SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2012

19 September 2012

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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

ELEVENTH REPORT OF 2012

The Committee presents its Eleventh 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:

Broadcasting Services Amendment (Public Interest Test) Bill 2012

Introduced into the Senate on 29 June 2012
By Senator Ludlam

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2012*. The Senator responded to the Committee's comments in a letter dated on 11 September 2012. A copy of the letter is attached to the back of this report.

Background

This bill amends the *Broadcasting Services Act 1992* to introduce a public interest test for changes in control of nationally significant media operations.

Retrospective effect
Penalties
Schedule 1, items 1 and 3

This item proposes to insert a new Part 5A into the *Broadcasting Services Act 1992* establishing a public interest test for changes in control of media operations of national significance. Proposed new section 78C places an obligation on a person who was not in a position to exercise control of a media operation of national significance to notify the ACMA if they come to be in such a position on or after 28 June 2012. Proposed section 78D provides that the ACMA can apply the public interest test to such a person if they become aware that a person has come to be in a position to control a media operation of national significance after the same date (whether or not the ACMA becomes aware of this because of a section 78C notice or otherwise). Item 3 of Schedule 1 is an application provision which provides that proposed sections 78C and 78D will apply on or after the commencement of the item, whether or not, respectively, the person or the ACMA becomes aware of the position of control of the media operation before, at or after that commencement. These application provisions commence on the day the Act receives the Royal Assent.

The Committee has recognised that a distinction may be drawn between provisions which commence retrospectively and those which operate on rights and obligations by reference to past events, though the line between the two cases can sometimes be difficult to draw. In this case the proposed new public interest test may be applied to change an affected person's rights and obligations on the basis of whether legal arrangements were entered into at a date prior to the proposed law being passed by the legislature. In this sense, the proposed changes are given legal significance prior to them being enacted into law. **In these circumstances, the Committee seeks the Senator's advice as to the justification for the proposed approach. The Committee would also appreciate the Senator's**

advice as to whether the penalties in the bill are consistent with similar provisions in Commonwealth legislation.

> *Pending the Senator'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.*

Senator's response - extract

The committee has sought my advice on the justification of the bill's retrospective effect and whether the penalties in the bill are consistent with similar provisions in Commonwealth legislation.

The bill is legitimate from the time of its introduction. A strong democracy requires independent and diverse media and who controls the media is an important matter of national interest. There has been considerable debate in the community about the need for such a test and we believe it is appropriate for the Bill to commence from the date of its introduction. It is not unusual for a bill to apply from the time of its introduction.

In relation to the penalties applied by the bill, they are consistent with those contained in the *Broadcasting Services Act 1992* in relation to cross-media ownership.

Committee Response

The Committee thanks the Senator for this response and notes the advice that the penalties in the bill are consistent with those already in relevant legislation.

In relation to retrospectivity, the Committee notes its long-standing view that a clear justification should be provided in the explanatory memorandum for any provisions which, by their terms, may have a detrimental retrospective *impact* even though their commencement is not retrospective. **In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012

Introduced into the House of Representatives on 27 June 2012
Portfolio: Special Minister of State

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2012*. The Minister responded to the Committee's comments in a letter dated on 13 September 2012. A copy of the letter is attached to the back of this report.

Alert Digest No. 8 of 2012 - extract

Background

This bill amends the *Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) to:

- remove the prescription relating to how postal votes are processed currently set out in the Electoral Act and the Referendum Act. The amendments will also seek to allow for technological developments over time;
- increase the sum to be deposited by or on behalf of a person nominated as a Senator from $1000 to $2000;
- increase the sum to be deposited by or on behalf of a person nominated as a Member of the House of Representatives from $500 to $1000;
- increase the number of nominators required by a candidate for the Senate or the House of Representatives who has not been nominated by a registered political party from 50 to 100 electors;
- require unendorsed candidates for the Senate who have made a request to be grouped to each be nominated by 100 unique electors; and
- make a number of minor and technical amendments.

Insufficiently defined administrative powers—broad delegation
Schedule 1, item 2, proposed section 28
Schedule 1, item 91, proposed section 138

These items seek to enable the Electoral Commissioner to delegate all or any of his or her powers or functions under the Act, other than those conferred by Parts III and IV to 'any officer' or 'any other member of the Staff of the Electoral Commission'. Delegates under this provision 'must comply with any directions of the Electoral Commissioner' (subsection 28(2)).

This broadening of the range of powers and functions which may be delegated by the Electoral Commissioner is claimed to be 'necessary due to the amendments made by subsequent items in Schedule 1 which make the Electoral Commissioner primarily responsible for the receipt and processing of postal vote applications' (see the explanatory memorandum at page 4). Although it is accepted that tasks associated with processing postal vote applications may appropriately be delegated to any member of the staff of the Commission, the Committee is concerned that this power of delegation is overly broad and may enable more significant functions to be delegated without a justification being provided. **The Committee therefore seeks the Minister's advice as to whether these delegations could be framed more narrowly. In particular, the Committee is interested in whether the bill can specify which powers will be able to be delegated to 'any person' and whether the delegation of other powers can be limited to particular positions or classes of people (for example, to AEC state managers or other as appropriate).**

> *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

Your letter referred to amendments proposed by Items 2 and 91 of Schedule 1 of the Bill to the *Commonwealth Electoral Act 1918* (Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act). Both amendments do essentially the same work with respect to the delegation power of the Electoral Commissioner under the Electoral Act and the Referendum Act.

The amendments result from Recommendation 12 of the Report of the Joint Standing Committee on Electoral Matters (JSCEM) into the conduct of the 2010 federal election. JSCEM supported legislative recognition of the current streamlined automated arrangements that the Australian Electoral Commission uses to manage postal votes. Therefore, the amendments to the delegation power, coupled with the amendments to the

postal voting arrangements set out at Part XV of the Electoral Act, were made to ensure that the Electoral Commissioner could better manage the way in which practical functions and processes for postal voting are conducted.

At the 16 July 2012 JSCEM hearing the Electoral Commissioner, Mr Ed Killesteyn, gave this example:

> "In the seat of McEwen there were 9,000 postal vote applications and in the seat of Lingiari in the Northern Territory there were 1,000 applications. In that sort of stark difference in workload, you need to find ways to spread that work and the way that the Electoral Commission has done it over the last decade is to centralise that work through the APVIS. The amendments seek to recognise the greater level of technology that is being applied now to the whole process of postal vote applications."

I understand that one of the Committee's terms of reference is to ensure that there is no inappropriate delegation of legislative powers. However, I do not consider the proposed amendments to the Electoral Act and the Referendum Act to be inappropriate. Rather, they are facilitating better handling of an increasing number of postal vote applications.

Therefore we would be very reluctant to consider reducing the flexibility we are seeking by limiting the classes of officers to whom some powers may be delegated.

Of course the amendments to section 28 do not remove the Electoral Commissioner's responsibility for the work at Parts III and IV of the Electoral Act. These parts refer to establishing representation for the House of Representatives and redistributions of electoral boundaries.

I consider that the amendments proposed by the Bill strike the right balance between allowing sufficient flexibility to meet the challenges of increased levels of postal voting and reserving certain critical functions to the Electoral Commissioner.

I trust that this information is of assistance to the Committee, and I thank you for bringing the Committee's views to my attention.

Committee Response

The Committee thanks the Minister for this detailed response. **The Committee requests that the key information is included in the explanatory memorandum.**

Financial Framework Legislation Amendment Bill (No.3) 2012

Introduced into the House of Representatives on 26 June 2012
Portfolio: Finance and Deregulation

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2012*. The Minister responded to the Committee's comments in a letter dated on 13 September 2012. A copy of the letter is attached to the back of this report.

Alert Digest No. 7 of 2012 - extract

Background

This bill responds to the decision of the High Court on 20 June 2012 in *Williams v Commonwealth* [2012] HCA 23. The bill:

- amends the *Financial Management and Accountability Act 1997* (FMA Act) to empower the Commonwealth, where authority does not otherwise exist, to make, vary or administer arrangements under which public money is or may become payable, or to make grants of financial assistance, including payments or grants for the purposes of particular programs, where those arrangements or grants, or a class including those arrangements or grants, or relevant programs, are specified in regulations. The amendments would also apply in relation to arrangements etc that are in force immediately before those amendments come into operation;

- clarifies that decisions under the proposed amendments are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* applies; and

- amends the *Financial Management and Accountability Regulations 1997* to specify arrangements or grants, or classes of arrangements or grants, or programs, in accordance with the proposed amendments to the FMA Act.

Judicial review
Schedule 1, item 1

Item 1 of the Bill has the effect of excluding specified decisions from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. The decisions are those made under Division 3B of Part 4, and section 44, of the *Financial Management and Accountability Act 1997*. This exclusion is achieved by listing these provisions in Schedule 1 of the ADJR Act.

The explanatory memorandum notes at page 5 that:

> Exempting decisions made under these provisions would ensure that the status quo is maintained. Importantly however, the guaranteed right of review under section 75 of the Australian Constitution, and review under section 39B of the *Judiciary Act 1903*, would still be available.

In most instances of Commonwealth decision-making, section 39B(1) review jurisdiction will be available even if the ADJR Act cannot be relied upon. However, the ADJR Act was enacted as a remedial statute and seeking judicial review under it has a number of important advantages. Potential applicants are entitled to a statement of reasons, there is a single test for standing, and the availability of remedies proceeds on a comparatively straightforward basis. It is also the case that applicants may succeed on the basis of establishing errors that would not justify a prerogative writ (or 'constitutional' writ). Given these advantages, and the fact that the enactment of the ADJR Act was intended to become the primary means for the review of Commonwealth administrative decisions (due to its comparative simplicity and the absence of technicality), the Committee looks for compelling reasons before accepting that jurisdiction under the Act should be excluded. The availability of alternative sources of judicial review jurisdiction does not explain the justification for excluding the ADJR Act.

Further, although the proposed approach is intended to maintain the status quo, the status quo rests on the assumption that the relevant powers were part of the executive power of the Commonwealth and did not require statutory authorisation. Given that this bill provides a statutory basis for entering into arrangements it is suggested that a further explanation for the necessity of excluding the ADJR Act be sought. In this regard it is noted that jurisprudence concerning the applicability of the ADJR Act to decisions made to enter into contracts or pursuant to existing contracts will typically not be reviewable. Nevertheless, there may be some circumstances where contractual powers are subject to clear legal limits (in a statute or regulations) that ADJR Act review is available. In these circumstances, it is the Committee's view that the explanatory memorandum does not provide a sufficiently detailed explanation for the proposed exclusion of ADJR Act review. **The Committee therefore seeks the Minister's further advice as to the justification for the proposed approach.**

> *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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

Minister's response - extract

Judicial Review - Schedule 1, item 1

I understand the issue here is why are Government spending decisions that are authorised by the FMA Act and FMA Regulations not subject to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (ADJR Act).

Prior to the High Court decision in *Williams,* decisions by the Government to spend public money were not subject to judicial review under the ADJR Act.

The majority of the High Court in *Williams* established a new test that, for certain spending activities, legislative authority (in addition to an Appropriation Act) is required. The FFLA Act (No.3) addressed this decision by providing legislative authority for certain spending activities that did not have the requisite legislative authority.

Item 1 of Schedule 1 of the FFLA Act (No.3), maintained the status quo that has existed since the ADJR Act was established, that a decision to make, vary or administer a spending arrangement is not subject to judicial review under the ADJR Act. The amendments in this item did not exclude decisions from review under the ADJR Act that had previously been subject to review under that Act. Further the amendments do not affect review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. The availability of that judicial review will continue to be a matter for the courts, and will depend on the specific characteristics of each scheme, and the applicability of judicial review principles and remedies.

There are additional mechanisms which provide for the transparency and accountability of decisions relating to making, varying or administering arrangements, including rules and requirements under the FMA Act and the FMA Regulations, such as the *Commonwealth Procurement Rules* and *Commonwealth Grants Guidelines.* These rules reinforce how procurement and grant decisions ensure the proper use of Commonwealth resources, and they help ensure appropriate transparency around these decisions.

The FFLA Act (No.3) provided authority to support existing Government spending activities by describing over 450 spending activities in Schedule 1AA of FMA Regulations.

Committee Response

The Committee thanks the Minister for this response. **The Committee notes that it remains concerned about the justification for the proposed approach, but makes no further comment as the bill has already been passed by the Parliament.**

Alert Digest No. 7 of 2012 - extract

Delegation of Legislative power
Schedule 1, item 2, subsection 32B(b)

This provision enables the regulations to specify the arrangements which will be authorised by the proposed new statutory source of authority to make, vary or administer an arrangement or grant (under proposed section 32B). Determining which arrangements and grants will attract this source of statutory authority through regulations (rather than primary legislation) is said to be 'necessary so that the Government can continue these activities in the national interest'.

The Committee has consistently expressed its preference that important matters be included in primary legislation whenever this is appropriate, and for the explanatory memorandum to outline a clear justification when the use of delegated legislation is proposed. In light of this, and the High Court's reasoning in *Williams*, the Committee expects a more detailed justification in the explanatory memorandum of the question of whether it is appropriate to delegate to the Executive (through the use of regulations) how its powers to contract and to spend are to be expanded. **The Committee therefore seeks the Minister's further advice as to the justification of this delegation of legislative power.**

> *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 - Schedule 1, item 2, subsection 32B (b)

I understand the issue here is why is legislative authority for Government spending activities provided by delegated legislation rather than primary legislation.

Every year the Australian Government spends over $300 billion. Over 75 per cent of this spending is made using special appropriations, that is spending authorised by legislation other than the annual appropriation Acts. However, given the range, frequency and, at times, urgency of Government spending, delegated legislation was favoured over primary legislation, providing a more practical method for authorising spending, while ensuring

that the regulations that authorise spending activities are tabled in Parliament and are subject to scrutiny and disallowance by the Parliament on a case by case basis.

The initial list of over 450 spending activities was added to Schedule 1AA of the FMA Regulations by primary legislation, the FFLA Act (No.3), and not by delegated legislation. Parliament considered and approved this list of spending activities. Parliament also agreed that, once the initial list of spending activities was prescribed by the FFLA Act (No.3), regulations could be made to add, remove or amend spending activities.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 7 of 2012 - extract

Insufficiently defined administrative power
Schedule 1, item 2, section 32D

This item will allow the Minister to, by writing, 'delegate any or all of his or her powers under this Division to an official in any Agency' (section 32D(1)). It will be a requirement that in exercising any delegated powers, the delegate must comply with any direction of the Minister concerned (section 32D(2)).

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum, at page 7, simply restates the effect of the provision. **The Committee therefore seeks the Minister's further advice as to the justification for the proposed approach.**

> *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

Insufficiently defined administrative power - Schedule 1, item 2, section 320

I understand the issue here is why the new spending power in the FMA Act can be delegated to a relatively large class of persons without more detail about their qualifications or attributes.

The delegation of power in section 32D is consistent with the delegation of other powers in the FMA Act to officials. A broad delegation is necessary to enable agencies and officials to make, vary and administer arrangements in an efficient, effective, economical and ethical manner depending on agency specific requirements.

The powers in the FMA Act are not delegated to a large class of persons with little or no specificity as to their qualifications or attributes. Officials delegated powers under the FMA Act must act in accordance with the requirements of the FMA Act and any directions or instructions from their Chief Executive. This includes the obligation to spend money efficiently, effectively, economically and ethically in a way that is not inconsistent with the policies of the Commonwealth, as well as requirements such as the *Commonwealth Procurement Rules* or *Commonwealth Grant Guidelines* (as applicable). Agency spending decisions are subject to external audit by the Australian National Audit Office and audited financial statements must be included in Agency annual reports and tabled in Parliament.

Committee Response

The Committee thanks the Minister for this response.

Alert Digest No. 7 of 2012

Retrospective validation
Schedule 1, item 9

This item is a transitional provision. The explanatory memorandum, at pages 8 and 9, states that it:

> ...provides for arrangements that were in force or purportedly in force, immediately before the commencement of new section 32B (and associated regulations) to have been made with the authority granted under section 32B.

> This provision ensures that the validity of an existing arrangement that is in force, or purportedly in force, immediately before the Bill commences is not in question by virtue of the fact that the Commonwealth lacked, or may have lacked, the legislative authority to make the grant, contract or similar arrangement at the relevant time.

The Scrutiny Committee is concerned about whether, from a scrutiny perspective, this provision unfairly or unduly affects rights or interests by applying to past facts and circumstances and the explanatory memorandum does not address this issue. **The Committee therefore seeks the Minister's further advice as to the justification for 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

Retrospective validation - Schedule 1, item 9

I understand the issue here is whether the transitional arrangements in the FFLA Act (No.3) that retrospectively validate previous Government spending activities, unfairly or unduly affect any rights or interests.

The retrospective transitional provision was included in the FFLA Act (No.3) to ensure that no rights or interests were unduly affected by the High Court decision in *Williams.*

Prior to the *Williams* decision, the understanding since Federation had been that the Government could rely on executive power to make certain payments (e.g. grants to individuals or community groups). The High Court overturned this position by requiring that legislative authority is necessary to support certain payments. The FFLA Act (No.3) was implemented swiftly to ensure that not only was there authority for future spending, but that payments made prior to the FFLA Act (No.3) were not put at risk.

The retrospective authorisation of certain spending activities by the FFLA Act (No.3) ensured that recipients of past Commonwealth payments, and hence the community in general, were not disadvantaged by the decision in *Williams.*

Committee Response

The Committee thanks the Minister for this response and notes its concern that while it is argued that the retrospective authorisation of certain spending activities may benefit some individuals and the community in general, it may disadvantage others, and this issue was not addressed in the explanatory memorandum. However, the Committee notes that the bill has already been passed by the Parliament.

National Portrait Gallery of Australia Bill 2012

Introduced into the House of Representatives on 23 August 2012
Portfolio: Regional Australia, Local Government, Arts and Sport

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2012*. The Minister responded to the Committee's comments in a letter dated on 18 September 2012. A copy of the letter is attached to the back of this report.

Alert Digest No. 10 of 2012 - extract

Background

This bill establishes the National Portrait Gallery of Australia as a Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997*, from 1 July 2013.

Possible inappropriate delegation of legislative power
Clause 54

Clause 54 of the bill enables the regulations to prescribe penalties, not exceeding 50 penalty units for offences against the regulations. The explanatory memorandum states, at page 20, that it 'is expected that offences will primarily relate to regulations that are made regulating the conduct of persons at the Gallery and in relation to the land and buildings'.

In general, the Committee prefers to see important matters dealt with in primary legislation and it is of concern that the need to create offences through regulations is not justified in the explanatory memorandum. While it is acknowledged that the clause limits the penalties for offences against the regulations to 50 penalty units (consistent with the recommended maximum penalty for such offences in the *Guide to Framing Commonwealth Offences*), given the absence of an explanation for the proposed approach, **the Committee seeks the Minister's advice as to whether such matters can be dealt with 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 Committee has requested further consideration of clause 54 of the NPGA Bill, which enables the Governor-General to make regulations and that these regulations may prescribe penalties for offences against the regulations. The Committee has noted its preference to include important matters in the primary legislation and has suggested that the provision to create offences through regulations may not be sufficiently justified in the Explanatory Memorandum (EM).

The inclusion of Clause 54, as drafted, is consistent with similar powers granted to other national collecting institutions under their enabling legislation such as the *National Museum* 01 *Australia Act 1980* (NMA Act) and the *National Gallery Act* 1975 (NG Act). It is my understanding that the inclusion of provisions in the legislation enabling the national cultural institutions to create offences by regulation is vital in ensuring that the national collecting institutions can appropriately adapt to protect the valuable cultural material in their care.

Section 44 of the NMA Act and the subsequent *National Museum* 01 *Australia Regulations 2000* (NMA Regulations) and Section 46 of the NG Act the subsequent *National Gallery Regulations* 1982 (NG Regulations) include provisions relating to the regulation of conduct of persons on land and buildings of the relevant institution to ensure the proper protection of the significant cultural material in their care. For example, offences under these regulations include:

- interfering with or causing damage to artworks (Item 7(1) of the NG Regulations) or to museum material (Item 5(1) of the NMA Regulations);

- prohibiting consumption of food within proximity to artworks (Item 7(3) of the NG Regulations) or to museum material (Item 5(3) of the NMA Regulations); and

- prohibiting any unauthorised photography of artworks (Item 7A of the NG Regulations) or empowering the Director10 prohibit unauthorised photography within the Museum (Item 6 of the NMA Regulation) to prevent damage caused by photographic equipment and to prevent, so far as possible, any unauthorised reproductions of any material protected by copyright.

The possible penalties described in Clause 54 of the NPGA Bill are included to regulate the control of Gallery land and buildings and the supply of liquor, which are dealt with in Clauses 52 and 53 of the primary legislation. Paragraph 134 of the EM for the NPGA Bill explains the type of regulations that may be provided under Clause 53. The use of regulations to create offences was considered appropriate because the prescribed penalties provided for in the Bill are limited to 50 penalty units.

In addition, the use of regulations in this circumstance was considered to be the most efficient mechanism for doing so given that in future, regulations could be made and repealed more expeditiously when compared with amending legislation.

The making of regulations under this Bill is also not without Parliamentary oversight. Since the enactment of the *Legislative Instruments Act 2003*, regulations of the type contemplated by Clause 54 of the Bill will be subject to disallowance by the Parliament. Further, the sunsetting provisions of the *Legislative Instruments Act 2003* means that there will be a compulsory review and consideration of the utility and effectiveness of any offences 10 years after such an offence is created by regulation. No provision has been included in this Bill that would exempt any regulations made pursuant to the power in Clause 54 from the sunsetting or disallowance regimes.

Further, during the drafting of this Bill the Office of Parliament Counsel advised that if the detail of Clauses 52 and 53 was to be included in regulations to be made under the NPGA Bill then it was appropriate that the detail of Clause 54 should also be dealt with in regulations to be made under the NPGA Bill.

Thank you for the Committee's interest in this matter. I trust that this information will address the Committee's concerns.

Committee Response

The Committee thanks the Minister for this detailed response and **requests that key information is included in the explanatory memorandum.**

Senator the Hon Ian Macdonald
Chair

SENATOR SCOTT LUDLAM
AUSTRALIAN GREENS
SENATOR FOR WESTERN AUSTRALIA

Senator Macdonald
Chair, Senate Scrutiny of Bills Committee
S1 111
Parliament House
CANBERRA ACT 2600

11 September 2012

Dear Senator Macdonald,

Broadcasting Services Amendment (Public Interest Test) Bill 2012

I note the committee's examination of the *Broadcasting Services Amendment (Public Interest Test) Bill 2012*, introduced by me on 29 June 2012.

The committee has sought my advice on the justification of the bill's retrospective effect and whether the penalties in the bill are consistent with similar provisions in Commonwealth legislation.

The bill is legitimate from the time of its introduction. A strong democracy requires independent and diverse media and who controls the media is an important matter of national interest. There has been considerable debate in the community about the need for such a test and we believe it is appropriate for the Bill to commence from the date of its introduction. It is not unusual for a bill to apply from the time of its introduction.

In relation to the penalties applied by the bill, they are consistent with those contained in the *Broadcasting Services Act 1992* in relation to cross-media ownership.

Yours sincerely,

Senator Scott Ludlam

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HON GARY GRAY AO MP

Special Minister of State
Minister for the Public Service and Integrity

REF:C12/2477

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

Dear Senator MacDonald

Thank you for your letter of 16 August 2012 regarding the Electoral Referendum Amendment (Improving Electoral Procedure) Bill 2012 (the Bill).

Your letter referred to amendments proposed by Items 2 and 91 of Schedule 1 of the Bill to the *Commonwealth Electoral Act 1918* (Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act). Both amendments do essentially the same work with respect to the delegation power of the Electoral Commissioner under the Electoral Act and the Referendum Act.

The amendments result from Recommendation 12 of the Report of the Joint Standing Committee on Electoral Matters (JSCEM) into the conduct of the 2010 federal election. JSCEM supported legislative recognition of the current streamlined automated arrangements that the Australian Electoral Commission uses to manage postal votes. Therefore, the amendments to the delegation power, coupled with the amendments to the postal voting arrangements set out at Part XV of the Electoral Act, were made to ensure that the Electoral Commissioner could better manage the way in which practical functions and processes for postal voting are conducted.

At the 16 July 2012 JSCEM hearing the Electoral Commissioner, Mr Ed Killesteyn, gave this example:

"In the seat of McEwen there were 9,000 postal vote applications and in the seat of Lingiari in the Northern Territory there were 1,000 applications. In that sort of stark difference in workload, you need to find ways to spread that work and the way that the Electoral Commission has done it over the last decade is to centralise that work through the APVIS. The amendments seek to recognise the greater level of technology that is being applied now to the whole process of postal vote applications."

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I understand that one of the Committee's terms of reference is to ensure that there is no inappropriate delegation of legislative powers. However, I do not consider the proposed amendments to the Electoral Act and the Referendum Act to be inappropriate. Rather, they are facilitating better handling of an increasing number of postal vote applications.

Therefore we would be very reluctant to consider reducing the flexibility we are seeking by limiting the classes of officers to whom some powers may be delegated.

Of course the amendments to section 28 do not remove the Electoral Commissioner's responsibility for the work at Parts III and IV of the Electoral Act. These parts refer to establishing representation for the House of Representatives and redistributions of electoral boundaries.

I consider that the amendments proposed by the Bill strike the right balance between allowing sufficient flexibility to meet the challenges of increased levels of postal voting and reserving certain critical functions to the Electoral Commissioner.

I trust that this information is of assistance to the Committee, and I thank you for bringing the Committee's views to my attention.

Yours sincerely

GARY GRAY

13 SEP 2012

SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation

REF:C12/1984

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

13 SEP 2012

Dear Senator

Thank you for your letter of 28 June 2012, concerning the Financial Framework Legislation Amendment Bill (No.3) 2012, which commenced on 28 June 2012 as the *Financial Framework Legislation Amendment Act (No.3) 2012* (FFLA Act (No. 3)).

The FFLA Act (No. 3) was enacted to provide the immediate Government response to the 20 June 2012 High Court decision of *Williams v Commonwealth* [2012] HCA 23. In *Williams* the majority of the High Court decided that certain Government spending activities require legislative authority in addition to an appropriation Act. The FFLA Act (No. 3) established legislative authority by creating a new power in section 32B of the *Financial Management and Accountability Act 1997* (FMA Act) for Ministers and officials to spend on over 450 Government spending activities prescribed in Schedule 1AA of the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

Comments on the issues that you identified in the *Alert Digest No.7 of 2012* of 27 June 2012 are set out below by reference to the four headings in the Alert Digest.

Judicial Review – Schedule 1, item 1

I understand the issue here is why are Government spending decisions that are authorised by the FMA Act and FMA Regulations not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

Prior to the High Court decision in *Williams*, decisions by the Government to spend public money were not subject to judicial review under the ADJR Act.

The majority of the High Court in *Williams* established a new test that, for certain spending activities, legislative authority (in addition to an Appropriation Act) is required. The FFLA Act (No. 3) addressed this decision by providing legislative authority for certain spending activities that did not have the requisite legislative authority.

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Item 1 of Schedule 1 of the FFLA Act (No. 3), maintained the status quo that has existed since the ADJR Act was established, that a decision to make, vary or administer a spending arrangement is not subject to judicial review under the ADJR Act. The amendments in this item did not exclude decisions from review under the ADJR Act that had previously been subject to review under that Act. Further the amendments do not affect review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. The availability of that judicial review will continue to be a matter for the courts, and will depend on the specific characteristics of each scheme, and the applicability of judicial review principles and remedies.

There are additional mechanisms which provide for the transparency and accountability of decisions relating to making, varying or administering arrangements, including rules and requirements under the FMA Act and the FMA Regulations, such as the *Commonwealth Procurement Rules* and *Commonwealth Grants Guidelines*. These rules reinforce how procurement and grant decisions ensure the proper use of Commonwealth resources, and they help ensure appropriate transparency around these decisions.

The FFLA Act (No. 3) provided authority to support existing Government spending activities by describing over 450 spending activities in Schedule 1AA of FMA Regulations.

Delegation of Legislative power – Schedule 1, item 2, subsection 32B (b)

I understand the issue here is why is legislative authority for Government spending activities provided by delegated legislation rather than primary legislation.

Every year the Australian Government spends over $300 billion. Over 75 per cent of this spending is made using special appropriations, that is spending authorised by legislation other than the annual appropriation Acts. However, given the range, frequency and, at times, urgency of Government spending, delegated legislation was favoured over primary legislation, providing a more practical method for authorising spending, while ensuring that the regulations that authorise spending activities are tabled in Parliament and are subject to scrutiny and disallowance by the Parliament on a case by case basis.

The initial list of over 450 spending activities was added to Schedule 1AA of the FMA Regulations by primary legislation, the FFLA Act (No. 3), and not by delegated legislation. Parliament considered and approved this list of spending activities. Parliament also agreed that, once the initial list of spending activities was prescribed by the FFLA Act (No. 3), regulations could be made to add, remove or amend spending activities.

Insufficiently defined administrative power – Schedule 1, item 2, section 32D

I understand the issue here is why the new spending power in the FMA Act can be delegated to a relatively large class of persons without more detail about their qualifications or attributes.

The delegation of power in section 32D is consistent with the delegation of other powers in the FMA Act to officials. A broad delegation is necessary to enable agencies and officials to make, vary and administer arrangements in an efficient, effective, economical and ethical manner depending on agency specific requirements.

The powers in the FMA Act are not delegated to a large class of persons with little or no specificity as to their qualifications or attributes. Officials delegated powers under the

FMA Act must act in accordance with the requirements of the FMA Act and any directions or instructions from their Chief Executive. This includes the obligation to spend money efficiently, effectively, economically and ethically in a way that is not inconsistent with the policies of the Commonwealth, as well as requirements such as the *Commonwealth Procurement Rules* or *Commonwealth Grant Guidelines* (as applicable). Agency spending decisions are subject to external audit by the Australian National Audit Office and audited financial statements must be included in Agency annual reports and tabled in Parliament.

Retrospective validation – Schedule 1, item 9

I understand the issue here is whether the transitional arrangements in the FFLA Act (No. 3) that retrospectively validate previous Government spending activities, unfairly or unduly affect any rights or interests.

The retrospective transitional provision was included in the FFLA Act (No. 3) to ensure that no rights or interests were unduly affected by the High Court decision in *Williams*.

Prior to the *Williams* decision, the understanding since Federation had been that the Government could rely on executive power to make certain payments (e.g. grants to individuals or community groups). The High Court overturned this position by requiring that legislative authority is necessary to support certain payments. The FFLA Act (No. 3) was implemented swiftly to ensure that not only was there authority for future spending, but that payments made prior to the FFLA Act (No. 3) were not put at risk.

The retrospective authorisation of certain spending activities by the FFLA Act (No. 3) ensured that recipients of past Commonwealth payments, and hence the community in general, were not disadvantaged by the decision in *Williams*.

Conclusion

Thank you for the opportunity to provide more detailed reasons for the reforms in the FFLA Act (No. 3). I trust that the above information provides sufficient explanation for the matters that you have raised.

Yours sincerely

Penny Wong

THE HON SIMON CREAN MP

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

Reference no: B12/1004

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18 SEP 2012

Dear Senator ~~MacDonald~~ Ian

Thank you for the letter of 13 September 2012 from the Scrutiny of Bills Committee Secretary drawing my attention to *Alert Digest No. 10 of 2012* (12 September 2012) and concerning the National Portrait Gallery of Australia Bill 2012 (NPGA Bill).

The Committee has requested further consideration of clause 54 of the NPGA Bill, which enables the Governor-General to make regulations and that these regulations may prescribe penalties for offences against the regulations. The Committee has noted its preference to include important matters in the primary legislation and has suggested that the provision to create offences through regulations may not be sufficiently justified in the Explanatory Memorandum (EM).

The inclusion of Clause 54, as drafted, is consistent with similar powers granted to other national collecting institutions under their enabling legislation such as the *National Museum of Australia Act 1980* (NMA Act) and the *National Gallery Act 1975* (NG Act). It is my understanding that the inclusion of provisions in the legislation enabling the national cultural institutions to create offences by regulation is vital in ensuring that the national collecting institutions can appropriately adapt to protect the valuable cultural material in their care.

Section 44 of the NMA Act and the subsequent *National Museum of Australia Regulations 2000* (NMA Regulations) and Section 46 of the NG Act the subsequent *National Gallery Regulations 1982 (*NG Regulations) include provisions relating to the regulation of conduct of persons on land and buildings of the relevant institution to ensure the proper protection of the significant cultural material in their care. For example, offences under these regulations include:

- interfering with or causing damage to artworks (Item 7(1) of the NG Regulations) or to museum material (Item 5(1) of the NMA Regulations);
- prohibiting consumption of food within proximity to artworks (Item 7(3) of the NG Regulations) or to museum material (Item 5(3) of the NMA Regulations); and
- prohibiting any unauthorised photography of artworks (Item 7A of the NG Regulations) or empowering the Director to prohibit unauthorised photography within the Museum (Item 6 of the NMA Regulation) to prevent damage caused by photographic equipment and to

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prevent, so far as possible, any unauthorised reproductions of any material protected by copyright.

The possible penalties described in Clause 54 of the NPGA Bill are included to regulate the control of Gallery land and buildings and the supply of liquor, which are dealt with in Clauses 52 and 53 of the primary legislation. Paragraph 134 of the EM for the NPGA Bill explains the type of regulations that may be provided under Clause 53. The use of regulations to create offences was considered appropriate because the prescribed penalties provided for in the Bill are limited to 50 penalty units.

In addition, the use of regulations in this circumstance was considered to be the most efficient mechanism for doing so given that in future, regulations could be made and repealed more expeditiously when compared with amending legislation.

The making of regulations under this Bill is also not without Parliamentary oversight. Since the enactment of the *Legislative Instruments Act 2003,* regulations of the type contemplated by Clause 54 of the Bill will be subject to disallowance by the Parliament. Further, the sunsetting provisions of the *Legislative Instruments Act 2003* means that there will be a compulsory review and consideration of the utility and effectiveness of any offences 10 years after such an offence is created by regulation. No provision has been included in this Bill that would exempt any regulations made pursuant to the power in Clause 54 from the sunsetting or disallowance regimes.

Further, during the drafting of this Bill the Office of Parliament Counsel advised that if the detail of Clauses 52 and 53 was to be included in regulations to be made under the NPGA Bill then it was appropriate that the detail of Clause 54 should also be dealt with in regulations to be made under the NPGA Bill.

Thank you for the Committee's interest in this matter. I trust that this information will address the Committee's concerns.

Yours sincerely

SIMON CREAN