SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator G Marshall
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

FIRST REPORT OF 2011

The Committee presents its First Report of 2011 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:

- Defence Legislation Amendment (Security of Defence Premises) Bill 2010
- Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010
- Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010
- Fisheries Legislation Amendment Bill (No.2) 2010
- National Health and Hospitals Network Bill 2010
- Screen Australia (Transfer of Assets) Bill 2010
- Tobacco Advertising Prohibition Amendment Bill 2010

Defence Legislation Amendment (Security of Defence Premises) Bill 2010

Introduced into the Senate on 24 June 2010 and reintroduced into the House of Representatives on 29 September 2010
Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on 28 January 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2010 - extract

Background

This bill inserts a new Part VIA, into the *Defence Act 1903* and makes associated amendments to the *Australian Federal Police Act 1979.*

The bill will enhance the security of Defence bases, facilities, assets, and personnel within Australia in response to the changing nature of security threats. These amendments include:

- clarifying that appropriately authorised members of the Defence Force may use reasonable and necessary force, including lethal force, to prevent the death of, or serious injury to a person in connection with an attack on Defence premises;

- establishing a statutory regime of search and seizure powers that will operate at Defence premises to reduce the risk of dangerous items entering Defence facilities, or material and classified information being unlawfully removed;

- updating and relocating the trespass offence and related arrest power in section 82 of the Act;

- supporting the enforcement of the trespass offence by authorising Defence to use overt optical surveillance devices to monitor the security of Defence premises and to

disclose the information captured by these devices to law enforcement agencies and Commonwealth, State and Territory public prosecution authorities; and

- clarifying that this Part does not limit the exercise of powers of a defence security official, a member of the Defence Force or any other person, under this Act or any other law.

Undue trespass on personal rights and liberties
Part IVA

Item 1 of Schedule 1 introduces new Part IVA, relating to the security of defence premises, into the *Defence Act 1903*. Among other things, this new Part introduces a number of powers allowing for the consensual and non-consensual collection of information (such as identification information and whether or not a person has authority to enter defence premises) and searches (of persons and vehicles) at defence access control points or on defence premises.

The new Part IVA also provides for the seizure of things on defence premises or found as a result of a search if it is reasonably believed that the item constitutes a threat to the safety of persons on the premises or relates to a criminal offence that has or may be committed on the premises.

Clearly, these powers are coercive and have the potential to trespass on personal liberty and property rights. However, Division 6 of the new Part IVA specifies limitations and safeguards on the exercise of the powers conferred. In particular, it is noted that the powers to restrain and detain persons are only conferred for the purpose of placing the person into the custody of a civil police officer, including a protective service officer of the AFP at the earliest practicable time (section 72J). Section 72G provides that in exercising powers under this Part officials may only use such force as is considered reasonable and necessary.

In the Committee's view the general question of whether an appropriate balance has been struck in these provisions between (1) personal rights and liberties and (2) interests in maintaining the security of Defence bases and responding to security threats is a question which may appropriately be **left to the consideration of the Senate as a whole**.

However, the Committee has a number of particular concerns about the detail of the bill. Given the seriousness of many of the amendments, including authorising non-consensual searches and the use of lethal force in particular circumstances, the Committee **seeks the Minister's advice** as to whether *defence premises* (as defined in clause 71A) includes land which may have a defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all *defence premises*.

The Committee also **seeks the Minister's advice** as to whether consideration has been given to adequately warning persons entering defence premises that they may be subject to

non-consensual searches if they enter the premises. Such a warning may offer a practical protection to personal rights without undermining the purposes sought to be achieved by the amendments.

Further, although clause 72J states that the powers given to restrain and detain under the amendments can only be exercised for the purpose of placing a person as soon as possible into the custody of the police or a protective service officer, the Committee is concerned that the bill does not deal with the adequacy of the training of defence security officials to ensure these 'police powers' are exercised safely and appropriately. The Committee therefore also **seeks the Minister's advice** about the adequacy of training and whether appropriate parameters for training requirements can be included in the bill.

> *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.*

Ministerial response - extract

Issue: Whether the definition of defence premises includes land which may have a Defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all defence premises.

Land or buildings that may have a Defence purpose, but which are not currently used by the Defence Force or the Department of Defence do not meet the definition of defence premises included in the Bill. So, for example, the provisions in the Bill would not apply to an immigration facility that is located on a former Defence base that is not currently used by the Defence Force or the Department. Similarly, if a portion of an operational base was set aside for a use that is unrelated to the Defence Force or the Department, the provisions of the Bill would not apply to that portion of the base. The Department will amend the Explanatory Memorandum to include a statement to this affect.

Defence facilities, assets and personnel are potentially attractive targets for terrorist groups. In addition, many Defence facilities house dangerous, restricted or classified items. To ensure that the Department can appropriately safeguard Defence facilities, assets and personnel and prevent the unlawful removal of dangerous or classified items, Defence requires the ability to exercise the powers contained in the Bill at all of its premises. In practice, the exercise of the powers contained in the Bill and the proposed use of the various classes of Defence security officials will be dependent on the nature of the site and the assessed level of the security threat, typically determined on the basis of intelligence.

Issue: Whether consideration has been given to adequately warning persons entering Defence premises that they may be subject to non-consensual searches.

The Department intends to implement a number of administrative measures to ensure that people entering Defence premises are aware of the requirements, obligations and consequences arising from the search regime in the Bill. Given the diverse nature and composition of Defence premises, the definition of which includes movable assets such as aircraft, vessels and vehicles, the selection and implementation of these measures will be tailored to the particular circumstances of each Defence premise. Measures will include:

- prominently displaying signs at the entrance to Defence bases or facilities notifying people that they, their carried items and vehicles may be subject to consensual and non-consensual searches;

- conducting a comprehensive awareness campaign, prior to the introduction of the Bill's measures, to ensure all Defence personnel and contractors are aware of the Bill's provisions and their rights and responsibilities in relation to consensual and non-consensual searches;

- incorporating appropriate advice on the Bill's provisions in recruitment material for all advertised Defence vacancies and tenders to ensure prospective employees and contractors are aware of Defence's expectations and security requirements;

- addressing the Bill's provisions during staff and contractor induction training and in regular, mandatory security awareness training; and

- requiring Defence Force members and public servants who are hosting or escorting visitors on Defence premises to notify visitors of search requirements.

Further, Defence would highlight that section 72B of the amendments require Defence security officials to notify people, before making a request or requirement under the Bill's provisions, of the affect of refusing or hindering the request or requirement.

Committee Response

The Committee thanks the Minister for this response and leaves the issue to the Senate as a whole.

Undue trespass on personal rights and liberties
Clause 71X

Clause 71X empowers a security authorised member of the Defence Force (but not 'lesser' classes of defence security officers) to take action to protect persons from an attack on defence premises which is occurring or is imminent and the attack is likely to, or is intended to, result in the death of or serious injury to one or more persons on the defence premises.

This section must be read with subsection 72H(1) and (2), the effect of which is (1) to allow a security authorised member of the Defence Force to use up to lethal force, 'if the member believes that this is necessary to prevent death or serious injury to themselves or others in taking action to protect persons from an actual or imminent attack on defence premises'; and (2) to require the a person fleeing from a security authorised member of the Defence Force to have first been called on to surrender (if practicable) and for the official to believe on reasonable grounds that the person cannot be apprehended in any other way.

The explanatory memorandum at page 18 states that this provision is modelled on the existing section 51T of the *Defence Act* which applies to the use of reasonable and necessary force by members of the Defence Force in assisting civilian authorities under Part IIIAAA. (Note: Subsection 72H(3) provides that the use of force by a 'contracted defence security guard or a defence security screening employee must not involve anything that is likely to cause death or grievous bodily harm'.)

Again, the general question of whether an appropriate balance has been struck in this bill between personal rights and liberties and interests in maintaining the security of Defence bases and responding to security threats, is a matter which may appropriately be **left to the Senate as a whole**.

Nevertheless, the amendments do not contain any provisions which allow the Committee to assess, with confidence, the question of whether officials entitled to use lethal force will have received appropriate training and instruction. The new subsection 71C(4) gives the Minister the power to determine, by legislative instrument, the training and qualification requirements for security authorised members of the Defence Force. Given that these officials may use up to lethal force, the Committee is concerned that the important matter of the training and qualifications which are required is not dealt with in the primary legislation.

In addition, the explanatory memorandum explains the effect of the provisions allowing and limiting the use of deadly force and force occasioning grievous bodily harm, but does

little more than state the terms of legislation and note that similar powers exist elsewhere in the Defence Act. Given the extraordinary nature of these powers the Committee **seeks the Minister's further advice** about the justification for the proposed approach, and particularly about the adequacy of training and whether appropriate parameters for training requirements can be included in the bill.

> *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.*

Ministerial response - extract

Issue: Concerns about the adequacy of the training of Defence security officials to ensure the restrain and detain powers are exercised safely and appropriately, and whether appropriate parameters for training requirements can be included in the Bill.

The Bill makes provision for Defence security officials to restrain and detain a person for the purposes of placing them in the custody of police or a protective security officer at the earliest practicable time. This power can only be exercised if the person is located on Defence premises and either refuses or fails to comply with an identification or search requirement or, as a result of complying, the Defence security official reasonably believes the person is not authorised to be on the premises, constitutes a threat to safety or has (or may) commit a criminal offence.

The ability to restrain and detain people is a fundamental component of the proposed search regime detailed in the Bill. Without the ability to restrain and detain people for the purposes of placing them in police custody, Defence will be significantly constrained in its mitigation of the risk of dangerous or classified items being improperly removed from Defence premises.

Under the Bill, all Defence security officials must satisfy training and qualification requirements before they can exercise any of the powers contained in the Bill, including the power to restrain and detain people. These training and qualification requirements, which will be specified in a legislative instrument, must be determined by the Minister for Defence or his delegate and will be stringent.

Defence is currently consulting with other Federal agencies, such as the Australian Federal Police and the Australian Customs and Border Protection Service, to assist in identifying the appropriate training and qualification requirements for Defence security officials.

The training requirement for contracted security guards under this Bill, and as determined by the Minister for Defence, will build upon and enhance the existing training regime as

mandated in Defence security policy. Current Defence policy demands that contracted security guards meet a number of requirements that includes the successful completion of a Certificate II in Security Operations and the provision of services in accordance with relevant legislation, including general criminal legislation which controls the use of force. Additional mandatory requirements state that Defence contracted security guards:

- must be licensed to carry out the required security function by the relevant State or Territory in which the Defence facility is located;
- must hold a minimum security clearance of CONFIDENTIAL;
- must provide services in accordance with any relevant enactment or direction by the regulatory authority in each State and Territory and Australian Standard (AS) 4421 Guards and Patrols; and
- must possess a current drivers licence and a first aid qualification or competency.

In addition, contracted security guards must complete a Defence-endorsed training package covering the following topics:

- Defence security policy and relevant laws;
- Defence protocols such as rank structure and customer service;
- Defence security environment and awareness;
- Defence policing; and
- the Defence security alert system.

Australian Public Service employees who are to be appointed as Defence security screening employees and security authorised Defence Force members will be required to undergo comparable training to contracted security guards, appropriately augmented to address the additional powers available to these two categories of Defence security officials.

The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for the restrain and detain powers, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Justification for the provisions allowing and limiting the use of deadly force, together with concerns about of the adequacy of the training and qualification requirements and whether parameters for these can be included within the primary legislation.

A key rationale behind the development of the Bill is the requirement to clarify the legal issues surrounding Defence Force members acting in self defence in the event of a no-warning attack on Defence premises.

Australian law recognises the right to protect yourself or others who are threatened. This currently provides a legal basis for Defence Force members to use reasonable and necessary force to protect themselves, or others, in the event of an attack on Defence premises. This Bill, however, will provide certainty as to the scope of actions that authorised and appropriately trained Defence Force members could take, rather than having to refer to the various Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.

The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for appropriately authorised Defence Force members who may be required to exercise potentially lethal force in the context of base security, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Committee Response

The Committee thanks the Minister for this response and leaves the issue to the Senate as a whole.

Alert Digest No. 8 of 2010 - extract

Strict liability
Clause 71W

Section 71W makes it an offence for a person to hinder or obstruct a search under the Division if certain requirements are complied with (eg the production of an identity card). The offence is not expressed to be a strict liability offence but the explanatory memorandum claims that it is such an offence. No justification for this is given. The Committee notes that the offence of refusing to provide evidence pursuant to section 71V is not said, in the bill or the explanatory memorandum, to be a strict liability offence. The Committee **seeks the Minister's clarification** of whether, and if so, why it is intended that the offence proposed in section 71W is a strict liability offence.

> *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.*

Ministerial response - extract

Issue: Whether, and if so why, it is intended that the proposed offence @71W of hindering or obstructing a search be regarded as a strict liability offence.

The Explanatory Memorandum incorrectly states this is a strict liability offence. It will be amended to correct this error.

Committee Response

The Committee thanks the Minister for this response and notes that the error in the explanatory memorandum will be corrected.

Alert Digest No. 8 of 2010 - extract

Possible undue trespass on personal rights and liberties
Clause 72M

Section 72M empowers a security authorised member of the Defence Force to use a dog if this is considered reasonably necessary to: (a) assist with the conduct of a search; (b) assist with the restraint or detention or removal of a person; (c) to assist with the arrest of a person for trespass; (d) to assist with the performance of a function or exercise of a power under Part IVA. The explanatory memorandum notes that this power will provide an improved capability to detect explosives and other hazardous materials. However, no justification of the need for dogs to be used for other functions is provided. Given the risk of injury to persons that the use of dogs may carry, the Committee **seeks the Minister's further advice** about the justification of the need to use dogs for functions other than to detect explosives and other hazardous materials.

> *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.*

Ministerial response - extract

Issue: Justification of the use of dogs for functions other than to detect explosives or other hazardous materials.

The primary use of dogs is for the protection of people and assets. Apart from their role in the detection of explosives or other hazardous material, dogs may be used by security authorised Defence Force members to deter, detect and, if required, apprehend trespassers for the purposes of placing them in the custody of the police or a protective service officer at the earliest practicable time (ie restrain and detain).

Military working dogs are presently employed at a number of Defence sites, in particular around Air Force bases. They are used to assist with the protection of people and assets over an extended area, which can often be difficult to protect effectively through other means. The presence of military working dogs can also be a very effective deterrent to trespassers and assist in avoiding a situation escalating to a point where injury to personnel or damage to assets may occur.

Defence maintains stringent policies and procedures around the training and use of military working dogs and the training of dog handlers. At all times, military working dog handlers

are required to only use such force as is reasonable and necessary and direct their dogs in such a manner as to prevent unreasonable injury to persons or damage to property.
The use of dogs to assist with the conduct of searches or other functions or powers under this Bill is limited to security authorised Defence Force members who are also fully qualified dog handlers.

Committee Response

The Committee thanks the Minister for this response and leaves the issue to the Senate as a whole.

Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010

Introduced into the House of Representatives on 17 November 2010
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2010*. The Minister responded to the Committee's comments in a letter dated on 25 November 2010. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2010 - extract

Background

The bill amends the *Family Law Act 1975* (the Act) to:

- create new statutory rights and liabilities for families who may have been affected by the High Court's decision in *MRR v GR* [2010] HCA 4. This decision casts doubt on the validity of certain parenting orders made or purportedly made on or after 1 July 2006 when shared parenting reforms were introduced. The bill seeks to ensure that parenting arrangements under orders affected by the High Court decision continue to have effect; and

- amend the Act to provide that courts, in future proceedings, may, but are not required to, consider the matters set out in subsections 65DD(1) and (2) of that Act before making an order, with the consent of all the parties to the proceedings, providing for parents to have equal shared parental responsibility for their child.

The bill confirms that the best interests of the child remain the paramount consideration.

Ability to obtain review
Items 3 and 6

The explanatory memorandum at paragraph 13 explains that item 3 seeks to provide that the rights and liabilities in relation to affected orders 'are the same as if the court or Registrar making the affected order had considered the required matters for the order...they include the right to appeal against or apply for a review of the affected order (Item 3(3)).' The explanatory memorandum states at paragraph 14 that:

> Subject to the relevant court extending time for appeal or review where it has expired, parties dissatisfied with an affected order may challenge the affected order through an appeal or review or taking proceedings for an order under Item 6.

The Committee understands the overall purpose of the Bill and supports the intention to create certainty for families and their children. However, in assessing the Bill against Standing Order 24 the Committee is interested to understand the potential impact of these sections and **seeks the Attorney-General's advice** about whether the proposed approach has the potential for any detrimental effect in relation to time limits for appeal and review, particularly in relation to orders that otherwise would have been invalidly made.

> *Pending the Attorney-General'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.*

Ministerial response - extract

The first issue concerns Items 3 and 6 of Schedule I to the Bill. The Committee asks whether the preservation by the Bill of rights to appeal against or to apply for review of orders affected by the High Court's decision in *MRR v GR* [2010] HCA 4 will have any detrimental effect on time limits for appeal or review.

Under the relevant court rules, parties have 28 days in which to appeal or seek a review, and 7 days to seek a review of a consent order made by a Federal Magistrates Court Registrar. Courts have the power to extend that time, including in cases where the relevant time period has passed. It can be expected that those time periods for appeal or review, in relation to orders affected by the High Court's decision. will have expired in most cases. However, those periods are able to be extended on application in accordance with the applicable rules of court *(Family Law Rules 2004* r.1.14; *Federal Magistrates Court Rules 2001,* r.3.05). Item 3 of Schedule 1 to the Bill, in preserving relevant rights to appeal or seek a review, preserves the rights that paI1ies have to apply to a court to extend the relevant periods for doing so.

Item 6 of Schedule 1 to the Bill deals with the separate issue of later variation or the rights and liabilities created by the Bill in relation to orders affected by the High Court's decision. Accordingly, Item 6 does not retrospectively affect rights of appeal or review of those orders.

Committee Response

The Committee thanks the Attorney-General for this response.

Alert Digest No. 10 of 2010 - extract

Possible retrospective effect
Item 7

The purpose of this item is to provide that interference with a right conferred or affected by item 3, or failure to satisfy or comply with a liability imposed by item 3, 'can be dealt with in the same manner as it if had occurred in relation to a right or liability arising under [a] parenting order validly made under section 65D of the Family Law Act' (see paragraph 27 of the explanatory memorandum).

As noted above, the Committee understands the overall purpose of the Bill and supports the intention to create certainty for families and their children. However, in assessing the Bill against Standing Order 24 it seems to the Committee that this approach could retrospectively affect rights that a person would otherwise have had in a case involving an invalidly made order. Unlike item 3 (discussed above), no justification for this approach is outlined in the explanatory memorandum. The Committee therefore **seeks the Attorney-General's advice** about whether the proposed approach could detrimentally affect the rights of any person.

> *Pending the Attorney-General'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.*

Ministerial response - extract

The second issue on which the Committee seeks my advice relates to Item 7 of Schedule 1 to the Bill.

Item 7 clarifies that the approach taken by the Bill extends to the validation of acts and things done in relation to affected orders of courts within the federal family law system which are not superior courts of record. As mentioned in the Bill's Explanatory

Memorandum, that clarification is not necessary in relation to orders of the Family Court of Australia which, as a superior court of record, remain valid until set aside.

I acknowledge that the Bill will retrospectively affect the rights of any person dealt with by a lower court in enforcement or contempt proceedings. It is, however, in the public interest that civil enforcement or contempt action taken to secure compliance with an order that the parties to it will have regarded as one that binds them, and will have expressly stated the consequences that may follow from contravention, should be validated.

I note that the most recent Commonwealth validation legislation included a provision to the same effect as Item 7 *(Judiciary Legislation Amendment Act 2006,* Schedule I Item 13; *Family Law Amendment (Shared Parental Responsibility) Act 2006,* Schedule 10, Item 3, section l14MM).

I do not consider that Items 3, 6 and 7 of Schedule 1 to the Bill trespass unduly on personal rights and liberties.

Committee Response

The Committee thanks the Attorney-General for this response.

Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 27 October 2010
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2010*. The Treasurer responded to the Committee's comments in a letter dated on 15 December 2010. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2010 - extract

Background

This bill implements changes to federal financial arrangements. It gives effect to reforms to the financing of health and hospital services set out in the National Health and Hospitals Network Agreement, endorsed by the States, with the exception of Western Australia, on 20 April 2010.

Standing appropriation
Section 15A

The proposed section 15A establishes the NHHN Fund to facilitate the payment of dedicated GST revenue, special payments and top-up payments under the *Federal Financial Relations Act*. The section specifies that the Fund will be a Special Account for the purposes of section 21 of the *Financial Management and Accountability Act* 1997. This means that, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for these purposes. This proposed new section is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of* 2005, the Committee stated:

> *The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the*

legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

Although the explanatory memorandum does not expressly detail the reasons as to why a standing appropriation is appropriate in this instance, it is noted that the amounts to be credited will be based on an intergovernmental agreement and that amounts can only be debited from the Fund for the purposes specified. Nevertheless, the Committee **seeks the Minister's advice** as to whether the Commonwealth's funding of the NHHN Agreement could be subject to approval through the standard annual appropriations process, thus ensuring continuing Parliamentary oversight.

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.

Ministerial response - extract

The Committee has questioned whether section 15A of the Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010 breaches principle (1)(a)(v) of the Committee's terms of reference through creating a standing appropriation which may be considered to insufficiently subject the exercise of legislative power to Parliamentary scrutiny.

More specifically, the Committee's *Fourteenth Report* of 2005 indicates that standing appropriations may potentially infringe on the Committee's terms of reference relating to the delegation and exercise of legislative power where they "allow the executive government to spend unspecified amounts of money for an indefinite amount of time into the future".

Section 15A of the Bill establishes the NHHN Fund as a Special Account for the purposes of section 21 of the *Financial Management and Accountability Act* 1997. As set out in the paragraph 2.7 of the Explanatory Memorandum:

'A Special Account is an appropriation mechanism that sets aside an amount within the Consolidated Revenue Fund to be expended for specific purposes. Any amounts credited to the NHHN Fund are quarantined from the rest of the Consolidated Revenue Fund and can only be debited from the NHHN Fund for the purposes specified.'

Although the crediting of the NHHN Fund is established as a standing appropriation, the Parliament has oversight of each the three types of payments that can be debited from the NHHN Fund.

The first type of payment that can be debited from the NHHN Fund is Dedicated GST revenue payments. The amount of GST that can be debited from the NHHN Fund is limited by the amount of GST revenue collected which is in turn determined by the rate and base of the GST which are set by Parliament through separate legislation. In accordance with the NHHN Agreement, only an agreed proportion of GST revenue collected will be debited from the NHHN Fund and dedicated to health and hospital services. I note that under the current arrangements set out in the *Federal Financial Relations Act 2009* the Parliament has already agreed that all of the GST revenue should be paid as grants to the States and Territories.

The second type of payment that can be debited from the NHHN Fund is Special payments. Special payments reflect funding under the former National Healthcare Specific Purpose Payment. Section 15F limits the total amount able to be debited from the NHHN Fund to $11,224,185,000 for the 2009-10 financial year which is indexed annually. The Intergovernmental Agreement on Federal Financial Relations provides that this amount will be indexed by a growth factor that will be the product of: a health specific cost index; growth in population estimates weighted for hospital utilisation; and a technology factor. The Minister will determine the indexation arrangements by legislative instrument and these legislative instruments will be disallowable.

The final type of payment that can be debited from the NHHN Fund is Top-up payments. Top-up payments commence in 2014-15. Subsections I5H(7) and 15H(8) require an Appropriations Act relating to a financial year to specify a general drawing rights limit before any Top-up payments can be debited from the NHHN Fund.

I consider that the arrangements for Parliamentary oversight of debits from the NHHN Fund set out above ensure that Parliament can ensure that the executive government is not able to spend unspecified amounts of money for an indefinite amount of time into the future. As such, I consider that subjecting crediting of the NHHN Fund to the standard annual appropriations process is unnecessary as it would simply duplicate the arrangements outlined above.

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

Committee Response

The Committee thanks the Treasurer for this comprehensive response.

Fisheries Legislation Amendment Bill (No.2) Bill 2010

Introduced into the House of Representatives on 26 May 2010 and reintroduced on 29 September 2010
Portfolio: Agriculture, Fisheries and Forestry

Introduction

In *Alert Digest No. 10 of 2010* the Committee sought advice from the Minister concerning two of the amendments agreed to in the Senate. The Minister responded in a letter dated 28 January 2011. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2010 - extract

On the 26 November 2010 the House of Representatives passed the bill without amendment. On 18 November 2010 a supplementary explanatory memorandum was tabled and 20 amendments agreed to in the Senate. Two of the proposed amendments fall within the Committee's terms of reference.

Amendment No. (5) proposes the inclusion of new 84B to implement an agreement between Australia and the Government of the French Republic relating to the cooperative enforcement of fisheries laws in Antarctic and other territories. It is proposed in 84B(2) that for the purposes of conducting cooperative enforcement an international officer is taken for the purposes of the Fisheries Act to have exercised the power as an officer. Proposed section 84B(5) and (7) seek to provide that:

> An international officer is not liable to any civil or criminal proceedings in respect of anything done or omitted to be done in good faith in the exercise or purported exercise of a power…

…either conferred on an officer by subsection (3) or referred to in subsection (6).

The Committee is concerned that the effect of these sections could be to remove a court's jurisdiction to consider a range of issues relating to the conduct of an international officer. The supplementary explanatory memorandum describes the effect of these proposed amendments, but does not provide a justification for them. Although the Bill has been transmitted for Royal Assent, the Committee **seeks the Minister's advice** about the justification for the 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.

Ministerial response - extract

Amendment number five provides immunity for international officers from liability while undertaking fisheries-related enforcement duties. This amendment implements article 5.2 of the Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands. It ensures international officers have the same level of immunity provided to Australian officers lawfully enforcing Australian fisheries laws under section 90 of the *Fisheries Management Act 1991.* Similar immunity provisions have been extended to Australian officers enforcing French fisheries laws.

The agreement specifies that Australia or France 'shall, where one of its officers has allegedly breached the laws of the other party, ensure appropriate action, consistent with its laws and regulations, is taken against its officers' (article 5.3). It is unlikely that an issue will arise requiring prosecution of an officer as the agreement provides that crews shall take all appropriate measures to respect and observe the other nation's laws.

Thank you again for your comments.

Committee Response

The Committee thanks the Minister for this response and notes that it would have been helpful for this information to be included in a supplementary explanatory memorandum.

National Health and Hospitals Network Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 29 September 2010
Portfolio: Health and Ageing

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on 4 February 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2010 - extract

Background

The bill provides a framework for the establishment of the Australian Commission for Safety and Quality in Health Care as a permanent, independent statutory authority under the *Commonwealth Authorities and Companies Act 1997*.

The establishment of this body forms part of the National Health and Hospitals Network Agreement between the Commonwealth and the States (with the exception of Western Australia) and Territories endorsed on 20 April 2010.

Commencement
Clause 2

Clause 2 provides that 'This Act commences on 1 July 2011.' Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

If the bill is passed during this sitting period then commencement of the bill will be delayed by longer than six months. The Committee understands that the proposed approach may be justifiable, but in this case no information about the rationale of the commencement provision is included in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** about the reason for the proposed commencement date.

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.

Ministerial response - extract

Clause 2 - reason/or proposed commencement date

The proposed commencement date for the permanent Australian Commission on Safety and Quality in Health Care (the Commission) of 1 July 2011 is consistent with the timeframes outlined in the NHHN Agreement. Under the terms of the Agreement, the earliest date on which the NHHN will commence operation is on and from 1 July 2011. The funding and administrative arrangements for the Commission in its current form as part of the Department of Health and Ageing are set to expire on 30 June 2011. Passage of the NHHN Bill during the Spring 2010 sittings will allow new administrative and funding arrangements to be put in place in time for the permanent, independent Commission to commence operations on I July 2011. Establishing the administrative processes and recruiting a Chief Executive Officer and Board is expected to take around six months.

Committee Response

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

Alert Digest No. 8 of 2010 - extract

Legislative instrument
Possible insufficient scrutiny of legislative power
Clause 9

Clause 9 of the bill sets out the functions of the Commission. These functions include setting the of written standards, guidelines and indicators (see paragraphs 9(1)(e)-(g)). Compliance with these is voluntary and the explanatory memorandum claims at page 4 that the Commission does not have regulatory functions. Nevertheless, the Commission is to promote and monitor the implementation of such standards etc (see paragraphs 9(1)(h)-(k)). The Commission is also to 'formulate model national schemes' (paragraph 9(1)(l))

and ‘such functions…as are specified in a written instrument given by the Minister’ (paragraphs 9(1)(n)).

Subsections (3)-(7) of clause 9 declare all of these functions not to be legislative instruments, but it is not clear whether this is merely describing the effect of the *Legislative Instruments Act 2003* or is being done to avoid the usual operation of that Act. The explanatory memorandum does not address whether or not such instruments would usually fall within the definition of legislative instruments in section 5 of the *Legislative Instruments Act 2003*. Paragraph (b) of subsection 5(2) of the *LI Act*, states that an instrument will be taken to be of a legislative character if it has ‘the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right’.

Although compliance with the various standards etc referred to in clause 9 of the bill is voluntary - in the sense that Commission does not have regulatory enforcement powers - the Commission does have other standard regulatory functions, such as encouraging and monitoring compliance. Moreover, as the explanatory memorandum explains at page 7, compliance ‘may be made a term or condition of a grant or under a contract or other legally enforceable agreement’ and they ‘may also be applied or adopted by a State or Territory law or a law of the Commonwealth.’

It seems apparent, therefore, that these instruments arguably qualify as legislative instruments, given the indirect affect they may have on an affected persons interests or privileges (and perhaps even rights and obligations). In other contexts, courts have pointed to requirements to engage in consultative processes as one factor the points to the conclusion that a decision has a legislative character. In this regard, it is noted clauses 10 and 11 of the bill impose a range of consultation requirements.

In these circumstances, it is unclear why these instruments should be exempted from the normal *LI Act* requirements, which promote accountability to the parliament. The fact that the Commission may in some circumstances dispense with the consultation requirements (see subclause 10(3)) increases the need for parliamentary oversight of the making of the standards. The Committee is concerned that there is insufficient scrutiny of this legislative power and therefore **seeks the Minister's advice** as to why it was decided to declare these instruments not to be legislative instruments.

> *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.*

Ministerial response - extract

Clause 9 - Possible insufficient scrutiny of legislative power

Section 57 of the NHHN Bill makes it clear that the Commission does not have the power to compel compliance with the standards or guidelines it formulates. The Commission will not be involved in enforcing compliance against its standards and guidelines. It is intended that the Commission will develop safety and quality standards for use by accrediting agencies during their accreditation processes.

If compliance with such instruments was made a term or condition of a grant or under a contract or other legally enforceable agreement, then they would be enforceable under private rather than public law. If such instruments were to be applied or adopted by a state or territory law or a Commonwealth law (as contemplated by cl 57(3)), then this would provide an opportunity (at that later stage) for Parliamentary review. It is not necessary for an instrument to be a legislative instrument in order for it to be used in other law.

Monitoring and promotion activities undertaken by the Commission will be in relation to impact of the voluntary uptake of standards and guidelines formulated by the Commission or those that have been adopted under another law as stated in the Bill.

The Commission's standards, guidelines and indicators will be publicly available and these publicly available documents will be regularly updated so that the current standards, guidelines or indicators arc easily accessible at any given time.

Further, any rule made by the Minister in relation to formulating standards, guidelines or indicators will be a legislative instrument and subject to parliamentary scrutiny.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 8 of 2010 - extract

Incorporation of material by reference
Subclause 10(4)

Subclause10(4) of the bill states that standards, guidelines or indicators may apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing, as existing (a) at a particular time; or (b) 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. Paragraph (b) may therefore be thought to inappropriately delegate legislative power. Although legitimate reasons for the use of such a provision can be guessed at, it is unfortunate that the explanatory memorandum does not address this issue. The Committee **seeks the Minister's advice** about the justification for the 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.*

Ministerial response - extract

Subclause 10(4) -Incorporation a/material by reference

As outlined above, compliance with any standard, guideline or indicator formulated by the Commission is voluntary. This includes where the Commission has applied, adopted or incorporated, with or without modification, instruments or writings in its standards, guidelines or indicators. Where a standard or guideline is adopted by a state or territory law or a Commonwealth law (as contemplated by cl 57(3)), then this would provide an opportunity (at that later stage) for parliamentary review.

This subclause will allow the Commission flexibility to apply, adopt or incorporate, with or without modification, instruments or writings as standards or guidelines in order to avoid duplication of work carried out by other bodies or organisations.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 8 of 2010 - extract

Insufficiently defined administrative power
Clause 14

Clause 14 of the bill enables the Commission to charge fees for things done in performing its functions under rules made, by legislative instrument, by the Minister. At page 8 the explanatory memorandum notes that this facility is intended to allow the Commission to charge fees for the provision of services to third parties but not to allow the Commission to charge for services provided to any government in the ordinary performance of its functions. This intention is not clearly reflected in the terms of clause 14 and the Committee's view is that it is preferable that the bill provide more guidance as to the nature of the circumstances in which it is appropriate for the Minister to make rules for the charging of fees. The Committee **seeks the Minister's advice** about whether clause 14 can be amended to address this concern.

> *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.*

Ministerial response - extract

Clause 14 - Insufficiently defined administrative power

This clause is drafted to allow the Minister, in consultation with participating state and territory Health Ministers, flexibility to make rules in relation to the circumstances in which the Commission can charge fees. I note that there would be parliamentary oversight of the content of the rules made under subclause 14(c) of the NHHN Bill. It is envisaged that such circumstances may change over time and therefore a broad construction of the clause was favourable.

I trust that the above information is of assistance.

Committee Response

The Committee thanks the Minister for this response.

Screen Australia (Transfer of Assets) Bill 2010

Introduced into the House of Representatives on 17 November 2010
Portfolio: Arts

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2010*. The Minister responded to the Committee's comments in a letter dated on 23 December 2010. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2010 - extract

Background

This bill provides for the change of name of the National Film and Sound Archive (NFSA) and will facilitate the legal transfer of certain assets and liabilities associated with Screen Australia's (SA) film library and related sales and digital learning functions from SA to the newly named National Film and Sound Archive of Australia (the NFSAA).

Retrospective application
Schedule 2, item 12

This item in part that provides that a determination made under subitem (1) takes effect:

> (a) at the time specified in the determination (which may be a time before the determination is made but not a time earlier than the transition time).

As the explanatory memorandum at paragraph 64 simply describes the operation of the section without any explanation of its effect, the Committee **seeks the Minister's advice** about whether this is provision will have an adverse effect on any person.

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

Ministerial response - extract

The Committee has requested advice about whether Schedule 2, item 12 of the Bill will have an adverse effect on any person as the provisions may be considered to trespass unduly on personal rights and liberties and be in breach of principle 1(a)(i) of the Committee's terms of reference.

I am advised that a determination made under the provision in question would not have an adverse effect on any person. The two parties that will be predominantly affected by item 12 are Screen Australia and the National Film and Sound Archive (NFSA), both of which have been consulted in the drafting of the Bill and have consented to the transfer of the film library.

Item 12 of Schedule 2 of the Bill enables the Minister to determine in writing that a provision of item 9, 10 or 11 does not apply in relation to instruments, proceedings, records or documents specified in the determination. Under subitem 12(2)(a), this determination takes effect at the time specified in the determination (which may be a time before the determination is made but not a time earlier than the transition time of 1 July 2011).

Subitems 9(2), 10(2) and 11(2) of Schedule 2 provide for the automatic transfer of a number of matters (including instruments, legal proceedings, records and documents), which relate to film library assets or film library liabilities from Screen Australia to the NFSA. The Minister is also provided a discretion to transfer certain other matters not covered by subitems 9(2), 10(2) and 11(2) from Screen Australia to NFSA by written determination (subitems 9(3), 10(3) and 11(3)).

Item 12 was included in the Bill to overcome any unintended consequences of the transfer of film library assets or film library liabilities from Screen Australia to NFSA under items 9, 10 and 11.

A large amount of material connected with the film library will be transferred from Screen Australia to the NFSA through the operation of these items and therefore circumstances may arise where it would be considered more appropriate for particular material to remain with Screen Australia.

For example, if records or documents were automatically transferred from Screen Australia to the NFSA due to the operation of subitem 11(2) but it was considered that for operational reasons these records or documents should actually have been retained by Screen Australia, I would be able to make a determination under item 12 which would exclude the records or documents specified in the determination from being transferred from Screen Australia to the NFSA. This determination may need to have retrospective effect if the transition time has already passed and the documents have therefore already effectively been transferred from Screen Australia to the NFSA under subitem 11(2).

There is a possibility that some third parties may be connected with the matters in items 9 and 10 (for example, parties to either contracts or legal proceedings connected with the film library) and therefore a determination under item 12 may also similarly have consequences for these parties. However, substituting the NFSA for Screen Australia (or vice versa) as a party to these contracts or legal proceedings would not disadvantage these third parties in any way because the rights of these parties either under contract or in the proceedings would remain the same. If a determination were made under item 12 with retrospective effect, third parties would merely be returned to the position they were in prior to 1 July 2011, that is, they would remain as a party to a contract (or legal proceedings) with Screen Australia rather than the NFSA.

I trust this information assists the Committee in its deliberations.

Committee Response

The Committee thanks the Minister for this comprehensive response and notes the advice that there will be no adverse effect on any person, including third parties. It would have been helpful for this information to be included in the explanatory memorandum.

Tobacco Advertising Prohibition Amendment Bill 2010

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2010*. The Minister responded to the Committee's comments in a letter dated on 7 February 2011. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2010 - extract

Background

This bill amends the *Tobacco Advertising Prohibition Act 1992* to clarify that it is an offence to advertise tobacco products on the internet and in other electronic media in line with restrictions in other media and at other retain points of sale.

Retrospective application
Item 16

This item seeks to provide that the Bill will apply to advertisements published electronically before the commencement of the Act if the advertisement is accessible by the public at or after its commencement. This would mean that proposed clause 15A, which establishes the offence the offence of publishing a tobacco advertisement electronically, could apply retrospectively.

The explanatory memorandum explains at page 46 that:

> The retrospective application of new section 15A is necessary to avoid the objects of the offence provision being undermined by permitting the continued display on the internet of tobacco advertisements that were published prior to the commencement of the Bill.
>
> However, the practical effect of this retrospective application on a potential defendant is substantially diminished by the fact that the period between enactment of the Bill and its date of commencement will provide an opportunity for previously published tobacco advertisements to be removed from websites. It is intended that the Bill will commence automatically after Royal Assent, rather than by early proclamation.

The explanatory memorandum also observes at page 46 that 'the practical effect of this retrospective application on a potential defendant is substantially diminished by the fact that the period between enactment of the Bill and its date of commencement will provide an opportunity for previously published tobacco advertisements to be removed from websites.'

The Committee notes that it is useful that this issue has been addressed directly in the explanatory memorandum. However, because of the retrospective application of this provision the Committee remains concerned about the potential for a person to unknowingly contravene the new offence. The Committee therefore **seeks the Minister's further advice** about whether it is intended that any measures be taken to inform those affected about the retrospective application of the proposed law, whether consideration has been given to allowing a period of grace or a possible defence to be available for a short period of time for a defendant who was not aware of the retrospective application of the provision (once the law commences) and whether the commencement of the Act could be stated to be 6 months after Royal Assent is given rather than leaving the option for commencement by proclamation.

> *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.*

Ministerial response - extract

The Explanatory Memorandum described the application ofs15A as 'retrospective'. It is important to understand how this retrospective application operates. It is not the case that the law is retrospective in the traditional legal meaning of that word. While a better choice of words may have been preferable, an illustration will clarify the distinction.

For example, the hypothetical website www.cigarettes.com sells cigarettes online and has had images of cigarette packets at each point of sale since 2003. After the commencement date of the law and proposed amendments to the Tobacco Advertising Prohibition Regulations 1993 (the Regulations), www.cigarettes.com must remove all images of cigarette packets and include text only descriptions.

As the law is not retrospective, www.cigarettes.com cannot be prosecuted for having published images of cigarette packets prior to the commencement date. That is, the law does not render illegal the then-legal act of uploading an image in 2002. The law does make it illegal to continue to display that image on the website after the Bill and amended Regulations come into effect. regardless of when the advertisements were first uploaded onto the internet. This is the same way the *Tobacco Advertising Prohibition Act* 1992 (the Act) applied to existing advertisements when it came into force in 1992. The offence is not

uploading the image in 2002 (which would make the law truly retrospective). The offence is displaying the image in 2011.

The Act included a defence when it came into force in 1992. The Committee has asked whether consideration was given to including such a defence, possibly time-limited, to protect defendants who were not aware of the new law. The Government does not consider this necessary for the following reasons.

Firstly, one of the reasons for the original defence was that many of the advertisements that the Act made illegal in 1992 were large and potentially costly and difficult to remove (billboards at sports stadiums for example). Internet advertisements, by contrast, can be removed in moments and with minimal cost.

Secondly, a defence, even if time-limited, would complicate prosecution because of the difficulty in proving whether or not a person was genuinely unaware of the new provision.

Thirdly, the Government believes that there will be adequate time to alert all Australians to the new provisions. In particular it is proposed that the legislative amendments to the Regulations will commence six months after the Bill receives Royal Assent. The Government proposes to use this six month time period to complete the drafting and passage of the amended Regulations and conduct a public consultation process. A consultation paper will be released in conjunction with a media release and advertisements in major national and state/territory newspapers. My Department is also considering appropriate social networking and online media to advertise the Bill and proposed amendments to the Regulations.

Finally, my Department intends to prosecute breaches of the Bill in the same way as the breaches of the Act. That is, my Department will write to the organisation responsible for publishing the potential breach to advise it and ask it to outline what measures it intends to undertake in order to comply with the Act. A response would be required within 30 days. If the response includes a statement that the breach will be removed and future compliance is assured, my Department will inform the organisation that no further action will be taken. My Department will monitor the website to ensure the advertisement has been removed. If no response is received, or the undertaking to remove the advertisement is not honored, my Department will refer the breach to the Director of Public Prosecutions.

The Senate Standing Committee for the Scrutiny of Bills Alert Digest also suggested the commencement date be six months after Royal Assent rather than by earlier proclamation. The Government agrees to allow the six month period after Royal Assent to lapse (i.e. without making a proclamation) so that Schedule I of the Bill commences at that time automatically. This time lag of six months, which complements the consultation process outlined above, will ensure the public has sufficient and advance warning of the time of commencement so they can remove any advertisements that may contravene the new offence provision.

I trust the above measures are sufficient to reassure the Senate Standing Committee for the Scrutiny of Bills about the application of the new offence provision.

Committee Response

The Committee thanks the Minister for this comprehensive response which addresses its concerns. The Committee thanks the Minister for the commitment to ensure that the Bill commences appropriately.

Senator the Hon Helen Coonan
Chair

Stephen Smith MP
Minister for Defence

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

28 JAN 2011

Helen
Dear Senator Coonan

Thank you for the letter of 28 October 2010 requesting a response to issues identified in the Scrutiny of Bills Committee's *Alert Digest No 8 of 2010* with regards to the *Defence Legislation Amendment (Security of Defence Premises) Bill 2010*.

In order to address some of the issues raised in the Alert Digest, the Explanatory Memorandum will be amended to provide additional information clarifying those aspects related to training, the definition of Defence premises and the use of military working dogs.

Enclosed is my response to your specific queries. My point of contact in respect of this matter is Ms Hilary Hall on 02 6266 3316.

Yours sincerely
Best Wishes

Stephen Smith
Encl

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7800 Fax: (02) 6273 4118

Scrutiny of Bill's Committee's Alert Digest No 8 of 2010 -
Defence Legislation Amendment (Security of Defence Premises) Bill 2010

Issue: Whether the definition of defence premises includes land which may have a Defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all defence premises.

Land or buildings that may have a Defence purpose, but which are not currently used by the Defence Force or the Department of Defence do not meet the definition of defence premises included in the Bill. So, for example, the provisions in the Bill would not apply to an immigration facility that is located on a former Defence base that is not currently used by the Defence Force or the Department. Similarly, if a portion of an operational base was set aside for a use that is unrelated to the Defence Force or the Department, the provisions of the Bill would not apply to that portion of the base. The Department will amend the Explanatory Memorandum to include a statement to this affect.

Defence facilities, assets and personnel are potentially attractive targets for terrorist groups. In addition, many Defence facilities house dangerous, restricted or classified items. To ensure that the Department can appropriately safeguard Defence facilities, assets and personnel and prevent the unlawful removal of dangerous or classified items, Defence requires the ability to exercise the powers contained in the Bill at all of its premises. In practice, the exercise of the powers contained in the Bill and the proposed use of the various classes of Defence security officials will be dependent on the nature of the site and the assessed level of the security threat, typically determined on the basis of intelligence.

Issue: Whether consideration has been given to adequately warning persons entering Defence premises that they may be subject to non-consensual searches.

The Department intends to implement a number of administrative measures to ensure that people entering Defence premises are aware of the requirements, obligations and consequences arising from the search regime in the Bill. Given the diverse nature and composition of Defence premises, the definition of which includes movable assets such as aircraft, vessels and vehicles, the selection and implementation of these measures will be tailored to the particular circumstances of each Defence premise. Measures will include:

- prominently displaying signs at the entrance to Defence bases or facilities notifying people that they, their carried items and vehicles may be subject to consensual and non-consensual searches;
- conducting a comprehensive awareness campaign, prior to the introduction of the Bill's measures, to ensure all Defence personnel and contractors are aware of the Bill's provisions and their rights and responsibilities in relation to consensual and non-consensual searches;
- incorporating appropriate advice on the Bill's provisions in recruitment material for all advertised Defence vacancies and tenders to ensure prospective employees and contractors are aware of Defence's expectations and security requirements;

- addressing the Bill's provisions during staff and contractor induction training and in regular, mandatory security awareness training; and
- requiring Defence Force members and public servants who are hosting or escorting visitors on Defence premises to notify visitors of search requirements.

Further, Defence would highlight that section 72B of the amendments require Defence security officials to notify people, before making a request or requirement under the Bill's provisions, of the affect of refusing or hindering the request or requirement.

Issue: Concerns about the adequacy of the training of Defence security officials to ensure the restrain and detain powers are exercised safely and appropriately, and whether appropriate parameters for training requirements can be included in the Bill.

The Bill makes provision for Defence security officials to restrain and detain a person for the purposes of placing them in the custody of police or a protective security officer at the earliest practicable time. This power can only be exercised if the person is located on Defence premises and either refuses or fails to comply with an identification or search requirement or, as a result of complying, the Defence security official reasonably believes the person is not authorised to be on the premises, constitutes a threat to safety or has (or may) commit a criminal offence.

The ability to restrain and detain people is a fundamental component of the proposed search regime detailed in the Bill. Without the ability to restrain and detain people for the purposes of placing them in police custody, Defence will be significantly constrained in its mitigation of the risk of dangerous or classified items being improperly removed from Defence premises.

Under the Bill, all Defence security officials must satisfy training and qualification requirements before they can exercise any of the powers contained in the Bill, including the power to restrain and detain people. These training and qualification requirements, which will be specified in a legislative instrument, must be determined by the Minister for Defence or his delegate and will be stringent.

Defence is currently consulting with other Federal agencies, such as the Australian Federal Police and the Australian Customs and Border Protection Service, to assist in identifying the appropriate training and qualification requirements for Defence security officials.

The training requirement for contracted security guards under this Bill, and as determined by the Minister for Defence, will build upon and enhance the existing training regime as mandated in Defence security policy. Current Defence policy demands that contracted security guards meet a number of requirements that includes the successful completion of a Certificate II in Security Operations and the provision of services in accordance with relevant legislation, including general criminal legislation which controls the use of force. Additional mandatory requirements state that Defence contracted security guards:

- must be licensed to carry out the required security function by the relevant State or Territory in which the Defence facility is located;
- must hold a minimum security clearance of CONFIDENTIAL;

- must provide services in accordance with any relevant enactment or direction by the regulatory authority in each State and Territory and Australian Standard (AS) 4421 Guards and Patrols; and
- must possess a current drivers licence and a first aid qualification or competency.

In addition, contracted security guards must complete a Defence-endorsed training package covering the following topics:

- Defence security policy and relevant laws;
- Defence protocols such as rank structure and customer service;
- Defence security environment and awareness;
- Defence policing; and
- the Defence security alert system.

Australian Public Service employees who are to be appointed as Defence security screening employees and security authorised Defence Force members will be required to undergo comparable training to contracted security guards, appropriately augmented to address the additional powers available to these two categories of Defence security officials.

The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for the restrain and detain powers, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Justification for the provisions allowing and limiting the use of deadly force, together with concerns about of the adequacy of the training and qualification requirements and whether parameters for these can be included within the primary legislation.

A key rationale behind the development of the Bill is the requirement to clarify the legal issues surrounding Defence Force members acting in self defence in the event of a no-warning attack on Defence premises.

Australian law recognises the right to protect yourself or others who are threatened. This currently provides a legal basis for Defence Force members to use reasonable and necessary force to protect themselves, or others, in the event of an attack on Defence premises. This Bill, however, will provide certainty as to the scope of actions that

authorised and appropriately trained Defence Force members could take, rather than having to refer to the various Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.

The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for appropriately authorised Defence Force members who may be required to exercise potentially lethal force in the context of base security, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Whether, and if so why, it is intended that the proposed offence @71W of hindering or obstructing a search be regarded as a strict liability offence.

The Explanatory Memorandum incorrectly states this is a strict liability offence. It will be amended to correct this error.

Issue: Justification of the use of dogs for functions other than to detect explosives or other hazardous materials.

The primary use of dogs is for the protection of people and assets. Apart from their role in the detection of explosives or other hazardous material, dogs may be used by security authorised Defence Force members to deter, detect and, if required, apprehend trespassers for the purposes of placing them in the custody of the police or a protective service officer at the earliest practicable time (ie restrain and detain).

Military working dogs are presently employed at a number of Defence sites, in particular around Air Force bases. They are used to assist with the protection of people and assets over an extended area, which can often be difficult to protect effectively through other means. The presence of military working dogs can also be a very effective deterrent to trespassers and assist in avoiding a situation escalating to a point where injury to personnel or damage to assets may occur.

Defence maintains stringent policies and procedures around the training and use of military working dogs and the training of dog handlers. At all times, military working dog handlers are required to only use such force as is reasonable and necessary and direct their dogs in such a manner as to prevent unreasonable injury to persons or damage to property.

The use of dogs to assist with the conduct of searches or other functions or powers under this Bill is limited to security authorised Defence Force members who are also fully qualified dog handlers.

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

10/19048

25 NOV 2010

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

Dear Senator Coonan

I refer to your letter of 24 November 2010 attaching the Senate Scrutiny of Bills Committee's *Alert Digest No. 10 of 2010* (24 November 2010) concerning the Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010.

At pages 7 to 9 of the Digest the Committee seeks my advice on two issues related to the Bill.

The first issue concerns Items 3 and 6 of Schedule 1 to the Bill. The Committee asks whether the preservation by the Bill of rights to appeal against or to apply for review of orders affected by the High Court's decision in *MRR v GR* [2010] HCA 4 will have any detrimental effect on time limits for appeal or review.

Under the relevant court rules, parties have 28 days in which to appeal or seek a review, and 7 days to seek a review of a consent order made by a Federal Magistrates Court Registrar. Courts have the power to extend that time, including in cases where the relevant time period has passed. It can be expected that those time periods for appeal or review, in relation to orders affected by the High Court's decision, will have expired in most cases. However, those periods are able to be extended on application in accordance with the applicable rules of court (*Family Law Rules 2004* r.1.14; *Federal Magistrates Court Rules 2001*, r.3.05). Item 3 of Schedule 1 to the Bill, in preserving relevant rights to appeal or seek a review, preserves the rights that parties have to apply to a court to extend the relevant periods for doing so.

Item 6 of Schedule 1 to the Bill deals with the separate issue of later variation of the rights and liabilities created by the Bill in relation to orders affected by the High Court's decision. Accordingly, Item 6 does not retrospectively affect rights of appeal or review of those orders.

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The second issue on which the Committee seeks my advice relates to Item 7 of Schedule 1 to the Bill.

Item 7 clarifies that the approach taken by the Bill extends to the validation of acts and things done in relation to affected orders of courts within the federal family law system which are not superior courts of record. As mentioned in the Bill's Explanatory Memorandum, that clarification is not necessary in relation to orders of the Family Court of Australia which, as a superior court of record, remain valid until set aside.

I acknowledge that the Bill will retrospectively affect the rights of any person dealt with by a lower court in enforcement or contempt proceedings. It is, however, in the public interest that civil enforcement or contempt action taken to secure compliance with an order that the parties to it will have regarded as one that binds them, and will have expressly stated the consequences that may follow from contravention, should be validated.

I note that the most recent Commonwealth validation legislation included a provision to the same effect as Item 7 (*Judiciary Legislation Amendment Act 2006*, Schedule 1 Item 13; *Family Law Amendment (Shared Parental Responsibility) Act 2006*, Schedule 10, Item 3, section 114MM).

I do not consider that Items 3, 6 and 7 of Schedule 1 to the Bill trespass unduly on personal rights and liberties.

The action officer for this matter in my Department is Mr Peter Meibusch who can be contacted on 02 6141 3119.

Yours sincerely

Robert McClelland

DEPUTY PRIME MINISTER
TREASURER

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15 DEC 2010

Senator the Hon Helen Coonan
Senator for New South Wales
Chair
Senate Standing Committee for the Scrutiny of Bills
S1 111, Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

Thank you for the letter of 17 November 2010 from the Scrutiny of Bills Committee seeking my advice as to whether the Commonwealth's funding of the National Health and Hospitals Network (NHHN) Agreement could be subject to the standard annual appropriations process.

The Committee has questioned whether section 15A of the Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010 breaches principle (1)(a)(v) of the Committee's terms of reference through creating a standing appropriation which may be considered to insufficiently subject the exercise of legislative power to Parliamentary scrutiny.

More specifically, the Committee's *Fourteenth Report* of 2005 indicates that standing appropriations may potentially infringe on the Committee's terms of reference relating to the delegation and exercise of legislative power where they "allow the executive government to spend unspecified amounts of money for an indefinite amount of time into the future".

Section 15A of the Bill establishes the NHHN Fund as a Special Account for the purposes of section 21 of the *Financial Management and Accountability Act 1997*. As set out in the paragraph 2.7 of the Explanatory Memorandum:

> 'A Special Account is an appropriation mechanism that sets aside an amount within the Consolidated Revenue Fund to be expended for specific purposes. Any amounts credited to the NHHN Fund are quarantined from the rest of the Consolidated Revenue Fund and can only be debited from the NHHN Fund for the purposes specified.'

Although the crediting of the NHHN Fund is established as a standing appropriation, the Parliament has oversight of each the three types of payments that can be debited from the NHHN Fund.

The first type of payment that can be debited from the NHHN Fund is Dedicated GST revenue payments. The amount of GST that can be debited from the NHHN Fund is limited by the amount of GST revenue collected which is in turn determined by the rate and base of the GST which are set by Parliament through separate legislation. In accordance with the NHHN Agreement, only an agreed proportion of GST revenue collected will be debited from the NHHN Fund and dedicated to health and hospital services. I note that under the current arrangements set out in the *Federal Financial Relations Act 2009* the Parliament has already agreed that all of the GST revenue should be paid as grants to the States and Territories.

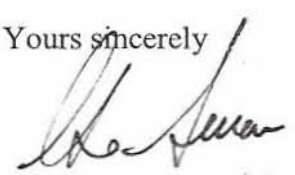
The second type of payment that can be debited from the NHHN Fund is Special payments. Special payments reflect funding under the former National Healthcare Specific Purpose Payment. Section 15F limits the total amount able to be debited from the NHHN Fund to $11,224,185,000 for the 2009-10 financial year which is indexed annually. The Intergovernmental Agreement on Federal Financial Relations provides that this amount will be indexed by a growth factor that will be the product of: a health specific cost index; growth in population estimates weighted for hospital utilisation; and a technology factor. The Minister will determine the indexation arrangements by legislative instrument and these legislative instruments will be disallowable.

The final type of payment that can be debited from the NHHN Fund is Top-up payments. Top-up payments commence in 2014-15. Subsections 15H(7) and 15H(8) require an Appropriations Act relating to a financial year to specify a general drawing rights limit before any Top-up payments can be debited from the NHHN Fund.

I consider that the arrangements for Parliamentary oversight of debits from the NHHN Fund set out above ensure that Parliament can ensure that the executive government is not able to spend unspecified amounts of money for an indefinite amount of time into the future. As such, I consider that subjecting crediting of the NHHN Fund to the standard annual appropriations process is unnecessary as it would simply duplicate the arrangements outlined above.

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

Yours sincerely



WAYNE SWAN

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2010-12261

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 24 November 2010 from Ms Toni Dawes, Committee Secretary, seeking comments on amendments to the Fisheries Legislation Amendment Bill (No.2) 2010. I regret the delay in responding.

Amendment number five provides immunity for international officers from liability while undertaking fisheries-related enforcement duties. This amendment implements article 5.2 of the Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands. It ensures international officers have the same level of immunity provided to Australian officers lawfully enforcing Australian fisheries laws under section 90 of the *Fisheries Management Act 1991.* Similar immunity provisions have been extended to Australian officers enforcing French fisheries laws.

The agreement specifies that Australia or France 'shall, where one of its officers has allegedly breached the laws of the other party, ensure appropriate action, consistent with its laws and regulations, is taken against its officers' (article 5.3). It is unlikely that an issue will arise requiring prosecution of an officer as the agreement provides that crews shall take all appropriate measures to respect and observe the other nation's laws.

Thank you again for your comments.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

17 January 2011

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THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

I refer to the letter of 28 October 2010 from Ms Toni Dawes, Committee Secretariat, regarding comments relating to the National Health and Hospitals Network (NHHN) Bill 2010 in the Senate Standing Committee for the Scrutiny of Bills (the Committee) identified in Alert Digest No. 8, of 27 October 2010.

I am pleased to provide the following response in relation to the issues raised by the Committee concerning the NHHN Bill.

Clause 2 – reason for proposed commencement date
The proposed commencement date for the permanent Australian Commission on Safety and Quality in Health Care (the Commission) of 1 July 2011 is consistent with the timeframes outlined in the NHHN Agreement. Under the terms of the Agreement, the earliest date on which the NHHN will commence operation is on and from 1 July 2011. The funding and administrative arrangements for the Commission in its current form as part of the Department of Health and Ageing are set to expire on 30 June 2011. Passage of the NHHN Bill during the Spring 2010 sittings will allow new administrative and funding arrangements to be put in place in time for the permanent, independent Commission to commence operations on 1 July 2011. Establishing the administrative processes and recruiting a Chief Executive Officer and Board is expected to take around six months.

Clause 9 - Possible insufficient scrutiny of legislative power
Section 57 of the NHHN Bill makes it clear that the Commission does not have the power to compel compliance with the standards or guidelines it formulates. The Commission will not be involved in enforcing compliance against its standards and guidelines. It is intended that the Commission will develop safety and quality standards for use by accrediting agencies during their accreditation processes.

If compliance with such instruments was made a term or condition of a grant or under a contract or other legally enforceable agreement, then they would be enforceable under private rather than public law. If such instruments were to be applied or adopted by a state or territory law or a Commonwealth law (as contemplated by cl 57(3)), then this would provide an opportunity (at that later stage) for Parliamentary review. It is not necessary for an instrument to be a legislative instrument in order for it to be used in other law.

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Monitoring and promotion activities undertaken by the Commission will be in relation to impact of the voluntary uptake of standards and guidelines formulated by the Commission or those that have been adopted under another law as stated in the Bill.

The Commission's standards, guidelines and indicators will be publicly available and these publicly available documents will be regularly updated so that the current standards, guidelines or indicators are easily accessible at any given time.

Further, any rule made by the Minister in relation to formulating standards, guidelines or indicators will be a legislative instrument and subject to parliamentary scrutiny.

Subclause 10(4) - Incorporation of material by reference
As outlined above, compliance with any standard, guideline or indicator formulated by the Commission is voluntary. This includes where the Commission has applied, adopted or incorporated, with or without modification, instruments or writings in its standards, guidelines or indicators. Where a standard or guideline is adopted by a state or territory law or a Commonwealth law (as contemplated by cl 57(3)), then this would provide an opportunity (at that later stage) for parliamentary review.

This subclause will allow the Commission flexibility to apply, adopt or incorporate, with or without modification, instruments or writings as standards or guidelines in order to avoid duplication of work carried out by other bodies or organisations.

Clause 14 - Insufficiently defined administrative power
This clause is drafted to allow the Minister, in consultation with participating state and territory Health Ministers, flexibility to make rules in relation to the circumstances in which the Commission can charge fees. I note that there would be parliamentary oversight of the content of the rules made under subclause 14(c) of the NHHN Bill. It is envisaged that such circumstances may change over time and therefore a broad construction of the clause was favourable.

I trust that the above information is of assistance.

Yours sincerely

NICOLA ROXON

04 FEB 2011

THE HON SIMON CREAN MP

Minister for Regional Australia, Regional Development and Local Government
Minister for the Arts

Reference no: C10/74001

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

23 DEC 2010

Dear Helen

I refer to the letter of 24 November 2010 from the Committee Secretary of the Standing Committee for the Scrutiny of Bills (the Committee) regarding Schedule 2, item 12 of the *Screen Australia (Transfer of Assets) Bill 2010* (the Bill).

The Committee has requested advice about whether Schedule 2, item 12 of the Bill will have an adverse effect on any person as the provisions may be considered to trespass unduly on personal rights and liberties and be in breach of principle 1(a)(i) of the Committee's terms of reference.

I am advised that a determination made under the provision in question would not have an adverse effect on any person. The two parties that will be predominantly affected by item 12 are Screen Australia and the National Film and Sound Archive (NFSA), both of which have been consulted in the drafting of the Bill and have consented to the transfer of the film library.

Item 12 of Schedule 2 of the Bill enables the Minister to determine in writing that a provision of item 9, 10 or 11 does not apply in relation to instruments, proceedings, records or documents specified in the determination. Under subitem 12(2)(a), this determination takes effect at the time specified in the determination (which may be a time before the determination is made but not a time earlier than the transition time of 1 July 2011).

Subitems 9(2), 10(2) and 11(2) of Schedule 2 provide for the automatic transfer of a number of matters (including instruments, legal proceedings, records and documents), which relate to film library assets or film library liabilities from Screen Australia to the NFSA. The Minister is also provided a discretion to transfer certain other matters not covered by subitems 9(2), 10(2) and 11(2) from Screen Australia to NFSA by written determination (subitems 9(3), 10(3) and 11(3)).

Item 12 was included in the Bill to overcome any unintended consequences of the transfer of film library assets or film library liabilities from Screen Australia to NFSA under items 9, 10 and 11.

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A large amount of material connected with the film library will be transferred from Screen Australia to the NFSA through the operation of these items and therefore circumstances may arise where it would be considered more appropriate for particular material to remain with Screen Australia.

For example, if records or documents were automatically transferred from Screen Australia to the NFSA due to the operation of subitem 11(2) but it was considered that for operational reasons these records or documents should actually have been retained by Screen Australia, I would be able to make a determination under item 12 which would exclude the records or documents specified in the determination from being transferred from Screen Australia to the NFSA. This determination may need to have retrospective effect if the transition time has already passed and the documents have therefore already effectively been transferred from Screen Australia to the NFSA under subitem 11(2).

There is a possibility that some third parties may be connected with the matters in items 9 and 10 (for example, parties to either contracts or legal proceedings connected with the film library) and therefore a determination under item 12 may also similarly have consequences for these parties. However, substituting the NFSA for Screen Australia (or vice versa) as a party to these contracts or legal proceedings would not disadvantage these third parties in any way because the rights of these parties either under contract or in the proceedings would remain the same. If a determination were made under item 12 with retrospective effect, third parties would merely be returned to the position they were in prior to 1 July 2011, that is, they would remain as a party to a contract (or legal proceedings) with Screen Australia rather than the NFSA.

I trust this information assists the Committee in its deliberations.

Yours sincerely

SIMON CREAN

THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

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

Dear Senator Coonan Helen

I refer to a letter of 24 November 2010 from Ms Toni Dawes, Committee Secretary of the Standing Committee for the Scrutiny of Bills. Ms Dawes sought my response to comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 10 of 2010 about the issue of retrospective application of the Tobacco Advertising Prohibition Amendment Bill 2010 (the Bill).

The Explanatory Memorandum described the application of s15A as 'retrospective'. It is important to understand how this retrospective application operates. It is not the case that the law is retrospective in the traditional legal meaning of that word. While a better choice of words may have been preferable, an illustration will clarify the distinction.

For example, the hypothetical website www.cigarettes.com sells cigarettes online and has had images of cigarette packets at each point of sale since 2003. After the commencement date of the law and proposed amendments to the Tobacco Advertising Prohibition Regulations 1993 (the Regulations), www.cigarettes.com must remove all images of cigarette packets and include text only descriptions.

As the law is not retrospective, www.cigarettes.com cannot be prosecuted for having published images of cigarette packets prior to the commencement date. That is, the law does not render illegal the then-legal act of uploading an image in 2002. The law does make it illegal to continue to display that image on the website after the Bill and amended Regulations come into effect, regardless of when the advertisements were first uploaded onto the internet. This is the same way the *Tobacco Advertising Prohibition Act 1992* (the Act) applied to existing advertisements when it came into force in 1992. The offence is not uploading the image in 2002 (which would make the law truly retrospective). The offence is displaying the image in 2011.

The Act included a defence when it came into force in 1992. The Committee has asked whether consideration was given to including such a defence, possibly time-limited, to protect defendants who were not aware of the new law. The Government does not consider this necessary for the following reasons.

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Firstly, one of the reasons for the original defence was that many of the advertisements that the Act made illegal in 1992 were large and potentially costly and difficult to remove (billboards at sports stadiums for example). Internet advertisements, by contrast, can be removed in moments and with minimal cost.

Secondly, a defence, even if time-limited, would complicate prosecution because of the difficulty in proving whether or not a person was genuinely unaware of the new provision.

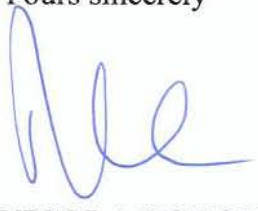
Thirdly, the Government believes that there will be adequate time to alert all Australians to the new provisions. In particular it is proposed that the legislative amendments to the Regulations will commence six months after the Bill receives Royal Assent. The Government proposes to use this six month time period to complete the drafting and passage of the amended Regulations and conduct a public consultation process. A consultation paper will be released in conjunction with a media release and advertisements in major national and state/territory newspapers. My Department is also considering appropriate social networking and online media to advertise the Bill and proposed amendments to the Regulations.

Finally, my Department intends to prosecute breaches of the Bill in the same way as the breaches of the Act. That is, my Department will write to the organisation responsible for publishing the potential breach to advise it and ask it to outline what measures it intends to undertake in order to comply with the Act. A response would be required within 30 days. If the response includes a statement that the breach will be removed and future compliance is assured, my Department will inform the organisation that no further action will be taken. My Department will monitor the website to ensure the advertisement has been removed. If no response is received, or the undertaking to remove the advertisement is not honored, my Department will refer the breach to the Director of Public Prosecutions.

The Senate Standing Committee for the Scrutiny of Bills Alert Digest also suggested the commencement date be six months after Royal Assent rather than by earlier proclamation. The Government agrees to allow the six month period after Royal Assent to lapse (i.e. without making a proclamation) so that Schedule 1 of the Bill commences at that time automatically. This time lag of six months, which complements the consultation process outlined above, will ensure the public has sufficient and advance warning of the time of commencement so they can remove any advertisements that may contravene the new offence provision.

I trust the above measures are sufficient to reassure the Senate Standing Committee for the Scrutiny of Bills about the application of the new offence provision.

Yours sincerely



NICOLA ROXON

7 FEB 2011