SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2005

16 March 2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
Senator A Murray

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

THIRD REPORT OF 2005

The Committee presents its Third Report of 2005 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:

Aged Care Amendment (Transition Care and Assets Testing) Bill 2005

Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005

Australian Communications and Media Authority Bill 2004

Aged Care Amendment (Transition Care and Assets Testing) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2005*. The Minister for Ageing has responded to those comments in a letter dated 15 March 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2005

[Introduced in the House of Representatives 10 February 2005. Portfolio: Ageing]

The bill amends the *Aged Care Act 1997* to ensure that leave arrangements are in place to allow recipients of residential care to receive transition care following a hospital stay.

The bill also provides for the Secretary of the Department of Health and Ageing to undertake and make determinations about assets assessments for new residents entering aged care homes after 1 July 2005. This task is currently undertaken by approved providers of residential aged care. The bill enables the Secretary to delegate relevant powers to Centrelink and the Department of Veterans' Affairs.

The bill also contains application provisions.

Retrospective application
Schedule 1, items 3 and 4

Item 4 of Schedule 1 to this bill would apply the amendments made by item 3 of the Schedule to circumstances which may have arisen before the amendment had commenced and is, to that extent, retrospective. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.

In this case, the explanatory memorandum does not indicate whether this retrospective application could be to the disadvantage of some recipients of aged care, and the Committee **seeks the Minister's advice** as to whether this might be the case.

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

Relevant extract from the response from the Minister

I am pleased to advise that the retrospective application of Items 3 and 4 of Schedule 1 will not be to the disadvantage of any recipient of aged care, and provide the following explanation.

The Amendment Bill establishes a new form of flexible leave for transition care which enables current residents living in residential aged care to access transition care without jeopardizing their security of tenure. Transition care must be preceded by a hospital episode for residents already living in residential aged care. The amendments will allow existing residents who require transition care after a hospital stay to retain their residential aged care place, and to return to their aged care home after completion of transition care. The amendments will ensure that residents who need transition care after a hospital episode will not be disadvantaged compared with residents who return to their aged care home directly from hospital.

The retrospective application of subparagraph 44-4(1)(a)(ii) recognizes that there will be some residents who are on hospital leave prior to the commencement date of the amendments. It ensures that the total period of hospital leave plus transition care leave will be treated in exactly the same way, for the purpose of payment of residential care subsidy to the approved provider, whether the resident began a period of hospital leave before or after the commencement of the amendments. The retrospective application does not affect any entitlement to residential care subsidy that may have accrued prior to the commencement date, nor does it remove any leave entitlement that a resident may have had prior to the commencement date.

The Australian Government will pay residential care subsidy in respect of residential aged care places, in line with the legislative arrangements, from the date that residents enter hospital care and throughout transition care. The Australian Government will also pay flexible care subsidy for transition care, for the duration of residents' transition care. The bill will ensure that residents retain their aged care place while in hospital and while receiving transition care.

I trust that this information clarifies that recipients of residential aged care will not be disadvantaged by the retrospective application of Schedule 1 Items 3 and 4.

The Committee thanks the Minister for this response. The explanatory memorandum was virtually impenetrable on this point and the Committee is reassured that the provision will not operate to the disadvantage of any recipient of aged care.

Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2005*. The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry responded to those comments in a letter dated 11 March 2005.

Extract from Alert Digest No. 2 of 2005

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Agriculture, Fisheries and Forestry]

The Australian Pesticides and Veterinary Medicines Authority (APVMA) evaluates and regulates agricultural and veterinary chemicals. The costs of the authority are recoverable through a system of fees and levies. According to the minister's second reading speech the amendments in this bill 'bring the cost recovery arrangements for the APVMA into closer consistency with the Government's Cost Recovery Guidelines.'

Key amendments to levy arrangements include:

- a shift from a calendar year to a financial year basis;
- provision for a tiered rate of levy based on the volume of leviable disposals of a particular chemical product;
- removal of existing caps and thresholds; and
- creation of a new penalty for understating the amount of leviable disposals.

The bill also repeals a suite of 'interim' levy legislation enacted in 1994.

Legislative Instruments Act – Declarations
Schedule 1, item 6

Proposed subsection 6(3) of the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*, to be added by item 6 of Schedule 1 to this bill, would declare that a notice made under paragraph 6(1)(a) of that Act is not a 'legislative instrument'. This has the effect of excluding such a notice from parliamentary scrutiny.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. (See the Committee's *Second Report of 2005* under the heading 'Legislative Instruments Act – Declarations'.)

In this case, it appears that a notice made under paragraph 6(1)(a) is not of a legislative character, as it does no more than determine the notional wholesale value of a particular product at a particular time, and does not state any general principle that is applicable in a variety of circumstances. Unfortunately the explanatory memorandum does little more than repeat the words of the amendment.

The Committee **seeks the Minister's advice** as to whether proposed new subsection 6(3) is no more than declaratory (and included for the avoidance of doubt) and, if so, whether it would have been appropriate to include that information in the explanatory memorandum.

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

Relevant extract from the response from the Parliamentary Secretary

As noted by the Committee, item 6 of Schedule 1 to the bill would insert a new provision, subsection 6(3), into the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*. New subsection 6(3) provides that a notice under paragraph 6(1)(a) is not a legislative instrument. This is because a notice made under paragraph 6(1)(a) applies the law in a particular case and does not determine the law or alter the content of the law and would therefore not come within the definition of legislative instrument in section 6 of the *Legislative Instruments Act 200*. This is consistent with advice received from the Office of Legislative Drafting and Publishing.

New subsection 6(3) is merely declaratory and included for the avoidance of doubt. It does not have the effect of exempting an instrument from the application of the *Legislative Instruments Act 2003* that would otherwise have been subject to that Act. As noted by the Committee, it may have been appropriate to have included a statement to this effect in the Explanatory Memorandum.

The Committee thanks the Parliamentary Secretary for this response.

Retrospective validation
Schedule 1, item 46

Subsection 164(3) of the *Agricultural and Veterinary Chemicals Code Act 1994* places a limit on the fee which may be prescribed to be paid under section 164 of the Act. Item 45 of Schedule 1 to this bill removes that limit and item 46 would retrospectively validate any fee that was purported to have been paid under regulations made under section 164, despite the fact that the fee may have been in excess of the statutory limit.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case the explanatory memorandum, in respect of item 46, states merely that 'Since 2 October 1996, the regulations have included one item of application fees that exceeds the limit in subsection 164(3)', but does not indicate how much was wrongfully exacted from members of the public.

The Committee **seeks the Minister's advice** as to the amount by which the fees exceeded the statutory limit, and the number of people who paid those fees, in order that the Committee and the Senate may better determine whether this retrospective validation of fees trespasses *unduly* on the personal rights of those who have paid the fees.

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

Relevant extract from the response from the Parliamentary Secretary

> Item 46 of Schedule 1 to the bill retrospectively validates any fees that were paid under the Agricultural and Veterinary Chemicals Code Regulations 1995 (the Regulations) in excess of the statutory limit of $20,000 contained in subsection 164(3) of the Agricultural and Veterinary Chemicals Code. Despite this limit, item 1 of Schedule 6 to the Regulations makes provision for a fee of $20,620, $620 in excess of the limit. This amount was inserted by the Agricultural and Veterinary Chemicals Code Regulations 2 (Amendment) - Dated 25 September 1996. Since that provision commenced, the Australian Pesticides and Veterinary Medicines Authority (the APVMA) has received 82 applications in respect of which this fee was payable. The total excess amount has been $50,840.
>
> I trust this response addresses the Committee's concerns in relation to this Bill.

The Committee thanks the Parliamentary Secretary for this response and suggests that it may have been useful for this information to have been included in the explanatory memorandum to the bill.

Australian Communications and Media Authority Bill 2004

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2004*. The Minister for Communications, Information Technology and the Arts responded to those comments in a letter dated 9 March 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2004

[Introduced in the House of Representatives on 2 December 2004. Portfolio: Communications, Information Technology and the Arts]

The bill establishes a new regulatory authority for communications, the Australian Communications and Media Authority (ACMA), replacing the Australian Broadcasting Authority and the Australian Communications Authority.

The bill specifies the functions of the new authority in the areas of telecommunications, spectrum management, broadcasting services and datacasting, among others. It sets out administrative arrangements for the authority and provides for the appointment of members, including a full-time Chair and Deputy Chair, and associate members.

The bill is accompanied by the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and eight related bills.

Wide discretion
Subclauses 24(1) and (4)

According to the second reading speech, the bill 'allows the Minister to appoint associate members to undertake specified matters such as inquiries, investigations and hearings'. In fact, subclause 24(1) of this bill would give to the Minister the discretion to appoint 'as many associate members of the ACMA as he or she thinks fit'.

The only limit on the exercise of this discretion is that, by virtue of subclause 24(4), an associate member's appointment must relate to one or more 'specified matters', however paragraph 24(4)(b) allows such specified matters to be 'any other matter that relates to the ACMA's functions or the exercise of the ACMA's powers'.

The Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister's advice** as to whether the number of associate members of the Authority, or the circumstances in which they may be appointed, might not be limited to some extent.

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

Relevant extract from the response from the Minister

The Committee has noted its concern that the ability of the Minister to appoint an unlimited number of associate members to the Australian Communications and Media Authority (ACMA) under clause 24 of the Bill, and the fact that the appointments may be for 'any matter that relates to the ACMA's functions and powers' (paragraph 24(4)(b)) may insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee has therefore sought my advice as to whether it might be possible to limit the number of associate members of ACMA, or the circumstances in which they may be appointed.

I have been advised that the appointment of an associate member would not be an exercise of legislative power of the kind referred to in principle 1(a)(v) of the Committee's terms of reference. An instrument of appointment of an associate member would not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (see item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*). Appointments of associate members are an exercise of statutory executive power.

It is important to note that the Bill only effects an administrative merger and therefore is not conferring additional functions or powers on ACMA. The clauses of concern to the Committee simply replicate the current powers to appoint associate members to the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) currently provided for by section 156 of the *Broadcasting Services Act 1992* and section 18 of the *Australian Communications Authority Act 1997*. I note that these provisions are similar to the power to appoint an unlimited number of associate members to the Australian Competition and

Consumer Commission (ACCC) provided by section 8A of the *Trade Practices Act 1974.*

In addition, there have only been a limited number of associate appointments made to both the ABA and the ACA. For example, Mr Jogn Dickjie was appointed to the ABA in 1995 for the purposes of the Regulation of Online Services Investigation, while Ms Christine Goode was appointed in the same year for general purposes. Mr Dale Boucher was appointed an associate member of the ACA from 18 January 1999 to 30 June 1999 with specific reference to the Telecommunications Interception Review. Both the ABA and the ACA, as well as the ACCC, have also had reciprocal arrangements whereby members are appointed as associate members of the other authorities.

I would expect these arrangements to continue with only a limited number of associate member appointments being made to ACMA. In addition, the number of members will not affect the regulatory functions of the ACMA, which are defined in other legislation. For these reasons, and the fact that clause 24 merely replicates existing provisions, I do not consider there is a need to restrict the Minister's ability to limit the number of associate members that may be appointed or the matters for which an associate member may be appointed.

The Committee thanks the Minister for this response. The Committee notes that there have only been a limited number of associate appointments made to both the ABA and the ACA in the past and also notes the Minister's assurance that she 'would expect these arrangements to continue with only a limited number of associate member appointments being made to ACMA'. Given the history and predicted future of the arrangements the Minister describes, the Committee continues to question the need for the bill to enable the Minister to appoint an unlimited number of associate members.

In the circumstances, however, the Committee makes no further comment on the provision.

Incorporation of extrinsic material
Clause 65

Under clause 64 of this bill, the ACMA may make determinations, which may be of a legislative character, setting out the definitions of expressions used in specified instruments made by the ACMA under telecommunications and broadcasting legislation. Clause 65 would allow a determination made under clause 64 to apply, adopt or incorporate '(with or without modifications) matter contained in any other instrument or writing whatever', whether or not that other instrument or writing is in existence at the time of the making of the determination. Furthermore, the other instrument or writing may, by virtue of paragraph 65(2)(g), be 'an instrument or writing made unilaterally'.

Section 49A of the *Acts Interpretation Act 1901* allows an instrument to adopt or incorporate extrinsic material and to give it the force of law. Where the material adopted is not itself an Act or a regulation, the general rule in section 49A allows for its adoption in the form that it exists at the time of adoption, but *not* 'as in force from time to time'. Without such an approach a person or organisation may change the obligations imposed by a regulation without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. (Section 14 of the *Legislative Instruments Act 2003* contains a similar provision.) While this is a general rule, it may be ousted by a statement of contrary intention in an Act and this is what clause 65 seeks to achieve.

Where a provision seeks to oust this general rule, the Committee will usually seek an explanation of the need for the provision. In this case, the explanatory memorandum states that the operation of section 49A 'would cause unnecessary administrative work for the ACMA and [the ACMA Act] would lack the flexibility' in other telecommunications legislation.

In considering the precursor to clause 65, section 54A of the *Australian Communications Authority Act 1997*, the Committee repeated its long held position that mere administrative convenience cannot justify an absence of parliamentary scrutiny, but accepted the Minster's argument that the incorporation of material was not intended to affect policy, but rather to make technical changes. (See *Fourth Report of 2003*, Communications Legislation Amendment Bill (No. 1) 2002.)

The Committee has taken a similar approach with other relevant legislation. In its commentary on proposed section 314A of the *Radiocommunications Act 1992*, for instance, the Committee was prepared to accept a similar provision where it was clear that the instruments in question dealt with the technical nature of standards (*Fourth Report of 1995*, Communications and the Arts Legislation Amendment Bill 1994).

In relation to clause 65, the explanatory memorandum sets out a wide range of examples of material which may be incorporated, and there is nothing to indicate an intention that the matters to be dealt with by incorporation would be restricted, for instance, to technical matters.

The only limit on the width of the Authority's power is that determinations made under clauses 64 and 65 are solely for the purpose of defining expressions used in other determinations. The Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister's advice** as to whether there might not be some limit put upon the exercise of this power.

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

Relevant extract from the response from the Minister

The Committee has also expressed concerns about clause 65 of the Bill which would allow ACMA to define expressions used in specified instruments made by ACMA by applying, adopting, or incorporating material contained in any other instrument or writing, including material as it is in force from time to time. I note that the Committee's concerns that the ability of the ACMA to define expressions by reference to extrinsic material is insufficiently limited and the lack of Parliamentary scrutiny of determinations.

Clause 65 is based upon section 54A of the Australian *Communications Act 1997*. I note that the previous Minister for Communications, Information Technology and the Arts, Senator Alston, wrote to the Committee in September 2002 explaining the need for this amendment. The rationale for the inclusion of this amendment in the ACMA Bill remains the same as that explained by Senator Alston. Clause 65 is intended to reduce the administrative load of ACMA so that it would not be required to amend a determination under clause 64 every time an instrument or writing

applied, adopted or incorporated in that determination is amended. It is important that ACMA has the ability, in making a determination under clause 64, to incorporate provisions of other instruments or writings by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time. Clause 65 is not intended to operate so as to affect the policy behind instruments which refer to expressions defined in a determination made under clause 64, but rather to allow for changes and innovation in technology to be reflected in defined expressions without the need for ACMA to constantly amend those expressions.

I note that Senator Alston provided the Committee with a list of similar existing provisions in the telecommunications and radiocommunications legislation. I have replicated this list below for the Committee's convenience:

- Section 349 of the *Telecommunications Act 1997* allows the ACA to make a written determination requiring certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Subsection 349(7) provides that in making a determination under section 349, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This enables the ACA to readily adopt pre-selection arrangements that the industry has been able to reach agreement upon itself.

- Section 377 of the *Telecommunications Act 1997* allows the ACA, in making a technical standard under section 376, to incorporate (with or without modification) any matter contained in a standard as in force or existing from time to time proposed or approved by Standards Australia International Limited or any other body or association.

- Section 589 of the *Telecommunications Act 1997* and section 314A of the *Radiocommunications Act 1992* allow any instrument made under those Acts to incorporate by reference (with or without modification) matter contained in any other instrument or writing whatsoever as in force or existing from time to time.

- Section 147 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* enables the ACA to impose requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. Subsection 147(8) provides that in making a determination under section 147, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This allows the ACA to take into account any work in the area of emergency call services which may be undertaken by a body formed for that purpose by representatives from the telecommunications industry and from emergency service organisations.

The Committee thanks the Minister for this response, which adopts and incorporates advice from the previous Minister, Senator Alston.

The Committee particularly thanks the Minister for her assurance that the incorporation of material provided for in clause 65 'is not intended to operate so as to affect the policy behind instruments…' As the Alert Digest notes, there is nothing in the bill or the explanatory memorandum to indicate that the matters to be dealt with by incorporation would be restricted, for instance, to technical matters. Indeed, the explanation proffered rested on the avoidance of administrative inconvenience, which the Committee has previously rejected as justification for an absence of parliamentary scrutiny.

As the Minister notes, similar provisions have been the subject of correspondence between the Committee and the responsible Minister on numerous occasions, indeed since at least 1994. It would perhaps be of greater assistance to the Committee and to the Parliament generally if assurances of this kind were contained in the explanatory memorandum to the bill in question or, better still, if the provisions of bills were drafted so as to place appropriate constraints on apparently wide-ranging powers. Otherwise the Committee has little option but to engage in correspondence of this nature.

The Committee makes no further comment on the provision.

Robert Ray
Chair

The Hon Julie Bishop MP
Minister for Ageing

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

On 10 March 2005 Mr Richard Pye, Secretary to the Standing Committee for the Scrutiny of Bills (the Committee), wrote to my Office enclosing a copy of the *Scrutiny of Bills Alert Digest No. 2 of 2005* (9 March 2005). The Digest notes that the Explanatory Memorandum to the Aged Care Amendment (Transition Care and Assets Testing) Bill 2005 did not indicate whether the retrospective application of Items 3 and 4 of Schedule 1 could be to the disadvantage of some recipients of aged care, and that the Standing Committee sought my advice on this matter.

I am pleased to advise that the retrospective application of Items 3 and 4 of Schedule 1 will not be to the disadvantage of any recipient of aged care, and provide the following explanation.

The Amendment Bill establishes a new form of flexible leave for transition care which enables current residents living in residential aged care to access transition care without jeopardising their security of tenure. Transition care must be preceded by a hospital episode for residents already living in residential aged care. The amendments will allow existing residents who require transition care after a hospital stay to retain their residential aged care place, and to return to their aged care home after completion of transition care. The amendments will ensure that residents who need transition care after a hospital episode will not be disadvantaged compared with residents who return to their aged care home directly from hospital.

The retrospective application of subparagraph 44-4(1)(a)(ii) recognises that there will be some residents who are on hospital leave prior to the commencement date of the amendments. It ensures that the total period of hospital leave plus transition care leave will be treated in exactly the same way, for the purpose of payment of residential care subsidy to the approved provider, whether the resident began a period of hospital leave before or after the commencement of the amendments. The retrospective application does not affect any entitlement to residential care subsidy that may have accrued prior to the commencement date, nor does it remove any leave entitlement that a resident may have had prior to the commencement date.

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The Australian Government will pay residential care subsidy in respect of residential aged care places, in line with the legislative arrangements, from the date that residents enter hospital care and throughout transition care. The Australian Government will also pay flexible care subsidy for transition care, for the duration of residents' transition care. The Bill will ensure that residents retain their aged care place while in hospital and while receiving transition care.

I trust that this information clarifies that recipients of residential aged care will not be disadvantaged by the retrospective application of Schedule 1 Items 3 and 4.

Yours sincerely

JULIE BISHOP

15 MAR 2005

Senator the Hon Richard Colbeck

Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Department of the Senate
Parliament House
CANBERRA ACT 2600

14 MAR 2005

Dear Senator

I refer to Senate Standing Committee for the Scrutiny of Bills Alert Digest No.2 of 2005 in which the Committee has commented on the Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005 and seeks my response with respect to two of the matters raised.

As noted by the Committee, item 6 of Schedule 1 to the bill would insert a new provision, subsection 6(3), into the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*. New subsection 6(3) provides that a notice under paragraph 6(1)(a) is not a legislative instrument. This is because a notice made under paragraph 6(1)(a) applies the law in a particular case and does not determine the law or alter the content of the law and would therefore not come within the definition of legislative instrument in section 6 of the *Legislative Instruments Act 200*. This is consistent with advice received from the Office of Legislative Drafting and Publishing.

New subsection 6(3) is merely declaratory and included for the avoidance of doubt. It does not have the effect of exempting an instrument from the application of the *Legislative Instruments Act 2003* that would otherwise have been subject to that Act. As noted by the Committee, it may have been appropriate to have included a statement to this effect in the Explanatory Memorandum.

Item 46 of Schedule 1 to the bill retrospectively validates any fees that were paid under the *Agricultural* and Veterinary Chemicals Code Regulations 1995 (the Regulations) in excess of the statutory limit of $20,000 contained in subsection 164(3) of the Agricultural and Veterinary Chemicals Code. Despite this limit, item 1 of Schedule 6 to the Regulations makes provision for a fee of $20,620, $620 in excess of the limit. This amount was inserted by the Agricultural and Veterinary Chemicals Code Regulations 2 (Amendment) - Dated 25 September 1996. Since that provision commenced, the Australian Pesticides and Veterinary Medicines Authority (the APVMA) has received

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82 applications in respect of which this fee was payable. The total excess amount has been $50,840.

I trust this response addresses the Committee's concerns in relation to this Bill.

Yours sincerely

Richard Colbeck

MINISTER FOR COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

Senator the Hon Helen Coonan

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Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

F 9 MAR 2005

Dear Senator

I refer to the comments contained in the Scrutiny of Bills Alert Digest No. 12 of 2004 concerning the Australian Communications and Media Authority Bill 2004 (the Bill).

The Committee has noted its concern that the ability of the Minister to appoint an unlimited number of associate members to the Australian Communications and Media Authority (ACMA) under clause 24 of the Bill, and the fact that the appointments may be for 'any matter that relates to the ACMA's functions and powers' (paragraph 24(4)(b)) may insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee has therefore sought my advice as to whether it might be possible to limit the number of associate members of ACMA, or the circumstances in which they may be appointed.

I have been advised that the appointment of an associate member would not be an exercise of legislative power of the kind referred to in principle 1(a)(v) of the Committee's terms of reference. An instrument of appointment of an associate member would not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (see item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*). Appointments of associate members are an exercise of statutory executive power.

It is important to note that the Bill only effects an administrative merger and therefore is not conferring additional functions or powers on ACMA. The clauses of concern to the Committee simply replicate the current powers to appoint associate members to the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) currently provided for by section 156 of the *Broadcasting Services Act 1992* and section 18 of the *Australian Communications Authority Act 1997*. I note that these provisions are similar to the power to appoint an unlimited number of associate members to the Australian Competition and Consumer Commission (ACCC) provided by section 8A of the *Trade Practices Act 1974*.

In addition, there have only been a limited number of associate appointments made to both the ABA and the ACA. For example, Mr Jogn Dickjie was appointed to the ABA in 1995 for the purposes of the Regulation of Online Services Investigation, while Ms Christine Goode was appointed in the same year for general purposes. Mr Dale Boucher was appointed an associate member of the ACA from 18 January 1999 to 30 June 1999 with specific reference to the Telecommunications Interception Review. Both the ABA and the ACA, as well as the ACCC, have also had reciprocal arrangements whereby members are appointed as associate members of the other authorities.

I would expect these arrangements to continue with only a limited number of associate member appointments being made to ACMA. In addition, the number of members will not affect the regulatory functions of the ACMA, which are defined in other legislation. For these reasons, and the fact that clause 24 merely replicates existing provisions, I do not consider there is a need to restrict the Minister's ability to limit the number of associate members that may be appointed or the matters for which an associate member may be appointed.

The Committee has also expressed concerns about clause 65 of the Bill which would allow ACMA to define expressions used in specified instruments made by ACMA by applying, adopting, or incorporating material contained in any other instrument or writing, including material as it is in force from time to time. I note that the Committee's concerns that the ability of the ACMA to define expressions by reference to extrinsic material is insufficiently limited and the lack of Parliamentary scrutiny of determinations.

Clause 65 is based upon section 54A of the *Australian Communications Act 1997*. I note that the previous Minister for Communications, Information Technology and the Arts, Senator Alston, wrote to the Committee in September 2002 explaining the need for this amendment. The rationale for the inclusion of this amendment in the ACMA Bill remains the same as that explained by Senator Alston. Clause 65 is intended to reduce the administrative load of ACMA so that it would not be required to amend a determination under clause 64 every time an instrument or writing applied, adopted or incorporated in that determination is amended. It is important that ACMA has the ability, in making a determination under clause 64, to incorporate provisions of other instruments or writings by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time. Clause 65 is not intended to operate so as to affect the policy behind instruments which refer to expressions defined in a determination made under clause 64, but rather to allow for changes and innovation in technology to be reflected in defined expressions without the need for ACMA to constantly amend those expressions.

I note that Senator Alston provided the Committee with a list of similar existing provisions in the telecommunications and radiocommunications legislation. I have replicated this list below for the Committee's convenience:

- Section 349 of the *Telecommunications Act 1997* allows the ACA to make a written determination requiring certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Subsection 349(7) provides that in making a determination under section 349, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force

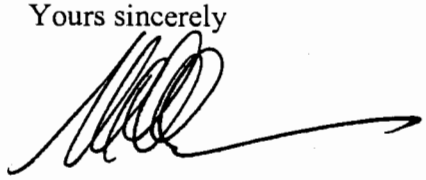
or existing from time to time that has been proposed or approved by a body or association. This enables the ACA to readily adopt pre-selection arrangements that the industry has been able to reach agreement upon itself.

- Section 377 of the *Telecommunications Act 1997* allows the ACA, in making a technical standard under section 376, to incorporate (with or without modification) any matter contained in a standard as in force or existing from time to time proposed or approved by Standards Australia International Limited or any other body or association.
- Section 589 of the *Telecommunications Act 1997* and section 314A of the *Radiocommunications Act 1992* allow any instrument made under those Acts to incorporate by reference (with or without modification) matter contained in any other instrument or writing whatsoever as in force or existing from time to time.
- Section 147 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* enables the ACA to impose requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. Subsection 147(8) provides that in making a determination under section 147, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This allows the ACA to take into account any work in the area of emergency call services which may be undertaken by a body formed for that purpose by representatives from the telecommunications industry and from emergency service organisations.

In relation to the Committee's concerns about lack of Parliamentary scrutiny, I am advised that a determination made by the ACMA under clause 64 would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. As a result, a determination would be tabled in Parliament and would be subject to disallowance. In addition, section 41 of the *Legislative Instruments Act 2003* would allow either House of Parliament to require any document incorporated by reference in a determination to be made available for inspection at a particular time and place.

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

Yours sincerely



HELEN COONAN