SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2007

28 February 2007

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ISSN 0729-6258

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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

SECOND REPORT OF 2007

The Committee presents its Second Report of 2007 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:

Airspace Bill 2006

Australian Participants in British Nuclear Tests (Treatment) Act 2006

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006

Classification (Publications, Films and Computer Games) Amendment Bill 2006

Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006

Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006

Non-Proliferation Legislation Amendment Bill 2006

Private Health Insurance Bill 2006

Tax Laws Amendment (2006 Measures No. 7) Bill 2006

Airspace Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2006 and Alert Digest No. 1 of 2007*. The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 25 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 15 of 2006

Introduced into the House of Representatives on 29 November 2006
Portfolio: Transport and Regional Services

Background

Introduced with the Airspace (Consequentials and Other Measures) Bill 2006, this bill provides for the transfer of airspace regulation and administration from Airservices Australia to the Civil Aviation Safety Authority.

The bill requires the Minister to make an Australian Airspace Policy Statement on the administration and regulation of, and policy objectives for, Australian administered airspace.

The bill does not affect powers and functions related to the management and use of airspace in the *Defence Act 1903* and the *Defence Special Undertakings Act 1952*.

Insufficient scrutiny of instrument
Subclauses 8(1) and 8(5) and Section 42, clause 10

Subclause 8(1) obliges the Minister to make the Australian Airspace Policy Statement, which must contain the variety of matters set out in subclause 8(2). Subclause 8(5) provides that this Statement is a legislative instrument, but that section 42 of the *Legislative Instruments Act 2003* does not apply to it, rendering the Statement not subject to disallowance.

Subclause 8(5) goes on to provide that Part 6 of the *Legislative Instruments Act 2003* also does not apply to the Australian Airspace Policy Statement, with the effect that the Statement is not subject to sunsetting. The explanatory memorandum seeks to justify the latter of these exclusions by observing that clause 10 of the bill will require the Statement to be reviewed every three years.

The explanatory memorandum seeks to justify the former exclusion – which would render the Statement not subject to disallowance – on the basis that the regular review of the Statement 'includes a comprehensive consultation process'.

The Committee considers that it may be argued that consultation, however comprehensive, is in no way equivalent to the consideration which would be given to the Policy Statement if it were subject to the normal processes of possible disallowance by the Senate. The Committee also notes that the inability to propose the disallowance of this Statement gives the Minister an unfettered discretion (within the constraints imposed by subclause 8(2)) to determine the contents of the Statement.

The Committee is concerned that policy statements of this type are subject to appropriate scrutiny, both at the time of their making and subsequently. The Committee notes that the bill requires the Minister to consult with two executive agencies prior to making the Policy Statement, CASA and Airservices Australia, but only provides that the Minister may consult any other person or body the Minister thinks appropriate. Notwithstanding the commitment in the explanatory memorandum to consult with the Department of Defence when making regulations and other matters that may affect Defence activities, operations or practices, there appears to be no requirement in the bill for wider consultation prior to the formulation of the Policy Statement. The Committee **seeks the Minister's advice** as to whether provision could be made to ensure comprehensive consultation is undertaken prior to the making of the policy statement and, notwithstanding the explanation offered in the explanatory memorandum, whether consideration could be given to subjecting the policy statement to disallowance.

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

Relevant extract from the response from the Minister

The letter of 7 December sought my advice as to whether provision could be made to ensure comprehensive consultation is undertaken prior to the making of the Australian Airspace Policy Statement and whether consideration could be given to subjecting the Statement to disallowance. The Statement is proposed to be non-disallowable for reasons that relate to both the content of the Statement and the level of consultation that will be undertaken on the Statement.

The Airspace Policy Statement is to be an instrument setting out Government policy and intended strategy - it will not seek to regulate the aviation industry but will provide guidance to the airspace change regime defined in the Airspace Regulations. CASA will be obliged to act consistently with this Statement, but only insofar as it is acting within its existing key safety and other obligations under the *Civil Aviation Act 1988*. The Statement will not be highly prescriptive - considerable discretion will remain with CASA as the decision-maker on the appropriate means to pursue the directions indicated in the Statement consistent with existing responsibilities.

The Statement will contain descriptions of processes and a description of Government intent as to how it wants to see airspace managed and where it thinks airspace management should be directed in the future. The Statement will not contain material that would be the basis for disallowance.

Although the Airspace Bill 2006 requires the Minister to consult with CASA and Airservices, I have made my intention clear on consultation on all aspects of airspace change in the Second Reading Speech and the Explanatory Memorandum for the Airspace Bills. My predecessor also flagged this intention in the Ministerial Statement on Airspace Reform of 14 September 2006.

I will ensure all interested parties are consulted, including the Minister for Defence and the aviation community more broadly: firstly, to have an initial Policy Statement in place for CASA when the airspace regulatory functions are transferred and then to finalise a new statement over the next year as all concerned settle into the new airspace decision making processes. Under the Bill, the Statement will be reviewed, with full consultation, a minimum of every three years thereafter.

I am concerned that if the Policy Statement was subject to disallowance it is possible that it could remain unmade for some time, causing the airspace governance structure envisaged by the Airspace Bill to be incomplete. For these reasons I am not inclined to change the status of the Statement to disallowable.

The Committee thanks the Minister for this comprehensive response and for the assurances that all interested parties will be consulted on the framing of the Australian Airspace Policy Statement.

Extract from Alert Digest No. 1 of 2007

Insufficiently defined administrative power – delegation to a 'person' Sub-clause 11(8)

The Committee considered this bill in *Alert Digest No. 15 of 2006* and sought a response from the Minister in relation to subclauses 8(1) and (5) and section 42, clause 10.

The Committee's attention has subsequently been drawn to subclause 11(8) which provides for regulations made for the purpose of conferring functions and powers on CASA in connection with the administration and regulation of Australian-administered airspace to provide for CASA to delegate functions or powers to another person.

The Committee notes that the provision appears to afford a wide discretion in the delegation of CASA's functions and powers. The Committee notes that the explanatory memorandum states, at page eight, that '[T]his delegation is most likely when decisions are required in the management of Australian-administered airspace. For example, this could occur with respect to the designation and conditions of use of an air route or airway, and the giving of direction in connection with the use or operation of designated routes and airways.' Not withstanding this statement, the Committee remains concerned that the bill appears to permit significant and wide-ranging powers to be delegated to anyone who fits the all embracing description of 'a person'. The Committee has a longstanding expectation that delegation powers will reflect the principle that the discretion to delegate ought to be limited to a particular class of persons or to a particular range of powers and functions. The Committee **seeks the Minister's advice** as to the need for this wide discretion and whether it would be possible to provide some specification in the legislation as to the scope of the powers that can be delegated and the attributes or qualifications of the persons who may be appointed as delegates.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The letter of 8 February sought my advice as to whether the discretion in the existing delegation clause is needed and whether it would be possible to provide some specification in the legislation as to the scope of the powers that can be delegated and the attributes or qualifications of the persons who may be appointed as delegates.

Subsection 11(8) of the Airspace Bill 2006 states:

> *Regulations made for the purposes of subsection (1) may make provision for and in relation to CASA delegating functions or powers to another person.*

Subsection (1) qualifies this power by relating it to powers and functions in connection with the administration and regulation of Australian-administered airspace. It will be left to particular regulations to make provision for a power to delegate a specific regulatory function and it will therefore be subject to Parliamentary scrutiny. As an example, the Explanatory Memorandum notes that powers will need to be delegated by regulation from CASA to Airservices to enable its air traffic controllers to make day to day decisions in relation to the designation of air routes and airways, the conditions of use of a designated air route or airway, and the giving of directions in connection with the use or operation of a designated air route, airway or air route or airway facilities.

I would prefer the scope of the powers to be delegated, and any qualifications on delegations, to be examined by Parliament when proposed delegations are brought forward in specific regulations.

I understand that this issue has also been raised by the Senate Rural and Regional Affairs and Transport Committee during its inquiry into the Airspace Bills and my Department has responded to it in similar terms.

Thank you for raising these matters.

The Committee thanks the Minister for this response.

Australian Participants in British Nuclear Tests (Treatment) Act 2006

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 of 2006*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter dated 6 February 2007.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2006

Introduced into the House of Representatives on 14 September 2006
Portfolio: Veterans' Affairs

Background

Introduced with the Australian Participants in British Nuclear Tests (Treatment) (Consequential Amendments and Transitional Provisions) Bill 2006, this bill provides non-liability treatment of, and testing for, malignant neoplasia (cancer) of eligible Australians who participated in the British Nuclear Testing Program from 1952 to 1963. Treatment will be provided through the Repatriation Commission and the Department of Veterans' Affairs.

The bill also provides for the Consolidated Revenue Fund to be appropriated to the extent necessary for the payment of amounts payable for the provision of treatment and for the payment of travelling expenses. The bill also provides continued access to existing statutory workers' compensation schemes.

Strict criminal liability
Subclauses 34(2) and 42(2)

Subclauses 34(2) and 42(2) create offences of strict liability. The Committee notes that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states, on page 23, that '[s]trict or absolute liability should only be used in an offence where there are well thought out grounds for this.' The Committee expects that such justification will be clearly set out in the explanatory memorandum.

In this case, the explanatory memorandum does not expressly state the reason for these provisions, although the Committee notes it states, on page 22, that subclause 42(2) is based on section 93E of the *Veterans' Entitlements Act 1986* and section 311 of the *Military Rehabilitation and Compensation Act 2004*. A note on page iv of the explanatory memorandum states that many of the provisions of this bill are based on those Acts, and goes on to assert that the 'need to maintain a consistent offence and penalty regime in relation to the provision of treatment is important in protecting the integrity of the health care arrangements and the operation of the current health card system.' Reading all of these comments together, the reader may be able to understand the purported justification for these impositions of strict criminal liability, but only with difficulty. The Committee **seeks the Minister's advice** whether there could have been a clearer explanation of the reason for these impositions of strict criminal liability, as has been done in relation to subclause 37(2).

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 refer to the Committee's letter of 12 October 2006 concerning comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest (No. 11 of 2006) of 11 October 2006, relating to the content of the Explanatory Memorandum in respect of the strict criminal liability provisions of subclauses 34(2) and 42(2) of the Australian Participants in British Nuclear Tests (Treatment) Bill (the Bill).
>
> The Committee has requested my advice as to whether there could have been a clearer explanation of the reason for these impositions of strict liability, as had been provided in relation to subclause 37(2). Given the Committee's comments, it is

acknowledged that a clearer explanation could have been provided in the Explanatory Memorandum as to the need for these offences to be offences attracting the strict liability provisions in the *Criminal Code.*

As the Explanatory Memorandum notes, section 34 of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* is based on section 128 of the *Veterans' Entitlements Act 1986* (VEA) and section 405 of the *Military Rehabilitation and Compensation Act 2004* (MRCA). Both of these provisions apply strict liability to the offence of failing to comply with a notice from the Secretary or Commission, as the case may be. Similarly, section 42 is based on section 93E of the VEA and section 311 of the MRCA.

The Committee notes that the explanation for the strict liability offences contained in section 37 was adequately explained in the Explanatory Memorandum. In relation to that section, the Explanatory Memorandum outlines the difficulties with involving elderly and infirmed veterans, war widows and widowers in the prosecution processes. This explanation also applies to section 42 as individual eligible persons would also be required to attend court to address the matters in subsection 42(1).

In relation to both sections 34 and 42 of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006,* these offences involve the actions of practitioners and other persons who are likely to be legal entities and businesses which employ staff to act on their behalf. Accordingly, while those entities and businesses obtain the benefit from the commission of the offence, it would be impossible to prove who within those entities or businesses actually authorised or engaged in the actions which resulted in the commission of the offence. Unless each offence involved strict liability, it would be necessary to prove which individual within the entity or business failed to provide the information or offered an inducement and which individual had the requisite fault elements of intention, knowledge, recklessness or negligence to commit the offence. This would be impossible to achieve where they acted through employees or other authorised persons. Indeed, with the information gathering powers in section 34, it is the failure to act and to provide the necessary material which is the offence and proving a failure to act having regard to the fault elements would be almost impossible in most scenarios.

Having these offences as a strict liability offence merely removes the fault elements from being available as a defence and enables other defences (such as mistake of fact) to still be claimed. It is submitted that such offences are required to enable both sections to operate effectively.

I trust the information I have provided is of assistance to the Committee.

The Committee thanks the Minister for this response and notes the Minister's acknowledgment that a clearer explanation could have been provided in the explanatory memorandum as to the need for these offences attracting the strict liability provisions in the Criminal Code. The Committee also thanks the Minister for clarifying that these provisions are two of the many provisions in the bill which are based on, and similar to, provisions of the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004*, as indicated in the general statement on page iv of the explanatory memorandum.

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 12 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the Senate on 6 December 2006
Portfolio: Attorney-General

Background

This bill amends the *Bankruptcy Act 1966*, the *Payment Systems and Netting Act 1998* and the *Proceeds of Crime Act 2002* in response to the High Court's decision in *Cook v Benson* in relation to the recovery of superannuation contributions made by a person in the lead up to bankruptcy. The bill:

- provides for the recovery of superannuation contributions made prior to bankruptcy with the intention to defeat creditors; and
- provides for certain rural support grants to be exempt from the property available to pay the bankrupt's creditors.

The bill also contains transitional provisions and makes minor technical amendments.

Regulations - retrospective effect
Schedule 2, item 7

Proposed new subsection 116(2E) of the *Bankruptcy Act 1966*, to be inserted by item 7 of Schedule 2, would permit the making of regulations which may have retrospective effect, in derogation of section 12(2) of the *Legislative Instruments Act 2003*.

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 explanatory memorandum seeks to justify this provision on the ground that its purpose is to protect from seizure under the Bankruptcy Act payments made pursuant to certain rural support schemes, and that the new subsection is necessary because existing rural support schemes may in the future be amended without the passage of new primary legislation, and new rural support schemes may be introduced without new primary legislation. The explanatory memorandum regards the solution to this perceived problem to be proposed new subsections 116(2)(k) to (ma) which would permit payments under rural support schemes which are to be protected from the recipient's bankruptcy to be prescribed by regulation, and the new subsection 116(2E), which would allow such regulations to have retrospective effect. The Committee **seeks the Attorney-General's advice** as to whether protection of rural support schemes from seizure under the Bankruptcy Act may be afforded by means other than retrospective regulations.

Pending the Attorney-General'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 Attorney-General

1. The effect of the amendments to be made by items 5 to 7 of Schedule 2 to the Bankruptcy Legislation (Amendment) Bill 2006 will be to implement a regime to afford protection from seizure under the Bankruptcy Act to certain payments made pursuant to certain rural support schemes.

2. A number of rural grants are currently afforded the status of non-divisible property under the Bankruptcy Act. For example, grants pursuant to the Dairy Exit Program ("Dairy Exit") and the Farm Help Re-establishment Grant Scheme ("Farm Help").

3. The current non-divisible property status of Farm Help, Dairy Exit and other grants is provided for in the Bankruptcy Act and therefore can only be modified by primary legislation.

4. Amendments to existing rural grant schemes may necessitate changes to the provisions providing for their protection in bankruptcy. Existing rural grant schemes may be modified without the passage of fresh primary legislation which might be used as a vehicle to modify the Bankruptcy Act. Future rural

grant schemes may also come into existence without the passage of fresh primary legislation which might be used to insert protective provisions into the Bankruptcy Act.

5. In such circumstances, a regulation making power is required to put in place or to amend, in a timely manner, adequate and appropriate protections for certain kinds of rural grants.

6. Grant schemes may be introduced (or amended) and payments to primary producers commenced within a short period. Rapid introduction (or amendment) of schemes may be necessitated by the circumstances giving rise to the creation (or amendment) of the schemes. Accompanying protections under the Bankruptcy Act for those payments must therefore also be capable of being introduced rapidly. They must also operate to protect payments from the time at which the scheme is announced by the Government.

7. It may not be appropriate to delay the payment of grants to needy recipients pending the amendment of the regulations to provide for their protection in bankruptcy.

8. Mechanisms are required to ensure that all of those recipients whose financial circumstances are most dire (those who are already in bankruptcy or whose bankruptcy is imminent) will receive the benefit of the financial assistance provided by the Government. It is not intended that the benefit of the relevant grants be diverted to third parties.

9. In order to be effective, the protections afforded to non-divisible property by section 116(2) must apply at the time that property would otherwise vest in bankruptcy by virtue of section 58 of the Act. This may occur upon bankruptcy in respect of property owned by the debtor prior to bankruptcy or may occur upon a debtor acquiring the property prior to discharge from bankruptcy ("after acquired property").

10. The primary intention of subsection 116(2E) is to provide for the protection of payments made after a rural grants scheme is announced but before the regulations can be made.

11. Where it is the intention of the Government that payments under a new grant schemes will always be for the direct benefit of the debtor (or their household) and not for the benefit of third parties AND the public (including creditors) is informed before grant payments are made that it is the intention of the Government that the payments will be afforded bankruptcy protection, creditors will have no reasonable expectation of an entitlement to those grant funds. Such creditors cannot be considered to be unfairly adversely affected by any retrospective effect of regulations that subsequently give effect to that intent.

12. Other than in such circumstances, the regulations are not intended to apply to payments which have already vested in bankruptcy trustees and the regulations

will not result in the retrospective alteration of the respective property rights of debtors and creditors (via their rights in respect of the debtor's bankrupt estate).

13. Regulations that inappropriately seek to divest parties from any interest in a rural grant to which they may be considered to have a legitimate expectation would be subject to disallowance pursuant to section 42 of the *Legislative Instruments Act 2003.*

The Committee thanks the Attorney-General for this comprehensive response.

Regulations – incorporating material as in force from time to time
Schedule 2, item 7

Proposed new subsection 116(2F) of the *Bankruptcy Act 1966*, also to be inserted by item 7 of Schedule 2, would permit the making of regulations which may 'make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.' The explanatory memorandum seeks to justify this provision on the same basis as that for new subsection 116(2E), discussed above. New subsection 116(2F) would give the Executive a completely unfettered discretion in determining the nature of the matter which regulations may apply, adopt or incorporate. The Committee **seeks the Attorney-General's advice** as to whether some limit might be included in new subsection 116(2F), as to the scope of the matter which may be so applied, adopted or incorporated.

Pending the Attorney-General'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 Attorney-General

14. Rural grants may be provided for in joint State and Commonwealth agreements, which may be subject to modification from time to time.

15. The Bankruptcy Act currently provides non-exempt status for four kinds of grants that arise due to such agreements (see paragraphs 116(2)(k) to (mb) of the Bankruptcy Act).

16. The Office of Legislative Drafting and Publishing have confirmed that these provisions (or any new similar provisions in respect of new grants of this kind) will not be able to be replicated in the regulations without a regulation making power of the kind provided by the proposed subsection 116(2F).

17. The absence of such a power would require fresh regulations to be passed to 'renew' the exempt status of a grant pursuant to a joint State/Commonwealth agreement in the event that such an agreement was modified. Potentially, gaps might arise during which no such exemption applied resulting in grant recipients being divested of grant monies or property acquired with grant monies.

18. These exemptions, although referring to an agreement that may be modified, clearly specify the type of grants pursuant to such an agreement that would be protected. The regulations will clearly identify the documents in question to ensure there is no uncertainty as to which documents are being incorporated. If a change to such an agreement modified the nature of the grant such that it no longer fell within the description of exempt grant in the regulations, it would no longer be exempt, notwithstanding subsection 116(2F).

19. Any regulation that sought to rely on subsection 116(2F) to provide the Executive with an unfettered discretion in determining the nature of the matter to which the regulations would apply would be subject to disallowance.

The Committee thanks the Attorney-General for this comprehensive response.

Classification (Publications, Films and Computer Games) Amendment Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 26 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the House of Representatives on 7 December 2006
Portfolio: Attorney-General

Background

This bill amends the *Broadcasting Services Act 1992*, the *Classification (Publications, Films and Computer Games) Act 1995*, and the *Freedom of Information Act 1982* to:

- facilitate the integration of the Office of Film and Literature Classification into the Attorney-General's Department;
- reinforce the independence of the Classification Board and the Classification Review Board; and
- amend the operation of the National Classification Scheme to respond to technological developments, provide for certain additions to already classified films not to be treated as modifications necessitating reclassification and to provide for an additional content assessor scheme to make recommendations to the Board in relation to additional content releases with an already classified or exempt film.

The bill also makes minor amendments to repeal expired or redundant provisions and contains application, saving and transitional provisions.

Insufficiently defined administrative power – wide discretion
Schedule 2, item 11 and Schedule 2, item 15

Proposed new subsection 59(2) of the *Classification (Publications, Films and Computer Games) Act 1995*, to be inserted by item 11 of Schedule 2, and proposed new section 79A of the same Act, to be inserted by item 15 of Schedule 2, would permit the Director of the Office of Film and Literature Classification and the new Convenor of the Classification Review Board respectively to delegate many of their several powers, and the powers of the Classification Board and the Classification Review Board, to 'a member of staff mentioned in section 88A'. That section, which is to be inserted in the same Act by item 13 of Schedule 1, provides that the staff assisting both the Classification Board and the Review Board 'are to be persons engaged under the *Public Service Act 1999*'. As a consequence, the delegations in new subsection 59(2) and section 79A may be to any APS employee, regardless of the position which such an employee holds or of his or her qualifications. The Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'. While the Committee notes that the delegation in this case is limited to members of staff engaged under the Public Services Act, the Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. The Committee **seeks the Attorney-General's advice** as to whether the very wide discretion given to the Director and Convenor under these proposed new provisions should not be limited in some way.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

> Specifically, the Committee referred to proposed new subsection 59(2) and new section 79A of the *Classification (Publications, Films and Computer Games) Act 1995* (to be inserted by Item 11 and Item 15 of Schedule 2, respectively).
>
> The amendments would permit the Director of the Classification Board and the Convenor of the Classification Review Board respectively to delegate various powers to 'a member of staff mentioned in section 88A.' The Committee has asked

my advice as to 'whether the very wide discretion given to the Director and Convenor under these proposed new provisions should not be limited in some way.'

The proposed amendments are consequential to the integration of the Office of Film and Literature Classification (OFLC) into the Attorney-General's Department and the separation of the administration and management functions and powers of the Review Board from the Board.

Once amended, sections 59 and 79A would permit the Director and Convenor to delegate variously some of their powers to members of their respective boards and particular staff. The Committee noted that the delegation is limited to members of staff engaged under the *Public Service Act 1999* (PSA) but expresses a preference that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

The ability to delegate to Board members the Director's power under the Act and to delegate to particular staff specified Board powers under the Act are pre-existing. There will be additional provisions allowing the delegation of powers under the Regulations and permitting the Convenor to delegate. I consider they are all necessary and appropriately limited.

Section 59(1) already permits the Director to delegate his powers under the Act to the nominated office of Board member. Only a small number of delegations are currently in place. These are to specified Board members or to holders of the office of Senior Classifier (a Board position). Amendments would add the ability to delegate to a Board member the Director's powers under the Regulations and would provide mirror powers for the Convenor in proposed section 79A(l). Thus the first option for delegation is to a nominated office - that of Board or Review Board member.

Section 59(2) already provides that the Director may delegate to a public servant in the OFLC any of the Board's power under the Act in relation to classification or approval of advertisements but only if the Board has determined by resolution that it is desirable for the efficient running of the Board. There are no current delegations under this provision in place. The proposed amendments take account of the change of staff from the OFLC to the AGD and respond to a specific request from the current Director.

I draw the Committee's attention to proposed new section 88A (to be inserted by Item 13 of Schedule 1) which identifies the staff supporting the Boards after the integration of the OFLC. It provides that staff assisting the Board and the Review Board are to be public servants 'made available for the purpose by the Secretary of the Department.' Accordingly, the staff to whom powers may be delegated are restricted specifically to staff of the Attorney-General's Department who are expressly supporting the work of the Boards through providing secretariat services or otherwise. In addition, under section 59(3) (and proposed section 79A(3)), such a power may only be delegated if the relevant Board has determined by resolution that it is desirable for the efficient running of that Board. The Director and Convenor

would put their mind to the appropriate seniority and experience of the staff to whom the power is proposed to be delegated.

Amendments to section 59(2) and new subsection 79A(2)(b) would also allow the Director and Convenor to delegate their own powers under the Regulations to the same staff. It is intended to enable the Director and Convenor to delegate routine administrative functions which are not necessary or efficient to exercise personally. The Regulations deal essentially with fees for classification activities such as for providing priority processing, partial refund of fees when an application is withdrawn after some work has already been performed, exemption certificates, and approval of advertisements. The criteria for determining the relevant fees for each activity are clearly set out in the Regulations.

The Boards process approximately 9,000 applications each year. The current Director of the Board specifically requested the ability to delegate his powers under the Regulations during development of the proposals. The ability to delegate routine aspects of their functions is therefore highly desirable to enable the Director and Convenor to effectively manage the resources and workload of the Boards.

I do not consider these to be unnecessarily wide provisions. The Committee has suggested that delegates be confined to holders of nominated offices or members of the SES. In addition to the fact that the provisions as discussed above allow delegation of some powers to members of the nominated office of Board or Review Board member, the description of the staff to whom powers can be delegated is clearly limited. The staff are not merely 'persons' engaged under the PSA. There is only one SES officer in the office supporting the work of the boards. Given that it is likely only routine and administrative matters would be delegated, it would not be appropriate or feasible for that officer to exercise all delegated powers.

The power is clearly constrained by the class of the person being APS staff made specifically available by the Secretary of the Attorney-General's Department for the purpose of assisting the Board and Review Board and by the criteria for exercising the power which has been set out in the Regulations. I believe the proposed delegations are appropriate and necessary for the efficient operation of the classification function.

The Committee thanks the Attorney-General for this response.

Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 22 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the House of Representatives on 7 December 2006
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Disability Services Act 1986* to provide for the staged introduction of contestability in the provision of vocational rehabilitation services. The bill broadens the range of non-departmental organisations to which the Secretary may delegate powers under Part III of the Disability Services Act in relation to the provision of rehabilitation services by the Commonwealth.

The bill makes changes to the income test arrangements where a CDEP Scheme payment is payable and allows for financial case management debts to be deducted from social security payments.

The bill also contains application provisions and makes minor and technical amendments to the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* in relation to the application of Welfare to Work measures which commenced on 1 July 2006.

Insufficiently defined administrative power – wide discretion
Schedule 1, items 2 and 16

Proposed new paragraph 34(1)(a) of the *Disability Services Act 1986*, to be inserted by item 16 of Schedule 1, would permit the Secretary to the Department to 'delegate to an officer all or any of the powers of the Secretary under Part III' of that Act. Item 2 of Schedule 1 would amend section 4 of the *Disability Services Act 1986* to define **officer** as including a person or company who or which 'performs services on behalf of the Department under a contract made between [the person or company] and the Commonwealth' or an employee of such a person or company. The Secretary will therefore be given the power to delegate all or any of his or her powers to any employee of a company to which the Department has outsourced the provision of services, without reference to the capabilities or qualifications of such an employee. The Committee **seeks the Minister's advice** as to whether the very wide discretion given to the Secretary to the Department under this proposed new paragraph should not be limited in some way.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In broadening the ability of the Secretary to delegate his powers under Part III of the *Disability Services Act 1986* (DSA), a range of legislative and contractual safeguards will be put in place.
>
> These include: (a) legislative guidelines which will be formulated to guide the Secretary in the administration of Part III of the DSA. Parliament will continue to have the ability to disallow these guidelines, consistent with the *Legislative Instruments Act 2003*; (b) a specific legislative safeguard in the Bill to ensure that in exercising any delegated powers, the delegate must comply with directions of the Secretary. Any decision made under Part III of the DSA will continue to be subject to the current review mechanisms including review by the Administrative Appeals Tribunal; and (c) contractual arrangements and programme procedures that will govern the day-to-day administration and decision-making of any person delegated the Secretary's powers.
>
> The contractual requirements will set out in detail the manner in which any delegations are to be exercised and will also specify the standards of services to be observed; these include a Service Guarantee, Code of Practice and Performance

Reviews. In addition, Star Ratings (which provide a relative measure of the performance of the provider against key performance indicators) will be developed. Legislative Disability Services Standards must also be met in the provision of a rehabilitation program. Compliance with these standards is independently assessed.

I note the Committee's concerns about the Department outsourcing the provision of services 'without reference to the capabilities or qualifications' of providers. In assessing Vocational Rehabilitation Services tenders, organisations were asked to provide details of the qualifications and experience of their staff. This will be taken into account in assessing successful tenders.

Failure to meet these contractual or legislative standards can result in a range of penalties being applied, including termination of the contract, in whole or part; suspension of referrals of clients to providers; and reduction in, or suspension of business that is allocated to providers.

I can reassure the Committee that the Secretary's powers of delegation will be sufficiently limited by a range of legislative and contractual safeguards for any powers that the Secretary may delegate.

I trust this information is of assistance.

The Committee thanks the Minister for this response. The Committee notes the Minister's assurance that legislative guidelines will be formulated to guide the Secretary in the administration of part III of the *Disability Services Act 1986* and that these guidelines will be disallowable instruments under the *Legislative Instruments Act 2003*. However the Committee remains concerned about the contractual safeguards outlined by the Minister as neither the Committee nor the Senate as a whole will have any knowledge of the content of these contracts nor, possibly, how successful they are in ensuring that the delegations are kept within proper bounds.

The Committee therefore **seeks the Minister's further advice** regarding whether the legislative guidelines will include information on the proposed contractual safeguards, thus making them subject to the scrutiny of the parliament, or, if not, whether the Minister might give further consideration to limiting in some other way the very wide discretion given to the Secretary under proposed new paragraph 34(1)(a).

Pending the Minister's further 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.

Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Parliamentary Secretary to the Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 26 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the House of Representatives on 6 December 2006
Portfolio: Transport and Regional Services

Background

This bill amends the *Navigation Act 1912* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement Australia's obligations under Annex VI (Prevention of Air Pollution from Ships) of the Convention for the Prevention of Pollution from Ships, commonly known as MARPOL, which came into force on 19 May 2005. The bill also updates certain references and removes the current limit on the amount of penalty for a breach of a regulation or an order.

Legislative Instruments Act - Declarations
Schedule 1

Item 2 in the table to subclause 2(1) to this bill, in detailing when the amendments proposed in Schedule 1 are to commence, concludes by stating that the *Gazette* notice which the Minster must give if certain conditions are met, 'is not a legislative instrument'. It appears from the context that the reason for that statement is that the notice is not legislative in character, and that the statement is included for the benefit of readers.

Where a provision states 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. Unfortunately, in this case, the explanatory memorandum makes no reference to the final sentence of item 2 in the table to subclause 2(1). The Committee **seeks the Minister's advice** whether that sentence has been included merely for the information of readers.

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 Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 1 of 2007 commented that the explanatory memorandum for the Bill did not explain the reason for the concluding statement in item 2 in the table to subclause 2(1) to the Bill. This statement indicates that the *Gazette* notice which the Minister must give if certain conditions are met, 'is not a legislative instrument'.
>
> I would like to clarify that the statement was provided to assist readers and that it is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003.*
>
> Thank you for raising this matter.

The Committee thanks the Parliamentary Secretary for this response and for clarifying that the statement is merely declaratory of the law. The Committee would normally expect this clarification to be set out in the explanatory memorandum.

Non-Proliferation Legislation Amendment Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Foreign Affairs responded to the Committee's comments in a letter dated 27 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the Senate on 6 December 2006
Portfolio: Foreign Affairs

Background

This bill amends the *Chemical Weapons (Prohibition) Act 1994*, the *Comprehensive Nuclear Test-Ban Treaty Act 1998*, the *Nuclear Non-Proliferation (Safeguards) Act 1987* and the *Australian Federal Police Act 1979* by implementing amendments to the Convention on the Physical Protection of Nuclear Material (agreed in July 2005) to strengthen international measures for the physical protection of nuclear material and facilities.

The bill:

- implements new requirements of the amendments to the Convention on the Physical Protection of Nuclear material (Physical Protection Convention) agreed in July 2005;
- regulates the decommissioning of a nuclear facility to ensure that Australia is able to meet its international obligations to the International Atomic Energy Agency under the Additional Protocol;
- introduces penalties for the most serious offences; and
- extends the geographical jurisdiction for offences related to proliferation of nuclear and chemical weapons.

The bill also contains application provisions.

Commencement
Schedule 1, item 28

Item 3 in the table to subclause 2(1) provides that the amendment to be made by item 28 of Schedule 1 to this bill would commence on 'the day on which the amendments done at Vienna on 8 July 2005 to the Convention on the Physical Protection of Nuclear Material take effect', but that provision does not commence at all if that event does not occur. The Committee notes that most provisions which tie commencement to the coming into force of international agreements make further provision for the Minister to announce when that event occurs by *Gazette* notice or the like. However, in this bill there is no provision for the Minister to announce if, and therefore when, item 28 of Schedule 1 has come into force, or whether the amendment to the Convention, on which the commencement of item 28 depends, is never going to occur. The Committee **seeks the Minister's advice** whether such a notification could be provided for in this instance.

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

The Committee has indicated a desire for a provision in the Bill to require a notice in the Gazette, "or the like", when amendments to the Convention on the Physical Protection of Nuclear Material (the "Physical Protection Convention") come into force. I understand that the objective of such a provision would be to prevent undue trespass on personal rights and liberties when item 28 in Schedule 1 of the Bill commences.

It is my view that commencement of item 28 in Schedule 1 without notification in the Gazette would not risk trespass on personal rights and liberties. The purpose of that item is to repeal the definition of a nuclear facility inserted by item 27 in Schedule 1, and replace it with a reference to the definition of a nuclear facility in the Physical Protection Convention. I note, however, that the two definitions are the same, and the rights and obligations of any person in relation to such a facility would not alter with the commencement of item 28.

As mentioned in the relevant part of the Explanatory Memorandum, the Bill provides for the implementation by Australia of some elements of the amended Physical Protection Convention before the amendments enter into force. As it is not possible to define a nuclear facility by reference to treaty provisions that are not yet in force, item 27 in Schedule 1 of the Bill inserts an express definition using the words in the

amended Convention. When those treaty provisions do enter into force, item 28 in Schedule 1 will replace the express definition with a reference to the Physical Protection Convention.

The Committee thanks the Minister for this response.

Private Health Insurance Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 27 February 2007. A copy of the letter is attached to this report.

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill provides a new regulatory framework for the private health insurance sector replacing the current regime which is mainly set out in the *National Health Act 1953*, the *Health Insurance Act 1973* and the *Private Health Insurance Incentives Act 1998*. The bill will come into effect on 1 April 2007.

The bill:

- provides incentives for people to purchase insurance;
- provides for standard health insurance product information;
- imposes obligations on private health insurers;
- empowers the Minister and the Private Health Insurance Administration Council to take a range of actions to encourage or compel insurers to comply with the bill; and
- establishes the Private Health Insurance Ombudsman and the Private Health Insurance Administration Council.

Delegation of legislative power – Henry VIII Clause
Subclause 78-1(6) and subclause 217-5(4)

Subclause 78-1(6) would permit the Private Health Insurance (Complying Product) Rules (which will be a legislative instrument made by the Minister under clause 333-20) to modify the portability requirements set out in the other provisions of clause 78-1 in relation to all or particular kinds of private health insurers, benefits or insured persons. The explanatory memorandum seeks to justify this delegation of legislative authority, on page 46, on the ground that it will 'give the Government flexibility in adapting the portability regime to emerging patterns of care to ensure a fair balance between the interests of insurers and insured persons and persons transferring between insurers.'

The Committee notes that subclause 78-1(6) appears to be a Henry VIII Clause; an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. The Committee **leaves for the Senate as a whole** the question of whether this particular delegation of legislative power is inappropriate. However, the Committee **seeks the Minister's advice** whether the flexibility to modify the portability requirements could be achieved in some other way.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> The Committee has drawn attention to the inclusion of 'Henry VIII' clauses (subclause 78-1(6) and several elements in clause 217-5) and a provision that abrogates a person's privilege against self-incrimination in requirements to give information to the Private Health Insurance Ombudsman (subclause 250-1(6)).
>
> The portability requirements set out in clause 78 of the Bill are intended to provide a fair balance between the rights of people to transfer between private health insurers and the rights of existing members of transferee insurers. It has proved necessary in the past to make subordinate legislation (under section 73B of the *National Health*

Act 1953) to deal expeditiously with practices introduced by some insurers which would have unfairly limited transfer rights.

Subclause 78-1(6) of the Bill providing that the Private Health Insurance (Complying Product) Rules may modify the requirements in clause 78-1 in relation to any or all private health insurers, benefits or insured persons continues the ability under the current Act to address unfair practices introduced by insurers without amending the primary legislation.

I consider that the most practical and appropriate way of retaining the power to move swiftly to address emerging circumstances is to include the provision that subordinate legislation may modify the portability provisions as appropriately required, subject to a Parliamentary scrutiny and disallowance regime.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

Delegation of legislative power – Henry VIII Clause Subparagraph 217-5(1)(b)(ii)

Subparagraph 217-5(1)(b)(ii) would permit the Private Health Insurance (Health Benefits Fund Enforcement) Rules (which will be a legislative instrument made by the Minister under clause 333-20) to modify various provisions of the *Corporations Act 2001* in regulating the external management of a health benefits fund. Subclause 217-5(4) provides that the Private Health Insurance (Health Benefits Fund Enforcement) Rules may provide for different modifications according to the nature of the health benefits fund that is to be, or that is being, administered. The Committee considers that this is clearly a delegation of legislative power, but has no means of ascertaining whether or not it is appropriate as the explanatory memorandum does not indicate to what extent it is intended to modify the provisions of the *Corporations Act 2001*, nor the purpose intended to be achieved by such modifications. The Committee **seeks the Minister's** advice as to the reason for the delegation of legislative power in this instance.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> The Committee has also noted that subparagraph 217-5(1)(b)(ii) and subclause 217-5(4), which deal with the external management of health benefits funds, delegate legislative power. These provisions replicate provisions in the current regulatory regime at paragraph 83XB(2)(b) and subsection 82XB(6) of the *National Health Act 1953.* The inclusion in the Bill of these provisions allows for the continuation of the current rules for the administration of health benefits funds. The intended scope of the application of the provisions to the *Corporations Act 2001* has not changed.

The Committee thanks the Minister for this response and agrees that it would have been helpful if this explanation had been included in the explanatory memorandum.

Subclause 250-1(6)
Abrogation of the privilege against self-incrimination

Subclause 250-1(6) would abrogate the privilege against self-incrimination for a person required to give the Private Health Insurance Ombudsman the records of a body against whom a complaint has been made under Division 241 of the bill. However, the Committee notes that the provision seeks to strike a balance between the competing interests of obtaining information and protecting individuals' rights by limiting the circumstances in which information so provided is admissible in evidence in proceedings against the affected person.

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

Relevant extract from the response from the Minister

> Similarly, subclause 250-1(6), which requires a person to give the Private Health Insurance Ombudsman information relevant to a complaint regardless of whether the requirement may incriminate the person or make the person liable to a penalty, allows for the continuation of the current rules under the *National Health Act 1953* at subsections 82ZSAA(10) and 82ZTB(8). I consider that the provision that material

produced under the subclause cannot be used in proceedings against the person gives appropriate protection to individuals' rights.

I trust that this information has been helpful to the Committee.

The Committee thanks the Minister for this response.

Tax Laws Amendment (2006 Measures No. 7) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Revenue and Assistant Treasurer responded to the Committee's comments in a letter dated 26 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2007

Introduced into the House of Representatives on 7 December 2006
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Tax Administration Act 1953*, the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* and the *Income Tax (Transitional Provisions) Act 1997*.

Schedule 1 reduces compliance costs for small business and increases the availability of capital gains tax concessions.

Schedule 2 exempts eligible non-debenture debt interests from interest withholding tax.

Schedule 3 streamlines the deductible gift recipients (DGR) integrity arrangements and reduces compliance requirements.

Schedule 4 extends the time period for which certain entities can receive tax deductible donations.

Schedule 5 preserves the current depreciation arrangements that apply to tractors and harvesters used in the primary production sector.

Schedule 6 increases the non-primary production income threshold and the total deposit limit for farm management deposits.

Schedule 7 ensures equivalent taxation treatment is given to capital protection on a capital protected borrowing whether the capital protection is provided explicitly or implicitly.

The bill also contains application, consequential and transitional provisions.

Retrospective application - legislation by press release
Schedule 7, item 5

Item 5 of Schedule 7 provides that the amendments proposed in that Schedule apply retrospectively 'to arrangements, or extensions of arrangements, entered into at or after 9.30 am by legal time in the Australian Capital Territory on 16 April 2003.'

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 notes, that the explanatory memorandum states, in paragraphs 7.5 to 7.11, that the purpose of these amendments is to overcome the effect of a decision of the Federal Court in *Commissioner of Taxation v Firth*, decided in 2002, which allows some borrowers to obtain an income tax deduction for what may in fact be, in substance, a capital cost. The amendments are to apply from the date (and time) of the Treasurer's original press release on 16 April 2003, even though the actual methodology used to overcome the effect of *Firth's* case was not promulgated until a later press release, issued by the Minister for Revenue on 30 May 2003. This retrospective application is therefore an instance of 'legislation by press release', upon which the Committee has always commented unfavourably.

The Committee has, in the past, been prepared to accept legislation by press release, so long as the legislation is introduced within six months of the press release. In this case the legislation has not been introduced until some three and a half years after the press release. In this context, the Committee notes that in 1988 the Senate passed a declaratory resolution to the effect that if more than six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill. The Committee **seeks the Treasurer's advice** as to the reason for the delay in introducing this Schedule.

Pending the Treasurer'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 Assistant Treasurer

The Committee sought advice as to the reason for the delay in introducing Schedule 7 to Tax Laws Amendment (2006 Measures No. 7) Bill 2006, which contains the amendments in respect of the taxation of capital protected borrowings (CPB).

Although the Committee has characterised this delay as 'an instance of legislation by press release', it is important to note that the retrospective aspect of the CPB measures is giving legislative effect to a pre-existing Australian Taxation Office (ATO) interpretation and administrative practice that applied prior to *Firth's case*, rather than the implementation of a 'new' taxation treatment.

The ATO's interpretation of the law as it applied to CPBs was rejected by the Federal Court of Australia in *Firth's case* in November 2002. The ATO's administrative practice following *Firth's case* was consistent with the 'interim apportionment methodology' the details of which were provided in the former Minister for Revenue and Assistant Treasurer, the Hon Helen Coonan's press release No. C046 of 30 May 2003.

The transitional provisions of the CPB measures ensure that the tax treatment of CPBs entered into on or after 16 April 2003 is consistent with that for CPBs entered into prior to *Firth's case*. The 'interim apportionment methodology' has a 16 April 2003 start date as the amendment is an integrity measure directed at protecting the revenue base. A later start date would put the revenue at risk.

The proposed CPB measures, which reflect an extensive consultation process with industry, ensure that part of the cost of a CPB is attributed to the capital protection feature of the arrangement. Broadly, there were two pragmatic approaches that could have been use to calculate the cost of capital protection for a CPB. The first approach was to use options pricing methodologies to determine the cost of capital protection. The second approach was to use a 'benchmark' interest rate as a cap on the amount of interest deductible by the investor.

Consultations were held in 2003 and 2004, with industry indicating a preference for the cost of capital protection for CPBs to be determined by reference to a benchmark interest rate.

In 2005, a consultant was engaged to undertake an independent report as to the best way to estimate the cost of capital of a CPB. This report was provided on a confidential basis to industry as part of the consultation process. At industry's request, there were further discussions regarding the report. Allowing for this, the appropriate level of the benchmark interest rate was not settled until July 2006.

During consultation, industry requested that there be sufficient lead time after the introduction date of the CPB measures to allow industry to comply with the measures. Industry representatives also stated that the market would be disrupted should the legislation be introduced during the last quarter of the financial year. The timing of the introduction of the proposed CPB measures also takes into account these concerns.

As this provision is effectively restoring a pre-existing taxation treatment for CPB investors it is not considered to adversely affect personal rights and liberties.

The Committee thanks the Assistant Treasurer for this response, but reiterates its view that this amendment is 'legislation by press release'. Regardless of what the Australian Tax Office's interpretation and administrative practice was in relation to capital protected borrowings prior to the *Firth's case*, the Federal Court, when handing down its decision in that case, declared the true position in relation to such borrowings. This bill seeks to change that position.

The Committee notes the reasons provided by the Assistant Treasurer for the delay in implementing the changes announced by the Treasurer on 16 April 2003. The Committee questions, however, the Assistant Treasurer's assertion that 'as the provision is effectively restoring a pre-existing taxation treatment for CPB [capital protected borrowings] investors it is not considered to adversely affect personal rights and liberties.' It is clear from the Assistant Treasurer's letter that this change will have adverse consequences for those taxpayers who have entered into capital protected borrowings as it will retrospectively impose greater tax liabilities on these investors.

The Committee **seeks the further advice of the Assistant Treasurer** as to why the Committee should not recommend that the Senate amend this aspect of the bill so that it applies from the date the bill was introduced, consistent with the declaratory resolution of the Senate, of 8 November 1988, as referred to in *Alert Digest No. 1 of 2007*.

Pending the Assistant Treasurer's further 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.

Robert Ray
Chair

The Hon Mark Vaile MP

Deputy Prime Minister
Minister for Transport and Regional Services
Leader of The Nationals

Reference: 12715-2006

Senator Robert Ray
Chair, Senate Scrutiny of Bills Committee
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25 FEB 2007

Dear Senator Ray

I refer to the letters of 7 December 2006 and 8 February 2007 on behalf of the Standing Committee for the Scrutiny of Bills concerning the Airspace Bill 2006.

The letter of 7 December sought my advice as to whether provision could be made to ensure comprehensive consultation is undertaken prior to the making of the Australian Airspace Policy Statement and whether consideration could be given to subjecting the Statement to disallowance. The Statement is proposed to be non-disallowable for reasons that relate to both the content of the Statement and the level of consultation that will be undertaken on the Statement.

The Airspace Policy Statement is to be an instrument setting out Government policy and intended strategy – it will not seek to regulate the aviation industry but will provide guidance to the airspace change regime defined in the Airspace Regulations. CASA will be obliged to act consistently with this Statement, but only insofar as it is acting within its existing key safety and other obligations under the *Civil Aviation Act 1988*. The Statement will not be highly prescriptive – considerable discretion will remain with CASA as the decision-maker on the appropriate means to pursue the directions indicated in the Statement consistent with existing responsibilities.

The Statement will contain descriptions of processes and a description of Government intent as to how it wants to see airspace managed and where it thinks airspace management should be directed in the future. The Statement will not contain material that would be the basis for disallowance.

Although the Airspace Bill 2006 requires the Minister to consult with CASA and Airservices, I have made my intention clear on consultation on all aspects of airspace change in the Second Reading Speech and the Explanatory Memorandum for the Airspace Bills. My predecessor also flagged this intention in the Ministerial Statement on Airspace Reform of 14 September 2006.

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I will ensure all interested parties are consulted, including the Minister for Defence and the aviation community more broadly: firstly, to have an initial Policy Statement in place for CASA when the airspace regulatory functions are transferred and then to finalise a new statement over the next year as all concerned settle into the new airspace decision making processes. Under the Bill, the Statement will be reviewed, with full consultation, a minimum of every three years thereafter.

I am concerned that if the Policy Statement was subject to disallowance it is possible that it could remain unmade for some time, causing the airspace governance structure envisaged by the Airspace Bill to be incomplete. For these reasons I am not inclined to change the status of the Statement to disallowable.

The letter of 8 February sought my advice as to whether the discretion in the existing delegation clause is needed and whether it would be possible to provide some specification in the legislation as to the scope of the powers that can be delegated and the attributes or qualifications of the persons who may be appointed as delegates.

Subsection 11(8) of the Airspace Bill 2006 states:

> *Regulations made for the purposes of subsection (1) may make provision for and in relation to CASA delegating functions or powers to another person.*

Subsection (1) qualifies this power by relating it to powers and functions in connection with the administration and regulation of Australian-administered airspace. It will be left to particular regulations to make provision for a power to delegate a specific regulatory function and it will therefore be subject to Parliamentary scrutiny. As an example, the Explanatory Memorandum notes that powers will need to be delegated by regulation from CASA to Airservices to enable its air traffic controllers to make day to day decisions in relation to the designation of air routes and airways, the conditions of use of a designated air route or airway, and the giving of directions in connection with the use or operation of a designated air route, airway or air route or airway facilities.

I would prefer the scope of the powers to be delegated, and any qualifications on delegations, to be examined by Parliament when proposed delegations are brought forward in specific regulations.

I understand that this issue has also been raised by the Senate Rural and Regional Affairs and Transport Committee during its inquiry into the Airspace Bills and my Department has responded to it in similar terms.

Thank you for raising these matters.

Yours sincerely

MARK VAILE

The Hon Bruce Billson MP
Minister for Veterans' Affairs
Minister Assisting the Minister for Defence
Federal Member for Dunkley

Senator the Hon Robert Ray
Chair
Senate Standing Committee for the
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6 FEB 2007

Dear Senator Ray

I refer to the Committee's letter of 12 October 2006 concerning comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest (No. 11 of 2006) of 11 October 2006, relating to the content of the Explanatory Memorandum in respect of the strict criminal liability provisions of subclauses 34(2) and 42(2) of the Australian Participants in British Nuclear Tests (Treatment) Bill (the Bill).

The Committee has requested my advice as to whether there could have been a clearer explanation of the reason for these impositions of strict liability, as had been provided in relation to subclause 37(2). Given the Committee's comments, it is acknowledged that a clearer explanation could have been provided in the Explanatory Memorandum as to the need for these offences to be offences attracting the strict liability provisions in the *Criminal Code.*

As the Explanatory Memorandum notes, section 34 of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* is based on section 128 of the *Veterans' Entitlements Act 1986* (VEA) and section 405 of the *Military Rehabilitation and Compensation Act 2004* (MRCA). Both of these provisions apply strict liability to the offence of failing to comply with a notice from the Secretary or Commission, as the case may be. Similarly, section 42 is based on section 93E of the VEA and section 311 of the MRCA.

The Committee notes that the explanation for the strict liability offences contained in section 37 was adequately explained in the Explanatory Memorandum. In relation to that section, the Explanatory Memorandum outlines the difficulties with involving elderly and infirmed veterans, war widows and widowers in the prosecution processes. This explanation also applies to section 42 as individual eligible persons would also be required to attend court to address the matters in subsection 42(1).

In relation to both sections 34 and 42 of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*, these offences involve the actions of practitioners and other persons who are likely to be legal entities and businesses which employ staff to act on their behalf. Accordingly, while those entities and businesses obtain the benefit from the commission of the offence, it would be impossible to prove who within those entities or businesses actually authorised or engaged in the actions which resulted in the commission of the offence. Unless each offence involved strict liability, it would be necessary to prove which individual within the entity or business failed to provide the information or offered an inducement and which

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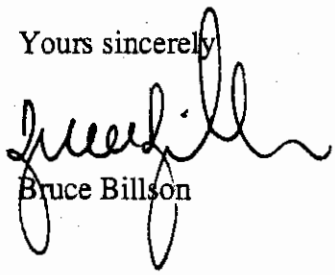
individual had the requisite fault elements of intention, knowledge, recklessness or negligence to commit the offence. This would be impossible to achieve where they acted through employees or other authorised persons. Indeed, with the information gathering powers in section 34, it is the failure to act and to provide the necessary material which is the offence and proving a failure to act having regard to the fault elements would be almost impossible in most scenarios.

Having these offences as a strict liability offence merely removes the fault elements from being available as a defence and enables other defences (such as mistake of fact) to still be claimed. It is submitted that such offences are required to enable both sections to operate effectively.

I trust the information I have provided is of assistance to the Committee.

Yours sincerely



Bruce Billson

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

MC06/102 ITSA

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

12 FEB 2007

Dear Senator

I refer to the letter from the Secretary of the Committee dated 8 February 2007, in respect of the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006, seeking my comments in respect of the proposed new subsections 116(2E) and 116(2F).

Retrospectivity

1. The effect of the amendments to be made by items 5 to 7 of Schedule 2 to the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006 will be to implement a regime to afford protection from seizure under the Bankruptcy Act to certain payments made pursuant to certain rural support schemes.

2. A number of rural grants are currently afforded the status of non-divisible property under the Bankruptcy Act. For example, grants pursuant to the Dairy Exit Program ("Dairy Exit") and the Farm Help Re-establishment Grant Scheme ("Farm Help").

3. The current non-divisible property status of Farm Help, Dairy Exit and other grants is provided for in the Bankruptcy Act and therefore can only be modified by primary legislation.

4. Amendments to existing rural grant schemes may necessitate changes to the provisions providing for their protection in bankruptcy. Existing rural grant schemes may be modified without the passage of fresh primary legislation which might be used as a vehicle to modify the Bankruptcy Act. Future rural grant schemes may also come into existence without the passage of fresh primary legislation which might be used to insert protective provisions into the Bankruptcy Act.

5. In such circumstances, a regulation making power is required to put in place or to amend, in a timely manner, adequate and appropriate protections for certain kinds of rural grants.

6. Grant schemes may be introduced (or amended) and payments to primary producers commenced within a short period. Rapid introduction (or amendment) of schemes may be necessitated by the circumstances giving rise to the creation (or amendment) of the schemes. Accompanying protections under the Bankruptcy Act for those payments must therefore also be capable of being introduced rapidly. They must also operate to protect payments from the time at which the scheme is announced by the Government.

7. It may not be appropriate to delay the payment of grants to needy recipients pending the amendment of the regulations to provide for their protection in bankruptcy.

8. Mechanisms are required to ensure that all of those recipients whose financial circumstances are most dire (those who are already in bankruptcy or whose bankruptcy is imminent) will receive the benefit of the financial assistance provided by the Government. It is not intended that the benefit of the relevant grants be diverted to third parties.

9. In order to be effective, the protections afforded to non-divisible property by subsection 116(2) must apply at the time that property would otherwise vest in bankruptcy by virtue of section 58 of the Act. This may occur upon bankruptcy in respect of property owned by the debtor prior to bankruptcy or may occur upon a debtor acquiring the property prior to discharge from bankruptcy ("after acquired property").

10. The primary intention of subsection 116(2E) is to provide for the protection of payments made after a rural grants scheme is announced but before the regulations can be made.

11. Where it is the intention of the Government that payments under a new grant schemes will always be for the direct benefit of the debtor (or their household) and not for the benefit of third parties AND the public (including creditors) is informed before grant payments are made that it is the intention of the Government that the payments will be afforded bankruptcy protection, creditors will have no reasonable expectation of an entitlement to those grant funds. Such creditors cannot be considered to be unfairly adversely affected by any retrospective effect of regulations that subsequently give effect to that intent.

12. Other than in such circumstances, the regulations are not intended to apply to payments which have already vested in bankruptcy trustees and the regulations will not result in the retrospective alteration of the respective property rights of debtors and creditors (via their rights in respect of the debtor's bankrupt estate).

13. Regulations that inappropriately seek to divest parties from any interest in a rural grant to which they may be considered to have a legitimate expectation would be subject to disallowance pursuant to section 42 of the *Legislative Instruments Act 2003*.

Incorporating material as in force from time to time

14. Rural grants may be provided for in joint State and Commonwealth agreements, which may be subject to modification from time to time.

15. The Bankruptcy Act currently provides non-exempt status for four kinds of grants that arise due to such agreements (see paragraphs 116(2)(k) to (mb) of the Bankruptcy Act).

16. The Office of Legislative Drafting and Publishing has confirmed that these provisions (or any new similar provisions in respect of new grants of this kind) will not be able to be replicated in the regulations without a regulation making power of the kind provided by the proposed subsection 116(2F).

17. The absence of such a power would require fresh regulations to be passed to 'renew' the exempt status of a grant pursuant to a joint State/Commonwealth agreement in the event that such an agreement was modified. Potentially, gaps might arise during which no such exemption applied resulting in grant recipients being divested of grant monies or property acquired with grant monies.

18. These exemptions, although referring to an agreement that may be modified, clearly specify the type of grants pursuant to such an agreement that would be protected. The regulations will clearly identify the documents in question to ensure there is no uncertainty as to which documents are being incorporated. If a change to such an agreement modified the nature of the grant such that it no longer fell within the description of exempt grant in the regulations, it would no longer be exempt, notwithstanding subsection 116(2F).

19. Any regulation that sought to rely on subsection 116(2F) to provide the Executive with an unfettered discretion in determining the nature of the matter to which the regulations would apply would be subject to disallowance.

The action officer for this matter in the Insolvency and Trustee Service Australia is Daniel McAuliffe who can be contacted on (02) 6270 3435.

Yours sincerely

Philip Ruddock

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

26 FEB 2007

07/1527

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

Dear Senator Ray,

The Senate Standing Committee for the Scrutiny of Bills sought my advice on the Classification (Publications, Films and Computer Games) Amendment Bill 2006. Specifically, the Committee referred to proposed new subsection 59(2) and new section 79A of the *Classification (Publications, Films and Computer Games) Act 1995* (to be inserted by Item 11 and Item 15 of Schedule 2, respectively).

The amendments would permit the Director of the Classification Board and the Convenor of the Classification Review Board respectively to delegate various powers to 'a member of staff mentioned in section 88A.' The Committee has asked my advice as to 'whether the very wide discretion given to the Director and Convenor under these proposed new provisions should not be limited in some way.'

The proposed amendments are consequential to the integration of the Office of Film and Literature Classification (OFLC) into the Attorney-General's Department and the separation of the administration and management functions and powers of the Review Board from the Board.

Once amended, sections 59 and 79A would permit the Director and Convenor to delegate variously some of their powers to members of their respective boards and particular staff. The Committee noted that the delegation is limited to members of staff engaged under the *Public Service Act 1999* (PSA) but expresses a preference that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

The ability to delegate to Board members the Director's power under the Act and to delegate to particular staff specified Board powers under the Act are pre-existing. There will be additional provisions allowing the delegation of powers under the Regulations and permitting the Convenor to delegate. I consider they are all necessary and appropriately limited.

Section 59(1) already permits the Director to delegate his powers under the Act to the nominated office of Board member. Only a small number of delegations are currently in place. These are to specified Board members or to holders of the office of Senior Classifier (a Board position). Amendments would add the ability to delegate to a Board member the Director's powers under the Regulations and would provide mirror powers for the Convenor in proposed section 79A(1). Thus the first option for delegation is to a nominated office – that of Board or Review Board member.

Section 59(2) already provides that the Director may delegate to a public servant in the OFLC any of the Board's power under the Act in relation to classification or approval of advertisements but only if the Board has determined by resolution that it is desirable for the efficient running of the Board. There are no current delegations under this provision in place. The proposed amendments take account of the change of staff from the OFLC to the AGD and respond to a specific request from the current Director.

I draw the Committee's attention to proposed new section 88A (to be inserted by Item 13 of Schedule 1) which identifies the staff supporting the Boards after the integration of the OFLC. It provides that staff assisting the Board and the Review Board are to be public servants 'made available for the purpose by the Secretary of the Department.' Accordingly, the staff to whom powers may be delegated are restricted specifically to staff of the Attorney-General's Department who are expressly supporting the work of the Boards through providing secretariat services or otherwise. In addition, under section 59(3) (and proposed section 79A(3)), such a power may only be delegated if the relevant Board has determined by resolution that it is desirable for the efficient running of that Board. The Director and Convenor would put their mind to the appropriate seniority and experience of the staff to whom the power is proposed to be delegated.

Amendments to section 59(2) and new subsection 79A(2)(b) would also allow the Director and Convenor to delegate their own powers under the Regulations to the same staff. It is intended to enable the Director and Convenor to delegate routine administrative functions which are not necessary or efficient to exercise personally. The Regulations deal essentially with fees for classification activities such as for providing priority processing, partial refund of fees when an application is withdrawn after some work has already been performed, exemption certificates, and approval of advertisements. The criteria for determining the relevant fees for each activity are clearly set out in the Regulations.

The Boards process approximately 9,000 applications each year. The current Director of the Board specifically requested the ability to delegate his powers under the Regulations during development of the proposals. The ability to delegate routine aspects of their functions is therefore highly desirable to enable the Director and Convenor to effectively manage the resources and workload of the Boards.

I do not consider these to be unnecessarily wide provisions. The Committee has suggested that delegates be confined to holders of nominated offices or members of the SES. In addition to the fact that the provisions as discussed above allow delegation of some powers to members of the nominated office of Board or Review Board member, the description of the

staff to whom powers can be delegated is clearly limited. The staff are not merely 'persons' engaged under the PSA. There is only one SES officer in the office supporting the work of the boards. Given that it is likely only routine and administrative matters would be delegated, it would not be appropriate or feasible for that officer to exercise all delegated powers.

The power is clearly constrained by the class of the person being APS staff made specifically available by the Secretary of the Attorney-General's Department for the purpose of assisting the Board and Review Board and by the criteria for exercising the power which has been set out in the Regulations. I believe the proposed delegations are appropriate and necessary for the efficient operation of the classification function.

Yours sincerely

Philip Ruddock

The Hon Dr Sharman Stone MP
Minister for Workforce Participation

RECEIVED
23 FEB 2007
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Ray

I am writing in response to your letter of 8 February 2007 regarding the Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006 (Scrutiny of Bills Alert Digest No. 1 of 2007).

In broadening the ability of the Secretary to delegate his powers under Part III of the *Disability Services Act 1986* (DSA), a range of legislative and contractual safeguards will be put in place.

These include: (a) legislative guidelines which will be formulated to guide the Secretary in the administration of Part III of the DSA. Parliament will continue to have the ability to disallow these guidelines, consistent with the *Legislative Instruments Act 2003*; (b) a specific legislative safeguard in the Bill to ensure that in exercising any delegated powers, the delegate must comply with directions of the Secretary. Any decision made under Part III of the DSA will continue to be subject to the current review mechanisms including review by the Administrative Appeals Tribunal; and (c) contractual arrangements and programme procedures that will govern the day-to-day administration and decision-making of any person delegated the Secretary's powers.

The contractual requirements will set out in detail the manner in which any delegations are to be exercised and will also specify the standards of services to be observed; these include a Service Guarantee, Code of Practice and Performance Reviews. In addition, Star Ratings (which provide a relative measure of the performance of the provider against key performance indicators) will be developed. Legislative Disability Services Standards must also be met in the provision of a rehabilitation program. Compliance with these standards is independently assessed.

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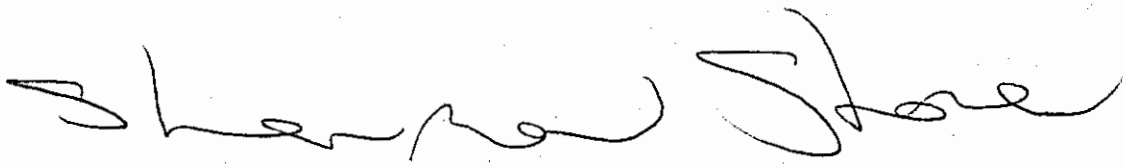
I note the Committee's concerns about the Department outsourcing the provision of services 'without reference to the capabilities or qualifications' of providers. In assessing Vocational Rehabilitation Services tenders, organisations were asked to provide details of the qualifications and experience of their staff. This will be taken into account in assessing successful tenders.

Failure to meet these contractual or legislative standards can result in a range of penalties being applied, including termination of the contract, in whole or part; suspension of referrals of clients to providers; and reduction in, or suspension of business that is allocated to providers.

I can reassure the Committee that the Secretary's powers of delegation will be sufficiently limited by a range of legislative and contractual safeguards for any powers that the Secretary may delegate.

I trust this information is of assistance.

Yours sincerely



Dr Sharman Stone

22.02.07

THE HON DE-ANNE KELLY BE FIE (Aust) MP

Parliamentary Secretary to the
Deputy Prime Minister and Minister for Transport and Regional Services

Reference: 01330-2007

26 FEB 2007

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

Dear Senator Ray

I refer to the letter dated 8 February 2007 to the Hon Mark Vaile MP, the Deputy Prime Minister and Minister for Transport and Regional Services, from the Secretary to the Standing Committee for the Scrutiny of Bills concerning the Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006 (the Bill). The Deputy Prime Minister has passed your letter to me as have I have portfolio responsibility for Maritime matters.

The Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 1 of 2007 commented that the explanatory memorandum for the Bill did not explain the reason for the concluding statement in item 2 in the table to subclause 2(1) to the Bill. This statement indicates that the *Gazette* notice which the Minister must give if certain conditions are met, 'is not a legislative instrument'.

I would like to clarify that the statement was provided to assist readers and that it is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Thank you for raising this matter.

Yours sincerely

DE-ANNE KELLY BE FIE (Aust) MP

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THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

27 FEB 2007

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

Dear Senator Ray

I refer to comments by the Standing Committee for the Scrutiny of Bills concerning the Non-Proliferation Legislation Amendment Bill 2006 (Scrutiny of Bills Alert Digest No.1 of 2007). The Committee has indicated a desire for a provision in the Bill to require a notice in the Gazette, "or the like", when amendments to the Convention on the Physical Protection of Nuclear Material (the "Physical Protection Convention") come into force. I understand that the objective of such a provision would be to prevent undue trespass on personal rights and liberties when item 28 in Schedule 1 of the Bill commences.

It is my view that commencement of item 28 in Schedule 1 without notification in the Gazette would not risk trespass on personal rights and liberties. The purpose of that item is to repeal the definition of a nuclear facility inserted by item 27 in Schedule 1, and replace it with a reference to the definition of a nuclear facility in the Physical Protection Convention. I note, however, that the two definitions are the same, and the rights and obligations of any person in relation to such a facility would not alter with the commencement of item 28.

As mentioned in the relevant part of the Explanatory Memorandum, the Bill provides for the implementation by Australia of some elements of the amended Physical Protection Convention before the amendments enter into force. As it is not possible to define a nuclear facility by reference to treaty provisions that are not yet in force, item 27 in Schedule 1 of the Bill inserts an express definition using the words in the amended Convention. When those treaty provisions do enter into force, item 28 in Schedule 1 will replace the express definition with a reference to the Physical Protection Convention.

Yours sincerely

Alexander Downer

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THE HON TONY ABBOTT MP
MINISTER FOR HEALTH AND AGEING
Leader of the House of Representatives

27 FEB 2007

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

Dear Senator Ray

I understand that the Standing Committee for the Scrutiny of Bills has commented on some aspects of the Private Health Insurance Bill 2006 in its Scrutiny of Bills Alert Digest No. 1 of 2007 (7 February 2007). The Committee has drawn attention to the inclusion of 'Henry VIII' clauses (subclause 78-1(6) and several elements in clause 217-5) and a provision that abrogates a person's privilege against self-incrimination in requirements to give information to the Private Health Insurance Ombudsman (subclause 250-1(6)).

The portability requirements set out in clause 78 of the Bill are intended to provide a fair balance between the rights of people to transfer between private health insurers and the rights of existing members of transferee insurers. It has proved necessary in the past to make subordinate legislation (under section 73B of the *National Health Act 1953*) to deal expeditiously with practices introduced by some insurers which would have unfairly limited transfer rights.

Subclause 78-1(6) of the Bill providing that the Private Health Insurance (Complying Product) Rules may modify the requirements in clause 78-1 in relation to any or all private health insurers, benefits or insured persons continues the ability under the current Act to address unfair practices introduced by insurers without amending the primary legislation.

I consider that the most practical and appropriate way of retaining the power to move swiftly to address emerging circumstances is to include the provision that subordinate legislation may modify the portability provisions as appropriately required, subject to a Parliamentary scrutiny and disallowance regime.

The Committee has also noted that subparagraph 217-5(1)(b)(ii) and subclause 217-5(4), which deal with the external management of health benefits funds, delegate legislative power. These provisions replicate provisions in the current regulatory regime at paragraph 83XB(2)(b) and subsection 82XB(6) of the *National Health Act 1953*. The inclusion in the Bill of these provisions allows for the continuation of the current rules for the administration of health benefits funds. The intended scope of the application of the provisions to the *Corporations Act 2001* has not changed.

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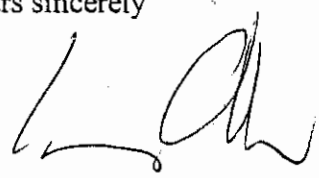
Similarly, subclause 250-1(6), which requires a person to give the Private Health Insurance Ombudsman information relevant to a complaint regardless of whether the requirement may incriminate the person or make the person liable to a penalty, allows for the continuation of the current rules under the *National Health Act 1953* at subsections 82ZSAA(10) and 82ZTB(8). I consider that the provision that material produced under the subclause cannot be used in proceedings against the person gives appropriate protection to individuals' rights.

I trust that this information has been helpful to the Committee.

Yours sincerely



TONY ABBOTT

THE HON PETER DUTTON MP

MINISTER FOR REVENUE AND ASSISTANT TREASURER

26 FEB 2007

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

Dear Senator Ray

I am writing in response to the query raised in the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 1 of 2007 (7 February 2007) relating to the Tax Laws Amendment (2006 Measures No. 7) Bill 2006. The Treasurer has asked me to respond on his behalf.

The Committee sought advice as to the reason for the delay in introducing Schedule 7 to Tax Laws Amendment (2006 Measures No. 7) Bill 2006, which contains the amendments in respect of the taxation of capital protected borrowings (CPB).

Although the Committee has characterised this delay as 'an instance of legislation by press release', it is important to note that the retrospective aspect of the CPB measures is giving legislative effect to a pre-existing Australian Taxation Office (ATO) interpretation and administrative practice that applied prior to *Firth's case*, rather than the implementation of a 'new' taxation treatment.

The ATO's interpretation of the law as it applied to CPBs was rejected by the Federal Court of Australia in *Firth's case* in November 2002. The ATO's administrative practice following *Firth's case* was consistent with the 'interim apportionment methodology' the details of which were provided in the former Minister for Revenue and Assistant Treasurer, the Hon Helen Coonan's press release No. C046 of 30 May 2003.

The transitional provisions of the CPB measures ensure that the tax treatment of CPBs entered into on or after 16 April 2003 is consistent with that for CPBs entered into prior to *Firth's case*. The 'interim apportionment methodology' has a 16 April 2003 start date as the amendment is an integrity measure directed at protecting the revenue base. A later start date would put the revenue at risk.

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The proposed CPB measures, which reflect an extensive consultation process with industry, ensure that part of the cost of a CPB is attributed to the capital protection feature of the arrangement. Broadly, there were two pragmatic approaches that could have been use to calculate the cost of capital protection for a CPB. The first approach was to use options pricing methodologies to determine the cost of capital protection. The second approach was to use a 'benchmark' interest rate as a cap on the amount of interest deductible by the investor.

Consultations were held in 2003 and 2004, with industry indicating a preference for the cost of capital protection for CPBs to be determined by reference to a benchmark interest rate.

In 2005, a consultant was engaged to undertake an independent report as to the best way to estimate the cost of capital of a CPB. This report was provided on a confidential basis to industry as part of the consultation process. At industry's request, there were further discussions regarding the report. Allowing for this, the appropriate level of the benchmark interest rate was not settled until July 2006.

During consultation, industry requested that there be sufficient lead time after the introduction date of the CPB measures to allow industry to comply with the measures. Industry representatives also stated that the market would be disrupted should the legislation be introduced during the last quarter of the financial year. The timing of the introduction of the proposed CPB measures also takes into account these concerns.

As this provision is effectively restoring a pre-existing taxation treatment for CPB investors it is not considered to adversely affect personal rights and liberties.

Yours sincerely

PETER DUTTON