SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2010

16 June 2010

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator L Pratt
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

SIXTH REPORT OF 2010

The Committee presents its Sixth Report of 2010 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:

Agricultural and Veterinary Chemicals Code Amendment Bill 2010

Broadcasting Legislation Amendment (Digital Television) Bill 2010

Building Energy Efficiency Disclosure Bill 2010

Territories Law Reform Bill 2010

Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010

Agricultural and Veterinary Chemicals Code Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 7 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 0f 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill consists of two measures and will amend the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*. The bill seeks to appropriately improve the efficiency of the registration processes of the Australian Pesticides and Veterinary Medicines Authority (APVMA). The Bill provides for:

- the APVMA being effectively exempted from the general prohibition on using confidential commercial information when registering a permit for minor use or emergency use; and
- trade issues being considered when addressing the adequacy of product labels by extending the definition of 'adequate'.

Insufficient scrutiny of legislative power
Possible trespass on personal rights
Schedule 1, items 3, 4, 5 and 7

The legislation to be amended by this Bill contains a general prohibition on the disclosure of confidential commercial information. This Bill, through the proposed addition to section 3 (Schedule 1, item 3) and supported by the amendment proposed in item 7, provides for an exception in relation to consideration of 'minor use' or 'emergency use' permits. Although one of the policy objectives in the proposed legislation appears to be to protect confidential commercial information for applicants it seems possible that releasing information in relation to 'minor use' or 'emergency use' permits could amount to a trespass on personal rights.

In addition, the meaning given to these terms will be determined by regulation (Schedule 1, items 4 and 5). Therefore, the meaning given to *confidential commercial information* which is not to be disclosed is to be contained in regulations and could be modified by regulation in the future.

The explanatory memorandum notes at page 2 that this amendment is designed to increase the efficiency of the Australian Pesticides and Veterinary Medicines Authority's process for assessing and issuing permits, and also that applications 'for minor use or emergency use permits do not ordinarily contain commercially valuable information'.

The Committee acknowledges that these amendments as currently proposed are unlikely to give rise to any undue trespass on personal rights and liberties, but is concerned that the definitions of key terms such as 'emergency use' and 'minor use', which will work to alter the meaning of *confidential commercial information*, will be established in delegated legislation. Even though the regulations defining the meaning of the terms 'emergency use' and 'minor use' are already in place (in the Agricultural and Veterinary Chemicals Code Regulations 1995), it is possible that they could be modified in the future without sufficient Parliamentary scrutiny. Given the importance of the meaning of these terms for the protection of confidential commercial information the Committee **seeks the Minister's advice** about whether the terms 'minor use' and 'emergency use' can be defined in the primary legislation.

> *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's *Alert digest* (No.5 of 2010) raises concerns about the exception proposed for the disclosure of confidential commercial information with regard to 'emergency use' and 'minor use' permits. The Bill indicated that the terms 'minor use' and 'emergency use' were to be defined in delegated legislation, and the committee is therefore concerned that the meaning given to confidential commercial information could be modified as the regulations are amended. The committee notes that the amendments proposed aren't likely to give rise to any undue trespass on personal rights and liberties, but suggests that changes to the regulations could give rise to such concerns without sufficient parliamentary scrutiny.

I have considered whether the definitions of 'minor use' and 'emergency use' could be defined in the primary legislation. However, as these terms have been defined in the regulations since 1995, I do not consider that there will be a need to modify the current definitions.

Should an applicant be concerned at any stage about how this information will be used, they have the discretion not to apply for either class of permit. In some cases it will be appropriate for them to apply for research permits instead.

The Committee thanks the Minister for this response and notes that an alternative process is available to applicants who are concerned about the possible release of commercial information.

Broadcasting Legislation Amendment (Digital Television) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter dated 3 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 0f 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* and the *Copyright Act 1968* to enable provision of a satellite solution to areas of terrestrial digital television signal deficiency (black spots) and to address a range of related matters.

Determination of important matters by legislative instrument Schedule 1, item 26

This Bill addresses a range of matters associated with the provision of satellite services to areas 'of terrestrial digital television signal deficiency (black spots)'.

Schedule 1, item 26 introduces section 38C into the Act. The new subsections 38C(11) and (12) allow Australian Communication Management Authority (ACMA) to determine a price-based system for allocating licences by a written instrument which is declared to not be a legislative instrument. The Minister may, by legislative instrument, give specific directions as to the exercise of this power. The ACMA may thus be considered to hold a broad delegation of power to determine the system for allocation of licences. The explanatory memorandum does not explain why the allocation system is not set out in more detail in the legislation. The Committee **seeks the Minister's advice** about whether more detail about the

system for the allocation of licences can be included in the primary legislation and the reasons why an instrument made under ACMA's delegation is not a legislative instrument and a direction made by the Minister in relation to the [ACMA] delegation is a legislative instrument.

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

Relevant extract from the response from the Minister

Determination of important matters by legislative instrument
Schedule 1, item 26

Item 26 in the proposed legislation would insert new section 38C into the *Broadcasting Services Act* 1992 (the BSA) to provide a legislative framework for the allocation of commercial television broadcasting licences for services to be delivered by use of a satellite. The legislation would enable, in the first instance, remote commercial television broadcasting licensees to form a joint venture company, or to form a new company of their own, to apply for a licence under section 38C.

Subsection 38C(11) provides that the Australian Communications and Media Authority (ACMA) may determine a price-based allocation system where there are two or more applications for a section 38C licence. Under subsection 38C(13) I would have the discretion to specifically direct the ACMA in relation to the power conferred on the ACMA in subsection 38C(11). As noted by the Committee, subsection 38C(12) provides that an instrument made by the ACMA under subsection 38C(11) is not a legislative instrument.

In relation to the Committee's request for advice on the inclusion of more detail on the price-based allocation system in primary legislation, the price-based allocation provisions proposed in section 38C are consistent with other allocation systems for commercial television broadcasting licenses under sections 36 and 38B of the BSA, where it has not previously been considered necessary to provide more detailed guidance in the primary legislation.

In relation to an instrument made under proposed subsection 38C(11) not being a legislative instrument, I am advised that an instrument outlining a price-based system would appropriately be characterised as administrative, not legislative. The substantive legislative requirement is that if there are two or more applicants a price-based system will

determine who is allocated the 38C licence. An instrument detailing the administrative procedures to be followed for allocating the licence does not determine or alter the substantive law.

Through proposed subsection 38C(13) the Minister would have the power to give specific direction to the ACMA about the price-based system. This would involve the Minister determining the content of law as it relates to the ACMA's development of one or more price-based allocation systems. As such the direction is appropriately characterised as legislative in character. It is appropriate to delegate legislative power to the Minister since a variety of factors would influence the development of a price-based allocation system suitable for allocating the 38C licence, including the state of the market at a particular time. The legislative framework should be flexible enough to enable the most appropriate allocation process to be used. The price-based system is a matter for the ACMA's administrative decision. To the extent that legally binding rules are required, the Minister may determine them. The flexibility required by a market-driven price-based allocation system would be mitigated if the legal framework attempted to settle a price-based system through the inclusion of specific measures or criteria in the primary legislation.

The Committee thanks the Minister for this comprehensive response.

Delegation of legislative power
Incorporation by reference
Schedule 1, items 62 and 63

Schedule 1, item 62 inserts a new s 130AC into the legislation. Section 130AC(2) enables the ACMA to determine, by legislative instrument, technical standards under section 130AC(1) by reference to other instruments even if that instrument is not yet made. It is not necessary that the other instrument have any legal force or effect. The explanatory memorandum does not explain the reasons for this delegation of legislative power or the justification for incorporating material by reference.

Schedule 1, item 63 inserts a new section 130BB into the legislation. This provision allows the ACMA, by legislative instrument, to determine technical standards in relation to domestic reception equipment (paragraph (1)). Proposed subsection 130BB(2) makes it an offence for a person to supply equipment which does not comply with such standards and subsection130BB(3) makes non-compliance a civil penalty (though no penalty is specified).

The Committee notes that the content of the offence and civil penalty will be provided for in a legislative instrument. The legislative instrument may also adopt standards set out in other instruments or writing in force from time to time.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The explanatory memorandum does not comment on the justification for this delegation of the content of an offence. The Committee therefore **seeks the Minister's advice** as to the justification for the proposed approach, including that the content of the offence and civil penalty will be provided in a legislative instrument and the ability to adopt standards set out in other instruments or writing in force from time to time.

> *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

Delegation of legislative power
Incorporation by reference
Schedule 1, items 62 and 63

Incorporation by reference in sections 130AC and 130BB

The Committee has questioned proposed sections 130AC and 130BB in the Bill in relation to the ACMA's determination, by legislative instrument, of technical standards either for digital transmission of television services provided with the use of a satellite (section 130AC) or for domestic digital reception equipment for satellite television services (section 130BB).

The Committee has expressed concerns with subsections 130AC(2) and 130BB(5), which provide for the application of section 589 of the *Telecommunications Act 1997* to the

technical standards made under sections 130AC and 130BB. These provisions, which enable the technical standards to incorporate documents by reference (pursuant to section 589 of the Telecommunications Act) may be considered to insufficiently subject the exercise of legislative power under subsections 130AC(1) and 130BB(1) to parliamentary scrutiny. The Committee is concerned that this may be a possible breach of principle 1(a)(v) of the Committee's terms of reference.

Proposed subsections 130AC(2) and 130BB(5) are modelled on Part 9A of the BSA. That Part, enacted in 2006, allows the ACMA to determine technical standards for digital terrestrial transmission and reception, and also allows the ACMA to incorporate by reference other documents into those standards.

The purpose of subsections 130AC(2) and 130BB(5) is to provide the ACMA with the scope to incorporate by reference into the technical standard relevant provisions or matters from other instruments as in force from time to time. For example, a technical standard might incorporate an existing standard developed through Standards Australia. The proposed subsections would also enable the technical standard to automatically incorporate future changes to, or replacement of, the Standards Australia standard. The inclusion of subsections 130AC(2) and 130BB(5) thus provides clarity about the content and effect of the legislative instrument made by the ACMA, having regard to section 14 of the *Legislative Instruments Act 2003* (the LlA).

The benefit of incorporation by reference is that the incorporated document (which could be lengthy) is taken to be part of the legislative instrument without having to replicate its terms in the text of the legislative instrument. The appropriateness of incorporating particular provisions or matters by reference is something that the ACMA would be expected to consult about when preparing the technical standard, in accordance with Part 3 of the LlA.

The ACMA determination of a technical standard under proposed section 130AC or 130BB is a disallowable instrument and subject to Parliamentary scrutiny. When considering a legislative instrument that is tabled for disallowance, the Parliament may require any document that is incorporated by reference to be made available for scrutiny by it in accordance with section 41 of the LlA.

To allay the concerns of the Committee, the purpose of proposed subsections 130AC(2) and 130BB(5) will be clarified in a revised Explanatory Memorandum.

Offence and civil penalty provisions in proposed section 130BB

The Committee has also expressed concern that the ACMA may provide the content of the offence and civil penalty provisions in section 130BB through a legislative instrument. I note the Committee's concern that such a use of a legislative instrument may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny and that this may be a possible breach of principle 1(a)(v) of the Committee's terms of reference.

The ACMA may, by legislative instrument, determine the technical standards that relate to domestic reception equipment capable of receiving either or both commercial and national digital television services provided by satellite (proposed subsection 130BB(1)). However, section 130BB does not give the ACMA power to stipulate the content of an offence or civil penalty through a legislative instrument or by any other means. The specific elements of the offence are set out in proposed subsection 130BB(2). The ACMA is not empowered to add or modify those elements. The offence is subject to a maximum penalty of 1 500 penalty units. The same maximum penalty would apply to the civil penalty provision under subsection 205F(4) of the BSA. Under Part 14B of the BSA, the ACMA may apply to the Federal Court for a civil penalty order. If the Federal Court is satisfied that a person has contravened a civil penalty provision, the Federal Court may order the person to pay the Commonwealth a pecuniary penalty.

The extent of the ACMA's power to make a legislative instrument is solely in relation to technical standards for digital television reception equipment to access satellite delivered services. The extent of the ACMA's powers in this regard will be clarified in a revised Explanatory Memorandum.

The Committee thanks the Minister for this comprehensive response and thanks the Minister for his commitment to introduce a revised explanatory memorandum that includes information clarifying these matters.

Delegation of legislative power
Schedule 1, item 130ZFA

Under proposed new section 130ZFA the ACMA can, by legislative instrument, determine what 'adequate reception' is to mean for the purposes of a complaints scheme about 'adequate reception'. The explanatory memorandum does not explain the necessity for this delegation of legislative power and the Committee **seeks the Minister's advice** about the justification for this approach.

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

Delegation of legislative power
Schedule 1, item 64

The Committee has queried the justification for the ACMA's power to determine, by legislative instrument, 'adequate reception' under proposed section 130ZFA for the purposes of conditional access to commercial television broadcasting services provided with the use of a satellite in proposed Part 9C of the Bill.

I note the Committee's concerns that the ACMA's determination of 'adequate reception' by legislative instrument may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny and that this may be a possible breach of principle l(a)(v) of the Committee's terms of reference.

Under Schedule 4 to the BSA, the ACMA has responsibility for formulating and regulating schemes for the conversion of commercial and national television services from analog to digital. The schemes include the objective of achieving the same level of coverage and potential reception quality of television services in digital mode as is achieved in analog mode. The schemes include the development, by the ACMA, of digital channel plans which provide the technical specifications for achievement of coverage and reception quality objectives.

As part of its responsibility, the ACMA undertakes digital signal measurements both through computer modelling and by field measurements at various locations around Australia and statistical and engineering analyses to determine the strength and coverage of terrestrial digital television signals broadcast from commercial broadcaster transmitter sites.

A determination for 'adequate reception' under proposed section 130ZFA will relate to minimum technical specifications that the ACMA considers necessary for the adequate reception of all commercial digital television services in the relevant terrestrial licence area. The ACMA's similar existing regulatory responsibilities and technical capacity make it the appropriate body to determine adequate reception for the purposes of a conditional access scheme under new Part 9C of the BSA.

The ACMA's determination of 'adequate reception' would be a disallowable legislative instrument, and thus subject to Parliamentary scrutiny. The revised Explanatory Memorandum will provide further clarity on this point.

The Committee thanks the Minister for this response and also thanks the Minister for his commitment to introduce a revised explanatory memorandum that includes information clarifying ACMA's determination of 'adequate reception'.

Building Energy Efficiency Disclosure Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister for Climate Change, Water and Energy Efficiency responded to the Committee's comments in a letter dated 10 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 0f 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Climate Change, Energy Efficiency and Water

Background

This bill provides for the establishment of a new national scheme for the disclosure of commercial office building energy efficiency.

Phasing in a national scheme for the disclosure of commercial building energy efficiency was agreed to by the Council of Australian Governments on 2 July 2009 under the National Strategy on Energy Efficiency. The parameters of an initial scheme for office buildings were subsequently agreed to by the Ministerial Council on Energy on 2 November 2009, including that the scheme be enacted through Commonwealth legislation.

The scheme will require the disclosure of information about the energy efficiency of large commercial office buildings at the point of sale, lease and sublease. The information to be disclosed will be in the form of a building energy efficiency certificate (BEEC). A BEEC will have three components: an energy efficiency star rating for the office building; information about the energy efficiency of the office lighting; and generic guidance on how the energy efficiency of the office may be improved.

BEECs will be accessible to potential purchasers and lessees via an online registry. The applicable energy efficiency star rating must be disclosed in any advertisement for the sale, lease or sublease of an office.

Broad delegation of power
Part 2, proposed subsection 13(7)

Proposed subsection 13(7) introduces a broad discretionary power enabling the Secretary to recognise a person or body as an issuing authority for the purposes of issuing a building energy efficiency certificate. No criteria for recognition are specified. However, at page 79 the explanatory memorandum states that in practice the Secretary would recognise the NSW Government department responsible for the administration of the National Australian Built Environment Rating System for Energy as an issuing authority. The explanatory memorandum (also at page 79) states that the recognition of any further issuing authorities would be based on consultation and 'rigorous analysis'.

Given the important role an issuing authority will have under the proposed legislation, the Committee **seeks the Minister's advice** about the criteria on which an analysis of a possible issuing authority would be conducted and whether the criteria can be included in the primary legislation.

> *Pending the Minister's response, the Committee draws Senators' attention to the provisions, as they 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

Broad delegation of powers - Part 2, proposed subsection 13(7)

The Committee has expressed concern about the use of broad discretionary powers to enable the Secretary to recognise a person or body as an issuing authority for the purposes of issuing a Building Energy Efficiency Certificate.

This discretion enables the Commonwealth to take into account a range of relevant factors, including technical and administrative criteria, in accordance with the following principles:

- any person or body recognised as an issuing authority must have the competencies necessary to apply the assessment methods and standards determined under the Bill to decide whether energy efficiency ratings and assessments of the energy efficiency of lighting are appropriate for particular buildings and areas of buildings; and

- the person or body must have systems in place to ensure that certificates issued to meet the requirements of building energy efficiency certificates are issued in good faith.

As noted on page 79 of the Explanatory Memorandum, it is presently proposed that the Secretary will recognise the NSW Government department responsible for the administration of the National Australian Built Environment Rating System (NABERS) as an issuing authority. The Commonwealth is satisfied that the relevant NSW Government department meets the relevant technical and administrative criteria. A decision to recognise any additional issuing authority or authorities would be made after a process of rigorous analysis against the principles identified above, and include government and industry consultation.

The Government has addressed the Committee's concerns relating to the breadth of the discretion under section 13(7) by preparing amendments which will insert into the Bill the principles set out above. Specifically, the proposed amendments will insert a new subsection after the existing subsection 13(7), as follows:

(7A) The Secretary must not recognise a person or body as an issuing authority unless the Secretary is satisfied that:

(a) the person or body has the competencies necessary to apply the assessment methods and standards determined under section 21 to decide whether energy efficiency ratings or assessments of the energy efficiency of lighting are appropriate; and
(b) the person or body has systems in place to ensure that building energy efficiency certificates are issued in good faith.

The Committee thanks the Minister for this comprehensive response and particularly thanks for the Minister for her commitment to introduce amendments which will include principles in the bill relating to the exercise of the discretion in proposed subsection 13(7) .

Strict liability
Part 4, Division 1, items 35 and 50

Section 35 imposes an offence for a person who fails to surrender their identity card after ceasing to be an auditor. The offence is an offence of strict liability. The explanatory memorandum notes that such offences are regulated by section 6.1 of the Criminal Code and that the defence of mistake of fact remains available. Although there is no real attempt in the explanatory memorandum to justify the application of strict liability, the penalty is only 1 penalty unit. A similar problem appears in relation to section 50 which also imposes a strict liability offence and imposes a more severe penalty (50 units). The Committee may wish to seek a fuller justification as to the need for strict liability in relation to these offences.

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case there is no explanation of the application of strict liability to these offences in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** about the justification for this approach.

> *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

Strict liability - Part 4. Division 1, sections 35 and 50

The Committee has expressed concern about the imposition of strict liability offences under sections 35 and 50. The offences created by the statutory obligations in these sections both relate to omissions. Subsection 35(3) provides that it is an offence for a person to fail to return an identity card if the person ceases to be an auditor. Subsection

50(1) provides that it is an offence for a person to fail to comply with a notice given under section 49 (which relates to the provision of information and documents to the Secretary).

During the drafting of these provisions the relevant principles contained in section 4.2 of the Guide to Framing Commonwealth Offences were considered. Relevantly:

- neither of these offences is punishable by imprisonment, and both are punishable by penalties ofless than 60 penalty units for an individual;

- an offence under either of these sections would be difficult to establish if the prosecution was required to prove intention, as it can be very difficult to prove intention with respect to an omission to do a thing. The proposed sections 35 and 50 are consistent with provisions in a number of other Acts under which an obligation to comply with a notice or direction is imposed with an offence of strict liability. Examples of this approach in other legislation include section l54C of the *Trade Practices Act* 1974 (in relation to identity cards) and section 154 of the *Renewable Energy (Electricity) Act 2000* (in relation to failure to provide documents);

- in relation to the section 35 offence in particular, auditors are given considerable powers under the Bill, including powers to enter premises and seek warrants. It is important to place a clear and unambiguous obligation on persons who cease to be auditors to return the identity card, to ensure that there is no opportunity for misuse of auditor powers. Externally engaged auditors would be placed on notice in relation to the obligation to return the identity card, as part of the contractual arrangements between the auditor and the Commonwealth. Auditors who are Australian Public Service or other Government employees would be given notice of the requirement by their employer; and

- in relation to the section 50 offence, the strict liability nature of the offence would enhance the effectiveness of the enforcement of the obligation by deterring non-compliance. Widespread non-compliance with section 49 notices would severely inhibit the effective enforcement of the legislative scheme, as compliance with section 49 notices enables the Secretary to obtain information and documents that relate to compliance with the civil penalty provisions of the Bill. A person will be served a notice under section 49 only after preliminary informal requests for the relevant information or documents have been rejected. As part of the preliminary requests the person would be made aware of the Secretary's need for the information. The person would then be advised of the strict liability nature of the offence in the section 49 notice.

If possible, the Explanatory Memorandum will be amended to provide further clarification on this issue of strict liability.

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

Territories Law Reform Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister for Home Affairs responded to the Committee's comments in a letter received 15 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 0f 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Home Affairs

Background

This bill amends a range of Commonwealth legislation to improve Norfolk Island's governance arrangements and strengthen the accountability of the Norfolk Island Government. The bill provides for the reform of the electoral system of Norfolk Island and establishes a new financial management framework. The bill also amends administrative law legislation to strengthen the transparency and accountability of the Norfolk Island Government and public sector.

The bill also implements changes to the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1995* to provide a vesting mechanism for powers and functions under Western Australian laws applied in the Territories.

Insufficiently defined administrative power
Schedule 1, item 39

Item 39 of Schedule 1 of this Bill confers a broad discretionary power on the Administrator of Norfolk Island to dismiss a member of the Legislative Assembly from office if the member has engaged, or is engaging, in (a) seriously unlawful conduct or (b) grossly improper conduct. The explanatory memorandum does not explain the need for this power, nor why it is not possible to specify with more precision the nature of the unlawful or improper conduct which may lead to its exercise. The Committee **seeks the Minister's advice** about whether more legislative guidance about the intended scope and operation of the provision can be provided.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon 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 Territories Law Reform Bill 2010 amends the *Norfolk Island Act 1979* to provide the Administrator with the power to dismiss members of the Legislative Assembly if they have, or are, engaging in seriously unlawful conduct or grossly improper conduct. The amendment will work in partnership with the existing section 39 of the Act, which states that a member of the Legislative Assembly vacates their office if they become an undischarged bankrupt or are convicted of an offence and sentenced to imprisonment for one year or longer.

The purpose of the amendment is to capture behaviour that is not covered by the existing section 39, but is serious enough to require being dismissed from the Legislative Assembly. The Administrator's powers will be exercised at his or her discretion and will be subject to judicial review. As such, the courts will have the power to consider individual cases and ensure procedural fairness in the application of the provision.

The term' grossly improper' is used in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) in relation to the authority of the Governor-General to dissolve the Assembly. The use of the same term in a similar context within the Norfolk Island Act is intended to set a consistent standard in interpretation and implementation.

The Joint Standing Committee on the National Capital and External Territories (JSCNCET) report, 'Quis Custodiet ipsos Custodes? Inquiry into Governance on Norfolk Island', examined issues relating to the Administrator's dismissal powers, particularly in the context of unlawful and corrupt conduct. The Committee made several recommendations to increase these powers. The Committee was of the view that the Administrator should have expanded powers where Members of the Legislative Assembly have acted unlawfully or corruptly. The Australian Government has accepted this view, and carefully considered the conclusions drawn by the Committee in making these recommendations. The Australian Government considers that item 39 of the Bill appropriately addresses the concerns outlined in the Committee's report.

The Committee thanks the Minister for this response.

Determination of important matters by regulation
Schedule 1, Part 2, items 82 and 83

Item 83 of the Schedule 1 amendments provides for the making of regulations in relation to the determination of the method and manner in which votes are to be cast and counted in elections for the Norfolk Island Legislative assembly and related matters. The explanatory memorandum states that these amendments allow 'flexibility in determining an electoral system' and that they allow scope for matters related to this issue to be considered at a later time. The need for 'flexibility' is not explained in the explanatory memorandum.

Given the importance of the electoral laws to the integrity of any system of government, the Committee is concerned that these are matters more appropriately dealt with in primary legislation. The Committee therefore **seeks the Minister's advice** about the justification for the proposed approach.

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

Relevant extract from the response from the Minister

The Territories Law Reform Bill provides tor the voting system for Norfolk Island Legislative Assembly elections to be prescribed by regulations. Changes to Norfolk Island's electoral system have been recommended in a number of previous reports on Norfolk Island, including by the JSCNCET. While Norfolk Island has a degree of self-government, it is also part of Australia and the Australian Parliament retains ultimate responsibility for territory electoral matters. The proposed amendments recognise this Commonwealth responsibility.

The Australian Government acknowledges the Committee's view that these matters would be more appropriately dealt with in the primary legislation. However, the Government's view is that the use of regulations is a more efficient and effective approach. The use of regulations enables a detailed and flexible electoral system to be established that responds to the unique circumstances of Norfolk Island.

The Australian Government agrees that the regulations should not be introduced until 2011 to ensure proper consultation with the Norfolk Island Government and community and consideration of appropriate voting systems for Norfolk Island.

Under the commencement provisions of the Territories Law Reform Bill, Part 2 – Amendments relating to elections, any electoral regulations will only take effect from the first meeting of the Legislative Assembly following the first general election after the Bill receives Royal Assent. The first general election after the Bill receives Royal Assent is anticipated to be some time in 2013. Accordingly, the first election to be conducted under any new electoral voting system is not expected to occur until 2016.

I have also agreed to provide the draft electoral regulations to the JSCNCET for review and comment before they are registered.

The Committee thanks the Minister for this response. The Committee retains its concern that these matters may be more appropriately dealt with in primary legislation, but notes the Minister's commitment to proper consultation and to provide the draft electoral regulations to the JSCNCET for review and comment.

Determination of important matters by regulation
Schedule 1, Part 4, item 130

This item will insert subsection 25(2) into the *Norfolk Island Act 1979*. It states that regulations may provide that applications may be made to the Administrative Appeals Tribunal for review of decisions made in the exercise of powers conferred by a Norfolk Island enactment. The explanatory memorandum (at page 39) describes the effect of the proposed provision, but does not explain why the ability to access administrative review is discretionary. The Committee **seeks the Minister's advice** about the justification for the approach and whether AAT jurisdiction can be conferred in the primary legislation.

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

Relevant extract from the response from the Minister

Part 4 of the Territories Law Reform Bill proposes amendments to the *Administrative Appeals Tribunal* (AAT) *Act 1975* which will confer on the AAT merits review

jurisdiction for specified decisions under Norfolk Island legislation. In general terms, the reforms will mean that where provided under regulations, administrative decisions which are made under Norfolk Island laws can be reviewed by the AAT on request by an affected party.

The approach taken in the Bill is to ensure a level of consistency with the application of the AAT review process at a Commonwealth level, while taking into account the unique circumstances of Norfolk Island's status as a self-governing territory. In the Commonwealth jurisdiction, the application of the AAT Act must be expressly specified within the Commonwealth Act under the authority of which the administrative decision is made. Generally, during the development phase of Commonwealth legislation the Administrative Law Branch of the Attorney-General's Department will undertake scrutiny of any Commonwealth legislation which authorises an administrative decision and provide advice on whether the decision should be subject to independent merits review by the AAT. The Administrative Law Branch assesses all legislation with reference to Australian Government policy on when merits review should be available.

It would be complex and ineffective to take exactly the same approach to the application of the Act to Norfolk Island. Such an approach would make the application of the AAT Act dependent upon Norfolk Island legislation which is not necessarily subject to the same Commonwealth scrutiny process. This could lead to the AAT being given jurisdiction where merits review is not appropriate (for example 'automatic' decisions) or some discretionary decisions not being subject to AAT review where external merits review should be available according to Australian Government policy. The preferred approach under this Bill is that the application of the Commonwealth AAT Act be controlled and maintained under Commonwealth legislation, enabling appropriate levels of scrutiny and consultation in determining the scope of the AAT's jurisdiction.

Currently, administrative decisions taken under Norfolk Island legislation are subject to a broad range of different and inconsistent administrative review mechanisms which are specified within each particular piece of legislation. Existing administrative review mechanisms under Norfolk Island legislation range from review by the Norfolk Island Administrative Review Tribunal, the Administrator or Executive Members. In some instances no review mechanism is provided at all.

The use of regulations to specify the decisions to which the AAT will have jurisdiction will enable the application of the AAT Act to be rolled out over a period of time in consultation with the AAT and Norfolk Island. The use of regulations also provides greater flexibility to amend the regulations in response to the amendments of a decision-making provision in a specified Norfolk Island Act, or the enactment of new Norfolk Island Acts to which it is appropriate to extend AAT jurisdiction. The use of regulations will also ensure that there is an appropriate level of Parliamentary scrutiny and oversight through the use of a disallowable legislative instrument.

The Attorney-General's Department has commenced officer level consultation with relevant Commonwealth agencies and the Norfolk Island Administration on the

development of the regulations related to the application of the AAT to Norfolk Island. It is anticipated that the first phase of the regulations will be in place by the end of2010.

The Committee thanks the Minister for this comprehensive response and notes the justification for the approach. The Committee notes that it would have been useful if some of this information was included in the explanatory memorandum.

Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Parliamentary Secretary for Health responded to the Committee's comments in a letter dated 3 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 0f 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Health and Ageing

Background

This bill makes a series of amendments to the *Therapeutic Goods Act 1989* (the Act). These include:

- a system for approving the supply of medical devices that are not on the Australian Register of Therapeutic Goods (the Register) to act as substitutes for devices that are on the Register but are unavailable or in short supply;
- a provision to allow listing on the Register of export-only variations of registered or listed medicines;
- amendments to provisions relating to permissible ingredients for inclusion in medicines;
- amendments relating to the information that may be considered by the Minister when reviewing initial decisions under the Act; and
- other minor amendments.

Incorporating material by reference
Schedule 2, item 3, proposed subsection 26BB(7)

The explanatory memorandum states at page 6 that subsection 26BB(1) empowers the Minister by legislative instrument, to make a determination specifying ingredients (paragraph (a)) and restrictions in relation to those ingredients being contained in medicines (paragraph (b)). Subsection (6) also empowers the Minister to make a determination specifying ingredients that must not be specified under paragraph (1)(a).

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, no explanation for the need for these determinations to incorporate material by reference to other instruments or documents is outlined in the explanatory memorandum. Therefore, the Committee **seeks the Minister's advice** about the justification for this approach.

> *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

Delegation of legislative power
Schedule 2, Part 1, item 3. subsection 26BB(7)

The Committee has made comment regarding the determination of permitted ingredients for the purposes of listing medicines under section 26A of the Therapeutic Goods Act 1989.

Subsection 26BB(7) replaces existing subsection 26BB(3) in the Act which established that the determination for permitted ingredients may apply, adopt or incorporate any matter contained in an instrument or other writing as in force from time-to-time.

It is important to note that the decision providing for the determination of permitted ingredients is not legislative in nature, it is technical within the scope of the legislation, and does not make or alter the law. As a result, the application, adoption or incorporation in a permitted ingredients determination of any matter contained in an instrument, or other writing as in force from time-to-time, does not constitute the making of a legislative decision.

Permitted ingredients determined. to be suitable for inclusion in Listed medicines are regarded to be low-risk in nature, or low-risk subject to specified constraints, for example, a content threshold. In some circumstances constraints are set out in detail in pharmacopoeias or other documents. For example, a mineral compound may be subject to compositional specifications prescribed in a pharmacopoeial monograph. The allowance for the Minister's determination to refer to other documents or instruments is, therefore, appropriate where the determination seeks to apply such specifications or restrictions for a given ingredient and removes the need for unnecessary duplication directly in the determination.

Medicine sponsors and manufacturers are familiar with reference documents such as pharmacopoeias as these are a core mechanism by which requirements for medicines are set, such as under section 10 of the Act, and against which medicines are manufactured. Such references also ensure that Australia's regulatory framework remains in-step with the requirements of corresponding regulatory agencies internationally reducing the potential for variation of requirements for sponsors and manufacturers where they produce products for multiple markets, Therefore, the provision at subsection 26BB(7) is not expected to cause concern or confusion for medicine sponsors or manufacturers but will clarify existing practice.

The Committee thanks the Parliamentary Secretary for this response and notes that it would have been useful if some of this information was included in the explanatory memorandum.

Senator the Hon Helen Coonan
Chair

The Hon. Tony Burke MP

Minister for Agriculture, Fisheries and Forestry

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

07 JUN 2010

Dear Senator Coonan Helen

I am responding to a request for a response in relation to issues identified by the Senate Standing Committee for the Scrutiny of Bills on the Agricultural and Veterinary Chemicals Code Amendment Bill 2010.

The committee's *Alert digest* (No. 5 of 2010) raises concerns about the exception proposed for the disclosure of confidential commercial information with regard to 'emergency use' and 'minor use' permits. The Bill indicated that the terms 'minor use' and 'emergency use' were to be defined in delegated legislation, and the committee is therefore concerned that the meaning given to confidential commercial information could be modified as the regulations are amended. The committee notes that the amendments proposed aren't likely to give rise to any undue trespass on personal rights and liberties, but suggests that changes to the regulations could give rise to such concerns without sufficient parliamentary scrutiny.

I have considered whether the definitions of 'minor use' and 'emergency use' could be defined in the primary legislation. However, as these terms have been defined in the regulations since 1995, I do not consider that there will be a need to modify the current definitions.

Should an applicant be concerned at any stage about how this information will be used, they have the discretion not to apply for either class of permit. In some cases it will be appropriate for them to apply for research permits instead.

Thank you for your committee's consideration of this Bill.

Yours sincerely

Tony Burke

Tony Burke

Parliament House, Canberra ACT 2600 Telephone: (02) 6277 7520 Facsimile: (02) 6273 4120 Email: Tony.Burke.MP@aph.gov.au

SENATOR THE HON STEPHEN CONROY
MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

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

03 JUN 2010

Dear Senator Helen Coonan

Broadcasting Legislation Amendment (Digital Television) Bill 2010: Alerts Digest No 5 of 2010 (12 May 2010)

I write in response to the request of the Standing Committee for the Scrutiny of Bills (the Committee) for my advice on issues of concern identified in the *Alerts Digest No 5 of 2010* (12 May 2010) in relation to the Broadcasting Legislation Amendment (Digital Television) Bill 2010 (the Bill).

I have addressed each of the items in the *Alerts Digest no 5 of 2010* on which my advice has been sought separately below.

Determination of important matters by legislative instrument
Schedule 1, item 26

Item 26 in the proposed legislation would insert new section 38C into the *Broadcasting Services Act 1992* (the BSA) to provide a legislative framework for the allocation of commercial television broadcasting licences for services to be delivered by use of a satellite. The legislation would enable, in the first instance, remote commercial television broadcasting licensees to form a joint venture company, or to form a new company of their own, to apply for a licence under section 38C.

Subsection 38C(11) provides that the Australian Communications and Media Authority (ACMA) may determine a price-based allocation system where there are two or more applications for a section 38C licence. Under subsection 38C(13) I would have the discretion to specifically direct the ACMA in relation to the power conferred on the ACMA in subsection 38C(11). As noted by the Committee, subsection 38C(12) provides that an instrument made by the ACMA under subsection 38C(11) is not a legislative instrument.

In relation to the Committee's request for advice on the inclusion of more detail on the price-based allocation system in primary legislation, the price-based allocation provisions proposed in section 38C are consistent with other allocation systems for commercial television broadcasting licenses under sections 36 and 38B of the BSA, where it has not previously been considered necessary to provide more detailed guidance in the primary legislation.

In relation to an instrument made under proposed subsection 38C(11) not being a legislative instrument, I am advised that an instrument outlining a price-based system would appropriately be characterised as administrative, not legislative. The

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substantive legislative requirement is that if there are two or more applicants a price-based system will determine who is allocated the 38C licence. An instrument detailing the administrative procedures to be followed for allocating the licence does not determine or alter the substantive law.

Through proposed subsection 38C(13) the Minister would have the power to give specific direction to the ACMA about the price-based system. This would involve the Minister determining the content of law as it relates to the ACMA's development of one or more price-based allocation systems. As such the direction is appropriately characterised as legislative in character. It is appropriate to delegate legislative power to the Minister since a variety of factors would influence the development of a price-based allocation system suitable for allocating the 38C licence, including the state of the market at a particular time. The legislative framework should be flexible enough to enable the most appropriate allocation process to be used. The price-based system is a matter for the ACMA's administrative decision. To the extent that legally binding rules are required, the Minister may determine them. The flexibility required by a market-driven price-based allocation system would be mitigated if the legal framework attempted to settle a price-based system through the inclusion of specific measures or criteria in the primary legislation.

Delegation of legislative power
Incorporation by reference
Schedule 1, items 62 and 63

Incorporation by reference in sections 130AC and 130BB

The Committee has questioned proposed sections 130AC and 130BB in the Bill in relation to the ACMA's determination, by legislative instrument, of technical standards either for digital transmission of television services provided with the use of a satellite (section 130AC) or for domestic digital reception equipment for satellite television services (section 130BB).

The Committee has expressed concerns with subsections 130AC(2) and 130BB(5), which provide for the application of section 589 of the *Telecommunications Act 1997* to the technical standards made under sections 130AC and 130BB. These provisions, which enable the technical standards to incorporate documents by reference (pursuant to section 589 of the Telecommunications Act) may be considered to insufficiently subject the exercise of legislative power under subsections 130AC(1) and 130BB(1) to parliamentary scrutiny. The Committee is concerned that this may be a possible breach of principle 1(a)(v) of the Committee's terms of reference.

Proposed subsections 130AC(2) and 130BB(5) are modelled on Part 9A of the BSA. That Part, enacted in 2006, allows the ACMA to determine technical standards for digital terrestrial transmission and reception, and also allows the ACMA to incorporate by reference other documents into those standards.

The purpose of subsections 130AC(2) and 130BB(5) is to provide the ACMA with the scope to incorporate by reference into the technical standard relevant provisions or matters from other instruments as in force from time to time. For example, a technical standard might incorporate an existing standard developed through Standards Australia. The proposed subsections would also enable the technical standard to

automatically incorporate future changes to, or replacement of, the Standards Australia standard. The inclusion of subsections 130AC(2) and 130BB(5) thus provides clarity about the content and effect of the legislative instrument made by the ACMA, having regard to section 14 of the *Legislative Instruments Act 2003* (the LIA).

The benefit of incorporation by reference is that the incorporated document (which could be lengthy) is taken to be part of the legislative instrument without having to replicate its terms in the text of the legislative instrument. The appropriateness of incorporating particular provisions or matters by reference is something that the ACMA would be expected to consult about when preparing the technical standard, in accordance with Part 3 of the LIA.

The ACMA determination of a technical standard under proposed section 130AC or 130BB is a disallowable instrument and subject to Parliamentary scrutiny. When considering a legislative instrument that is tabled for disallowance, the Parliament may require any document that is incorporated by reference to be made available for scrutiny by it in accordance with section 41 of the LIA.

To allay the concerns of the Committee, the purpose of proposed subsections 130AC(2) and 130BB(5) will be clarified in a revised Explanatory Memorandum.

Offence and civil penalty provisions in proposed section 130BB

The Committee has also expressed concern that the ACMA may provide the content of the offence and civil penalty provisions in section 130BB through a legislative instrument. I note the Committee's concern that such a use of a legislative instrument may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny and that this may be a possible breach of principle 1(a)(v) of the Committee's terms of reference.

The ACMA may, by legislative instrument, determine the technical standards that relate to domestic reception equipment capable of receiving either or both commercial and national digital television services provided by satellite (proposed subsection 130BB(1)). However, section 130BB does not give the ACMA power to stipulate the content of an offence or civil penalty through a legislative instrument or by any other means. The specific elements of the offence are set out in proposed subsection 130BB(2). The ACMA is not empowered to add or modify those elements. The offence is subject to a maximum penalty of 1 500 penalty units. The same maximum penalty would apply to the civil penalty provision under subsection 205F(4) of the BSA. Under Part 14B of the BSA, the ACMA may apply to the Federal Court for a civil penalty order. If the Federal Court is satisfied that a person has contravened a civil penalty provision, the Federal Court may order the person to pay the Commonwealth a pecuniary penalty.

The extent of the ACMA's power to make a legislative instrument is solely in relation to technical standards for digital television reception equipment to access satellite-delivered services. The extent of the ACMA's powers in this regard will be clarified in a revised Explanatory Memorandum.

Delegation of legislative power
Schedule 1, item 64

The Committee has queried the justification for the ACMA's power to determine, by legislative instrument, 'adequate reception' under proposed section 130ZFA for the purposes of conditional access to commercial television broadcasting services provided with the use of a satellite in proposed Part 9C of the Bill.

I note the Committee's concerns that the ACMA's determination of 'adequate reception' by legislative instrument may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny and that this may be a possible breach of principle 1(a)(v) of the Committee's terms of reference.

Under Schedule 4 to the BSA, the ACMA has responsibility for formulating and regulating schemes for the conversion of commercial and national television services from analog to digital. The schemes include the objective of achieving the same level of coverage and potential reception quality of television services in digital mode as is achieved in analog mode. The schemes include the development, by the ACMA, of digital channel plans which provide the technical specifications for achievement of coverage and reception quality objectives.

As part of its responsibility, the ACMA undertakes digital signal measurements both through computer modelling and by field measurements at various locations around Australia and statistical and engineering analyses to determine the strength and coverage of terrestrial digital television signals broadcast from commercial broadcaster transmitter sites.

A determination for 'adequate reception' under proposed section 130ZFA will relate to minimum technical specifications that the ACMA considers necessary for the adequate reception of all commercial digital television services in the relevant terrestrial licence area. The ACMA's similar existing regulatory responsibilities and technical capacity make it the appropriate body to determine adequate reception for the purposes of a conditional access scheme under new Part 9C of the BSA.

The ACMA's determination of 'adequate reception' would be a disallowable legislative instrument, and thus subject to Parliamentary scrutiny. The revised Explanatory Memorandum will provide further clarity on this point.

Yours sincerely

Stephen Conroy

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy

Minister for Climate Change, Water and Energy Efficiency

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

Dear Senator Helen

I am writing in relation to the issues identified in the *Alert Digest* No 5 of 2010 (12 May 2010) regarding the Building Energy Efficiency Disclosure Bill 2010.

The following is offered in response to the two issues identified.

Broad delegation of powers - Part 2, proposed subsection 13(7)

The Committee has expressed concern about the use of broad discretionary powers to enable the Secretary to recognise a person or body as an issuing authority for the purposes of issuing a Building Energy Efficiency Certificate.

This discretion enables the Commonwealth to take into account a range of relevant factors, including technical and administrative criteria, in accordance with the following principles:

- any person or body recognised as an issuing authority must have the competencies necessary to apply the assessment methods and standards determined under the Bill to decide whether energy efficiency ratings and assessments of the energy efficiency of lighting are appropriate for particular buildings and areas of buildings; and
- the person or body must have systems in place to ensure that certificates issued to meet the requirements of building energy efficiency certificates are issued in good faith.

As noted on page 79 of the Explanatory Memorandum, it is presently proposed that the Secretary will recognise the NSW Government department responsible for the administration of the National Australian Built Environment Rating System (NABERS) as an issuing authority. The Commonwealth is satisfied that the relevant NSW Government department meets the relevant technical and administrative criteria. A decision to recognise any additional issuing authority or authorities would be made after a process of rigorous analysis against the principles identified above, and include government and industry consultation.

The Government has addressed the Committee's concerns relating to the breadth of the discretion under section 13(7) by preparing amendments which will insert into the Bill the principles set out above. Specifically, the proposed amendments will insert a new subsection after the existing subsection 13(7), as follows:

(7A) The Secretary must not recognise a person or body as an issuing authority unless the Secretary is satisfied that:

(a) the person or body has the competencies necessary to apply the assessment methods and standards determined under section 21 to decide whether energy efficiency ratings or assessments of the energy efficiency of lighting are appropriate; and

(b) the person or body has systems in place to ensure that building energy efficiency certificates are issued in good faith.

Strict liability - Part 4, Division 1, sections 35 and 50

The Committee has expressed concern about the imposition of strict liability offences under sections 35 and 50. The offences created by the statutory obligations in these sections both relate to omissions. Subsection 35(3) provides that it is an offence for a person to fail to return an identity card if the person ceases to be an auditor. Subsection 50(1) provides that it is an offence for a person to fail to comply with a notice given under section 49 (which relates to the provision of information and documents to the Secretary).

During the drafting of these provisions the relevant principles contained in section 4.2 of the Guide to Framing Commonwealth Offences were considered. Relevantly:

- neither of these offences is punishable by imprisonment, and both are punishable by penalties of less than 60 penalty units for an individual;
- an offence under either of these sections would be difficult to establish if the prosecution was required to prove intention, as it can be very difficult to prove intention with respect to an omission to do a thing. The proposed sections 35 and 50 are consistent with provisions in a number of other Acts under which an obligation to comply with a notice or direction is imposed with an offence of strict liability. Examples of this approach in other legislation include section 154C of the *Trade Practices Act 1974* (in relation to identity cards) and section 154 of the *Renewable Energy (Electricity) Act 2000* (in relation to failure to provide documents);
- in relation to the section 35 offence in particular, auditors are given considerable powers under the Bill, including powers to enter premises and seek warrants. It is important to place a clear and unambiguous obligation on persons who cease to be auditors to return the identity card, to ensure that there is no opportunity for misuse of auditor powers. Externally engaged auditors would be placed on notice in relation to the obligation to return the identity card, as part of the contractual arrangements between the auditor and the Commonwealth. Auditors who are Australian Public Service or other Government employees would be given notice of the requirement by their employer; and
- in relation to the section 50 offence, the strict liability nature of the offence would enhance the effectiveness of the enforcement of the obligation by deterring non-compliance. Widespread non-compliance with section 49 notices would severely inhibit the effective enforcement of the legislative scheme, as compliance with section 49 notices enables the Secretary to obtain information and documents that relate to compliance with the civil penalty provisions of the Bill. A person will be served a notice under section 49 only after preliminary informal requests for the relevant information or documents have been rejected. As part of the preliminary requests the person would be made aware of the Secretary's need for the information. The person would then be advised of the strict liability nature of the offence in the section 49 notice.

If possible, the Explanatory Memorandum will be amended to provide further clarification on this issue of strict liability.

Thank you for bringing these matters to my attention.

Yours sincerely

Penny Wong

10 JUN 2010

THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs

10/4884, MC10/7580

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

Dear Senator Helen,

I refer to your letter dated 13 May 2010 on behalf of the Senate Standing Committee for the Scrutiny of Bills, requesting my response in relation to issues related to the Territories Law Reform Bill 2010 identified in the *Alert Digest No. 5 of 2010*.

My response to the matters raised by the Committee is attached for your consideration. I thank you for providing me with an opportunity to address these issues with you directly and trust this additional information will assist the Committee in its further consideration of the Bill.

If you wish to discuss this matter further, please phone Tallis Richmond in my office on (02) 6277 7290.

Yours sincerely

Brendan O'Connor

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Response to the Senate Standing Committee for the Scrutiny of Bills

Alert Digest No. 5 of 2010, 12 May 2010

Territories Law Reform Bill 2010

Insufficiently defined administrative power – Schedule 1, item 39

Item 39 of Schedule 1 of this Bill confers a broad discretionary power on the Administrator of Norfolk Island to dismiss a member of the Legislative Assembly from office if the member has engaged, or is engaging, in (a) seriously unlawful conduct or (b) grossly improper conduct. The explanatory memorandum does not explain the need for this power, nor why it is not possible to specify with more precision the nature of the unlawful or improper conduct which may lead to its exercise. The Committee seeks the Minister's advice about whether more legislative guidance about the unintended scope and operation of the provisions can be provided.

Response

The Territories Law Reform Bill 2010 amends the *Norfolk Island Act 1979* to provide the Administrator with the power to dismiss members of the Legislative Assembly if they have, or are, engaging in seriously unlawful conduct or grossly improper conduct. The amendment will work in partnership with the existing section 39 of the Act, which states that a member of the Legislative Assembly vacates their office if they become an undischarged bankrupt or are convicted of an offence and sentenced to imprisonment for one year or longer.

The purpose of the amendment is to capture behaviour that is not covered by the existing section 39, but is serious enough to require being dismissed from the Legislative Assembly. The Administrator's powers will be exercised at his or her discretion and will be subject to judicial review. As such, the courts will have the power to consider individual cases and ensure procedural fairness in the application of the provision.

The term 'grossly improper' is used in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) in relation to the authority of the Governor-General to dissolve the Assembly. The use of the same term in a similar context within the Norfolk Island Act is intended to set a consistent standard in interpretation and implementation.

The Joint Standing Committee on the National Capital and External Territories (JSCNCET) report, 'Quis Custodiet ipsos Custodes? Inquiry into Governance on Norfolk Island', examined issues relating to the Administrator's dismissal powers, particularly in the context of unlawful and corrupt conduct. The Committee made several recommendations to increase these powers. The Committee was of the view that the Administrator should have expanded powers where Members of the Legislative Assembly have acted unlawfully or corruptly. The Australian Government has accepted this view, and carefully considered the conclusions drawn by the Committee in making these recommendations. The Australian Government considers that item 39 of the Bill appropriately addresses the concerns outlined in the Committee's report.

Henry VIII – Schedule 1, item 53

Item 53 of Schedule 1 amends subsection 67(2) of the Norfolk Island Act so as to effect a relatively minor change in the circumstances in which regulations which repeal or alter an item in Schedule 2 or 3 of the Act takes effect. Technically, section 67 is a Henry VIII clause as the Schedules to the Act can be changed by the Regulations. The Committee notes, however, that a change can only take place once the Norfolk Island Legislative Assembly has agreed to the content of the regulations (see pages 17 and 18 of the explanatory memorandum).

Response

The Committee's consideration of this issue is noted.

Determination of important matters by regulation – Schedule 1, Part 2, items 82 and 83

Item 83 of the Schedule 1 amendments provides for the making of regulations in relation to the determination of the method and manner in which votes are to be cast and counted in elections for the Norfolk Island Legislative assembly and related matters. The explanatory memorandum states that these amendments allow 'flexibility in determining an electoral system' and that they allow scope for matters related to this issue to be considered at a later time. The need for 'flexibility' is not explained in the explanatory memorandum.

Given the importance of the electoral laws to the integrity of any system of government, the Committee is concerned that these are matters more appropriately dealt with in primary legislation. The Committee therefore seeks the Minister's advice about the justification for the proposed approach.

Response

The Territories Law Reform Bill provides for the voting system for Norfolk Island Legislative Assembly elections to be prescribed by regulations. Changes to Norfolk Island's electoral system have been recommended in a number of previous reports on Norfolk Island, including by the JSCNCET. While Norfolk Island has a degree of self-government, it is also part of Australia and the Australian Parliament retains ultimate responsibility for territory electoral matters. The proposed amendments recognise this Commonwealth responsibility.

The Australian Government acknowledges the Committee's view that these matters would be more appropriately dealt with in the primary legislation. However, the Government's view is that the use of regulations is a more efficient and effective approach. The use of regulations enables a detailed and flexible electoral system to be established that responds to the unique circumstances of Norfolk Island.

The Australian Government agrees that the regulations should not be introduced until 2011 to ensure proper consultation with the Norfolk Island Government and community and consideration of appropriate voting systems for Norfolk Island.

Under the commencement provisions of the Territories Law Reform Bill, Part 2 – Amendments relating to elections, any electoral regulations will only take effect from the first meeting of the Legislative Assembly following the first general election after the Bill receives Royal Assent. The

first general election after the Bill receives Royal Assent is anticipated to be some time in 2013. Accordingly, the first election to be conducted under any new electoral voting system is not expected to occur until 2016.

I have also agreed to provide the draft electoral regulations to the JSCNCET for review and comment before they are registered.

Determination of important matters by regulation – Schedule 1, Part 4, item 130

This item will insert subsection 25(5) into the Norfolk Island Act 1979. It states that regulations may provide that applications may be made to the Administrative Appeals Tribunal for review of decisions made in the exercise of powers conferred by a Norfolk Island enactment. The explanatory memorandum (at page 39) describes the effect of the proposed provision, but does not explain why the ability to access administrative review is discretionary. The Committee seeks the Minister's advice about the justification for the approach and whether the AAT jurisdiction can be conferred in the primary legislation.

Response

Part 4 of the Territories Law Reform Bill proposes amendments to the *Administrative Appeals Tribunal* (AAT) *Act 1975* which will confer on the AAT merits review jurisdiction for specified decisions under Norfolk Island legislation. In general terms, the reforms will mean that where provided under regulations, administrative decisions which are made under Norfolk Island laws can be reviewed by the AAT on request by an affected party.

The approach taken in the Bill is to ensure a level of consistency with the application of the AAT review process at a Commonwealth level, while taking into account the unique circumstances of Norfolk Island's status as a self-governing territory. In the Commonwealth jurisdiction, the application of the AAT Act must be expressly specified within the Commonwealth Act under the authority of which the administrative decision is made. Generally, during the development phase of Commonwealth legislation the Administrative Law Branch of the Attorney-General's Department will undertake scrutiny of any Commonwealth legislation which authorises an administrative decision and provide advice on whether the decision should be subject to independent merits review by the AAT. The Administrative Law Branch assesses all legislation with reference to Australian Government policy on when merits review should be available.

It would be complex and ineffective to take exactly the same approach to the application of the Act to Norfolk Island. Such an approach would make the application of the AAT Act dependent upon Norfolk Island legislation which is not necessarily subject to the same Commonwealth scrutiny process. This could lead to the AAT being given jurisdiction where merits review is not appropriate (for example 'automatic' decisions) or some discretionary decisions not being subject to AAT review where external merits review should be available according to Australian Government policy. The preferred approach under this Bill is that the application of the Commonwealth AAT Act be controlled and maintained under Commonwealth legislation, enabling appropriate levels of scrutiny and consultation in determining the scope of the AAT's jurisdiction.

Currently, administrative decisions taken under Norfolk Island legislation are subject to a broad range of different and inconsistent administrative review mechanisms which are specified within each particular piece of legislation. Existing administrative review mechanisms under Norfolk Island legislation range from review by the Norfolk Island Administrative Review Tribunal, the Administrator or Executive Members. In some instances no review mechanism is provided at all.

The use of regulations to specify the decisions to which the AAT will have jurisdiction will enable the application of the AAT Act to be rolled out over a period of time in consultation with the AAT and Norfolk Island. The use of regulations also provides greater flexibility to amend the regulations in response to the amendments of a decision-making provision in a specified Norfolk Island Act, or the enactment of new Norfolk Island Acts to which it is appropriate to extend AAT jurisdiction. The use of regulations will also ensure that there is an appropriate level of Parliamentary scrutiny and oversight through the use of a disallowable legislative instrument.

The Attorney-General's Department has commenced officer level consultation with relevant Commonwealth agencies and the Norfolk Island Administration on the development of the regulations related to the application of the AAT to Norfolk Island. It is anticipated that the first phase of the regulations will be in place by the end of 2010.

The Hon Mark Butler MP
Parliamentary Secretary for Health

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

Dear Senator Coonan

Thank you for your letter of 13 May 2010 to the Office of the Minister for Health and Ageing, the Hon Nicola Roxon MP, regarding the comments of the Scrutiny of Bills in its Committee *Alert Digest No. 5 of 2010* concerning the Therapeutic Goods Amendment (2010 Measures No 1) Bill 2010 (the Bill). Your letter has been referred to me as the Parliamentary Secretary for Health with executive responsibility for the Therapeutic Goods Administration. I am responding on behalf of the Australian Government.

The response to the specific comment by the Committee in relation to subsection 26BB (7) in the Bill is enclosed for your information.

Yours sincerely

MARK BUTLER

3 JUN 2010

Encl

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 3680 Facsimile: (02) 6277 5721

Response to the Standing Committee for the Scrutiny of Bills, Alert Digest No. 5, 2010 on the Therapeutic Goods Amendment (2010 Measures No 1) Bill 2010

Delegation of legislative power
Schedule 2, Part 1, item 3, subsection 26BB(7)
The Committee has made comment regarding the determination of permitted ingredients for the purposes of listing medicines under section 26A of the *Therapeutic Goods Act 1989*.

Subsection 26BB(7) replaces existing subsection 26BB(3) in the Act which established that the determination for permitted ingredients may apply, adopt or incorporate any matter contained in an instrument or other writing as in force from time-to-time.

It is important to note that the decision providing for the determination of permitted ingredients is not legislative in nature; it is technical within the scope of the legislation, and does not make or alter the law. As a result, the application, adoption or incorporation in a permitted ingredients determination of any matter contained in an instrument, or other writing as in force from time-to-time, does not constitute the making of a legislative decision.

Permitted ingredients determined to be suitable for inclusion in Listed medicines are regarded to be low-risk in nature, or low risk subject to specified constraints, for example, a content threshold. In some circumstances constraints are set out in detail in pharmacopoeias or other documents. For example, a mineral compound may be subject to compositional specifications prescribed in a pharmacopoeial monograph. The allowance for the Minister's determination to refer to other documents or instruments is, therefore, appropriate where the determination seeks to apply such specifications or restrictions for a given ingredient and removes the need for unnecessary duplication directly in the determination.

Medicine sponsors and manufacturers are familiar with reference documents such as pharmacopoeias as these are a core mechanism by which requirements for medicines are set, such as under section 10 of the Act, and against which medicines are manufactured. Such references also ensure that Australia's regulatory framework remains in-step with the requirements of corresponding regulatory agencies internationally reducing the potential for variation of requirements for sponsors and manufacturers where they produce products for multiple markets. Therefore, the provision at subsection 26BB(7) is not expected to cause concern or confusion for medicine sponsors or manufacturers but will clarify existing practice.