the matters in section 36(1) have not been met to the Minister's satisfaction. On the basis of information provided, an applicant may resubmit an application addressing the matters of concern identified in the written notice of the decision.

I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns. I trust this information will be of assistance to you.

Yours sincerely



PETER DUTTON

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

12 JUL 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

I refer to a letter from Ms Cheryl Wilson, Secretary of the Senate Scrutiny of Bills Committee to my Senior Advisor on 21 June 2007 seeking a response to the comments in the Scrutiny of Bills *Seventh Report of 2007* (20 June 2007) concerning the Forestry Marketing and Research and Development Services Bill 2007. These comments referred to the "non-reviewable decisions" in Clause 12.

I have taken further advice on the Committee's comments and can provide the following.

It is a matter for the company to obtain its own advice in relation to the legal mechanisms that may be available to it as it would depend on the particular factual circumstances at issue.

However, I have been advised that in general terms, it is possible, for example, that the company may challenge, whether by way of breach of statute or on administrative law principles, whether or not a declaration by the Minister under clause 12 of the bill was reasonable. This advice cannot be interpreted as legal advice.

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

Yours sincerely

ERIC ABETZ

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

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

07/10698, MC07/14181

16 JUL 2007

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

Dear Senator

I am writing in response to the Committee's letter of 21 June 2007, which drew to my attention comments made in the *Scrutiny of Bills Alert Digest No. 7 of 2007* regarding the International Trade Integrity Bill 2007 (the Bill).

The Committee sought my advice as to whether the imposition of absolute criminal liability is justified in proposed sections 233BABAB and 233BABAC of the *Customs Act 1901* (the Act), in light of the Committee's views expressed in the *Sixth Report of 2002, Application of Absolute and Strict liability Offences in Commonwealth Legislation.* Proposed sections 233BABAB and 233BABAC impose absolute liability on the element of the offence that importation or exportation of UN-sanctioned goods was prohibited absolutely under the Act.

As the Committee highlighted, the Explanatory Memorandum states, at paragraph 64, that the application of absolute liability in these circumstances is consistent with existing provisions in the Act. Existing sections 233BAA and 233BAB create special offences for the importation or exportation of a limited range of goods termed 'Tier 1' and 'Tier 2' goods. Sections 233BAA and 233BAB apply absolute liability to the element of the offences that importation or exportation of goods was prohibited absolutely under the Act.

The offences in proposed sections 233BABAB and 233BABAC relate to a broader range of goods than sections 233BAA and 233BAB but create offences for substantially similar actions. Proposed sections 233BABAB and 233BABAC are also drafted in substantially similar terms to the existing sections and provide identical penalties to those attaching to the importation or exportation of Tier 2 goods.

I consider that the application of absolute liability in proposed sections 233BABAB and 233BABAC is justified to ensure consistency across similar offences within the Act. While the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil*

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Penalties and Enforcement Powers (the Guide) were considered when framing the offences, I consider it appropriate to depart from the general policy set out in the Guide in these circumstances.

In addition, I note that proposed sections 233BABAB and 233BABAC and existing sections 233BAA and 233BAB provide that strict liability applies to the physical element that an approval had not been obtained at the time of the importation or exportation. This means the defence of honest and reasonable mistake of fact would be available for this element of the new offences.

The Committee also requested my advice as to whether the matters listed at Part 4.5 of the Guide were considered when framing the strict liability offences applicable to bodies corporate under proposed sections 233BABAB and 233BABAC.

As the Committee highlighted, paragraph 63 of the Explanatory Memorandum states 'the Government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions'. Other similar offences in the Bill, detailed at paragraphs 19, 27 and 36 of the Explanatory Memorandum, are offences of strict liability in their application to bodies corporate and carry identical penalties to the offences under proposed sections 233BABAB and 233BABAC. The imposition of strict liability to those offences is in accordance with Recommendation 2 of the Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, which the Committee accepted.

As with the similar offences detailed in paragraphs 19, 27 and 36, the matters listed at Part 4.5 of the Guide were considered when framing the offences in proposed section 233BABAB and 233BABAC. The imposition of strict liability on bodies corporate in these proposed offences is consistent with Recommendation 2 and, for this reason, I consider it appropriate to depart from the general policy set out in the Guide.

The action officer for this matter in my Department is Kane Preston-Stanley who can be contacted on (02) 6250 6107.

Yours sincerely

Philip Ruddock

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

07/9510 MC07/14180

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

3 - JUL 2007

Dear Senator Ray

Thank you for drawing to my attention comments contained in the Committee's Alert Digest 7 of 2007 on the Judges' Pensions Amendment Bill 2007.

I am pleased to confirm that the application provisions in this Bill which have a retrospective effect do not operate to the prejudice of any person.

The action officer for this matter in my Department is Adam Fletcher who can be contacted on (02) 6250 6301.

Yours sincerely

Philip Ruddock

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ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

07/335, MC07/13782

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

Dear Senator

I refer to a letter of 14 June 2007 from Ms Cheryl Wilson, Secretary of the Standing Committee, to my office about the Native Title Amendment (Technical Amendments) Bill 2007 (the Bill). Ms Wilson advises that the Standing Committee's *Sixth Report of 2007* refers to my response to earlier comments made by the Standing Committee about the Bill.

The Standing Committee's Report notes in part my assurance that, if Government amendments to the Bill are moved in Parliament, further information would be included in the explanatory material about whether an opinion of the Registrar of Aboriginal and Torres Strait Islander Corporations about fees charged by a prescribed body corporate would be a legislative instrument.

As you may be aware, the Senate made amendments to a number of provisions in the Bill on 14 June 2007. Paragraph 3.12 of the supplementary explanatory memorandum to the Bill specifies that the Registrar of Aboriginal and Torres Strait Islander Corporations' opinion about whether fees may be charged by prescribed bodies corporate for negotiating certain agreements is not of a legislative character.

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

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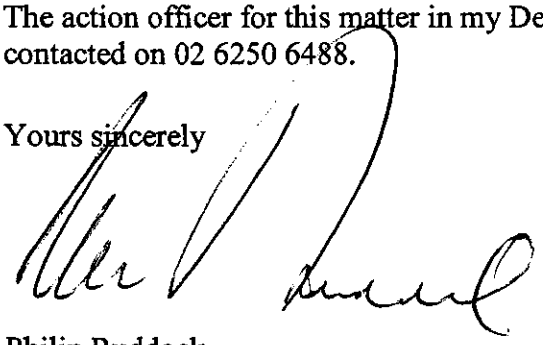
The action officer for this matter in my Department is Ms Julia Galluccio who can be contacted on 02 6250 6488.

Yours sincerely



Philip Ruddock

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

07/7899

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

12 JUL 2007

Dear Senator Ray,

I am writing in response to several matters raised by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in the Alert Digest No 7 of 2007 in relation to the Telecommunications (Interception and Access) Amendment Bill 2007 (the Bill). The Committee, sought advice and clarification regarding; exemptions powers, merits review and retrospective applications contained in the Bill. I now seek to address those queries.

Exemptions powers

The Committee queried why the Communications Access Co-ordinator's (the CAC) power to grant exemptions to interception capability obligations under new section 192 is treated differently to the Australian Communications and Media Authority's (ACMA) power to grant exemptions for trial services under new section 193.

These powers are in fact administratively identical although apply to different circumstances. Confusion may have been caused through the current drafting of the Explanatory Memorandum (the EM) as entries for the two exemptions powers focus on different aspects: the confidentiality requirements associated with new section 192, and the administrative nature of decisions under new section 193. In fact, both considerations apply to each exemption power.

I note that the Committee formed the view, based on the EM entry, that the CAC's exemption power is legislative in character and that the government's intention is to shield determinations under the section from Parliamentary review. This is not the intention of the sections as explained in the EM. I do not consider either of the exemption powers to be 'legislative in character', based on the definition in section 5 of the *Legislative Instruments Act 2003*, since they enable the CAC or AMCA respectively to exempt an individual carrier or carriage service provider from some limited part of a general legal obligation. Decisions made under these sections will not have any general effect of determining or altering the content of the law.

Similarly, as a further but separate consideration, these exemptions should not be publicly available as registered legislative instruments, since this knowledge would enable those seeking to evade lawful interception to ensure that they use communications methods that have been exempted from interception capability.

To clarify these matters, I intend to amend the EM. However, I note that the EM will not be tabled in Parliament until the completion of the current Senate Legal and Constitutional Affairs Committee inquiry into the Bill, which is due to report on 1 August 2007.

Merits review

The Committee sought advice regarding whether ACMA's power to grant exemptions for trial services under proposed section 193 should be subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

ACMA's power to grant exemptions is already subject to judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977.* For the Tribunal to also assess the merits of a decision not to exempt a particular telecommunications service from an interception capability would require the public examination of the operational importance of particular types of communications and/or particular categories of information associated with those communications. This would necessitate the provision of evidence pertaining to the telecommunications interception operations of agencies, and the limits of interception capability.

Retrospective application

The committee also sought advice regarding whether the retrospective application of amendments made by item 7 and items 20 and 21 of Schedule 2 will have any adverse effects on any person. These items relate to child sex offences, a proceeding under the *Spam Act 2003* and a police disciplinary proceeding respectively.

I do not consider that any of these provisions will have any such adverse affects on an individual.

Item 7 inserts a new subsection deeming child pornography offences to be a 'serious offence' under the TIA Act, and enables warrants for telecommunication interception and stored communications to be sought in the investigation of all such offences. Item 23 states that warrants may be sought for the investigation of child pornography offences constituted by conduct occurring either before or after the commencement of item 7. This does not constitute 'retrospectivity' in the sense of creating penalties for past behaviour. Rather, once the provision comes into operation, it permits police investigating a child pornography offence to seek a warrant notwithstanding that the relevant acts may have been committed before the amendment.

Item 20 extends the operation of section 139, to permit lawfully accessed stored communication to be disclosed in connection to a proceeding under the Spam Act. Similarly, item 21 extends the proceedings for which disclosure of lawfully accessed stored communications information to another agency is permitted, to include police disciplinary proceedings.

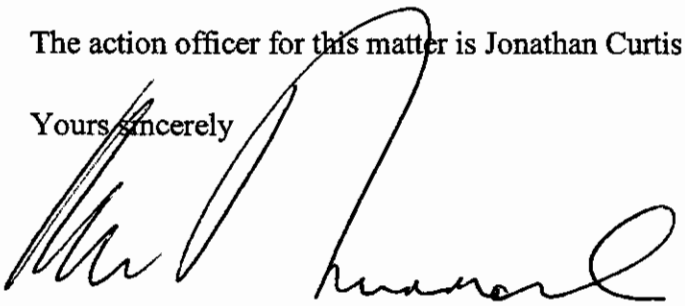
Item 25 provides that these amendments to section 139 apply to proceedings commenced before or after the commencement of items 20 and 21. This means that where an agency has lawfully obtained a stored communication, it may disclose this information to assist in a proceeding, even though that proceeding commenced prior to these provisions coming into force.

These changes therefore have only limited retrospectivity. They create no additional offences, nor create additional coercive or covert investigative powers. These changes merely accept that once the amendments come into force, agencies that have in their possession information relevant to another agency's proceeding, they may pass that information to the agency, notwithstanding that the proceeding actually commenced at an earlier time. As such, I consider Items 23 and 35 to be routine and appropriate provisions that carry no adverse impact on individuals.

I trust that this letter satisfactorily clarifies the matters raised by the Committee.

The action officer for this matter is Jonathan Curtis who can be contacted on (02) 6250 6359.

Yours sincerely



Philip Ruddock