SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2012

The Committee presents its Eighth Report of 2012 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:

Greenhouse and Energy Minimum Standards Bill 2012

Introduced into the House of Representatives on 30 May 2012
Portfolio: Climate Change and Energy Efficiency

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Parliamentary Secretary responded to the Committee's comments in a letter dated 10 August 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill establishes a national framework for regulating the energy efficiency of products supplied or used within Australia. The national framework will replace seven state and territory legislative frameworks.

In July 2009 the Council of Australian Governments (COAG) issued the National Strategy on Energy Efficiency with a commitment to establish national legislation for efficiency standards and labelling, and to expand the scope of the Equipment Energy Efficiency Program.

Broad discretionary power
Clause 45

This clause provides that the GEMS Regulator may impose written conditions on a product model's registration, but the bill does not seek to define the scope of the power. The explanatory memorandum states, at page 35, that the conditions 'must be reasonably adapted and appropriate to give effect to the purposes or provisions of the Act to be valid'. In essence this suggests that conditions must be proportionate to the purposes to be achieved by the legislation.

However, although broad statutory powers which delegate legislative power to regulate for particular purposes are sometimes read so as to require that they be exercised in a proportionate way, the standard of judicial review applied to administrative powers only requires that the decision not be so unreasonable that no reasonable decision-maker could have so exercised the power. It is true that the power could not be exercised for purposes which are thought to be unauthorised for the legislation, but the Committee is concerned to ensure that any conditions are directly proportionate. **The Committee therefore seeks the**

Minister's advice as to whether consideration has been given to including in the legislation a requirement that conditions be 'reasonably adapted and appropriate'.

Pending the Minister's reply, 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.

Minister's response - extract

Broad discretionary power
Clause 45 – Greenhouse and Energy Minimum Standards Bill 2012

Alert Digest No. 6 of 2012 requested the Minister's advice whether consideration had been given to including an explicit statement in the legislation that conditions imposed under.

Clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012 permits the GEMS Regulator to impose conditions on a model's registration, at any time. The explanatory memorandum to the Greenhouse and Energy Minimum Standards Bill 2012 explained that these conditions are limited to those that are reasonably adapted and appropriate to giving effect to the purposes of the Act. This limit is intended to ensure that conditions may only be imposed where they are proportionate and aimed at promoting the effectiveness of the GEMS legislation.

While the policy intention is clearly specified in the explanatory memorandum, it could be more clearly stated in the legislation itself. For these reasons, the Government will propose an amendment to clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012 to limit registration conditions to those that are 'appropriate and adapted to giving effect to the purposes of this Act'. The proposed amendment will be considered in the House of Representatives debate on the Greenhouse and Energy Minimum Standards Bill 2012.

Committee Response

The Committee thanks the Minister for this response and for his commitment to introduce an amendment to the bill to address the committee's concern.

Undue trespass—natural justice
Clauses 49 and 54

These clauses provide, respectively, for the suspension and cancellation of a product model's registration. These decisions would be reviewable under Part 9 of the bill which provides for internal review and AAT review. However, the statutory powers do not expressly provide for procedural fairness (i.e. natural justice) prior to the exercise of these powers. As such obligations are not clearly excluded by the statute, the exercise of these powers would be subject to the common law requirements for a fair hearing and impartial hearing. Nevertheless, it would be helpful if a statement to this effect was included in the explanatory memorandum to confirm that the legislation is not intended to (impliedly) exclude the common law rules of natural justice. **The Committee therefore requests the Minister's consideration to including this information in the explanatory memorandum.**

> *Pending the Minister's reply, 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.*

Minister's response - extract

Trespass—natural justice
Clauses 49 and 54 – Greenhouse and Energy Minimum Standards Bill 2012

Clauses 49 and 54 of the Greenhouse and Energy Minimum Standards Bill 2012 permit a product model's registration under the Act to be suspended or cancelled for various reasons. Suspension and cancellation are administrative remedies to certain breaches of responsibility, in contrast to financial penalties or other enforcement action.

As an administrative action affecting rights and responsibilities, the principles of procedural fairness should apply to all decisions to suspend or cancel a product model's registration under the Act.

To ensure this policy intention for the GEMS legislation is clear, the Government will include a statement in the explanatory memorandum that the common law rules of procedural fairness apply to decisions to suspend or cancel a registration. This will include the right to a fair hearing in any consideration of suspension or cancellation of a registration. This slight amendment will be made when the explanatory memorandum is reprinted after the House of Representatives debates the suggested amendment to clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012, prior to the Bill's introduction to the Senate.

Committee Response

The Committee thanks the Minister for this response and for his commitment to include additional information in the explanatory memorandum.

Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012

Introduced into the House of Representatives on 30 May 2012
Portfolio: Climate Change and Energy Efficiency

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Parliamentary Secretary responded to the Committee's comments in a letter dated 10 August 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill imposes registration fees to be charged on businesses registering regulated products as required under the Equipment Energy Efficiency Program.

Delegation of legislative power
Clauses 8 and 9

Clause 8 permits the regulator to specify fees by legislative instrument. The fees are imposed, for constitutional purposes, as a tax. Clause 9 permits the legislative instrument to specify fees by nominating an amount to be paid or a method or formula for calculating registration fees. Although subclause 9(2) enables the Regulator to consider the costs of processing registration applications and compliance monitoring in relation to GEMS products, subclauses 9(3) and (4) make it clear that fees need not be limited to considerations concerning the costs associated with product registration.

The explanatory memorandum, at page 5, states that this 'is not intended to mean that fees are not fundamentally a cost recovery mechanism, but that the costs recovered under registration fees need not be related to these activities only' and may relate to other program activities. The explanatory memorandum also states that although a maximum fee is not specified in the legislation, 'the Act clarifies that registration fees are for the purpose of cost recovery, meaning registration fees should never exceed the reasonable costs taken into account when specifying the amount of registration fees'. However, the clause itself does not clearly limit fees to cost recovery. In particular subclause 9(3) states that the matters which the GEMS Regulator may consider in specifying an amount or method to calculate fees is not limited to the cost recovery matters specified in subclause 9(2). Given that the legislation contains neither a maximum level of fees nor a formula for the

calculation of fees, **the Committee seeks the Minister's advice as to whether consideration might be given to an amendment to the bill which clarifies the intention that registration fees are limited to cost recovery purposes.**

Pending the Minister's reply, 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.

Minister's response - extract

Delegation of legislative power
Clauses 8 and 9 – GEMS Registration Fees Bill

The Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012 will allow the GEMS Regulator to set registration fees to recover a portion of the costs incurred in administering the GEMS legislation. The cost recovery will assist the Government to deliver registration services and a compliance and enforcement program that are improved from the current state-legislated Equipment Energy Efficiency Program.

The intention to limit registration fees to cost recovery was clearly stated in the explanatory memorandum to the Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012. However, this intention could be made more explicit on the face of the legislation. For this reason, the Government proposes an amendment to clause 9 of the GEMS Registration Fees Bill to clearly limit registration fees to the purposes of recovering costs incurred processing applications for registration under the GEMS legislation, and costs incurred monitoring compliance with the legislation.

Examples of costs incurred processing registration applications may include costs such as the staff required to process and approve applications, the costs of the establishing and maintaining the online portal and database for registration applications, the cost of procuring specialist advice to identify whether niche products comply with relevant standards, or the cost of communicating with existing and prospective applicants.

Examples of costs incurred in compliance monitoring may include testing products for compliance with relevant standards, training inspectors and conducting store audits or online monitoring to identify whether products comply with standards, and the cost of communicating with persons who are required to comply with the Act.

This amendment will be considered in the House of Representatives debate on the GEMS Registration Fees Bill 2012. The supplementary explanatory memorandum will include the (non-exhaustive) examples of costs that may be recovered listed above. This information will be included in the explanatory memorandum to the GEMS Registration Fees Bill 2012 before the Bill is introduced to the Senate.

Committee Response

The Committee thanks the Minister for this response and for his commitment to introduce an amendment to the bill to address the committee's concern and to include additional information in the explanatory memorandum.

Health Insurance Amendment (Professional Services Review) Bill 2012

Introduced into the House of Representatives on 9 May 2012
Portfolio: Health and Ageing

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter dated 15 July 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill responds to the Full Federal Court decision in *Kutlu* v *Director of Professional Services Review* (2011) 197 FCR 177 by validating certain acts.
It also amends the *Health Insurance Act 1973* in relation to:

- the judgments in *Daniel* v *Health Insurance Commission and Others* (2003) 200 ALR 379 and *Kelly* v *Daniel* (2004) 134 FCR 64 by requiring the Chief Executive Medicare to request the Director of Professional Services Review to review services by a person if the services have been provided in circumstances that constitute a prescribed pattern of services;

- allied health practitioners; the meaning of service; the extension of time in certain circumstances for final reports and determinations; the Professional Services Review Committee or Determining Authority not continuing an investigation in certain circumstances; and

- the date of effect for final determinations; referrals to the Medicare Participation Review Committee; referrals to appropriate regulatory bodies; disqualified practitioners; and details to be included in patient referrals.

The bill also makes technical amendments consequent on the *Legislative Instruments Act 2003*.

Retrospective validation of decisions
Schedule 1

Schedule 1 of this bill includes provisions which operate to validate actions taken by invalidly constituted Professional Services Review (PSR) Committees. In *Kutlu v Director of Professional Services Review* [2011] FCAFC 94 the Full Court of the Federal Court of Australia unanimously held that the Minster's failure to comply with statutory requirements to consult the Australian Medical Association prior to appointing a medical practitioner to be a member of the Professional Services Review Panel or as a director of the Panel had the consequence that (i) the appointments were invalid, and (ii) that any decision made by a Committee constituted by persons invalidly appointed were also invalid.

The explanatory memorandum states at page 1 that the amendments ensure that 'actions taken under Part VAA, VB or VII of the HIA [*Health Insurance Act*] and any flow on acts that have been brought into question as a result of the *Kutlu* decision, are treated as valid and effective and are to be taken always to have been valid and effective'. The validating provisions do not apply 'to parties to proceedings for which leave to appeal to the High Court of Australia has been given on or before the commencement of this Schedule' (explanatory memorandum at page 12) and the provisions in item 2 of Schedule 1 enable the Director of the PSR to re-refer matters to a new PSR Committee if, either before or after the commencement of item 2, [relevant] proceedings … have been finally determined by a court in favour of the person under review on the grounds that, or on grounds that include the ground that, a person not appointed, or [not] validly appointed, as a Panel member or Deputy Director under the HIA' (explanatory memorandum at page 12).

The retrospective validation of decisions involved in these provisions is addressed in the Statement of Compatibility with Human Rights (SOC). The SOC claims at page 7 that Schedule 1 of the bill seeks to 'recreate rights and liabilities that but for the invalid appointments would have been established as a result of the findings made by the invalidly constituted PSR Committees'. The SOC appears to proceed on the basis that 'no human rights objections' will generally be raised in relation to such provisions (see page 6). More particularly, in relation to whether the right to a fair trial is affected, it is argued that the bill has a legitimate objective in 'ensuring that a technical error in the appointment process of the PSR Panel and Deputy Director does not expose the public to the risks of inappropriate practice' and that the approach is 'reasonable, necessary and proportionate' to this objective (see page 7).

The Committee draws attention to proposed retrospective legislation where the provisions may, or will, have a detrimental effect on individuals. In addition, the Committee takes the view that retrospective legislation should be clearly justified in the explanatory memorandum. There are a number of aspects of the Federal Court's reasoning in *Kutlu* which are of relevance to a consideration of the adequacy of the justification of the approach taken in Schedule 1 of the bill. (The Committee also notes that the High Court has granted special leave to appeal from this decision.)

Although the Federal Court recognised that the invalid decisions produced by invalidly constituted committees may cause public inconvenience, the Court's reasons are clearly inconsistent with characterisation of the consultation requirement as a mere technicality. The general purposes of the review scheme included the promotion of public confidence in decisions reached, but the Court also emphasised a legislative intention to promote confidence of the regulated professions and individual professionals in the system [*Kutlu* [20]].

While the Court accepted that the views of the AMA are not determinative of the question of whether a person can be appointed, it was emphasised that the advice of the AMA is a mandatory relevant consideration—that is, a matter which the Minister must consider prior to making an appointment. It was also argued that the conclusion that consultation with the AMA was an essential element of valid appointments was consistent with the text of the legislation which provided that 'the Minister *must* consult' '*before*' making an appointment. The Court also emphasised the 'scale of the breaches' of the Act. In addition, the Court noted that the statutory requirements were not difficult to comply with and that political responsibility for any inconvenience lay with the decision-maker.

In light of the emphasis in the SOC that the bill is intended to ensure the protection of the public the Committee, further justification for the conclusion that the bill has a legitimate objective and that the approach is 'reasonable, necessary and proportionate' would be of assistance to the Committee to assess the proposed approach against its terms of reference. In addition, further information about extent of any public inconvenience created by Ministers' failures to comply with the legislation and the number of persons who may be adversely affected would assist the Committee in assessing whether the approach is proportionate in light of the significant affects that adverse committee decisions may have on those directly affected. Also relevant is whether the Department has already taken steps to minimise public inconvenience prior to the introduction of this legislation and whether any alternative solutions have been considered. **For these reasons, the Committee seeks the Minister's further advice about these matters and the justification of the proposed approach.**

> *Pending the Minister's reply, 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.*

Minister's response - extract

The Committee seeks advice about a number of matters and seeks further justification for the proposed approach outlined in Schedule 1 to the Health Insurance Amendment (Professional Services Review) Bill 2012 (the Bill). I note the Bill has passed both Houses

of Parliament and the *Health Insurance Amendment (Professional Services Review) Act 2012* (the Amending Act) was assented to on 27 June 2012.

As stated in the explanatory memorandum, the Professional Services Review (PSR) scheme is a statutory scheme that is the only mechanism available to the Commonwealth to ensure medical services subsidised under the Medicare Benefits Scheme (MBS), and medicines subsidised under the Pharmaceutical Benefits Scheme (PBS), are clinically relevant and appropriate. In 2010-11 both schemes provided $24.8 billion in combined patient assistance and it is essential the Commonwealth has a mechanism that ensures the services and medicines provided are appropriate and safe. The PSR is an essential part of the regulatory framework that protects the integrity of the MBS and PBS.

The Committee has raised concerns regarding the validating provisions provided in Schedule 1 of the Amending Act. These provisions respond to the Full Federal Court's decision in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94. In this decision the Court held that the Minister's failure to consult with the Australian Medical Association (AMA) as required under the *Health insurance Act* 1973 (the Act) invalidated a number of appointments of PSR Panel members and Deputy Directors and all PSR processes involving the invalidly appointed Panel members and Deputy Directors.

The Amending Act draws on precedents of earlier Commonwealth validation legislation (which have been upheld by the High Court) to ensure decisions and actions that may be invalid because a Panel member or Deputy Director was not validly appointed, are as valid and effective as they would have been had that person been validly appointed.

As stated in the Statement of Compatibility, the Commonwealth views the Amending Act as compatible with human rights, although notes that in the cases where it may limit human rights these limitations are reasonable, necessary and proportionate. The Commonwealth does not take these limitations lightly, but is confident there is a legitimate purpose in the Amending Act. By validating past PSR Committee decisions that may be ruled invalid due to irregularities in the appointment process, the Amending Act ensures the Commonwealth and the public are protected from the effects of inappropriate practice. Given the size and scope of the MBS and PBS, and the important public-protective function of the PSR, the Amending Act has a legitimate objective and does not trespass unduly on personal rights and liberties.

These provisions are also consistent with new subsection 33AB of the *Acts Interpretation Act 1901*. These provisions provide that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid merely because there was a defect or irregularity in connection with the appointment, the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased. I note the application of the Amending Act will have a similar effect as subsection 33AB, and provides that in these cases a legitimate objective can be found in preserving the decisions of these Committees.

I note the Committee's concern regarding the explanatory memorandum's phrasing of the appointment irregularities as a technical error given the gravity of the breaches of the Act found by the Court in *Kutlu.* I can assure the Committee that whilst the Commonwealth views the mistakes as technical in nature, the impact of these mistakes is far reaching and the description does not indicate that they have been taken lightly. As the effect of the validating provisions in the Amending Act will be to put persons in the same position they would have been if the decisions made by PSR Committees had been made by validly appointed persons, I do not believe the Amending Act trespasses unduly on personal rights and liberties. I note the PSR scheme maintains the support of the professional health practitioner bodies, including the AMA, and serves an important public-protective function.

The Committee has requested further information regarding the substantial public inconvenience which could result from the *Kutlu* decision. I emphasise that whilst the decision in *Kutlu* applies solely to those matters, it creates a precedential argument which calls into question the validity of PSR matters from 2005 and could potentially affect matters completed prior to this. The decision may also affect current and completed Medicare Participation Review Committee (MPRC) matters.

A total of over 100 findings of inappropriate practice were made in the last decade and practitioners were required to repay over $7.8 million. Many practitioners were disqualified from rendering Medicare services or prescribing pharmaceutical benefits in this time. If the problems highlighted in *Kutlu* were applied to all PSR decisions, the Commonwealth could expect many legal proceedings. More importantly, practitioners who may have been disqualified from medical practice by accreditation bodies, which have taken into account material referred to them by PSR Committees, may be able to practice medicine again. I am unable to provide the Committee with exact details of the conduct of some of these medical practitioners, but it could give rise to adverse health outcomes for patients, and I am confident that the public protective functions of these provisions have a reasonable and legitimate purpose.

I assure the Committee that appropriate steps have been taken to minimise the public inconvenience that resulted from the findings of the Federal Court in *Kutlu.* Once the Commonwealth became aware of the potential appointment irregularities, all current Panel members and Deputy Directors resigned as a preventative measure. This meant matters that were before PSR Committees at the time came to an end and no new matters would come before the PSR Committees. In total the PSR discontinued 39 matters that were at various stages in the PSR process to avoid any further public inconvenience. The PSR also suspended all matters at the Determining Authority stage at the time.

The Committee may wish to know that the Commonwealth is taking appropriate steps to prevent similar situations arising in the future. The Professional Services Review Advisory Committee has implemented Guidelines for the appointment of practitioners to the PSR Panel and as Deputy Directors. The Commonwealth is also working to implement the recommendations of the Senate Community Affairs References Committee report into the

PSR scheme that was tabled on 25 October 2011. The Commonwealth accepted all the recommendations made by the report in its response, tabled in the Senate on 6 March 2012.

I assure the Committee the Commonwealth views the decision of the Full Federal Court in *Kutlu* seriously and this is why the Commonwealth sought, and was granted, leave to appeal the decision to the High Court of Australia. However, it was deemed that a legislative solution was the most effective and assured measure that would provide the Commonwealth, and the public, protection from the effects of inappropriate practice. Once the passage of the Bill was assured the Commonwealth discontinued these proceedings.

Committee Response

The Committee thanks the Minister for this detailed and informative response, and notes that the legislation has already been passed by the Parliament.

Alert Digest No. 6 of 2012 - extract

Delegation of Legislative Power
Schedule 2, item 6

Item 6 of schedule 2 of the bill introduces a new section 82A, which concerns the meaning of the term 'prescribed pattern of services'. The Professional Services Review Committee may review the provision of such services. Proposed section 82A enables the regulations to prescribe the circumstances in which services are rendered or initiated so as to amount to a prescribed pattern of services. Subsections 82A(2) and (3) make it clear that the regulation making power for this purpose is a flexible one. Prescribed circumstances may relate to practices of practitioners in a particular profession or a sub-group of a particular profession. It is also the case that they may relate to circumstances which include the provision of services of more than a specified number, or more than a specified number of services of a particular kind, on each of more than a specified number of days during a period of a specified duration.

The explanatory memorandum at page 17 justifies this flexibility by reference to the 'significant variation' that 'exists in the way in which different health professions and individual specialties within professions practice and that the point at which the quality of the clinical service provided to patients may be undermined varies between professions and specialties'. In the Committee's view, the appropriateness of providing for the details of a 'prescribed pattern of services' through delegated legislation in general appears to be

justifiable given that what amounts to inappropriate clinical practice in particular professions is likely to be subject to variations and, also, a matter where it may be appropriate for regulation to be responsive to changing practices. **Thus, the Committee leaves to the Senate as a whole the question of whether the proposed approach is appropriate.**

> *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.*

Minister's response - extract

I note that the Committee has asked the Senate as a whole to consider the question of whether providing for the details of a 'prescribed pattern of services' through delegated legislation is appropriate.

I wish to assure the Committee and the Senate that this is not a new delegation of legislative powers as using regulations to define a 'prescribed pattern of service' was introduced by the *Health Insurance Amendment (Professional Services Review) Act 1999 (Amending Act 1999).*

The Amending Act 1999 introduced subsection 106KA of the Act, which provides that the regulations may prescribe a different number of services and a different number of days in respect of different categories of practitioner. The explanatory memorandum to the Amending Act 1999 provides that due to the substantial variation amongst the professions that the PSR arrangements apply to, regulations are the best method to prescribe an inappropriate pattern of services. Part 13 of the Amending Act repeals this subsection, and Part 6 of the Amending Act moves these provisions into subsection 82A.

These provisions, originally contained in the Amending Act 1999, address recommendations 4 and 6 of the 1999 Report of the Review Committee of the Professional Services Review Scheme.

As stated in the explanatory memorandum the changes to the provisions relating to a 'prescribed pattern of services' have been made in response to the Federal Court judgements in *Daniel v Health Insurance Commission and Others* [2003] FCA 772 and *Kelly v Daniel* (2004] FCAFC 14. These amendments make it abundantly clear that the Chief Executive Medicare must request the Director of P$R to review the provision of services by a person during the period specified in the request if the Chief Executive Medicare becomes aware that the services rendered constitute a 'prescribed pattern of services'. These provisions also clarify that this can be the sole reason for the request to review.

Committee Response

The Committee thanks the Minister for this additional information, and notes that the legislation has already been passed by the Parliament.

Alert Digest No. 6 of 2012 - extract

Delegation of Legislative Power
Schedule 2, items 16 and 17

Item 16 of Schedule 2 of the bill introduces a provision that has the effect of enabling the Minister to determine, by legislative instrument, new categories of health professionals to be a *practitioner* for the purposes of the Professional Services Review Scheme. The reason for enabling the Minister to broaden the definition of practitioner in this way is to implement a recommendation of the Review of the *Professional Services Review Scheme—Report of the Steering Committee—May 2007*, which recommended that all 'allied health groups who are eligible to provide services that attract a Medicare benefit' be included in the scheme (see the explanatory memorandum at 19). The explanatory memorandum lists a number of health services providers which can provide services within the meaning of the HIA, but who cannot currently be reviewed under the Professional Services Review Scheme. Although the argument for broadening the definition of practitioner is clear, it is less clear why this needs to be achieved through a delegation of legislative power to the Minister and the explanatory memorandum does not address this point.

The same issue also arises in relation to item 17 in relation to the definition of *profession*.

The Committee therefore seeks the Minister's advice as to why the health providers that should be included in the review scheme, and vocations determined to be a profession for the purposes of the review scheme, cannot be provided for in the primary legislation.

> *Pending the Minister's reply, 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.*

Minister's response - extract

The provisions contained in Part 2 of Schedule 2 of the Amending Act will allow the Minister to determine via legislative instrument professions and vocations that can fall under the purview of the PSR scheme. The Committee seeks clarification as to why this method was chosen rather than directly listing the relevant professions and vocations in the primary legislation.

Currently practitioners not covered by PSR provide over 4 million MBS and PBS services a year at a high cost to the taxpayer. It is important that PSR has the ability to review these services to ensure the public and the Commonwealth are protected from the potential inappropriate practice of these practitioners.

I note it is often not appropriate to be overly prescriptive in primary legislation. Given the ever expanding nature of the MBS and PBS it was decided the inclusion in the Act of a Ministerial power to determine the professions and vocations that fall under the purview of the PSR scheme was a lawful and flexible mechanism to respond to these changes as they occur. This will ensure the PSR is able to review all practitioners as they become able to access MBS and PBS services. Any determination made by the Minister under these provisions will be a disallowable instrument that will come under the scrutiny of the Senate.

I note that these provisions have undergone extensive consultation with the health profession and no objections were raised to these provisions.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the legislation has already been passed by the Parliament.

Low Aromatic Fuel Bill 2012

Introduced into the Senate on 1 March 2012
By: Senator Siewert

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2012*. Senator Siewert responded to the Committee's comments in a letter dated 11 July 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 3 of 2012 - extract

Background

This bill is to promote the supply of low aromatic fuel and control the supply of other fuels in certain areas by providing the Minister with the power to designate certain Low Aromatic Fuel (LAF) and Fuel Control Areas.

Inappropriate delegation of legislative power
Clauses 11 and 12

Clause 11 of the bill empowers the Minister to determine requirements relating to the supply, transport, possession or storage of a fuel in, or in relation to, a low aromatic fuel area or a fuel control area. Contravention of a requirement made under clause 11 constitutes an offence pursuant to clause 12. There may be reasons that justify enabling these important requirements in regulations rather than including them in the primary legislation. **However, as the explanatory memorandum does not address the justification for setting out the content of an offence in a legislative instrument, the Committee seeks the Senator's explanation as to why the proposed approach is justified.**

> *Pending the Senator's reply, 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.*

Senator's response - extract

On page 10 of the Digest, the Committee sought a response from the Senator on why the content of the offence under clause 12 is determined by regulations made under clause 11.

We have chosen this approach in order to be able to tailor the requirements to each area that is considered suitable to be a low aromatic fuel area or a fuel control area. This would enable the requirements to take account of the particular conditions in those areas. It is also recognised that the requirements specified for a particular area may need to change over time.

For this reason it is considered appropriate for the requirements relating to supply, transport, possession or storage of a fuel in, or in relation to, a low aromatic fuel area or a fuel control area to be specified in the regulations (rather than in the Act) to provide for the necessary flexibility.

Committee Response

The Committee thanks the Senator for this response and notes that this information would have been useful in the explanatory memorandum.

Maritime Powers Bill 2012

Introduced into the House of Representatives on 30 May 2012
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Attorney-General responded to the Committee's comments in a letter received on 14 August 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill provides for a single standard framework for authorising and exercising maritime enforcement powers.

Undue trespass on personal rights and liberties—warrants not required to exercise coercive powers
Clauses 35 and 25

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* recommends that coercive powers (entry, search and seizure powers etc) should ordinarily be conducted under a warrant. The explanatory memorandum, at page 35, accepts that clause 35, which provides that a maritime officer is not required to obtain a warrant to exercise any power under this Act, is inconsistent with this general principle. Nevertheless it is argued that a similar power exists in the existing legislation which is being replaced by this bill. Moreover, attention is directed to the context of maritime enforcement which frequently occurs in remote locations, and is often isolated from the support normally available to land based operations. Further the bill points to the fact that the bill establishes a system of 'authorisations' (to be obtained in general by the most senior maritime officer available) which 'provides for a degree of oversight in relation to the exercise of powers under the Bill'. It is also noted that the *Guide* indicates that an exception to the requirement for a warrant is often accepted in relation to conveyances which are inherently mobile. **The Committee therefore leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

> *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.*

However, it is noted that authorisations, which enable the exercise of maritime powers, need not be issued in writing (clause 25). The explanatory memorandum gives a justification for this based on the fact that authorisation may need to be made urgently in a maritime environment. The explanatory memorandum also indicates that an authorising officer may be required to give evidence about the existence and nature of an orally made authorisation for the purposes of prosecuting an offence that was enforced under the bill (see page 31). However, if it is not possible to issue the authorisation in writing, it may be thought desirable for written records to be kept soon after an authorisation is made to facilitate transparency of decision-making in this context. **The Committee therefore seeks the Attorney-General's advice as to whether consideration has been given to including further procedures in the bill for the authorisation scheme, for example a requirement that oral authorisations be recorded as soon as practicable.**

> *Pending the Attorney-General's reply, 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.*

Undue trespass—nature of enforcement powers
Clause 29

Clause 29 makes it clear that a maritime officer may exercise maritime powers to ensure the safety of the officer or any other person without authorisation. This power is not dependent on the officer having a suspicion on reasonable grounds, in line with the recommendation of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* for the exercise of enforcement powers. Nevertheless, as noted by the explanatory memorandum, at page 32, the maritime officer would only be able to 'exercise the powers for the purpose of ensuring the safety of the officer or another person'. Furthermore, it is said that the power would often need to exercise in urgent or emergency circumstances. **The Committee notes this information, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

However, the Committee also seeks the Attorney-General's advice as to whether there are any subsequent reporting requirements on the use of maritime powers without authorisation.

> *Pending the Attorney-General's reply, 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.*

Attorney-General's response - extract

In its review of the Bill, the Committee has sought my advice on:

1. whether consideration has been given to including further procedures in the Bill for the authorisation scheme, for example a requirement that oral authorisations pursuant to clause 25 be recorded as soon as practicable, and
2. whether there are any subsequent reporting requirements on the use of maritime powers without authorisation pursuant to clause 29.

The Australian Defence Force, the Australian Customs and Border Protection Service, Border Protection Command, the Department of Immigration and Citizenship and the Australian Fisheries Management Authority are the key agencies which will exercise maritime powers under the Bill. I am advised that these agencies already utilise detailed operational procedures for the exercise of maritime powers under existing maritime enforcement regimes. Relevantly, these procedures are used to record key events, including authorisations to exercise legislative powers. As a result of these procedures, a significant amount of information is recorded as part of maritime enforcement operations, including video and audio recordings.

As is common across a range of enforcement regimes, including the operational procedures for the on-land enforcement regime of the Australian Federal Police, these procedures have been implemented as part of the operations of the relevant agency, rather than being detailed in legislation. This approach has significant benefits, including providing agencies with the ability to refine and improve their operational procedures over time.

Pursuant to clause 2, the Bill will take effect 12 months after Royal Assent, unless an earlier date is set by proclamation. This extended commencement period has been included for the specific purpose of providing agencies with the necessary time to ensure that the operational practices and procedures in place are appropriate for the exercise of maritime powers under the Bill, and to ensure that officers are trained to follow them. These revisions will include updating the operational procedures to ensure that they are appropriately tailored to the new regime for authorising maritime powers.

As noted by the Committee in relation to the use of maritime powers pursuant to clause 29, the Explanatory Memorandum confirms that the clause would only allow the use of maritime powers without an authorisation where the power is exercised for the purpose of ensuring the safety of the officer or another person, such as where a vessel is sinking. These circumstances would be limited, and I am advised that the operational procedures would encompass recording the exercise of power in this situation.

For those reasons, in my view the authorisation regime, accompanied by the operational procedures of agencies, will be appropriately tailored to recording authorisations for the use of power, as well as the exercise of power, including power exercised without an authorisation. I therefore do not consider that legislatively mandating reporting requirements would serve any appreciable utility.

Committee Response

The Committee thanks the Attorney-General for this detailed response. The Committee notes the explanation provided in relation to the reporting requirements contained in detailed operational procedures, but remains concerned that the status of an obligation under an operational procedure is not the same as being under a legal obligation to take particular action. **The Committee requests that the key information provided by the Attorney-General in her response is included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011

Introduced into the House of Representatives on 21 September 2011
Portfolio: Immigration and Citizenship

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011*. The Minister responded to the Committee's comments in a letter dated 7 February 2012 which was published in the Committee's *First Report 2012*. The Committee sought further advice and the Minister responded in a letter dated 13 August 2012. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2011 - extract

Trespass on personal rights and liberties
Subsections 198AB(7), 198AD(9), and 198E(3)

Proposed subsections 198AB(7), 198AD(9), and 198E(3) all state that 'the rules of natural justice do not apply' to an exercise of the power or to the performance of the duty to which each provision refers. The first relates to the Minister's power to make or revoke a designation of a country as an offshore processing country; the second to the Minister's obligation to direct an officer to take an offshore entry person (or class of such persons) to a particular offshore processing country where there are two or more such countries; and the third relates to the power to determine that section 198AD does not apply to an offshore entry person. The explanatory memorandum merely states, in relation to each of these provisions, that the Minister is not required to give a right to be heard to affected individuals in relation to the power or duty being exercised (see pages 14, 17 and 19). The Committee therefore **seeks the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them**.

> *Pending the Minister's reply, 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.*

Minister's first response - extract

Under the heading "Trespass on personal rights and liberties" on page 19 of the Digest the Committee sought "the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them.

Natural justice would involve seeking and taking into consideration the comments of potentially affected individuals:

- before any country was designated to be a offshore processing country (under the new section 198AB); and

- before the Minister directed an officer to take a person to a specified country (when there is more than one country designated to be an offshore processing country).

If natural justice were not excluded as a ground of review it would in effect mean that the Minister could not designate an offshore processing country or direct an officer to take a person to a specified country without seeking and taking into consideration comments in relation to every individual offshore entry person affected or likely to be affected. This would negate the policy objective to arrange for persons to be taken quickly for processing offshore in order to break the people smugglers guarantee that asylum seekers would have their refugee claims processed in Australia.

Committee's first response

The Committee thanks the Minister for this response, but is not persuaded that it is necessary to exclude natural justice in order to achieve the policy outcomes sought. The committee notes the High Court's decision in *Kioa* v *West* (1985) 159 CLR 550, which has the effect that a policy decision that affects people generally, or a class of people in an undifferentiated way, will not be subject to the natural justice fair hearing rule. However, there may be instances in which the powers are exercised in circumstances where matters pertaining to individuals are taken into account and in these exceptional cases it would be consistent with the common law for a fair hearing to be available. **The committee therefore remains concerned about the proposed approach and requests the Minister's further advice about this issue.**

Minister's second response - extract

I would like to provide the following information to the Committee as a result of the comments made in the Report.

On page 36 of the Report, the Committee notes the High Court's decision in *Kioa v West(1985)* 159 CLR 550, which has the effect that a policy decision that affects people generally, or a class of people in an undifferentiated way, will not be subject to the natural justice fair hearing rule. However, there may be instances in which the powers are exercised in circumstances where matters pertaining to individuals are taken into account and in these exceptional cases it would be consistent with the common law for a fair hearing to be available. The Committee states it remains concerned about the proposed approach and requests the Minister's further advice about this Issue.

While it may be the case that the observations in *Kioa v West* that you have mentioned could be argued to apply in these circumstances, that proposition is not beyond doubt. In this highly contested area of policy, any potential grounds of judicial review are likely to be pursued, with the delay that that involves. This would thwart the intent of the amendments. An explicit statement excluding natural justice is considered appropriate to ensure that the Minister's decisions are able to be acted upon in a timely and efficient manner.

Committee Response

The Committee thanks the Minister for this additional response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Senator the Hon Ian Macdonald
Chair

Cabinet Secretary
Parliamentary Secretary for Climate Change and Energy Efficiency
Parliamentary Secretary for Industry and Innovation

Senator the Hon Ian McDonald
Chair
Senate Standing Committee for the Scrutiny of Bills
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator McDonald

I would like to thank you and the Senate Standing Committee for the Scrutiny of Bills for the Committee's inquiry into the Greenhouse and Energy Minimum Standards Bill 2012, and the Greenhouse and Energy Minimum Standards Bill (Registration Fees) 2012. In the Committee's Alert Digest No. 6 of 2012, the Committee requested advice from the Minister for Climate Change and Energy Efficiency, the Hon Greg Combet MP, on three issues relating to the Greenhouse and Energy Minimum Standards (GEMS) legislation. I am pleased to respond to the issues raised in the Alert Digest on Mr Combet's behalf.

The response to each of the three issues on which Mr Combet's advice was requested is detailed in Attachment A.

A copy of this response will be emailed to the Committee Secretariat at scrutiny.sen@aph.gov.au, as requested.

I trust this information will address the Committee's concerns.

Yours sincerely

MARK DREYFUS QC MP
10/8/12

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Attachment A

Broad discretionary power
Clause 45 – Greenhouse and Energy Minimum Standards Bill 2012

Alert Digest No. 6 of 2012 requested the Minister's advice whether consideration had been given to including an explicit statement in the legislation that conditions imposed under

Clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012 permits the GEMS Regulator to impose conditions on a model's registration, at any time. The explanatory memorandum to the Greenhouse and Energy Minimum Standards Bill 2012 explained that these conditions are limited to those that are reasonably adapted and appropriate to giving effect to the purposes of the Act. This limit is intended to ensure that conditions may only be imposed where they are proportionate and aimed at promoting the effectiveness of the GEMS legislation.

While the policy intention is clearly specified in the explanatory memorandum, it could be more clearly stated in the legislation itself. For these reasons, the Government will propose an amendment to clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012 to limit registration conditions to those that are 'appropriate and adapted to giving effect to the purposes of this Act'. The proposed amendment will be considered in the House of Representatives debate on the Greenhouse and Energy Minimum Standards Bill 2012.

Trespass—natural justice
Clauses 49 and 54 – Greenhouse and Energy Minimum Standards Bill 2012

Clauses 49 and 54 of the Greenhouse and Energy Minimum Standards Bill 2012 permit a product model's registration under the Act to be suspended or cancelled for various reasons. Suspension and cancellation are administrative remedies to certain breaches of responsibility, in contrast to financial penalties or other enforcement action.

As an administrative action affecting rights and responsibilities, the principles of procedural fairness should apply to all decisions to suspend or cancel a product model's registration under the Act.

To ensure this policy intention for the GEMS legislation is clear, the Government will include a statement in the explanatory memorandum that the common law rules of procedural fairness apply to decisions to suspend or cancel a registration. This will include the right to a fair hearing in any consideration of suspension or cancellation of a registration. This slight amendment will be made when the explanatory memorandum is reprinted after the House of Representatives debates the suggested amendment to clause 45 of the Greenhouse and Energy Minimum Standards Bill 2012, prior to the Bill's introduction to the Senate.

Delegation of legislative power
Clauses 8 and 9 – GEMS Registration Fees Bill

The Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012 will allow the GEMS Regulator to set registration fees to recover a portion of the costs incurred in administering the GEMS legislation. The cost recovery will assist the Government to deliver registration services and a compliance and enforcement program that are improved from the current state-legislated Equipment Energy Efficiency Program.

The intention to limit registration fees to cost recovery was clearly stated in the explanatory memorandum to the Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012. However, this intention could be made more explicit on the face of the legislation. For this reason, the Government proposes an amendment to clause 9 of the GEMS Registration Fees Bill to clearly limit registration fees to the purposes of recovering costs incurred processing applications for registration under the GEMS legislation, and costs incurred monitoring compliance with the legislation.

Examples of costs incurred processing registration applications may include costs such as the staff required to process and approve applications, the costs of the establishing and maintaining the online portal and database for registration applications, the cost of procuring specialist advice to identify whether niche products comply with relevant standards, or the cost of communicating with existing and prospective applicants.

Examples of costs incurred in compliance monitoring may include testing products for compliance with relevant standards, training inspectors and conducting store audits or online monitoring to identify whether products comply with standards, and the cost of communicating with persons who are required to comply with the Act.

This amendment will be considered in the House of Representatives debate on the GEMS Registration Fees Bill 2012. The supplementary explanatory memorandum will include the (non-exhaustive) examples of costs that may be recovered listed above. This information will be included in the explanatory memorandum to the GEMS Registration Fees Bill 2012 before the Bill is introduced to the Senate.

The Hon Tanya Plibersek MP
Minister for Health

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

Dear Senator Macdonald

Thank you for the letter of 21 June 2012 regarding the Senate Scrutiny of Bills Committee's (the Committee) *Alert Digest No.6 of 2012* and the concerns the Committee expressed regarding the Health Insurance Amendment (Professional Services Review) Bill 2012 (the PSR Bill).

I note that the PSR Bill has already passed both Houses of Parliament and the *Health Insurance Amendment (Professional Services Review) Act 2012* was assented to on 27 June 2012. However, I note the Committee's concerns and I welcome the chance to provide further clarification on the operation and impact of the PSR Bill.

I appreciate the role and valuable service the Committee provides to the Australian people and trust that the enclosed response satisfies the Committee's concerns.

Once again, thank you for writing.

Yours sincerely

Tanya Plibersek

Tanya Plibersek

15.7.12

Encl

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Response to Questions from the Senate Scrutiny of Bills Committee

In light of the emphasis in the [Statement of Compatibility] that the bill is intended to ensure the protection of the public the Committee [sic], further justification for the conclusion that the bill has a legitimate objective and that the approach is 'reasonable, necessary and proportionate' would be of assistance to the Committee to assess the proposed approach against its terms of reference. In addition, further information about the extent of any public inconvenience created by Ministers' failures to comply with the legislation and the number of persons who may be adversely affected would assist the Committee in assessing whether the approach is proportionate in light of the significant affects that adverse committee decisions may have on those directly affected. Also relevant is whether the Department has already taken steps to minimise public inconvenience prior to the introduction of this legislation and whether any alternative solutions have been considered.

For these reasons, the Committee seeks the Minister's further advice about these matters and the justification of the proposed approach.

Pending the Minister's reply, 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.

The Committee seeks advice about a number of matters and seeks further justification for the proposed approach outlined in Schedule 1 to the Health Insurance Amendment (Professional Services Review) Bill 2012 (the Bill). I note the Bill has passed both Houses of Parliament and the *Health Insurance Amendment (Professional Services Review) Act 2012* (the Amending Act) was assented to on 27 June 2012.

As stated in the explanatory memorandum, the Professional Services Review (PSR) scheme is a statutory scheme that is the only mechanism available to the Commonwealth to ensure medical services subsidised under the Medicare Benefits Scheme (MBS), and medicines subsidised under the Pharmaceutical Benefits Scheme (PBS), are clinically relevant and appropriate. In 2010-11 both schemes provided $24.8 billion in combined patient assistance and it is essential the Commonwealth has a mechanism that ensures the services and medicines provided are appropriate and safe. The PSR is an essential part of the regulatory framework that protects the integrity of the MBS and PBS.

The Committee has raised concerns regarding the validating provisions provided in Schedule 1 of the Amending Act. These provisions respond to the Full Federal Court's decision in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94. In this decision the Court held that the Minister's failure to consult with the Australian Medical Association (AMA) as required under the *Health insurance Act 1973* (the Act) invalidated a number of

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appointments of PSR Panel members and Deputy Directors and all PSR processes involving the invalidly appointed Panel members and Deputy Directors.

The Amending Act draws on precedents of earlier Commonwealth validation legislation (which have been upheld by the High Court) to ensure decisions and actions that may be invalid because a Panel member or Deputy Director was not validly appointed, are as valid and effective as they would have been had that person been validly appointed.

As stated in the Statement of Compatibility, the Commonwealth views the Amending Act as compatible with human rights, although notes that in the cases where it may limit human rights these limitations are reasonable, necessary and proportionate. The Commonwealth does not take these limitations lightly, but is confident there is a legitimate purpose in the Amending Act. By validating past PSR Committee decisions that may be ruled invalid due to irregularities in the appointment process, the Amending Act ensures the Commonwealth and the public are protected from the effects of inappropriate practice. Given the size and scope of the MBS and PBS, and the important public-protective function of the PSR, the Amending Act has a legitimate objective and does not trespass unduly on personal rights and liberties.

These provisions are also consistent with new subsection 33AB of the *Acts Interpretation Act 1901*. These provisions provide that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid merely because there was a defect or irregularity in connection with the appointment, the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased. I note the application of the Amending Act will have a similar effect as subsection 33AB, and provides that in these cases a legitimate objective can be found in preserving the decisions of these Committees.

I note the Committee's concern regarding the explanatory memorandum's phrasing of the appointment irregularities as a technical error given the gravity of the breaches of the Act found by the Court in *Kutlu*. I can assure the Committee that whilst the Commonwealth views the mistakes as technical in nature, the impact of these mistakes is far reaching and the description does not indicate that they have been taken lightly. As the effect of the validating provisions in the Amending Act will be to put persons in the same position they would have been if the decisions made by PSR Committees had been made by validly appointed persons, I do not believe the Amending Act trespasses unduly on personal rights and liberties. I note the PSR scheme maintains the support of the professional health practitioner bodies, including the AMA, and serves an important public-protective function.

The Committee has requested further information regarding the substantial public inconvenience which could result from the *Kutlu* decision. I emphasise that whilst the decision in *Kutlu* applies solely to those matters, it creates a precedential argument which calls into question the validity of PSR matters from 2005 and could potentially affect matters

completed prior to this. The decision may also affect current and completed Medicare Participation Review Committee (MPRC) matters.

A total of over 100 findings of inappropriate practice were made in the last decade and practitioners were required to repay over $7.8 million. Many practitioners were disqualified from rendering Medicare services or prescribing pharmaceutical benefits in this time. If the problems highlighted in *Kutlu* were applied to all PSR decisions, the Commonwealth could expect many legal proceedings. More importantly, practitioners who may have been disqualified from medical practice by accreditation bodies, which have taken into account material referred to them by PSR Committees, may be able to practice medicine again. I am unable to provide the Committee with exact details of the conduct of some of these medical practitioners, but it could give rise to adverse health outcomes for patients, and I am confident that the public protective functions of these provisions have a reasonable and legitimate purpose.

I assure the Committee that appropriate steps have been taken to minimise the public inconvenience that resulted from the findings of the Federal Court in *Kutlu*. Once the Commonwealth became aware of the potential appointment irregularities, all current Panel members and Deputy Directors resigned as a preventative measure. This meant matters that were before PSR Committees at the time came to an end and no new matters would come before the PSR Committees. In total the PSR discontinued 39 matters that were at various stages in the PSR process to avoid any further public inconvenience. The PSR also suspended all matters at the Determining Authority stage at the time.

The Committee may wish to know that the Commonwealth is taking appropriate steps to prevent similar situations arising in the future. The Professional Services Review Advisory Committee has implemented Guidelines for the appointment of practitioners to the PSR Panel and as Deputy Directors. The Commonwealth is also working to implement the recommendations of the Senate Community Affairs References Committee report into the PSR scheme that was tabled on 25 October 2011. The Commonwealth accepted all the recommendations made by the report in its response, tabled in the Senate on 6 March 2012.

I assure the Committee the Commonwealth views the decision of the Full Federal Court in *Kutlu* seriously and this is why the Commonwealth sought, and was granted, leave to appeal the decision to the High Court of Australia. However, it was deemed that a legislative solution was the most effective and assured measure that would provide the Commonwealth, and the public, protection from the effects of inappropriate practice. Once the passage of the Bill was assured the Commonwealth discontinued these proceedings.

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Response to Questions from the Senate Scrutiny of Bills Committee

In the Committee's view, the appropriateness of providing for the details of a 'prescribed pattern of services' through delegated legislation in general appears to be justifiable given that what amounts to inappropriate clinical practice in particular professions is likely to be subject to variations and, also, a matter where it may be appropriate for regulation to be responsive to changing practices. Thus, the Committee leaves to the Senate as a whole the question of whether the proposed approach is appropriate.

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.

I note that the Committee has asked the Senate as a whole to consider the question of whether providing for the details of a 'prescribed pattern of services' through delegated legislation is appropriate.

I wish to assure the Committee and the Senate that this is not a new delegation of legislative powers as using regulations to define a 'prescribed pattern of service' was introduced by the *Health Insurance Amendment (Professional Services Review) Act 1999 (Amending Act 1999).*

The Amending Act 1999 introduced subsection 106KA of the Act, which provides that the regulations may prescribe a different number of services and a different number of days in respect of different categories of practitioner. The explanatory memorandum to the Amending Act 1999 provides that due to the substantial variation amongst the professions that the PSR arrangements apply to, regulations are the best method to prescribe an inappropriate pattern of services. Part 13 of the Amending Act repeals this subsection, and Part 6 of the Amending Act moves these provisions into subsection 82A.

These provisions, originally contained in the Amending Act 1999, address recommendations 4 and 6 of the 1999 Report of the Review Committee of the Professional Services Review Scheme.

As stated in the explanatory memorandum the changes to the provisions relating to a 'prescribed pattern of services' have been made in response to the Federal Court judgements in *Daniel v Health Insurance Commission and Others* [2003] FCA 772 and *Kelly v Daniel* [2004] FCAFC 14. These amendments make it abundantly clear that the Chief Executive Medicare must request the Director of PSR to review the provision of services by a person during the period specified in the request if the Chief Executive Medicare becomes aware that the services rendered constitute a 'prescribed pattern of services'. These provisions also clarify that this can be the sole reason for the request to review.

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Response to Questions from the Senate Scrutiny of Bills Committee

The explanatory memorandum lists a number of health services providers which can provide services within the meaning of the HIA, but who cannot currently be reviewed under the Professional Services Review Scheme. Although the argument for broadening the definition of practitioner is clear, it is less clear why this needs to be achieved through a delegation of legislative power to the Minister and the explanatory memorandum does not address this point.

The same issue also arises in relation to item 17 in relation to the definition of *profession*.

The Committee therefore seeks the Minister's advice as to why the health providers that should be included in the review scheme, and vocations determined to be a profession for the purposes of the review scheme, cannot be provided for in the primary legislation.

Pending the Minister's reply, 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.

The provisions contained in Part 2 of Schedule 2 of the Amending Act will allow the Minister to determine via legislative instrument professions and vocations that can fall under the purview of the PSR scheme. The Committee seeks clarification as to why this method was chosen rather than directly listing the relevant professions and vocations in the primary legislation.

Currently practitioners not covered by PSR provide over 4 million MBS and PBS services a year at a high cost to the taxpayer. It is important that PSR has the ability to review these services to ensure the public and the Commonwealth are protected from the potential inappropriate practice of these practitioners.

I note it is often not appropriate to be overly prescriptive in primary legislation. Given the ever expanding nature of the MBS and PBS it was decided the inclusion in the Act of a Ministerial power to determine the professions and vocations that fall under the purview of the PSR scheme was a lawful and flexible mechanism to respond to these changes as they occur. This will ensure the PSR is able to review all practitioners as they become able to access MBS and PBS services. Any determination made by the Minister under these provisions will be a disallowable instrument that will come under the scrutiny of the Senate.

I note that these provisions have undergone extensive consultation with the health profession and no objections were raised to these provisions.

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Senator
Rachel Siewert
Australian Greens Senator for Western Australia

Senator Ian Macdonald
Committee Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

11 July 2012

Dear Senator Macdonald,

Low Aromatic Fuel Bill 2012

I write in response to the issues raised by the Standing Committee for the Scrutiny of Bills in their Alert Digest of 14 March 2012. I apologise for the delay in this response.

On page 10 of the Digest, the Committee sought a response from the Senator on why the content of the offence under clause 12 is determined by regulations made under clause 11.

We have chosen this approach in order to be able to tailor the requirements to each area that is considered suitable to be a low aromatic fuel area or a fuel control area. This would enable the requirements to take account of the particular conditions in those areas. It is also recognised that the requirements specified for a particular area may need to change over time.

For this reason it is considered appropriate for the requirements relating to supply, transport, possession or storage of a fuel in, or in relation to, a low aromatic fuel area or a fuel control area to be specified in the regulations (rather than in the Act) to provide for the necessary flexibility.

Yours sincerely,

Rachel Siewert

Senator Rachel Siewert
Greens Senator for Western Australia

THE GREENS

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THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT

12/4603

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
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Parliament House
CANBERRA

Dear Senator MacDonald

Thank you for the Committee's consideration of the Maritime Powers Bill 2012, contained in *Alert Digest No.6 of 2012* (the Digest). In its review of the Bill, the Committee has sought my advice on:

1. whether consideration has been given to including further procedures in the Bill for the authorisation scheme, for example a requirement that oral authorisations pursuant to clause 25 be recorded as soon as practicable, and

2. whether there are any subsequent reporting requirements on the use of maritime powers without authorisation pursuant to clause 29.

The Australian Defence Force, the Australian Customs and Border Protection Service, Border Protection Command, the Department of Immigration and Citizenship and the Australian Fisheries Management Authority are the key agencies which will exercise maritime powers under the Bill. I am advised that these agencies already utilise detailed operational procedures for the exercise of maritime powers under existing maritime enforcement regimes. Relevantly, these procedures are used to record key events, including authorisations to exercise legislative powers. As a result of these procedures, a significant amount of information is recorded as part of maritime enforcement operations, including video and audio recordings.

As is common across a range of enforcement regimes, including the operational procedures for the on-land enforcement regime of the Australian Federal Police, these procedures have been implemented as part of the operations of the relevant agency, rather than being detailed in legislation. This approach has significant benefits, including providing agencies with the ability to refine and improve their operational procedures over time.

Pursuant to clause 2, the Bill will take effect 12 months after Royal Assent, unless an earlier date is set by proclamation. This extended commencement period has been included for the specific purpose of providing agencies with the necessary time to ensure that the operational practices and procedures in place are appropriate for the exercise of maritime powers under

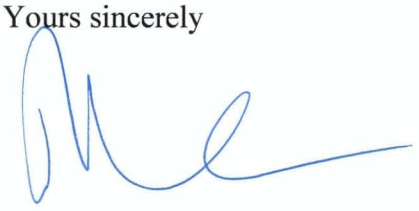
the Bill, and to ensure that officers are trained to follow them. These revisions will include updating the operational procedures to ensure that they are appropriately tailored to the new regime for authorising maritime powers.

As noted by the Committee in relation to the use of maritime powers pursuant to clause 29, the Explanatory Memorandum confirms that the clause would only allow the use of maritime powers without an authorisation where the power is exercised for the purpose of ensuring the safety of the officer or another person, such as where a vessel is sinking. These circumstances would be limited, and I am advised that the operational procedures would encompass recording the exercise of power in this situation.

For those reasons, in my view the authorisation regime, accompanied by the operational procedures of agencies, will be appropriately tailored to recording authorisations for the use of power, as well as the exercise of power, including power exercised without an authorisation. I therefore do not consider that legislatively mandating reporting requirements would serve any appreciable utility.

The action officer for this matter in my Department is Jeremy Shirm, who can be contacted on 6141 2997.

Yours sincerely



NICOLA ROXON

The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA 2600

Dear Senator

Thank you for your letter dated 9 February 2012 in relation to the comments made in the Committee's *First Report of 2012* (8 February 2012) concerning the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011.

I would like to provide the following information to the Committee as a result of the comments made in the Report.

On page 36 of the Report, the Committee notes the High Court's decision in *Kioa v West* (1985) 159 CLR 550, which has the effect that a policy decision that affects people generally, or a class of people in an undifferentiated way, will not be subject to the natural justice fair hearing rule. However, there may be instances in which the powers are exercised in circumstances where matters pertaining to individuals are taken into account and in these exceptional cases it would be consistent with the common law for a fair hearing to be available. The Committee states it remains concerned about the proposed approach and requests the Minister's further advice about this issue.

While it may be the case that the observations in *Kioa v West* that you have mentioned could be argued to apply in these circumstances, that proposition is not beyond doubt. In this highly contested area of policy, any potential grounds of judicial review are likely to be pursued, with the delay that that involves. This would thwart the intent of the amendments. An explicit statement excluding natural justice is considered appropriate to ensure that the Minister's decisions are able to be acted upon in a timely and efficient manner.

Yours sincerely

CHRIS BOWEN
13 AUG 2012