



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2005

12 October 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 A McEwen
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

TWELFTH REPORT OF 2005

The Committee presents its Twelfth Report of 2005 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Energy Efficiency Opportunities Bill 2005*

Telstra (Transition to Full Private Ownership) Act 2005

Therapeutic Goods Amendment Bill 2005*

- * Although these bills have not yet been introduced into the Senate, the Committee may report on its proceedings in relation to the bills, under standing order 24(9).

Energy Efficiency Opportunities Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2005*. The Minister for Industry, Tourism and Resources responded to the Committee's comments in a letter dated 11 October 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2005

Introduced into the House of Representatives on 14 September 2005
Portfolio: Industry, Tourism and Resources

Background

This bill establishes the framework for mandatory energy efficiency opportunities assessments announced in the Government's energy white paper, in June 2004.

The bill deals with registration of company details; submission of assessment plans; undertaking assessments; reporting on the outcomes of assessments; and compliance and enforcement arrangements.

Insufficiently defined administrative powers

Paragraph 25(1)(b)

Paragraph 25(1)(b) would allow the Secretary to the Department of Industry, Tourism and Resources to appoint 'any ... suitably qualified person' as an authorised officer. Such officers have the power to enter premises either with consent or under the authority of a monitoring warrant, to ask questions and to seek production of documents. The explanatory memorandum gives no indication of what type of person might be regarded as 'suitably qualified' for these purposes.

The Committee has consistently drawn attention to provisions which allow significant or wide-ranging powers to be delegated to 'a person', preferring to see a limit on either the powers delegated or the categories of people to whom they might be delegated. The Committee **seeks the Minister's advice** as to whether it would be possible to limit or better specify the range of persons who might be appointed under paragraph 25(1)(b).

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee has raised concerns in the Scrutiny of Bills Alert Digest of 5 October 2005 about the scope of paragraph 25(1)(b) of the *Energy Efficiency Opportunities Bill 2005* (EEO Bill). That paragraph provides for the Secretary of my Department to appoint 'any other suitably qualified person' as an authorised officer for the purposes of the legislation. The Committee is concerned that the meaning of 'any other suitably qualified person' may be insufficiently defined, in breach of principle 1(a)(ii) of the Committee's terms of reference.

I understand, however, that the Office of Parliamentary Counsel quite deliberately used this phrase in drafting the EEO Bill to limit the scope of this provision while retaining practical flexibility. This approach was taken in consultation with the Criminal Justice Division of the Attorney-General's Department.

'Suitably qualified' is not a term that is intended to be wide in scope in paragraph 25(1)(b). The inspection and verification powers proposed to be applied by authorised officers will be across a range of businesses where varied and different technical knowledge will be required. Suitable qualifications will substantially differ for inspection of different companies and business sectors. The statutory context of the use of the term constrains its scope. The term 'suitably qualified person', as used in the EEO Bill, will place a limit on the Secretary's power to appoint authorised officers in various circumstances - the Secretary can only appoint persons who are 'suitably qualified' in the particular circumstances.

It would not be possible to further define, in the legislation, the qualifications of persons to be appointed, as this would risk limiting the ability of my Department to adequately verify compliance with the legislation. The legislation is to apply to businesses covering a wide spectrum of economic activities, and needs to have the inherent ability to accommodate a diverse set of situations.

We have obtained advice from the Australian Government Solicitor (AGS) that supports this view, and identifies a number of precedents where this term is used in existing legislation. The AGS advice is attached for the information of the Committee.

If the Committee considers it necessary, I would be happy to amend the Explanatory Memorandum for the EEO Bill to explain more clearly the intended bounds of this

provision. I have attached a proposed correction to the Explanatory Memorandum for your consideration. I would be grateful for the Committee's advice.

CORRECTION TO THE EXPLANATORY MEMORANDUM

CLAUSE 25 APPOINTMENT OF AUTHORISED OFFICERS

Paragraph 364 - add to the end of that paragraph:

“Clause 25(1)(b) is not intended to allow an unlimited class of persons to be appointed as authorised officers. Suitable qualifications are intended to be determined in the context, and for the purposes, of the legislation. Suitable qualifications may differ from case to case depending on the types of companies or business processes for which monitoring or inspection of compliance is to be carried out. An example of a ‘suitably qualified person’ would be a person who has relevant qualifications and experience in the industry being carried on by the energy using group being monitored. For example, a fully qualified mining engineer with experience in open-cut mining operations may be a ‘suitably qualified person’ to monitor and inspect the energy use of an open-cut mine.”

This change is to clarify the intended meaning of clause 25(1)(b).

The Committee thanks the Minister for this response, and for undertaking to table a correction to the explanatory memorandum to the bill. The explanation meets the Committee's concerns.

The Committee makes no further comment on this provision.

Telstra (Transition to Full Private Ownership) Act 2005

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 of 2005*. The Minister for Communications, Information Technology and the Arts responded to the Committee's comments in a letter dated 7 October 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2005

Introduced into the Senate on 8 September

Portfolio: Communications, Information Technology and the Arts

Background

One of five bills introduced on 7 and 8 September 2005, this bill amends the *Telstra Corporation Act 1991* to allow the Commonwealth to sell its remaining equity interest in Telstra.

Commencement

Schedule 1, Part 2

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which provisions might commence. This view has long been reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently *Drafting Direction 2005, No. 10* at paragraphs 16 to 22).

Item 3 in the table to subclause 2(1) provides that the amendment proposed by Part 2 of Schedule 1 would commence on a day, as designated by the Minister, on which the majority of the voting shares in Telstra are held by persons other than the Commonwealth. The assumption behind this provision is that such a day will occur, and presumably relatively soon after Assent. However, the Committee **seeks the Minister's advice** as to whether item 3 in the table to subclause 2(1) should not also include provision to the effect that, if the majority of the voting shares in Telstra are still held by the Commonwealth at some fixed period after the bill has been assented to, then the measure will be deemed to be repealed at that time.

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

Thank you for your letter of 15 September 2005 concerning the commencement of provisions in the *Telstra (Transition to Full Private Ownership) Act 2005* (that enable the amendment of certain legislation affecting Telstra on the 'designated day', being the day on which the Government's shareholding in Telstra falls, or is taken to have fallen, below 50 per cent.

The Act has been developed in such a manner so that specific obligations that apply to Telstra as a result of its status as a majority public owned Government Business Enterprise and a Commonwealth-controlled company will be phased out in an orderly and transparent manner as the Government divests its direct holdings in Telstra or transfers some of its shares in Telstra to the proposed Future Fund to be established by the Future Fund Bill 2005 or the Communications Fund established by the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Act 2005*.

While the Government has moved to establish the legislation that would enable it to sell its remaining shareholding, it has undertaken not to proceed with any further sale of Telstra until it is fully satisfied that arrangements are in place to deliver adequate telecommunications services to all Australians, including maintaining the improvements to existing services, and that there is value for taxpayers from any further sale. The Act provides for the timing of the sale to remain open. The Government will make a further decision early next year about proceeding with a sale and the extent to which its shares in Telstra will be transferred to the proposed Future Fund or the Communications Fund.

The designated day is the day upon which the Minister determines that the Australian Government no longer holds the majority of voting shares in Telstra. In this regard, I note that subsection 3(3) of the Act provides that for the purposes of the Minister's declaration of the designated day under section 3, if a share is an investment of the Future Fund or the Communications Fund, the share is taken to be held by a person other than the Commonwealth.

The inclusion of a provision in the Act that would repeal Part 2 of Schedule 1 if the designated day had not occurred within some fixed period after the Bill had been assented to would be arbitrary, inconsistent with the Government's policy position and would unduly constrain the Government's ability to determine when a Telstra sale should commence or particular Telstra shares held by the Government should be transferred to the Future Fund or the Communications Fund.

The Committee thanks the Minister for this response.

The long-standing position of the Committee is that it is properly the role of the Parliament to determine the date upon which legislation ought to commence. Where it is not possible to specify a particular date, the Committee considers that the Parliament should set a defined period of time during which legislation might commence. These matters are also contemplated in the relevant drafting directions issued by the Office of Parliamentary Counsel (currently *Drafting Direction 2005, No. 10* at paragraphs 16 to 22).

Provisions such as the one contained in this Act remove that role from the Parliament and place it in the hands of the Executive, with virtually unfettered discretion vesting in the Minister. The terms of reference for the Committee require that it report such diminution in Parliamentary oversight to the Senate.

Given that the Senate has passed the bill with the provision intact, however, the Committee makes no further comment on the matter.

Therapeutic Goods Amendment Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2005*. The Parliamentary Secretary to the Minister for Health and Ageing responded to the Committee's comments in a letter dated 6 October 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 10 of 2005

Introduced into the House of Representatives on 17 August 2005
Portfolio: Health and Ageing

Background

The bill amends the *Therapeutic Goods Act 1989* to provide additional enforcement options to enhance the Therapeutic Goods Administration's ability to secure compliance with the Act.

The bill proposes a tiered offences regime with sanctions that match the degree of seriousness of the consequences of conduct and will allow for an alternative and quicker process for dealing with a wide range of legislative breaches.

The bill extends the liability of a body corporate to executive officers in certain circumstances if the body corporate commits an offence and introduces an offence for failing to provide assistance to the Secretary that is relevant to an application for a civil penalty order.

The bill contains consequential amendments.

Legislative Instruments Act – Declarations Schedule 1, item 34

Proposed new subsection 30F(4A) of the *Therapeutic Goods Act 1989*, to be inserted by item 34 of Schedule 1, would declare that a written notice given by the Secretary to the Department under that section is not a legislative instrument.

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'.)

It appears from the context that this provision is no more than declaratory of the existing law. However, the explanatory memorandum does not indicate the reason for its inclusion. The Committee therefore **seeks the Minister's advice** as to whether the provision is indeed 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

The Alert Digest noted that, proposed new subsection 30F(4A) of the *Therapeutic Goods Act 1989* (the Act), to be inserted by Item 34 of Schedule 1 of the Bill, declares that a written notice given by the Secretary of the Department of Health and Ageing to a person under section 30F of the Act is not a legislative instrument.

You indicated that where a provision specifies that an instrument is not a legislative instrument, the Committee considers it appropriate that an explanation is given as to whether the provision is merely declaratory, 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 2003*.

I am writing to confirm that the notice required to be gazetted under subsection 30F(4) of the Act is not a legislative instrument, and to explain that the notice referred to is no more than a statement that the Secretary has exercised her power under section 30F to require a person to recover certain therapeutic goods supplied by that person, either because they do not conform to applicable standards, or

because they are otherwise not fit to be used for their intended purpose. The particulars of the notice issued by the Secretary are required to be gazetted. The new subsection 30F(4A) was inserted to provide that such a gazetted notice is not a legislative instrument.

As the Committee considers it appropriate to include material in the explanatory memorandum that explains the basis for a provision that provides that a particular instrument is not a legislative instrument, this practice will be observed by the TGA in future.

The Committee thanks the Parliamentary Secretary for this response and for his undertaking to have the justification for future instances of such provisions set out in the relevant explanatory memorandum.

It appears from the response that the instrument is administrative, rather than legislative, in character. This explanation meets the Committee's concerns.

The Committee makes no further comment on the provision.

Brett Mason
Deputy Chair



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11 OCT 2005

Senate Standing C'ttee
for the Scrutiny of Bills

The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator Brett Mason
Deputy Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

11 OCT 2005

Dear Senator Mason *Brett*

I refer to the letter of 6 October 2005 from the Secretary to the Standing Committee for the Scrutiny of Bills, to my Senior Adviser, notifying concerns of the Standing Committee for the Scrutiny of Bills.

The Committee has raised concerns in the Scrutiny of Bills Alert Digest of 5 October 2005 about the scope of paragraph 25(1)(b) of the *Energy Efficiency Opportunities Bill 2005* (EEO Bill). That paragraph provides for the Secretary of my Department to appoint 'any other suitably qualified person' as an authorised officer for the purposes of the legislation. The Committee is concerned that the meaning of 'any other suitably qualified person' may be insufficiently defined, in breach of principle 1(a)(ii) of the Committee's terms of reference.

I understand, however, that the Office of Parliamentary Counsel quite deliberately used this phrase in drafting the EEO Bill to limit the scope of this provision while retaining practical flexibility. This approach was taken in consultation with the Criminal Justice Division of the Attorney-General's Department.

'Suitably qualified' is not a term that is intended to be wide in scope in paragraph 25(1)(b). The inspection and verification powers proposed to be applied by authorised officers will be across a range of businesses where varied and different technical knowledge will be required. Suitable qualifications will substantially differ for inspection of different companies and business sectors. The statutory context of the use of the term constrains its scope. The term 'suitably qualified person', as used in the EEO Bill, will place a limit on the Secretary's power to appoint authorised officers in various circumstances - the Secretary can only appoint persons who are 'suitably qualified' in the particular circumstances.

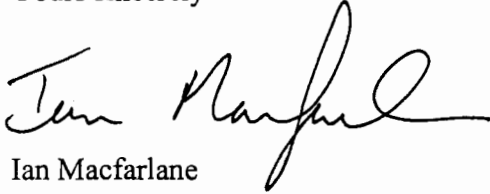
It would not be possible to further define, in the legislation, the qualifications of persons to be appointed, as this would risk limiting the ability of my Department to adequately verify compliance with the legislation. The legislation is to apply to businesses covering a wide spectrum of economic activities, and needs to have the inherent ability to accommodate a diverse set of situations.

We have obtained advice from the Australian Government Solicitor (AGS) that supports this view, and identifies a number of precedents where this term is used in existing legislation. The AGS advice is attached for the information of the Committee.

If the Committee considers it necessary, I would be happy to amend the Explanatory Memorandum for the EEO Bill to explain more clearly the intended bounds of this provision. I have attached a proposed correction to the Explanatory Memorandum for your consideration. I would be grateful for the Committee's advice.

I have copied this letter to my colleague the Minister for the Environment and Heritage.

Yours sincerely

A handwritten signature in black ink, appearing to read "Ian Macfarlane". The signature is fluid and cursive, with a large loop at the end.

Ian Macfarlane

2004 - 2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ENERGY EFFICIENCY OPPORTUNITIES BILL 2005

CORRECTION TO THE EXPLANATORY MEMORANDUM

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Paragraph 364 – add to the end of that paragraph:

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This change is to clarify the intended meaning of *clause 25(1)(b)*.

(Circulated by authority of the Minister for Industry, Tourism and Resources,
the Honourable Ian Macfarlane MP)



MINISTER FOR COMMUNICATIONS,
INFORMATION TECHNOLOGY
AND THE ARTS

Senator the Hon Helen Coonan

PARLIAMENT HOUSE
CANBERRA ACT 2600

RECEIVED

13 OCT 2005

Senate Standing C'ttee
for the Scrutiny of Bills

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Senator Brett Mason
Deputy Chair
Senate Scrutiny of Bills Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

7 - OCT 2005

Dear Senator Mason

Telstra (Transition to Full Private Ownership) Act 2005

Thank you for your letter of 15 September 2005 concerning the commencement of provisions in the *Telstra (Transition to Full Private Ownership) Act 2005* (that enable the amendment of certain legislation affecting Telstra on the 'designated day', being the day on which the Government's shareholding in Telstra falls, or is taken to have fallen, below 50 per cent.

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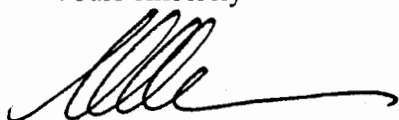
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The inclusion of a provision in the Act that would repeal Part 2 of Schedule 1 if the designated day had not occurred within some fixed period after the Bill had been assented to would be arbitrary, inconsistent with the Government's policy position and would unduly constrain the Government's ability to determine when a Telstra sale should commence or particular Telstra shares held by the Government should be transferred to the Future Fund or the Communications Fund.

Thank you for raising this matter with me.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Helen Coonan', with a long horizontal flourish extending to the right.

HELEN COONAN



THE HON CHRISTOPHER PYNE MP

**Parliamentary Secretary to the
Minister for Health and Ageing**

RECEIVED

13 OCT 2005

Senate Standing C'ttee
for the Scrutiny of Bills

Senator Brett Mason
Deputy Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator ^{Brett}Mason

I refer to the Committee's letter of 8 September 2005 to the office of the Minister for Health and Ageing, the Hon Tony Abbott MP, regarding a reference to the Therapeutic Goods Amendment Bill (No. 1) 2005 (the Bill) in the Scrutiny of Bills Alert Digest No. 10 of 2005 (the Alert Digest). As Parliamentary Secretary with executive responsibility for the Therapeutic Goods Administration (TGA), I am responding on behalf of the Australian Government.

The Alert Digest noted that proposed new subsection 30F(4A) of the *Therapeutic Goods Act 1989* (the Act), to be inserted by Item 34 of Schedule 1 of the Bill, declares that a written notice given by the Secretary of the Department of Health and Ageing to a person under section 30F of the Act is not a legislative instrument.

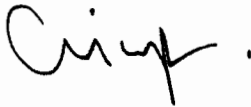
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I am writing to confirm that the notice required to be gazetted under subsection 30F(4) of the Act is not a legislative instrument, and to explain that the notice referred to is no more than a statement that the Secretary has exercised her power under section 30F to require a person to recover certain therapeutic goods supplied by that person, either because they do not conform to applicable standards, or because they are otherwise not fit to be used for their intended purpose. The particulars of the notice issued by the Secretary are required to be gazetted. The new subsection 30F(4A) was inserted to provide that such a gazetted notice is not a legislative instrument.

As the Committee considers it appropriate to include material in the explanatory memorandum that explains the basis for a provision that provides that a particular instrument is not a legislative instrument, this practice will be observed by the TGA in future.

I trust that this information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C. Pyne', with a small dot at the end.

Christopher Pyne MP

06 OCT 2005

