



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**NINTH REPORT**  
**OF**  
**2009**

**19 August 2009**



**SENATE STANDING COMMITTEE  
FOR THE  
SCRUTINY OF BILLS**

**NINTH REPORT  
OF  
2009**

**19 August 2009**

**ISSN 0729-6258**



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)  
Senator M Bishop (Deputy Chair)  
Senator D Cameron  
Senator J Collins  
Senator R Siewert  
Senator the Hon J Troeth

## 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

## NINTH REPORT OF 2009

The Committee presents its Ninth Report of 2009 to the Senate.

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

Fuel Quality Standards Amendment Bill 2009

Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009 \*

Midwife Professional Indemnity (Commonwealth Contribution Scheme) Bill 2009 \*

Migration Amendment (Immigration Detention Reform) Bill 2009

Renewable Energy (Electricity) Amendment Bill 2009

- \* Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to the bills, under Standing Order 24(9)

# Fuel Quality Standards Amendment Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Minister for the Environment, Heritage and the Arts responded to the Committee's comments in a letter dated 12 August 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 5 of 2009*

Introduced into the House of Representatives on 18 March 2009  
Portfolio: Environment, Heritage and the Arts

### **Background**

This bill amends the *Fuel Quality Standards Act 2000* (Fuel Quality Standards Act) to implement recommendations from the first statutory review of the Act conducted in 2004-05.

In particular, the bill aims to:

- improve the process for granting approvals to vary fuel standards by providing for a wider range of conditions that the Minister can apply to approvals and to simplify the procedures when an approval is required urgently to avoid a fuel supply shortfall;
- provide for more effective and efficient monitoring and enforcement powers, including the introduction of a civil penalty regime and the establishment of an infringement notice system; and
- address a number of issues that have arisen from the practical application of the Fuel Quality Standards Act and its subordinate legislation.

The bill also contains application and saving provisions.

## **Non-availability of merits review**

### **Schedule 1, item 11, new subsection 17E(4)**

Item 11 of Schedule 1 inserts four new sections into the Fuel Quality Standards Act in relation to 'variation of approvals'. Proposed new subsection 17E enables a person to apply to the Minister for an approval to be varied so that one or more regulated persons are added to the approval.

Subsection 17E(4) provides that if the Minister does not vary the approval, he or she must notify the applicant of the refusal. Section 70 of the Fuel Quality Standards Act authorises review of decisions, including review of decisions to 'refuse to grant an approval' and to 'vary or revoke an approval', but not review of a decision to 'refuse to vary an approval'. The Committee **seeks the Minister's advice** as to whether merits review of a decision under new section 17E(4) to refuse to vary an approval might 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 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***

I refer to the letter of 14 May 2009 from Ms Julie Dennett, Secretary to the Senate Standing Committee for the Scrutiny of Bills, concerning the Fuel Quality Standards Amendment Bill 2009 and particularly the non-availability of merits review of decisions to refuse to vary an approval granted under section 13 of the *Fuel Quality Standards Act 2000* (new subsection 17E(4)).

A government amendment has been approved by the Prime Minister, the Hon Kevin Rudd MP, to address this issue. The amendment will be moved when the Bill is introduced and debated in the Senate, which is now scheduled for the Spring Sittings of Parliament.

Thank you for drawing this matter to my attention.

The Committee thanks the Minister for this response, and is pleased to note his undertaking to move an amendment to address the issue raised by the Committee when the bill is introduced and debated in the Senate.

# Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 18 August 2009. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 9 of 2009*

Introduced into the House of Representatives on 24 June 2009

Portfolio: Health and Ageing

### **Background**

This bill amends the *Health Insurance Act 1973* and the *National Health Act 1953* to enable nurse practitioners, and appropriately qualified and experienced midwives, to request appropriate diagnostic imaging and pathology services for which Medicare benefits may be paid; and allows these health professionals to prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

The bill also makes amendments to the *Health Insurance Act 1973*, the *Medical Indemnity Act 2002*, the *Medicare Australia Act 1973* and the *National Health Act 1953* which are consequential to, and commence at the same time as, the proposed *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2009*.

### **Delayed commencement**

#### **Schedule 1, various items**

Schedule 1 amends the Health Insurance Act to, among other things, provide for nurse practitioners and midwives to request certain diagnostic imaging and pathology services (for example, new paragraph 16A(1)(aa), to be inserted by item 10 of Schedule 1).

Item 11 of Schedule 1 provides that the amendment made by item 10 applies in relation to a pathology service requested on or after 1 November 2010. Similarly, items 15, 21 and 24 of Schedule 1 provide for delayed commencement, on or after 1 November 2010, for various provisions of the Health Insurance Act relating to particular services and referrals.

Where a delay in commencement is longer than six months, the Committee generally expects that the explanatory memorandum to the bill will provide an explanation. In this case, no explanation is provided in the explanatory memorandum for the various delays. Therefore, the Committee **seeks the Minister's advice** on the reasons for the delayed commencement of these provisions.

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

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

The Committee has indicated that the explanatory memorandum to the ... Bill does not provide an explanation for the 1 November 2010 commencement date contained in various items in the Bill. Specific reference is made to the *Health Insurance Act 1973* (HIA), which relates to the Medicare Benefits Schedule (MBS), and particular reference is made to item 11 (in relation to item 10), and items 15, 21, and 24 of the Bill.

The request for advice to the Committee is made on the grounds of delay in commencement for longer than six months, as the Committee generally expects that the explanatory memorandum will provide an explanation. The Committee has not referred to other items contained in the ... Bill which contain a 1 November 2010 start date. That is, items 84, 91, 93, and 95, which propose amendments to the *National Health Act 1953* (NHA), relating to the Pharmaceutical Benefits Scheme (PBS). By way of completeness I will provide a response in relation to these items also.

The explanatory memorandum to the ... Bill, page 1, states that "The ..(Bill).. will commence on Royal Assent, with Schedule 1 commencing on the day after Royal Assent, and the new Medicare benefits and Pharmaceutical benefits arrangements to be available from 1 November 2010." The 1 November 2010 date, where contained in items in the ... Bill, is designed to ensure, in the legislation itself, that access to the new Medicare benefits and Pharmaceutical benefits will not be available to

patients of participating/authorised midwives or nurse practitioners prior to 1 November 2010.

Although it may have been possible for legislative instruments made under the HIA and NHA to state a commencement date of 1 November 2010, with no reference to the 1 November 2010 date in the legislation itself, the inclusion of the 1 November 2010 at certain key points was considered to be preferable in terms of transparency and accountability to Parliament.

Prior to commencement of access for patients of participating/authorised midwives and nurse practitioners to the MBS and PBS under the amendments proposed by this Bill, extensive consultation will take place with key stakeholder groups. A number of legislative instruments will be made, which will be subject to parliamentary scrutiny, and Medicare Australia will need to receive and process applications from persons who wish to become participating/authorised midwives or nurse practitioners. The first meeting of the Maternity Services Advisory Group, which has representatives from 22 key stakeholder organisations, took place on 12 August 2009. The first meeting of the Nurse Practitioner Advisory Group is being arranged for 28 August 2009 and representation is being sought from a similar number of stakeholder organisations.

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

# Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 18 August 2009. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 9 of 2009*

Introduced into the House of Representatives on 24 June 2009  
Portfolio: Health and Ageing

### **Background**

Introduced with the Midwife Professional Indemnity (Run-off Cover Support Payment) Bill 2009, this bill establishes a professional indemnity scheme to provide indemnity insurance to eligible privately practising midwives.

### **Delayed commencement**

#### **Clause 2**

Clause 2 of the bill provides for commencement on 1 July 2010. Where a delay in commencement is longer than six months, the Committee generally expects that the explanatory memorandum to the bill will provide an explanation. In this case, the explanatory memorandum states (at page 1) that making insurance available to eligible midwives from 1 July 2010 is 'in line with proposed new requirements of the National Accreditation and Registration Scheme'. The explanatory memorandum also states (at page 3) that the bill does not cover any incident that occurs before 1 July 2010. However, there is no explanation for the delay in commencement itself. The Committee **seeks the Minister's clarification** as to the specific reasons for the delay in commencement of the bill.

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

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

The Committee has asked for the specific reasons for the delay in the commencement of the Bill.

The Bill creates a framework for the Government to pay Commonwealth Contributions for a proportion of the cost of claims against eligible midwives. Since 2002, no insurer has provided professional indemnity insurance for midwives. The Government will support the new arrangements for midwives by selecting a private sector insurer (as a result of a tender process), to provide affordable professional indemnity insurance to eligible midwives.

The introduction of the Bill on 24 June 2009 is an important step in the lead up to the Government conducting a request for tender for a commercial insurer to offer the Commonwealth supported professional indemnity insurance policies to eligible midwives. The tender process will need to be conducted in late 2009, in order to ensure adequate time for policies to be developed by 1 July 2010. This provides both a sufficient lead-time for potential insurers to become aware of the Government's intentions before tendering to provide insurance during late 2009.

The National Registration and Accreditation Scheme (NRAS) commencement date will be 1 July 2010 at which time the standards of performance for midwives seeking registration are expected to be in place.

The delayed commencement in relation to both bills [this bill and the Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009] does not trespass unduly on personal rights and liberties of potentially-eligible midwives.

The Committee thanks the Minister for this response.

**Inappropriate delegation of legislative power**  
**Incorporation of material as in force from time to time**  
**Clause 90**

Paragraph 90(1)(b) provides for the Minister, by legislative instrument, to make Rules ‘necessary or convenient’ to give effect to the Act. Under subclause 90(2), the Rules may confer a power on the Minister or the CEO of Medicare Australia. Subclause 90(3) provides that the Rules may apply, adopt or incorporate any matter contained ‘in any other instrument or writing’ that is ‘in force or existing from time to time’. Although the Rules are a legislative instrument, the Committee notes that this provision gives very broad power and also incorporates material by reference. The explanatory memorandum does not explain the need or rationale for the breadth of the provision. The Committee **seek the Minister’s advice** on the reasons why such broad powers are required in the circumstances.

*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; and may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.*

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

The Committee has asked why the clause provides for the Minister, by legislative instrument, to make Rules ‘necessary or convenient’ to give effect to the Act and to incorporate material by reference.

The provision for Rules is included because there is insufficient information available on some matters before the passage of the legislation (for example the identity of the contracted insurer), and to retain appropriate flexibility for some matters (for example, the eligibility criteria for eligible midwives).

The Government has prepared the legislation in advance of the tender process so that insurers can make themselves aware of the environment in which they would be operating, but the legislation provides for sufficient Rule-making powers to ensure that the Government can respond to the emerging requirements of this new business environment.

The Explanatory Memorandum states that the power for these Rules to be made is required to allow the scheme to reflect any emerging changes to the market for

professional indemnity insurance, and that the Rules will allow the scheme to respond to the industry's provision of new types of insurance products to cover new types of claims, and to respond to contracts and claims that are affected in an unintentional manner by the legislation (to the extent this is possible within the legislative framework).

The Committee thanks the Minister for this response, which addresses its concerns.

### **Strict liability**

#### **Various clauses**

The Committee generally draws to the Senate's attention any provisions that create offences of strict liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum. Two new clauses in the bill create offences for failing to provide information. In both cases, the explanatory memorandum states (at page 32) that the privilege against self-incrimination applies but does not explain why the provision is necessary; nor does the explanatory memorandum refer to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*.

First, Division 6 of Part 4 of Chapter 2 contains offence provisions in relation to the payment of Commonwealth contributions. Clause 66 creates an offence for failing to provide information in response to a request from the CEO of Medicare Australia (pursuant to subclause 62(1)). Failure to comply is an offence of strict liability under subclause 66(3) but the explanatory memorandum does not explain the reason for the imposition of strict liability in these circumstances. Similarly, Part 3 of Chapter 3 contains provisions providing information-gathering powers in relation to run-off cover payments. Clause 84 creates an offence for failing to provide information in response to a request from the CEO of Medicare Australia pursuant to subclause 82(1). Failure to comply is an offence of strict liability under subclause 84(3) but, again, the explanatory memorandum does not explain the reason for the imposition of strict liability.

Other provisions in the bill also impose strict liability offences and the explanatory memorandum does not explain why the provisions are necessary, nor do they refer to the *Guide*. The provisions relate to: failure to comply with a direction to pay money to Medicare Australia (subclause 65(7)); failure to notify the CEO of Medicare Australia of certain information (subclauses 67(3) and 85(3)); failure to keep and retain records (subclause 68(3)); failure to include information in an invoice (subclause 69(3)); and failure to comply with a direction from the CEO of Medicare Australia (subclause 80(3)).

The Committee **seek the Minister's advice** on the reasons for the imposition of strict liability in each case and whether the *Guide* was considered in the course of framing these offences.

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

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

The Committee has asked for the reasons for the imposition of strict liability in each case and whether the Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers was considered in the course of framing these offences.

The strict liability regime included in the legislation mirrors the strict liability regime in existing Commonwealth medical indemnity legislation, which is a scheme familiar to the insurance industry.

The proposed new clauses creating offences for failure to provide information (and providing information-gathering powers), failure to comply with a direction to pay money to Medicare Australia, failure to notify the Chief Executive Officer of Medicare Australia of certain information, failure to keep and retain records, failure to include information in an invoice and failure to comply with a direction of the Chief Executive Officer of Medicare Australia reflect existing legislation for medical indemnity for medical practitioners (for example in the *Medical Indemnity Act 2002*) which provide the only existing model for the Commonwealth to pay a proportion of the cost of claims against health professionals. The existing business frameworks for relevant insurers operate in the environment of the existing legislation.

To provide an accurate estimate of possible Commonwealth Contributions, and to protect taxpayers, it is important that relevant persons (insurers, eligible midwives and a person or persons representing an eligible midwife) comply with the requirements in each clause as these clauses create a mechanism to ensure the

payments made by the Chief Executive Officer of Medicare Australia for Level 1 Commonwealth Contributions, Level 2 Commonwealth Contributions and Run-off Cover Payments are accurate, and that relevant persons can demonstrate that claims for Commonwealth Contributions meet the requirements of the legislation.

Imposing strict liability on these offences removes the need for the prosecution to prove intent to breach a requirement in the legislation. It is intended to provide an effective deterrent to breaches of a requirement by ensuring that relevant persons comply with the requirements.

In the unlikely event that a relevant person mistakenly takes an action that breaches a requirement of the legislation, the Criminal Code provides a defence of an honest and reasonable mistake of fact.

The Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers was considered in the course of framing these offences. In particular, the strict liability offences are not punishable by imprisonment and the maximum penalty for committing one of the strict liability offences is a fine of up to 30 penalty units for an individual. I consider the offences to be consistent with the Guide and will significantly enhance enforcement.

The Committee thanks the Minister for her comprehensive response, but considers that this information should also be included in the explanatory memorandum.

### **Standing appropriations**

#### **Subclause 43(2), clause 70 and subclause 78(2)**

There are three standing appropriations in the bill. In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be appropriated or a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament.

Subclause 43(2) provides that the Consolidated Revenue Fund is appropriated for the payment of amounts under Division 4 for Commonwealth liabilities if a run-off cover termination date has been set in relation to affected eligible midwives. The explanatory memorandum does not explain the appropriation, although the bill provides limitations of Commonwealth contributions on run-off claims under clause 35 (which is noted in the explanatory memorandum at page 2). There is no sunset clause on the appropriation.

Clause 70 provides that the Consolidated Revenue Fund is appropriated for the purposes of paying level one, level two and run-off cover Commonwealth contributions. The explanatory memorandum does not explain the appropriation, although the limits of Commonwealth contributions on level one, level two and run-off claims are provided (see clauses 17, 21 and 35) and noted in the explanatory memorandum (at pages 1-2). There is no sunset clause on the appropriation.

Subclause 78(2) provides that the Consolidated Revenue Fund is appropriated for the purposes of paying refunds under section 78 relating to overpayments. The explanatory memorandum states (at page 34) that such overpayments may relate to a run-off cover support payment or late payment penalty.

In his *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008), former Senator Andrew Murray (a previous long-standing member of this Committee) reported that more than 80% of all appropriations drawings for 2002-03 was spent from the Consolidated Revenue Fund under the authority of special (or standing) appropriations. Mr Murray drew attention to the need for parliamentary scrutiny of special or standing appropriations; and suggested that any such appropriations included in a bill be put in the Chamber as a separate question from the Chair in the committee-of-the-whole stage to ensure a separate vote on each appropriation. He recommended regular review of standing appropriations (recommendation 12).

In its June 2008 response to Mr Murray's report, the Federal Government agreed that review is needed but considered that such review be in a more limited form than that recommended. In light of the Federal Government's response to Mr Murray's report that it intends to be more accountable on the issue of standing appropriations, the Committee seeks **the Minister's advice** as to why more detailed explanations of the standing appropriations were not included in the bill's explanatory memorandum. The Committee also **seeks the Minister's advice** in relation to how parliamentary scrutiny of expenditure under the three standing appropriations will be achieved.

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

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

The Committee has asked why more detailed explanations of the standing appropriations were not included in the Bill's Explanatory Memorandum, and how parliamentary scrutiny of expenditure under the three standing appropriations will be achieved.

The inclusion of standing appropriations reflects a degree of unpredictability in the frequency and value of likely claims. The nature of the funding arrangement proposed in the Bill is one that will be required to respond to eligible claims from the contracted insurer as either a Level 1, Level 2 or Run-off cover Commonwealth Contribution. Whilst my Department has received actuarial advice as to the likely frequency and quantum of such eligible claims, it is in the nature of medical-based professional indemnity that some claims have the potential to be unusually large and also unpredictable in terms of their timing. Indeed, there could be no claims within a given period, or there may be several. The funding arrangements associated with this bill need to be able to respond to this potentially variable pattern of demand.

Further, it is in the nature of indemnity claims that involve births that the lead time for a claim to be made, processed and settled can be very long – perhaps decades in extreme cases (because State-based tort laws currently allow a child damaged at birth to bring a case as an adult against those involved in the birth). For this reason, for the protection of persons who are entitled under law to bring a case against an eligible midwife, it is not desirable to incorporate a sunset clause in this legislation. To do so would potentially deprive a person from access to fair compensation at some future point in time.

The expenditure will be scrutinised in a number of ways. The operation of the legislation will be monitored by my Department, Medicare Australia and the Australian Government Actuary and will be subject to parliamentary scrutiny through Senate Committees, the Portfolio Budget Statement and Annual Reporting.

In addition, clause 48 of the Bill provides for the Minister to cause a report on the run-off cover Commonwealth provisions to be prepared and tabled in each House of the Parliament after the end of each financial year.

I appreciate the opportunity to address the Committee's comments on the bills.

The Committee thanks the Minister for her very helpful response. The Committee considers that this information should also be included in the explanatory memorandum to assist readers.

# Migration Amendment (Immigration Detention Reform) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Immigration and Citizenship responded to the Committee's comments in a letter dated 18 August 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 9 of 2009*

Introduced into the Senate on 25 June 2009  
Portfolio: Immigration and Citizenship

#### **Background**

This bill amends the *Migration Act 1958* to support the implementation of the Federal Government's New Directions in Detention policy, announced on 29 July 2008. The New Directions in Detention policy includes the introduction of seven key Immigration Detention Values to guide and drive new detention policy and practice into the future.

#### **Insufficiently defined administrative powers Schedule 1, item 12, new section 194A**

Proposed new section 194A, to be inserted by item 12 of Schedule 1, provides for an authorised officer to grant a temporary community access permission to a person in immigration detention if the officer considers that it would involve minimal risk to the community (proposed new subsection 194A(2)). The authorised officer does not have a duty to consider whether to exercise the power to make, vary or revoke such a permission, whether he or she is requested to do so by any person, or in any other circumstances (proposed new subsection 194A(4)).

The decision of an officer not to exercise, or not to consider the exercise of this power, is a privative clause decision (see proposed new paragraph 474(7)(aa), to be inserted by item 19 of Schedule 1). This means that judicial review of the decision is limited. The explanatory memorandum and second reading speech do not explain the level of officers who will be making such decisions, although the Committee notes that the second reading speech refers to three-monthly senior officer reviews of the appropriateness of continued detention.

This contrasts with the information in the extrinsic material relating to proposed new section 197AF, to be inserted by item 13 of Schedule 1, which provides for the Minister's non-compellable residence determination power in Division 7 of Part 2 of the Migration Act to be delegated to departmental officers. The second reading speech states that this delegation will be exercised by a senior departmental officer.

The Committee generally prefers that senior officers exercise delegations and make decisions such as those contained in proposed new sections 194A and 197AF. In the circumstances, the Committee **seeks the Minister's advice** on the level, position or qualifications of authorised officers who are expected to make decisions pursuant to proposed new section 194A, and whether this information might be specified in the explanatory memorandum.

*Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

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

The Committee has sought my advice on the level, position or qualifications of authorised officers who are expected to make decisions pursuant to proposed new section 194A of the Bill, and whether this information might be specified in the explanatory memorandum.

I note the Committee's concern that the new section 194A of the Bill 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 in Senate standing order 24.

I would like to clarify that it is envisaged that the power to grant, vary or revoke a temporary community access permission will be used by senior officers within my

Department who hold broad responsibility for oversight of case resolution and the management of immigration detention.

In a separate process, my Department has provided this advice on the public record in its submission to the Senate Legal and Constitutional Affairs Committee in the context of that Committee's consideration of the Bill.

I will ask that my Department amend any supplementary explanatory memorandum that is provided in future to reflect the advice above.

Thank you for bringing this matter to my attention.

The Committee thanks the Minister for this response, and for his undertaking to have any future supplementary explanatory memorandum amended to reflect that only senior officers in the Department will have authority to exercise the relevant delegation.

# Renewable Energy (Electricity) Amendment Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 8 of 2009*. The Minister for Climate Change and Water responded to the Committee's comments in a letter dated 12 August 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 8 of 2009*

Introduced into the House of Representatives on 17 June 2009  
Portfolio: Climate Change and Water

#### **Background**

Introduced with the Renewable Energy (Electricity) (Charge) Amendment Bill 2009, this bill amends the *Renewable Energy (Electricity) Act 2000* to implement the Federal Government's commitment to expand its Mandatory Renewable Energy Target (MRET) scheme, which includes a statutory target of 9,500 gigawatt-hours (GWh) in 2010, to a national Renewable Energy Target (RET) scheme, which includes a target of 45,000 GWh in 2020.

The expanded scheme will mean that the equivalent of at least 20 per cent of Australia's electricity will come from renewable sources by 2020. The RET scheme has been designed in cooperation with the states and territories through the Council of Australian Governments (COAG), and brings the MRET and existing and proposed state schemes into a single national scheme.

In particular, the bill:

- clarifies the objectives of the RET scheme;
- increases annual targets for renewable energy generation from 2010, including a target of 45,000 GWh in 2020 maintained until 2030;

- implements a Solar Credits mechanism, based on a renewable energy certificate multiplier, for small-scale renewable energy including solar Photovoltaic (PV), wind and micro-hydro systems;
- mandates a review of the operation of the legislation and regulations underpinning the RET scheme in 2014;
- provides for partial legislative exemptions from liability under the scheme in respect of electricity-intensive, trade-exposed activities; and
- provides for the transition of existing and proposed state renewable energy target schemes.

### **Inappropriate delegation of legislative power** **Schedule 1, item 6**

The explanatory memorandum explains (at page 1) that the RET scheme has been designed in cooperation with the states and territories through COAG. While the Committee recognises the importance of giving effect to national regulatory schemes, it does not regard passage through the COAG process as a sufficient reason to bypass legislative scrutiny. In this bill, several elements of the legislative scheme are regulated in delegated legislation. While it is appropriate to include technical and procedural matters in regulations – such as forms (see proposed new paragraph 46A(2)(b), to be inserted by item 14 of Schedule 2) – the Committee regards substantive changes to the law as a matter for the primary Act.

For example, proposed new subsection 23B(2), to be inserted by item 6 of Schedule 1, provides that ‘(t)he regulations may provide that, in the circumstances specified by the regulations’, the number of certificates created in relation to a small generation unit may be multiplied. The Committee considers that this is an unduly broad delegation of legislative power and **seeks the Minister’s advice** on the reasons for delegating the power to determine criteria for issuing certificates.

*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***

I have considered the Committee's comments and provide the following advice as requested.

The Committee has expressed concern about the use of delegated legislation to determine the circumstances under which Renewable Energy Certificates (RECs) may be multiplied (for small-scale renewable energy systems, referred to as 'Solar Credits'). The Committee has indicated that use of delegated legislation for this purpose may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

I note that in the *Renewable Energy (Electricity) Act 2000* (the Act) and the *Renewable Energy (Electricity) Regulations 2001* (the Regulations) much of the operation of the scheme, including creation of RECs for small generation units to which the RECs multiplier is to be applied, is dealt with in the Regulations. The regulation making power included in Item 6, Schedule 1 of the Renewable Energy (Electricity) Amendment Bill 2009 has been drafted to ensure consistency with the context of the existing legislative framework.

The Regulations will include detail around the mechanism to prevent double-dipping under Solar Credits and between Solar Credits and the Solar Homes and Communities Plan. The Government's intention is that where a rebate has been received for a system under the Solar Homes and Communities Plan (SHCP), that system, despite meeting other eligibility requirements, will not be eligible for Solar Credits.

While the proposed regulation making power will detail the circumstances under which the multiplier is to be applied, this power is not open-ended. It has been carefully circumscribed in both the timing and the scale of the multiplier, and involves a relatively minor delegation of legislative power. It provides the basis for Solar Credits, without affecting obligations to acquire RECs, which are provided in the primary legislation.

In my view this regulation making power is consistent with the existing renewable energy scheme legislation and does not inappropriately delegate legislative power. The regulations, a disallowable instrument, will also be subject to the normal parliamentary review process undertaken by the Senate Standing Committee on Regulations and Ordinances.

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

## **Retrospective application Schedule 1, item 7**

Item 7 of Schedule 1 provides for amendments made by items 4, 5 and 6 of Schedule 1, which relate to section 23B of the Renewable Energy (Electricity) Act, to apply only to small generation units that are installed ‘on or after 9 June 2009’. This means that the amendments have retrospective application. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum provides no explanation for the retrospective operation of these provisions. Therefore, the Committee **seeks the Minister’s advice** as to the reasons for the retrospective application of the amendments to section 23B.

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

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

The Committee has expressed concern about the retrospective application of the ability for small-scale renewable energy systems to create multiple certificates (Solar Credits). The Committee has indicated that the proposed retrospective application 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.

Retrospective application of the multiplier for RECs (Solar Credits) reflects the Government’s commitment that support for small-scale renewable energy systems, particularly solar photovoltaic (PV) systems, previously provided through the SHCP, would be replaced by the REC multiplier (Solar Credits) under the Renewable Energy Target (RET) scheme. The Government announced on 9 June 2009 that no new applications made after 9 June 2009 would be eligible for a rebate under the SHCP, but that continuity of support for household solar PV systems would be provided by allowing installations from 9 June 2009 to be eligible for Solar Credits.

In my view retrospective application of these provisions will not trespass unduly on personal rights and liberties. No additional obligations are imposed by these provisions. Rather, retrospective application will extend a benefit to those installing certain small-scale renewable energy systems on or after 9 June 2009, by enabling additional tradable renewable energy certificates to be created in respect of these

systems. The benefit provided through the Solar Credits mechanism will be available to a wider range of recipients than the former SHCP.

The Committee thanks the Minister for her clarification of the retrospective operation of the provisions.

**Insufficiently defined administrative powers**  
**Schedule 2, item 14, new sections 46A, 46B and 46C**

Schedule 2 of the bill provides for partial exemptions from liability to charge under the RET scheme in respect of electricity-intensive, trade-exposed activities. Proposed new Division 1A of Part 5 of the Renewable Energy (Electricity) Act, to be inserted by item 14 of Schedule 2, provides for partial exemption certificates to be issued. Proposed new section 46A provides that a person may apply for a certificate and regulations will prescribe the information that the person must provide (proposed new paragraph 46A(2)(b)). Proposed new subsection 46B(1) provides that, if an application is made under section 46A, then the certificate must be issued by the Authority (see further discussion of ‘the Authority’ in the ‘Drafting note’ commentary below).

Proposed new section 46C provides for amendment to certificates. The Authority may consider a wider range of factors in relation to amendment than issuance since it ‘may have regard to any other matter that it considers relevant’ (proposed new paragraph 46C(2)(b)). The Authority may also exert control by amending certificates on its own initiative, in accordance with criteria prescribed in regulations (proposed new subsection 46C(3)).

The Committee considers that the explanatory memorandum is misleading when it states (at the first dot point in paragraph 32) that item 14 ‘outlines the criteria’ for obtaining partial exemption certificates since no criteria are provided in the bill. The Committee **seeks the Minister’s advice** on the reasons for providing the Authority with broad power to consider matters in amending certificates while, at the same time, limiting its power to consider matters in relation to the issue of certificates.

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

The Committee has questioned whether the Explanatory Memorandum is misleading when it says that, the Bill ‘outlines the criteria’ for obtaining partial exemption certificates since no criteria are provided in the Bill. Section 46A sets out a legislative test for applications for a partial exemption certificate. This test outlines criteria including that a prescribed person may apply in relation to an emissions-intensive, trade-exposed activity which is, or is to be, carried on at a site during the year, and either a person who is, or will be, a liable entity from whom the electricity is, or will be, acquired for use at the site in the activity or the prescribed person if they are or will be a liable entity. This test also includes requirements for the form and timing of the application.

The Committee has sought advice regarding the Authority having broad power to consider matters in amending partial exemption certificates while, at the same time, limiting its power to consider matters in relation to the issue of these certificates. The Committee has indicated that providing the Authority with broad power to consider matters in amending certificates while limiting its power in relation to the issue of certificates 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.

The distinction between the approaches for issuing and amending certificates reflects the fact that issuing a certificate is mandatory whereas an amendment to a certificate, once issued, is discretionary.

If an application is made under section 46A for a partial exemption certificate then in accordance with section 46B the Authority must issue the certificate. The regulations may prescribe any information to be included in the application. Also if the Authority wishes to amend certificates of its own initiative then it may only do so in circumstances prescribed by the regulations. By limiting the Authority’s scope for action to what is prescribed by the regulations this strictly controls the administrative power of the Authority and provides a measure of certainty for relevant stakeholders under the Act.

It is only in the case where the person to whom a certificate is issued requests in writing an amendment to that certificate that the Authority may have regard to other matters it considers relevant. This broader power to consider matters provides the Authority with the flexibility to, amongst other things, consider matters raised by the person to whom a certificate was issued that are not prescribed in the Regulations.

The Committee thanks the Minister for this response, which addresses its concerns. The Committee considers that the information contained in the Minister’s response could have been usefully included in the explanatory memorandum to provide clarity and to assist readers.

## **Drafting note**

### **Schedule 2, item 14**

Proposed new Division 1A of Part 5, to be inserted by item 14 of Schedule 2, provides for partial exemption certificates. The proposed new sections (for example, new section 46A) refer to ‘the Authority’ but, in the Act being amended – the Renewable Energy (Electricity) Act – the term ‘the Regulator’ is used (see, for example, section 46). ‘(T)he Authority’ is also referred to in proposed new section 38A (item 8 of Schedule 2) of the bill. Possibly, the proposed Australian Climate Change Regulatory Authority has functions in relation to these provisions but this is not made clear in the explanatory memorandum or the second reading speech. The Committee **draws to the attention of the Minister** this possible drafting error.

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

The Committee has noted the amendment Bill refers to ‘the Authority’ but in the Act the term ‘the Regulator’ is used. The Committee further notes the proposed Australian Climate Change Regulatory Authority has functions in relation to these provisions but this is not made clear in the explanatory memorandum or the second reading speech. The Committee has drawn my attention to this possible drafting error.

References to ‘the Regulator’ in the Act reflect current arrangements for administration of the Act and the Regulations, which are administered by the Renewable Energy Regulator. References to ‘the Authority’ in the Bill reflect future arrangements for administration of the legislation, where the scheme will be administered by the Australian Climate Change Regulatory Authority.

Schedule 2 of the Bill will only commence at the same time as Section 3 of the Carbon Pollution Reduction Scheme Act 2009 commences. The Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009, which would also commence at the same time as Section 3 of the Carbon Pollution Reduction Scheme Act 2009, would amend the Act by, inter alia, omitting references to the Regulator and substituting the Authority. Therefore the position of Regulator under the Act would be abolished at the time that Schedule 2, item 14 comes into force.

Thank you for bringing your issues to my attention and I trust that the Committee’s concerns have been fully addressed.

The Committee thanks the Minister for providing this explanation.

Senator the Hon Helen Coonan  
Chair



RECEIVED

12 AUG 2009

The Hon Peter Garrett AM MP

Senate Standing Committee  
for the Scrutiny of Bills

Minister for the Environment, Heritage and the Arts

C09/8613

12 AUG 2009

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

Dear Senator Coonan

I refer to the letter of 14 May 2009 from Ms Julie Dennett, Secretary to the Senate Standing Committee for the Scrutiny of Bills, concerning the Fuel Quality Standards Amendment Bill 2009 and particularly the non-availability of merits review of decisions to refuse to vary an approval granted under section 13 of the *Fuel Quality Standards Act 2000* (new subsection 17E(4)).

A government amendment has been approved by the Prime Minister, the Hon Kevin Rudd MP, to address this issue. The amendment will be moved when the Bill is introduced and debated in the Senate, which is now scheduled for the Spring Sittings of Parliament.

Thank you for drawing this matter to my attention.

Yours sincerely

Peter Garrett



THE HON NICOLA ROXON MP  
MINISTER FOR HEALTH AND AGEING

RECEIVED

18 AUG 2009

Senate Standing Committee  
for the Scrutiny of Bills

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Coonan

Thank you for the letters of 13 August 2009 drawing my attention to the Committee's Alert Digest No.9 of 2009 (12 August 2009) regarding the Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009 (M&NP Bill) and the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009.

I would like to make the following responses in the order in which they appear in the Digest.

**Delayed Commencement:** re the M&NP Bill, Schedule 1, various items.

The Committee has indicated that the explanatory memorandum to the M&NP Bill does not provide an explanation for the 1 November 2010 commencement date contained in various items in the Bill. Specific reference is made to the *Health Insurance Act 1973* (HIA), which relates to the Medicare Benefits Schedule (MBS), and particular reference is made to item 11 (in relation to item 10), and items 15, 21, and 24 of the Bill.

The request for advice to the Committee is made on the grounds of delay in commencement for longer than six months, as the Committee generally expects that the explanatory memorandum will provide an explanation. The Committee has not referred to other items contained in the M&NP Bill which contain a 1 November 2010 start date. That is, items 84, 91, 93, and 95, which propose amendments to the *National Health Act 1953* (NHA), relating to the Pharmaceutical Benefits Scheme (PBS). By way of completeness I will provide a response in relation to these items also.

The explanatory memorandum to the M&NP Bill, page 1, states that "The ..(M&NP Bill).. will commence on Royal Assent, with Schedule 1 commencing on the day after Royal Assent, and the new Medicare benefits and Pharmaceutical benefits arrangements to be available from 1 November 2010." The 1 November 2010 date, where contained in items in the M&NP Bill, is designed to ensure, in the legislation itself, that access to the new Medicare benefits and Pharmaceutical benefits will be not be available to patients of participating/authorised midwives or nurse practitioners prior to 1 November 2010.

Although it may have been possible for legislative instruments made under the HIA and NHA to state a commencement date of 1 November 2010, with no reference to the 1 November 2010 date in the legislation itself, the inclusion of the 1 November 2010 at certain key points was considered to be preferable in terms of transparency and accountability to Parliament.

Prior to commencement of access for patients of participating/authorised midwives and nurse practitioners to the MBS and PBS under the amendments proposed by this Bill, extensive consultation will take place with key stakeholder groups. A number of legislative instruments will be made, which will be subject to parliamentary scrutiny, and Medicare Australia will need to receive and process applications from persons who wish to become participating/authorised midwives or nurse practitioners. The first meeting of the Maternity Services Advisory Group, which has representatives from 22 key stakeholder organisations, took place on 12 August 2009. The first meeting of the Nurse Practitioner Advisory Group is being arranged for 28 August 2009 and representation is being sought from a similar number of stakeholder organisations.

**Delayed Commencement:** re the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009, clause 2.

The Committee has asked for the specific reasons for the delay in the commencement of the Bill.

The Bill creates a framework for the Government to pay Commonwealth Contributions for a proportion of the cost of claims against eligible midwives. Since 2002, no insurer has provided professional indemnity insurance for midwives. The Government will support the new arrangements for midwives by selecting a private sector insurer (as a result of a tender process), to provide affordable professional indemnity insurance to eligible midwives.

The introduction of the Bill on 24 June 2009 is an important step in the lead up to the Government conducting a request for tender for a commercial insurer to offer the Commonwealth supported professional indemnity insurance policies to eligible midwives. The tender process will need to be conducted in late 2009, in order to ensure adequate time for policies to be developed by 1 July 2010. This provides both a sufficient lead-time for potential insurers to become aware of the Government's intentions before tendering to provide insurance during late 2009.

The National Registration and Accreditation Scheme (NRAS) commencement date will be 1 July 2010 at which time the standards of performance for midwives seeking registration are expected to be in place.

The delayed commencement in the relation of both bills does not trespass unduly on personal rights and liberties of potentially-eligible midwives.

**Inappropriate delegation of legislative power and incorporation of material as in force from time to time** re: the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009, clause 90.

The Committee has asked why the clause provides for the Minister, by legislative instrument, to make Rules 'necessary or convenient' to give effect to the Act and to incorporate material by reference.

The provision for Rules is included because there is insufficient information available on some matters before the passage of the legislation (for example the identity of the contracted insurer), and to retain appropriate flexibility for some matters (for example, the eligibility criteria for eligible midwives).

The Government has prepared the legislation in advance of the tender process so that insurers can make themselves aware of the environment in which they would be operating, but the legislation provides for sufficient Rule-making powers to ensure that the Government can respond to the emerging requirements of this new business environment.

The Explanatory Memorandum states that the power for these Rules to be made is required to allow the scheme to reflect any emerging changes to the market for professional indemnity insurance, and that the Rules will allow the scheme to respond to the industry's provision of new types of insurance products to cover new types of claims, and to respond to contracts and claims that are affected in an unintentional manner by the legislation (to the extent this is possible within the legislative framework).

**Strict Liability re: the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009, various clauses.**

The Committee has asked for the reasons for the imposition of strict liability in each case and whether the Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers was considered in the course of framing these offences.

The strict liability regime included in the legislation mirrors the strict liability regime in existing Commonwealth medical indemnity legislation, which is a scheme familiar to the insurance industry.

The proposed new clauses creating offences for failure to provide information (and providing information-gathering powers), failure to comply with a direction to pay money to Medicare Australia, failure to notify the Chief Executive Officer of Medicare Australia of certain information, failure to keep and retain records, failure to include information in an invoice and failure to comply with a direction of the Chief Executive Officer of Medicare Australia reflect existing legislation for medical indemnity for medical practitioners (for example in the *Medical Indemnity Act 2002*) which provide the only existing model for the Commonwealth to pay a proportion of the cost of claims against health professionals. The existing business frameworks for relevant insurers operate in the environment of the existing legislation.

To provide an accurate estimate of possible Commonwealth Contributions, and to protect taxpayers, it is important that relevant persons (insurers, eligible midwives and a person or persons representing an eligible midwife) comply with the requirements in each clause as these clauses create a mechanism to ensure the payments made by the Chief Executive Officer of Medicare Australia for Level 1 Commonwealth Contributions, Level 2 Commonwealth Contributions and Run-off Cover Payments are accurate, and that relevant persons can demonstrate that claims for Commonwealth Contributions meet the requirements of the legislation.

Imposing strict liability on these offences removes the need for the prosecution to prove intent to breach a requirement in the legislation. It is intended to provide an effective deterrent to breaches of a requirement by ensuring that relevant persons comply with the requirements.

In the unlikely event that a relevant person mistakenly takes an action that breaches a requirement of the legislation, the Criminal Code provides a defence of an honest and reasonable mistake of fact.

The Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers was considered in the course of framing these offences. In particular, the strict liability offences are not punishable by imprisonment and the maximum penalty for committing one of the strict liability offences is a fine of up to 30 penalty units for an individual. I consider the offences to be consistent with the Guide and will significantly enhance enforcement.

**Standing Appropriations** re: the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009, Subclause 43(2), clause 70 and subclause 78(2).

The Committee has asked why more detailed explanations of the standing appropriations were not included in the Bill's Explanatory Memorandum, and how parliamentary scrutiny of expenditure under the three standing appropriations will be achieved.

The inclusion of standing appropriations reflects a degree of unpredictability in the frequency and value of likely claims. The nature of the funding arrangement proposed in the Bill is one that will be required to respond to eligible claims from the contracted insurer as either a Level 1, Level 2 or Run-off cover Commonwealth Contribution. Whilst my Department has received actuarial advice as to the likely frequency and quantum of such eligible claims, it is in the nature of medical-based professional indemnity that some claims have the potential to be unusually large and also unpredictable in terms of their timing. Indeed, there could be no claims within a given period, or there may be several. The funding arrangements associated with this bill need to be able to respond to this potentially variable pattern of demand.

Further, it is in the nature of indemnity claims that involve births that the lead time for a claim to be made, processed and settled can be very long - perhaps decades in extreme cases (because State-based tort laws currently allow a child damaged at birth to bring a case as an adult against those involved in the birth). For this reason, for the protection of persons who are entitled under law to bring a case against an eligible midwife, it is not desirable to incorporate a sunset clause in this legislation. To do so would potentially deprive a person from access to fair compensation at some future point in time.

The expenditure will be scrutinised in a number of ways. The operation of the legislation will be monitored by my Department, Medicare Australia and the Australian Government Actuary and will be subject to parliamentary scrutiny through Senate Committees, the Portfolio Budget Statement and Annual Reporting.

In addition, clause 48 of the Bill provides for the Minister to cause a report on the run-off cover Commonwealth provisions to be prepared and tabled in the each House of the Parliament after the end of each financial year.

I appreciate the opportunity to address the Committee's comments on the bills.

Yours sincerely

A handwritten signature in black ink, appearing to be 'NR', with a long horizontal flourish extending to the right.

**NICOLA ROXON**

**18 AUG 2015**



**Senator Chris Evans**

Leader of the Government in the Senate  
Minister for Immigration and Citizenship

RECEIVED  
10 AUG 2009  
Senate Standing Committee  
for the Scrutiny of Bills

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

Dear Senator Coonan *Helen*

I am writing in response to the request for advice in relation to the Migration Amendment (Immigration Detention Reform) Bill 2009 (the Bill) in the Senate Standing Committee for the Scrutiny of Bills (the Committee) Alert Digest No 9 of 2009 (12 August 2009).

The Committee has sought my advice on the level, position or qualifications of authorised officers who are expected to make decisions pursuant to proposed new section 194A of the Bill, and whether this information might be specified in the explanatory memorandum.

I note the Committee's concern that the new section 194A of the Bill 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 in Senate standing order 24.

I would like to clarify that it is envisaged that the power to grant, vary or revoke a temporary community access permission will be used by senior officers within my Department who hold broad responsibility for oversight of case resolution and the management of immigration detention.

In a separate process, my Department has provided this advice on the public record in its submission to the Senate Legal and Constitutional Affairs Committee in the context of that Committee's consideration of the Bill.

I will ask that my Department amend any supplementary explanatory memorandum that is provided in future to reflect the advice above.

Thank you for bringing this matter to my attention.

Yours sincerely

CHRIS EVANS

18/8/09.



Minister for Climate Change and Water

RECEIVED

14 AUG 2009

Senate Standing Committee  
for the Scrutiny of Bills

Senator the Hon Helen Coonan  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

12 AUG 2009

Dear Senator Coonan

I refer to Julie Dennett's letter dated 25 June 2009 concerning a number of measures in the Renewable Energy (Electricity) Amendment Bill 2009 and the Renewable Energy (Electricity) (Charge) Amendment Bill 2009.

I have considered the Committee's comments and provide the following advice as requested.

### **Renewable Energy (Electricity) Amendment Bill 2009**

#### Inappropriate delegation of legislative power

The Committee has expressed concern about the use of delegated legislation to determine the circumstances under which Renewable Energy Certificates (RECs) may be multiplied (for small-scale renewable energy systems, referred to as 'Solar Credits'). The Committee has indicated that use of delegated legislation for this purpose may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

I note that in the *Renewable Energy (Electricity) Act 2000* (the Act) and the *Renewable Energy (Electricity) Regulations 2001* (the Regulations) much of the operation of the scheme, including creation of RECs for small generation units to which the RECs multiplier is to be applied, is dealt with in the Regulations. The regulation making power included in Item 6, Schedule 1 of the Renewable Energy (Electricity) Amendment Bill 2009 has been drafted to ensure consistency with the context of the existing legislative framework.

The Regulations will include detail around the mechanism to prevent double-dipping under Solar Credits and between Solar Credits and the Solar Homes and Communities Plan. The Government's intention is that where a rebate has been received for a system under the Solar Homes and Communities Plan (SHCP), that system, despite meeting other eligibility requirements, will not be eligible for Solar Credits.

While the proposed regulation making power will detail the circumstances under which the multiplier is to be applied, this power is not open-ended. It has been carefully circumscribed in both the timing and the scale of the multiplier, and involves a relatively minor delegation of legislative power. It provides the basis for Solar Credits, without affecting obligations to acquire RECs, which are provided in the primary legislation.

In my view this regulation making power is consistent with the existing renewable energy scheme legislation and does not inappropriately delegate legislative power. The regulations, a disallowable instrument, will also be subject to the normal parliamentary review process undertaken by the Senate Standing Committee on Regulations and Ordinances.

#### Retrospective application

The Committee has expressed concern about the retrospective application of the ability for small-scale renewable energy systems to create multiple certificates (Solar Credits). The Committee has indicated that the proposed retrospective application 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.

Retrospective application of the multiplier for RECs (Solar Credits) reflects the Government's commitment that support for small-scale renewable energy systems, particularly solar photovoltaic (PV) systems, previously provided through the SHCP, would be replaced by the REC multiplier (Solar Credits) under the Renewable Energy Target (RET) scheme. The Government announced on 9 June 2009 that no new applications made after 9 June 2009 would be eligible for a rebate under the SHCP, but that continuity of support for household solar PV systems would be provided by allowing installations from 9 June 2009 to be eligible for Solar Credits.

In my view retrospective application of these provisions will not trespass unduly on personal rights and liberties. No additional obligations are imposed by these provisions. Rather, retrospective application will extend a benefit to those installing certain small-scale renewable energy systems on or after 9 June 2009, by enabling additional tradable renewable energy certificates to be created in respect of these systems. The benefit provided through the Solar Credits mechanism will be available to a wider range of recipients than the former SHCP.

#### Insufficiently defined administrative powers

The Committee has questioned whether the Explanatory Memorandum is misleading when it says that the Bill 'outlines the criteria' for obtaining partial exemption certificates since no criteria are provided in the Bill. Section 46A sets out a legislative test for applications for a partial exemption certificate. This test outlines criteria including that a prescribed person may apply in relation to an emissions-intensive, trade-exposed activity which is, or is to be, carried on at a site during the year, and either a person who is, or will be, a liable entity from whom the electricity is, or will be, acquired for use at the site in the activity or the prescribed person if they are or will be a liable entity. This test also includes requirements for the form and timing of the application.

The Committee has sought advice regarding the Authority having broad power to consider matters in amending partial exemption certificates while, at the same time, limiting its power to consider matters in relation to the issue of these certificates. The Committee has indicated that providing the Authority with broad power to consider matters in amending certificates while limiting its power in relation to the issue of certificates 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.

The distinction between the approaches for issuing and amending certificates reflects the fact that issuing a certificate is mandatory whereas an amendment to a certificate, once issued, is discretionary.

If an application is made under section 46A for a partial exemption certificate then in accordance with section 46B the Authority must issue the certificate. The regulations may prescribe any information to be included in the application. Also if the Authority wishes to amend certificates of its own initiative then it may only do so in circumstances prescribed by the regulations. By limiting the Authority's scope for action to what is prescribed by the regulations this strictly controls the administrative power of the Authority and provides a measure of certainty for relevant stakeholders under the Act.

It is only in the case where the person to whom a certificate is issued requests in writing an amendment to that certificate that the Authority may have regard to other matters it considers relevant. This broader power to consider matters provides the Authority with the flexibility to, amongst other things, consider matters raised by the person to whom a certificate was issued that are not prescribed in the Regulations.

#### Drafting note

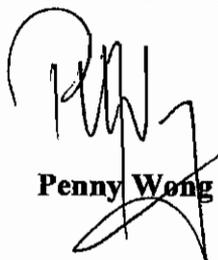
The Committee has noted the amendment Bill refers to 'the Authority' but, in the Act the term 'the Regulator' is used. The Committee further notes the proposed Australian Climate Change Regulatory Authority has functions in relation to these provisions but this is not made clear in the explanatory memorandum or the second reading speech. The Committee has drawn my attention to this possible drafting error.

References to 'the Regulator' in the Act reflect current arrangements for administration of the Act and the Regulations, which are administered by the Renewable Energy Regulator. References to 'the Authority' in the Bill reflect future arrangements for administration of the legislation, where the scheme will be administered by the Australian Climate Change Regulatory Authority.

Schedule 2 of the Bill will only commence at the same time as Section 3 of the Carbon Pollution Reduction Scheme Act 2009 commences. The Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009, which would also commence at the same time as Section 3 of the Carbon Pollution Reduction Scheme Act 2009, would amend the Act by, inter alia, omitting references to the Regulator and substituting the Authority. Therefore the position of Regulator under the Act would be abolished at the time that Schedule 2, item 14 comes into force.

Thank you for bringing your issues to my attention and I trust that the Committee's concerns have been fully addressed.

Yours sincerely



Penny Wong