SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2007

12 September 2007

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator J Adams (Deputy Chair)
Senator G Barnett
Senator A McEwen
Senator A Murray
Senator S Parry

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

NINTH REPORT OF 2007

The Committee presents its Ninth Report of 2007 to the Senate.

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

Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008

Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008

Aviation Legislation Amendment (2007 Measures No. 1) Act 2007

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

Higher Education Support Amendment (Extending FEE-HELP for VET Diploma and VET Advanced Diploma Courses) Bill 2007*****

Northern Territory National Emergency Response Act 2007

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007

Workplace Relations Amendment (A Stronger Safety Net) Act 2007

***** Although this bill has not yet been introduced in the Senate, the Committee may report on its proceedings in relation to the bill, under standing order 24(9).

Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The Minister for Finance and Administration responded to the Committee's comments in a letter dated 15 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 9 of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Finance and Administration

Background

This bill appropriates an additional $502 million from the Consolidated Revenue Fund to implement the first stage of emergency measures aimed at protecting Aboriginal children in the Northern Territory. The bill includes:

- $22.5 million for the Attorney-General's Department for the Australian Crime Commission to gather intelligence and analyse Indigenous child abuse in Australia, for the deployment of Australian Federal Police in the Northern Territory, and to fund additional legal services and Night Patrol Programmes;
- $15.5 million for the Department of Defence for logistics support;
- $33.6 million for the Department of Education, Science and Training to provide additional classrooms, strengthen curriculum offerings and deliver a breakfast and lunch program to school-aged children in schools in the targeted communities;

- $115.5 million for the Department of Employment and Workplace Relations to implement a range of employment and welfare reform measures. This includes $24.21 million to Indigenous Business Australia for investment and community initiatives, such as expanding the network of Outback Stores and supporting existing community stores;

- $212.3 million for the Department of Families, Community Services and Indigenous Affairs to implement a wide range of measures in support of the Government's Northern Territory Emergency Response;

- $82.9 million for the Department of Health and Ageing for the introduction of health checks for Aboriginal children in each community targeted under the measure; and

- $18.8 million for the Department of Human Services, including $10.1 million to Centrelink to fund activities to support the implementation of changes to welfare payments.

Legislative Instruments Act—declarations
Subclause 9(10)

Subclause 9(10) of this bill provides that a request made by a Minister or Chief Executive to the Finance Minister under either subclause 9(1) or 9(2) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that there is no explanatory memorandum to the bill. As such, while it appears that this provision is no more than declaratory of the law it is impossible to be sure. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption.

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

Relevant extract from the response from the Minister

I wish to advise that sub-section 9(10) of the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008 and sub-section 11(10) of Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008 are like clauses which make clear that in law written requests from Ministers to the Finance Minister seeking appropriation reductions are not legislative instruments. Such a written request is not an exercise of legislative power but is a requirement that must be met before the Finance Minister may reduce an appropriation under the section. Accordingly, the clauses are declaratory, to avoid doubt, rather than substantive clauses exempting instruments that are legislative in character. The provisions were first included in the annual appropriation Acts in the 2003-04 Additional Estimates.

The Committee thanks the Minister for this response.

Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The Minister for Finance and Administration responded to the Committee's comments in a letter dated 15 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 9 of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Finance and Administration

Background

This bill appropriates an additional $85.3 million from the Consolidated Revenue Fund to meet expenses in relation to grants to the Northern Territory and capital funding to support the implementation of the Northern Territory Emergency Response. The major components of the bill include:

- $48.8 million for the Department of Families, Community Services and Indigenous Affairs for grants for the employment of child protection workers and for the provision of safe places for families escaping domestic violence. This includes an equity injection of $34.3 million to address the short term accommodation requirements of staff involved in the response;
- $17.7 million in capital funding for Indigenous Business Australia to support measures such as the expansion of Outback Stores; and
- $14.3 million in capital funding for Centrelink to enhance its IT and service delivery capacity to support the implementation of changes to welfare payments.

Legislative Instruments Act—declarations
Subclause 11(10)

Subclause 11(10) of this bill provides that a request made by a Minister or Chief Executive to the Finance Minister under either subclause 11(1) or 11(2) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that there is no explanatory memorandum to the bill. As such, while it appears that this provision is no more than declaratory of the law it is impossible to be sure. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption.

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

Relevant extract from the response from the Minister

> I wish to advise that sub-section 9(10) of the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008 and sub-section 11(10) of Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008 are like clauses which make clear that in law written requests from Ministers to the Finance Minister seeking appropriation reductions are not legislative instruments. Such a written request is not an exercise of legislative power but is a requirement that must be met before the Finance Minister may reduce an appropriation under the section. Accordingly, the clauses are declaratory, to avoid doubt, rather than substantive clauses exempting instruments that are legislative in character. The provisions were first included in the annual appropriation Acts in the 2003-04 Additional Estimates.

The Committee thanks the Minister for this response.

Aviation Legislation Amendment (2007 Measures No. 1) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2007*. The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 28 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 8 of 2007

Introduced into the Senate on 21 June 2007
Portfolio: Transport and Regional Services

Background

This bill amends the *Aviation Transport Security Act 2004* and the *Civil Aviation Act 1988* with the aim of strengthening aviation security and safety. The bill:

- provides for the making of regulations to prohibit activities or conduct performed outside a security controlled airport that disrupts or interferes with the operations of a security controlled airport or aircraft;
- provides additional powers to eligible Australian Customs Officers working in parts of the airport where uniformed police are unlikely to routinely visit but which are visited by customs officers. These powers include the ability to stop and search people and vehicles, request that a person leave an area or zone of a security controlled airport and to physically restrain certain persons;
- provides for the making of regulations that exempt certain senior dignitaries, their spouses and minors from aviation security screening;
- introduces a mandatory drug and alcohol regime, including testing, education and support, in the civil aviation industry; and

- provides for the making of regulations outlining the details of the drug and alcohol regime.

The bill also contains application provisions.

Determination of important matters by regulation
Schedule 1, item 14

Proposed new section 38B of the *Aviation Transport Security Act 2004*, to be inserted by item 14 of Schedule 1, provides for regulations to 'prescribe offences in relation to the disruption or interference with the activities of an airport operator of a security controlled airport, or the activities of an aircraft operator at a security controlled airport' in certain circumstances.

The explanatory memorandum to the bill indicates that 'new section 38B is needed because the existing regulation making powers in the Act are not well adapted to creating offences that effectively deter disruptive activities [within airports]… Similarly, the existing regulation making powers do not permit the regulation of disruptive conduct outside the boundaries of an airport even if the conduct has the direct effect of severely disrupting the activities of the airport operator or of an aircraft operator. Examples of conduct outside an airport that might disrupt airport operations include directing light emitting devices (such as laser devices) into the airport through or over the top of the airport's perimeter fence. Although some such incidents may not pose a direct threat to aviation, all incidents inevitably invite a serious security response because the activity has to be investigated quickly to determine whether there is a serious risk…the existence of a set of appropriately crafted offences in the Regulations is expected to provide a sensible deterrent for deliberate and repeat offenders.'

Sub-section 38B(2) provides that the offences prescribed by the regulations 'may relate to conduct that occurs outside the boundaries of a security controlled airport', which could effectively mean anywhere, including, presumably, conduct that occurs on residential properties abutting airports. Given the apparent wide scope of these provisions and the not insignificant financial penalty that may be imposed (up to 50 penalty units = $5500), the Committee questions whether these offence making powers might be more appropriately exercised by the Parliament.

Certainly the explanatory memorandum provides no explanation as to why these 'appropriately crafted offences' could not be included in primary legislation rather than in regulations. The Committee **seeks the Minister's advice** as to why it was considered necessary for these offences to be able to be created by regulation rather than by primary legislation.

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

Schedule 1, item 14 of the Bill inserts new section 38B into the *Aviation Transport Security Act 2004.* Section 38B allows the Governor-General to make regulations to create relatively minor offences with a maximum penalty of 50 penalty units (currently $5,500). This approach is used in Bills where it is not possible at the time of drafting to anticipate all forms of offensive conduct that will need to be prohibited or regulated and where a relatively low penalty will apply.

One application of new section 38B will be to prescribe a new offence to prohibit a person from shining a laser light from a place outside a security controlled airport into the airport. Laser technology is changing rapidly, so that more powerful laser devices are becoming more readily available to the general public for a wide range of lawful purposes. In such circumstances, where it is not possible to predict all of the circumstances in which a laser device might be used to disrupt airport operations or against an aircraft on the ground, the most flexible and responsive strategy is to prescribe offences by regulation so that the regulations can be amended quickly as soon as a new type of threat emerges. The new regulation making power will also be useful as a first line of regulatory response in dealing with new problems as they are identified. Every regulation that creates a new offence is subject to Parliamentary scrutiny and disallowance.

The Committee thanks the Minister for this response.

Wide delegation of power
Schedule 1, item 25

Proposed new subsection 37(2) of the *Civil Aviation Act 1988* to be inserted by item 25 of Schedule 1, allows 'regulations that are made for the purposes of subsection 34(1) (which deals with drug and alcohol management plans) and subsection 34(2) (which deals with drug and alcohol testing) to confer the power to make an administrative decision on a person who is specified in the Regulations. Subsection 37(2) in turn allows the Regulations to permit such a person to delegate that power to another person' (explanatory memorandum page 30).

The Committee has consistently drawn attention to legislation that allows powers to be conferred on, or delegated to, a relatively large class of persons, with little or no specificity as to their qualifications or attributes. As outlined above, the explanatory memorandum to the bill paraphrases the provisions but does not provide an explanation of why no attempt has been made to limit the range of persons on whom the power to make an administrative decision may be conferred or delegated. (For example, by identifying the various classes of persons, ie. CEO, Senior Executive Service Officer etc, or the skills and experience of the persons to whom the powers are to be conferred or delegated). The Committee **seeks the Minister's advice** whether this wide power of delegation should be limited in some way.

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

Relevant extract from the response from the Minister

Schedule 1, item 25 of the Bill amends the *Civil Aviation Act 1988* by inserting new Part IV dealing with drug and alcohol management plans and testing. The Committee expressed two concerns with item 25, namely:

- a potentially inappropriate delegation of administrative power (new subsection 37(2)); and

- the potential (by operation of existing subsection 98(3A)) for incorporating undisclosed extrinsic materials in any new regulations that relate to drug and alcohol management plans, and drug and alcohol tests.

New subsection 37(2) of the *Civil Aviation Act 1988* provides that the regulations may make provision for a person who is identified in regulations dealing with drug and alcohol management plans and testing to delegate their decision making powers to another person. This provision is necessary because the body that will collect, test and analyse samples will be determined by competitive tender and some of these functions may involve decisions of an administrative character under the regulations. In these circumstances, there may be a need to appoint delegates within the testing body to make certain administrative decisions. No such delegation can be conferred unless the regulations clearly prescribe the person or class of persons who may be appointed as a delegate, and any such regulation is subject to Parliamentary scrutiny and disallowance.

The Committee thanks the Minister for this response.

Incorporation of extrinsic material
Schedule 1, item 25

Proposed new subsection 34(1) of the *Civil Aviation Act 1988*, to be inserted by item 25 of Schedule 1, would permit the making of regulations 'for and in relation to the development, implementation and enforcement of drug and alcohol management plans covering persons who perform, or are available to perform, safety-sensitive aviation activities'. Subsection 34(2) would provide for the making of regulations covering drug and alcohol testing of such persons. While that regulation-making power might appear on its face not to be within the Committee's terms of reference, subsection 98(3) of the same Act has provided for some time that any regulations made under the Act may apply, adopt or incorporate any matter contained in a written instrument or other document as in force at a particular time or from time to time.

This means that the regulations that this bill would allow for, in relation to drug or alcohol testing, could incorporate matter of which the Parliament might be completely unaware, because the regulations incorporate material from some outside source, as in force from time to time. The Committee **seeks the Minister's advice** regarding why the ability to incorporate material 'as in force from time to time' into the regulations that might be made under proposed new subsections 34(1) and (2) is necessary.

Pending the Minister's advice, the Committee draws Senators' attention to the 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

Subsection 98(3A) of the *Civil Aviation Act 1988* provides that regulations made under that Act may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any matter that is contained in a written instrument or other document as that document is in force at a particular time or from time to time. This mechanism has proven to be an effective and efficient means for legislation to incorporate relevant technical standards (such as Australian Standards) that have been developed and published by reputable and recognised bodies and organisations with special expertise. Because such an extrinsic document is always in written form, and its origin is explicitly identified in the regulations that adopt or incorporate it, the content of such a document at any given time is always ascertainable even though it is not included in the legislation. Every regulation that prescribes a standard or any other matter by reference to a document that is not part of the legislation is subject to Parliamentary scrutiny and disallowance.

Thank you for raising these matters in relation to the bill. I trust that this information meets the needs of the Committee.

The Committee thanks the Minister for this response and notes the Minister's assurance that extrinsic material always comes from 'reputable and recognised bodies' and that such material 'is always in written form, …its origin is explicitly identified in the regulations that adopt or incorporate it, and the content of such a document at any given time is always ascertainable'.

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 9 of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills developed to support the implementation of the Northern Territory Emergency Response, this bill was introduced with the Northern Territory National Emergency Response Bill 2007 and the Social Security and Other Legislation Amendment (Welfare Payment Reform Bill) 2007.

Schedule 1 inserts a new Part 10 into the *Classification (Publications, Films and Computer Games) Act 1995,* containing measures banning the possession and supply of pornographic materials in prescribed areas within the Northern Territory and giving the police powers in prescribed areas to seize and destroy materials that may be prohibited under this new Part 10.

Schedule 2 amends the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979* to:

- allow the Australian Crime Commission (ACC) Board to authorise the ACC to undertake an intelligence operation or investigation into Indigenous violence or child abuse;

- allow an ACC examiner to request or compel information, documents or things, relevant to an operation/investigation, that are held by state and territory agencies, provided an arrangement is in force between the Commonwealth and the state or territory;

- extend the term of appointment of ACC examiners from five to ten years; and

- clarify that Australian Federal Police officers deployed to the Northern Territory Police Service (NTPS) can exercise all of the powers and duties of a member of the NTPS under NT legislation.

Schedule 3 amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to allow the Commonwealth and Northern Territory to retain an interest in buildings and infrastructure constructed or upgraded on Aboriginal land with government funding (construction or renovation to be undertaken with the consent of the relevant Land Council). The schedule also provides a mechanism for the statutory rights to come to an end once the buildings and infrastructure are no longer required.

Schedule 4 amends provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* governing access to Aboriginal land. It removes the requirement for people to obtain permits to enter and remain on certain areas of Aboriginal land, including common areas of townships, road corridors, boat landings and airstrips. It also allows for the placement of temporary restrictions on access to these areas to protect the privacy of cultural events or public health and safety.

Schedule 5 makes several amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* and to what is referred to as the Northern Territory National Emergency Response Act 2007, which is currently still a bill.

The bill also provides that, for the purposes of the *Racial Discrimination Act 1975*, the provisions of this Act are deemed to be special measures and are excluded from the operation of Part II of that Act.

The bill also contains application provisions.

Legislative Instruments Act—exemptions
Schedule 4, item 12

Proposed new subsection 70B(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70B(2), to specify roads in vested Aboriginal land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 42) states that this subsection is included to assist readers, as the determination is not legislative in character.

Similarly, proposed new subsection 70E(4) of the same Act, also to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70E(3), to specify roads within Aboriginal community land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 47) provides the same explanation, that is, that the new subsection is merely declaratory of the law.

Proposed new subsections 70B(16) and 70E(20) also state that determinations made under other subsections of sections 70B and 70E are not legislative instruments. In this case, the determinations would impose temporary restrictions on the rights of any person to enter or remain on roads in vested Aboriginal land or within Aboriginal community land respectively. The Committee notes that, in contrast to the earlier occurrences, in these cases the explanatory memorandum (pages 43 and 48 respectively) states that the reason for these determinations not being legislative instruments is that the 'Attorney-General has granted an exemption from the Legislative Instruments Act on the basis that the restrictions will be temporary in nature and may need to take effect on short notice.'

The Committee notes that these determinations appear to be identical in nature, except that some specify roads on which a person may lawfully enter or remain, while others apply temporary restrictions on the right of any person to enter or remain on specified roads. Despite this, the bill indicates that one set of determinations (those that specify roads on which a person may lawfully enter or remain and which would appear to be more legislative in character) are *not* legislative instruments, while another set (those that apply temporary restrictions on access and appear to be more administrative in nature) are not legislative instruments because they have been exempted from the provisions of the Legislative Instruments Act by the Attorney-General.

The Committee **seeks the Minister's clarification** as to the nature of these determinations and whether a more considered explanation could be included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the 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

In relation to Schedule 4, item 12 (see pages 13 to 14), the Committee seeks clarification as to the nature of certain determinations in relation to the *Legislative Instruments Act 2003* (Legislative Instruments Act) and, in particular, why some are stated in the explanatory memorandum to have been exempted by the Attorney-General, while others are stated more simply not to be legislative instruments.

Proposed new subsections 70B(3) and 70E(4) provide that determinations related to certain roads under proposed new subsections 70B(2) and 70E(3) are not legislative instruments. The provisions assist the reader, as these determinations are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act. The determinations merely apply the law to a particular case (that is, to particular roads on Aboriginal land).

Proposed new subsections 70B(16) and 70E(20) provide that various determinations which impose temporary restrictions on access are not legislative instruments. The Attorney-General has granted an exemption for these determinations from the Legislative Instruments Act. The basis for these exemptions is that the determinations are only temporary in nature and will often need to take effect on very short notice, particularly where the restrictions are put in place to protect public health and safety. In these circumstances it would not be appropriate for the determinations to be subject to the Legislative Instruments Act.

The Committee thanks the Minister for this response and notes that determinations under subsections 70B(2) and 70E(3) of the bill are **not** considered to be legislative instruments, as defined by the *Legislative Instruments Act 2003*, as they apply the law to a particular case, that is, particular roads on Aboriginal land. The Committee further notes that it would have been useful if this explanation had been included in the explanatory memorandum.

The Committee remains confused regarding why the determinations referred to in subsections 70B(16) and 70E(20), which also appear to apply the law in a particular case, are not treated in the same way. The Minister advises that the 'Attorney-General has granted an exemption for these determinations from the Legislative Instruments Act' (thus implying that the determinations are, in fact, legislative in character) on the basis that they are 'only temporary in nature and will often need to take effect on very short notice.' The Committee notes, however, that the fact that an instrument is temporary in nature and needs to take effect on short notice is irrelevant to whether or not it is considered to be a legislative instrument, as defined in section 5 of the *Legislative Instruments Act 2003*. The Committee further notes that while the *Legislative Instruments Act 2003* provides for the Attorney-General to issue a certificate determining whether an instrument is a legislative instrument or not, it makes no provision for him or her to 'exempt' a determination from that Act.

The Committee **seeks the Minister's further advice** whether the determinations referred to in new subsections 70B(16) and 70E(20) of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* are administrative or legislative in nature.

Higher Education Support Amendment (Extending FEE-HELP for VET Diploma and VET Advanced Diploma Courses) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2007*. The Minister for Vocational and Further Education responded to the Committee's comments in a letter dated 6 September 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2007

Introduced into the House of Representatives on 21 June 2007
Portfolio: Education, Science and Training

Background

This bill amends the *Higher Education Support Act 2003* to extend FEE-HELP assistance to full-fee-paying students in Diploma and Advanced Diploma courses that are accredited as vocational education and training (VET) qualifications and where credit towards a higher education award is available.

The bill also contains consequential and technical provisions.

Legislative Instruments Act—determinations
Schedule 1, item 17

Proposed new clauses 12 and 38 of Schedule 1A to the *Higher Education Support Act 2003*, to be inserted by item 17 of Schedule 1 to this bill, provide that

- notice of the Minister's decision under clause 11 to approve an application from a body corporate as a VET provider, and
- notice of the Minister's decision under subclause 34(3) to revoke such an approval,

are legislative instruments. This means that such notices are subject to review by the Parliament and disallowance. However, it appears that such decisions are more akin to administrative decisions rather than determinations of a legislative character. Administrative decisions are normally subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

The Committee notes that the explanatory memorandum to the bill does not contain any explanation for these provisions and **seeks the Minister's advice** regarding why these determinations are declared to be legislative instruments and whether they should be subject to merits review under the *Administrative Appeals Tribunal Act 1975.*

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In response to the Committee's concern that proposed new clauses 12 and 38 of Schedule lA to the Bill may be more akin to administrative decisions rather than determinations of a legislative character, I provide the following comments:

- Proposed new clause 12 provides that a notice of the Minister's decision under clause 11 to approve an application from a body corporate as a vocational education and training (VET) provider is a legislation instrument. Proposed new clause 38 provides that a notice of the Minister's decision under subclause 34(3) to revoke such an approval is a legislative instrument. Both of these determinations are legislative instruments for the purposes of section 5 of the *Legislative Instruments Act 2003.*

- Clause 12 is based on section 16-55 and clause 38 is based on section 22-35 of the *Higher Education Support Act 2003* (the Act). The purpose of item 17 of the Bill is to duplicate the regime created under the Act for higher education providers and apply that as much as possible to the VET sector. By duplicating the regime for the VET sector (as much as practicable) the Department has ensured that there is consistency between the two regimes. This is particularly important for those providers who are dual sector providers (approved in the higher education sector as well as the VET sector). It would be administratively burdensome on those providers, in particular, to have to comply with two different regimes.

- Both determinations are legislative instruments and are required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament, are subject to Parliamentary Scrutiny and to the other provisions of the *Legislative Instruments Act 2003* (for example disallowance and sunsetting). This enables the process of approving a body corporate and revoking that approval to be open, transparent and publicly accountable. It also allows either House of Parliament to move a motion to disallow the instrument, because the instrument of approval or revocation does not take effect until either it has passed through the disallowance process or at a later date specified in the instrument.

- Instruments declared to be legislative instruments are not normally made subject to merits review under the *Administrative Appeals Tribunal Act 1975*. Once again, this is consistent with the treatment of existing instruments made under sections 16-55 and 22-35 of the Act in respect of higher education providers.

I trust this information addresses your concerns over the nature of the determinations in proposed new clauses 12 and 38 of the Bill.

The Committee thanks the Minister for this response.

Northern Territory National Emergency Response Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 9 of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

This bill is the principal bill in a package of five bills to support the implementation of the Australian Government's response to the 'national emergency confronting the welfare of Aboriginal children in the Northern Territory.' The bill:

- modifies the Northern Territory *Liquor Act* to restrict the possession, consumption, sale and transportation of liquor in the Northern Territory, particularly in areas of land prescribed by the bill;

- introduces a scheme of accountability to prevent, and detect, the misuse of publicly funded computers located in the prescribed areas;

- provides for the acquisition of five-year leases over certain Aboriginal townships, preserves the underlying ownership by traditional owners, preserves or excludes any existing interests, provides for compensation to be paid for any acquisition of property, and allows for the early termination of a lease, including when a township lease is granted;

- allows the Australian Government to exercise the powers of the Northern Territory Government to forfeit or resume certain leases known as 'town camps' during the five-year period of the emergency response and the option of acquiring a freehold interest over these areas;

- appoints Government Business Managers to assist local people to improve services such as housing construction, maintenance services, community services and various types of municipal services such as waste collection and road maintenance;

- amends Northern Territory law to prohibit any form of customary law or cultural practice excuses when exercising bail or sentencing discretion in relation to offences and strengthens bail provisions with a view to better securing the safety of victims and witnesses in remote communities;

- introduces a new licensing regime for persons operating community stores in Indigenous communities; and

- declares that the provisions of this bill are 'special measures' for the purposes of the *Racial Discrimination Act 1975* and excludes these provisions from the operation of Part II of that Act.

The bill also contains application provisions.

Personal rights and liberties
Paragraph 12(4)(a), clause 7, subclause 12(6)

Paragraph 12(4)(a) creates an offence relating to the transport, possession or consumption of **liquor** in a prescribed area, while clause 7, by incorporating in this bill the definition of terms used in the *Liquor Act* of the Northern Territory, would define **liquor** as meaning 'a beverage that contains more than 1.15% by volume of ethyl alcohol'. Subclause 12(6) then provides for an increase in the penalty that may be imposed if the quantity of **alcohol** involved in the commission of the offence is greater than 1,350 ml.

Similarly, clause 20 creates various offences relating to the sale of liquor containing more than 1,350 ml of **alcohol** for consumption away from licensed premises. The examples used in the explanatory memorandum (page 17) would imply that the term **alcohol** is referring to the amount of ethyl alcohol in the beverage. The Committee notes, however, that the term **alcohol** does not appear to be defined either in this bill or in the Northern Territory *Liquor Act*.

In addition, the Committee is concerned that the average person would be at a loss to know how to calculate the amount of ethyl alcohol in an alcoholic beverage. Australian information campaigns relating to alcohol consistently refer to 'standard drinks' and the number of 'standard drinks' in an alcoholic beverage is required to be identified on the label. The amount of ethyl alcohol in the beverage can be calculated using standard drink information, but it is not something that most Australians would know how to do. As such, the Committee is concerned that, as currently drafted, these clauses may be considered to trespass on personal rights and liberties, by creating offences that lack clear definition.

The Committee **seeks the Minister's advice** whether the reference to **alcohol** in subclause 12(6) and in clause 20 is a reference to the volume of ethyl alcohol in liquor and whether this should be clearly defined in the bill, along with a method for calculating it. The Committee also **seeks the Minister's advice** whether, for ease of reference for law enforcement officers, licensees etc, the explanatory memorandum could be amended to include a plain English explanation.

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

Relevant extract from the response from the Minister

In relation to paragraph 12(4)(a), clause 7 and subclause 12(6) (see pages 16 to 17), the Committee seeks advice about whether the reference to alcohol in subclause 12(6) and clause 20 is a reference to the volume of ethyl alcohol in liquor and whether this should be clearly defined in the bill, along with a method for calculating it. My department was advised during the drafting of the bill that there is no need to define alcohol, as it is commonly understood, and defined in the Macquarie Dictionary, to mean ethyl alcohol with an established chemical formula. The issue of legal definition is separate from that of the need to provide supporting education and information materials for retailers and others who will be administering aspects of

the new provisions. Such materials are currently being developed with input from peak liquor bodies and the Northern Territory Government.

The Committee thanks the Minister for this response and for his assurance that efforts will be made to deal with the issues raised by the Committee by way of supporting education and information materials. The Committee notes that it would have been useful if this information had been included in the explanatory memorandum.

Legislative Instruments Act—declaration
Subclause 26(1)

Subclause 26(4) states that an accreditation of a filter under subclause 26(1) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that the explanatory memorandum does not advert to subclause 26(4). The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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

Relevant extract from the response from the Minister

On pages 19 to 20, the Committee seeks advice on whether subclause 26(4), in specifying that an accreditation of a filter under subclause 26(1) is not a legislative instrument, is declaratory or substantive in nature. This provision is declaratory in nature to assist the reader, as this provision is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

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

Legislative Instruments Act—determinations
Subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4)

Subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) declare various determinations and notices relating to interests in land not to be legislative instruments. The Committee notes that, in each case, the explanatory memorandum asserts that this information 'is for the assistance of readers because [the determination or notice] is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003'*.

The Committee **seeks the Minister's advice** whether these determinations and notices are all administrative in character and, if so, whether they should be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

On page 21, the Committee seeks advice on whether certain determinations and notices mentioned in subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) are all administrative in character and, if so, whether they should be subject to merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act). These

subclauses provide that various notices and determinations related to interests in land are not legislative instruments. These provisions assist readers as the determinations and notices are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act. The determinations deal with the application of the law in a particular case (that is, to a particular piece of land or to a particular right, title or interest).

It is not appropriate for these determinations and notices to be subject to merits review under the AAT Act. The potential for review by the Administrative Appeals Tribunal would create unacceptable delays for what are short-term emergency measures.

The Committee thanks the Minister for this response. In light of the possible duration of the emergency response, i.e. up to five years initially, the Committee remains concerned at the absence of merits review of these decisions. The Committee is of the view that these provisions may be considered to *make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference* and trusts that careful consideration will be given to the possibility of providing for merits review of these decisions when the Act is reviewed in two years time.

'Henry VIII' clauses
Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4)

Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) allow regulations to amend or modify parts of this Act or other Commonwealth or Northern Territory Acts and are, therefore, 'Henry VIII' clauses.

A 'Henry VIII' clause is 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. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee. Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) create such a delegation of legislative power.

The Committee notes that in each of these cases the explanatory memorandum to the bill does not provide an explanation regarding why it was considered necessary to be able to amend or modify primary legislation through regulations, rather than by reference to the Parliament. The Committee **seeks the Minister's advice** regarding why each of these 'Henry VIII' clauses was considered necessary and whether these explanations could be included in the explanatory memorandum.

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

On pages 21 to 22, the Committee seeks advice on why subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) (effectively, 'Henry VIII clauses') were considered necessary. Subclauses 44(3), 46(3) and 58(3) allow regulations to modify parts of Northern Territory legislation. These powers are necessary to ensure that the emergency response measures related to land are not hindered by Northern Territory laws. The modifications can only be made by regulations which are disallowable. Subclause 64(1) allows regulations to modify Part 4 of Schedule 1 to the bill by removing town camp land from the Schedule. This is intended, for example, to allow certain town camps to be removed from the Schedule where a substantial part of the town camp lease has been subleased to a housing organisation or the Northern Territory Government on a long-term basis. In these circumstances, the Minister would no longer need to exercise the emergency powers of resuming or forfeiting the town camp leases and acquiring freehold and it is therefore appropriate for this town camp land to be removed from the Schedule.

Subclauses 78(4) and 81(4) form part of Division 4 of Part 5, which enables the Commonwealth Minister to exercise certain powers under Northern Territory legislation in relation to the appointment of external managers to community government councils and incorporated associations. The specific Northern Territory legislation is Part 13 of the *Local Government Act* (NT), in relation to community government councils, and Division 2 of Part 9 of the *Associations Act* (NT), in relation to incorporated associations.

This bill makes necessary and appropriate modifications to those Northern Territory laws. Subclauses 78(4) and 81(4) allow for further modifications to be made by regulations, for example, if the Northern Territory laws are amended so that further modifications are required to clarify the operation of the Commonwealth Minister's powers.

The inclusion of these subclauses in the Bill is necessary and appropriate, in the context of the Northern Territory emergency response, because it will facilitate any further modifications to be made in a responsive and timely manner. This is essential so that reforms aimed at improving governance and service delivery in prescribed communities can be implemented without delay. The further modifications (if any) would be made by regulations, which are disallowable.

The Committee thanks the Minister for this response.

Special (Standing) Appropriation
Clause 63

Clause 63 would make a special appropriation out of Consolidated Revenue for the amounts payable by the Commonwealth under clauses 60 and 62, under the *Special Purposes Leases Act* of the Northern Territory. In its *Fourteenth Report of 2005*, the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum merely records the operation of the clause and does not provide any further reason for the special appropriation.

The Committee **seeks the Minister's advice** regarding why this special (standing) appropriation is considered necessary, whether any limit has been forecast as to the total amount of such an appropriation, and whether an explanation could have been included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to this 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 and 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

> In relation to clause 63 (see pages 22 to 23), the Committee seeks advice on why this special (standing) appropriation is considered necessary. A special appropriation, as provided by clause 63, is necessary as the quantum of the payments under clauses 60 and 62 are dependent on the outcome of future events such as a Valuer-General's determination or a court finding on a reasonable amount of compensation. An annual appropriation is not suitable in these circumstances.

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

Personal Rights and Liberties
Subclause 60(2)

Subclause 60(2) of the bill provides that:

… if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

The Committee is concerned that the 'reasonable amount' of compensation which the Commonwealth is obliged to pay under this subclause is not necessarily compensation on just terms within the meaning of paragraph 51(xxxi) of the

Constitution and the subclause may therefore be void, leaving considerable uncertainty as to the rights of both the Commonwealth and any person affected by the operation of Part 4 of this bill.

The Committee **seeks the Minister's advice** as to the reason for the amount of compensation payable not following more closely the terms of paragraph 51(xxxi) of the Constitution.

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

> In relation to subclause 60(2) (see pages 23 to 24), the Committee seeks advice on its assessment that the amount of compensation payable does not follow closely the terms of paragraph 51(xxxi) of the Constitution. Subclause 60(2) has been drafted to ensure compliance with the Constitution and follows standard drafting precedent. Similar provisions are included in other Commonwealth laws including the *Customs Act 1901* and the *Commonwealth Radioactive Waste Management Act 2005.*

The Committee thanks the Minister for this response.

Excluding merits review
Clause 78

Clause 78 would permit the Commonwealth Minister to suspend all the members of a community government council on him or her being satisfied as to the matters in paragraph 78(2)(b). However, there does not appear to be any provision for merits review of such a decision under the *Administrative Appeals Tribunal Act 1975.* The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review and **seeks the Minister's advice** as to the reason for this lack of review.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In relation to clause 78 (see page 25), the Committee seeks advice on the reason for a lack of merits review. Clause 78 is part of Subdivision A of Division 4 of Part 5, which gives the Commonwealth Minister essentially the same power as the Northern Territory Minister under Part 13 of the *Local Government Act* (NT) (with necessary and appropriate modifications) to suspend the members of a community government council. This enables the Commonwealth Minister to exercise powers under Northern Territory legislation.

I note that the *Local Government Act* (NT) currently does not provide for merits review of a decision of the Northern Territory Minister under Part 13 to suspend the members of a council. The power conferred on the Commonwealth Minister by this bill is consistent with that position. In any event, it is considered appropriate that a decision of the Commonwealth Minister under Part 13 of the *Local Government Act* (NT) should not be subject to merits review. To open such a decision to merits review would lead to uncertainty regarding the status of an affected community government council. This in turn would severely impede the capacity of the council, under the direction of the appointed external manager, to continue to perform local government functions and deliver essential services in the relevant prescribed community. In the context of the Northern Territory emergency response, this level of uncertainty and delay in implementing reform and improving governance and service delivery in prescribed communities would be unacceptable.

The Committee thanks the Minister for this response. Not withstanding the Minister's advice that this clause is consistent with the powers of the Northern Territory Minister under Part 13 of the *Local Government Act* (NT), the Committee remains concerned at the absence of merits review of the decision. The Committee is of the view that this provision may be considered to *make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference* and trusts that careful consideration will be given to the possibility of providing for merits review of the decision when the Act is reviewed in two years time.

Legislative Instruments Act—declaration
Subclause 86(6)

Subclause 86(6) declares that a requirement made under subclause 86(2), that a person give the Secretary of the Department all reasonable assistance in connection with an application for a civil penalty order, is 'not a legislative instrument.'

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that the explanatory memorandum (page 51) merely repeats the words of the subclause, and provides no further clarification regarding their meaning. The Committee **seeks the Minister's advice** whether this provision is merely declaratory in nature and, if so, whether this information could be included in the explanatory memorandum.

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

Relevant extract from the response from the Minister

> In relation to subclause 86(6) (see pages 25 to 26), the Committee seeks advice on whether the provision, in specifying that a requirement made under subclause 86(2) is not a legislative instrument, is merely declaratory in nature. The statement in subclause 86(6) that a requirement made under subclause 86(2) is not a legislative instrument is declaratory only. Section 7 of the Legislative Instruments Act and regulation 7 and item 19 of Schedule 1 to the Legislative Instruments Regulations 2004 makes clear that requirements of this kind are not legislative instruments.

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

Excluding merits review
Clause 97 and 106

Clause 97 gives to the Secretary of the Department the discretion to grant or refuse a community store licence, and clause 106 permits the Secretary to revoke an existing community store licence. The Committee notes that the explanatory memorandum (page 62) indicates that a 'decision to refuse to grant a community store licence will not be subject to internal review or to external review by the Administrative Appeals Tribunal (AAT).' The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review as such provisions may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

The Committee notes that the explanatory memorandum seeks to justify this provision on the basis that 'given the emergency response, opening the licensing process to review could unduly prolong matters before action to improve the operation of community stores could be confirmed and hence such review processes are not considered appropriate in the circumstances.'

The Committee expressed concern that a decision to revoke a community store licence because the community store does not comply with newly developed 'assessable matters' and a decision to refuse to grant a community store licence to a new applicant, who has taken into account the 'assessable matters' in their application, are treated in the same way in terms of access to merits review. The Committee considers that the first decision fits more clearly within the 'emergency response' scenario outlined in the explanatory memorandum than the second decision does.

The Committee **seeks the Minister's advice** whether a decision not to grant a licence to a new applicant should be subject to merits review, as this process will occur in full cognisance of the new 'assessable matters' and would not result in a non-compliant community store continuing to operate pending the review.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In relation to clauses 97 and 106 (see pages 26 to 27), the Committee seeks advice about whether a decision not to grant a community store licence to a new applicant should be subject to merits review. The Committee would seem to accept the rationale for not providing merits review in cases where the Secretary revokes a licence because the community store does not comply with the assessable matters.

The rationale for not extending merits review from either type of decision is the same. The overarching concern is to address long-standing concerns that some stores in Indigenous communities are poorly managed and have low quality goods sold at high prices. Given the geographical location of many community stores, the way they operate and the quality of the food that they provide are critical to the Australian Government's efforts to improve the lives of Indigenous people in the Northern Territory. Providing merits review to people who were refused the grant of a community store licence could prolong matters, as stated in the explanatory memorandum for the Northern Territory National Emergency Response Bill 2007, and could jeopardise the Government's attempts in its emergency response to address these concerns.

It is also important when considering this issue to put the decision not to grant a community store licence into its proper context as such a decision is likely to be taken only after all possible options have been examined and their feasibility exhausted in relation to the particular community store. For example, it may be that concerns about some stores could be addressed by imposing a condition on a licence to take such steps in relation to appointing an external or independent manager to improve the quality of the services delivered by the store and these conditions monitored.

The Committee thanks the Minister for this response. The Committee remains concerned at the absence of merits review of a decision not to approve a new community store licence on the basis that it would 'prolong matters'. The Committee is of the view that this argument could be made in respect to any merits review process and is not a justification for refusing such review. It is also unclear to the Committee how a review process in these circumstances could jeopardise the Government's emergency response efforts, as the application is for a **new** store and an appeal by one applicant would not necessarily preclude the issuing of a license to another applicant. The Committee remains of the view that these provisions may be considered to *make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference* and trusts that careful consideration will be given to the possibility of providing for merits review of these decisions when the Act is reviewed in two years time.

Legislative Instruments Act—Declarations and excluding merits review
Subclause 112(6)

Subclause 112(6) states that a declaration made by the Minister under subclause 112(2), as to the assets and liabilities of a community store, is 'not a legislative instrument.' The Committee notes that the explanatory memorandum (pages 67-68) advises that the Minister's powers in this regard are discretionary then goes on to re-state that the declarations made by the Minister are 'not a legislative instrument' but provides no further point of clarification.

The Committee **seeks the Minister's advice** whether a declaration under subclause 112(2), although not legislative in character, is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977*, and, if so, whether the exercise of the Minister's discretion ought not to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In relation to subclause 112(6) (see pages 27 to 28), the Committee seeks advice on whether a declaration under subclause 112(2) is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977* and, if so, whether the discretion should be subject to merits review under the AAT Act.

Subclause 112(6) clarifies that any declaration made by the Minister under subclause 112(2) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is declaratory in nature to assist the reader, as this provision is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Any declarations made under subclause 112(2) will relate to the eligible assets or the liabilities of a particular community store or the eligible assets or liabilities of the owner or operator of a particular community store. The inclusion of subclause 112(6) is consistent with paragraph 5(2)(a) of the definition of 'legislative instrument' in the Legislative Instruments Act, which clarifies that an instrument is taken to be of a legislative character if it determines the law or alters the content of the law, rather than applying the law in a particular case, as would be the case here.

The declarations would also be likely to reflect the outcome of discussions with the operator/owner of the store concerned and may also be associated with a payment of compensation to the owner/operator under clause 134. Given the nature of these discussions, we consider that it would not be appropriate to register the declarations on the Federal Register of Legislative Instruments as part of the usual requirements that applies to legislative instruments.

The Committee thanks the Minister for this response and notes the advice that a determination under subsection 112(2) is not a legislative instrument, as it applies the law to a particular case. However the Committee **seeks the Minister's further advice** in respect of the Committee's original question as to whether a declaration under subclause 112(2) is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977*, and, if so, whether the exercise of the Minister's discretion ought to be subject to merits review under the *Administrative Appeals Tribunal Act 1975***.**

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 15 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 9 of 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills to support the implementation of the Government's Northern Territory Emergency Response, this bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Veterans' Entitlements Act 1986*, the *A New Tax System (Family Assistance) Act 1999*, and the *Income Tax Assessment Act 1936*, to provide new national welfare measures aimed at helping address child neglect and encourage school attendance. The bill:

- establishes a national income management regime that requires parents on income support to ensure that their children are enrolled at, and regularly attend, school. This applies whether either or both parents receive income support and family payments. In the case of more complex family circumstances it is intended that all adults who have a recognised level of responsibility (at least 14 per cent) for the care of the child must ensure the child attends school;

- establishes an income management regime that applies in respect of people on certain welfare payments in the Northern Territory and in Cape York;

- provides for the baby bonus to be paid in 13 fortnightly instalments to claimants who are subject to the income management regime;

- progressively replaces the Community Development Employment Program in the Northern Territory with other employment services and amends procedures and guidelines relating to Work for the Dole; and

- provides that new Part 3B of the *Social Security (Administration) Act 1999*, to be inserted by this bill, and all actions or omissions in any way related to it or the income support management regime, are deemed to be 'special measures' and are excluded from the operation of Part II of the *Racial Discrimination Act 1975*

The bill also contains application provisions.

Excluding merits review
Schedule 1, item 17, paragraph 123UC(b)

Proposed new paragraph 123UC(b) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, would allow a Child Protection Officer of a state or territory to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by proposed new Part 3B of that Act. The Committee notes that the *Social Security (Administration) Act 1999* makes provision for review by the Social Security Appeals Tribunal of 'all decisions of an officer under the social security law' (with some specified exceptions). However, it is unclear to the Committee if a 'Child Protection Officer of a state or territory' would be classified as 'an officer under the social security law'.

The Committee further notes that the explanatory memorandum does not give any indication that a person subject to such a notice has any right to seek the review of the exercise of the discretion by the Child Protection Officer. The Committee **seeks the Minister's advice** whether there is any such right of review and, if there is none, whether it should be provided for.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In relation to Schedule 1 item 17 new paragraphs 123UC(b) and 123UF(1)(b) (see pages 34 to 35), the Committee seeks advice on whether there is any right of review by, respectively, a Child Protection Officer or the Queensland Commission. In the case of the child protection income management regime, a person will be able to appeal a decision of an officer under new Part 3B to an authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal. An officer for this purpose does not include a child protection officer, as the latter would not be performing duties, or exercising powers or functions, under or in relation to the social security law. A decision of an officer for appeal purposes would include decisions made by Centrelink employees as a result of the delegation to Centrelink employees of the powers of the Secretary under the social security law.

The Australian Government believes that income management provides a useful tool for State and Territory Governments who already have responsibility for child protection. In principle, the decision to issue a notice requiring income management is no different from any other decision that may be taken by a child protection officer in the interests of protecting a child. The process for review of such a decision by a child protection officer is a matter that appropriately falls within the responsibility of State and Territory Governments.

The Australian Government will work with each of the States and Territories to establish agreements guiding the operation of this tool.

The Australian Government is required to specify a State or Territory in a legislative instrument before child protection officers in that State or Territory are able to issue an effective notice to place a person in income management. This legislative instrument is subject to disallowance by the Parliament.

The Committee thanks the Minister for this response and notes the Minister's confirmation that a decision by a Child Protection Officer will **not** be subject to review under the *Social Security (Administration) Act 1999*, but instead would need to be provided for in state or territory legislation. The Committee **seeks the Minister's assurance** that, in working with each of the states and territories to establish agreements guiding the operation of these provisions, the Australian Government will seek to ensure that each state and territory makes provision for merits review of a decision by a Child Protection Officer to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime under new paragraph 123UC(b) of the *Social Security (Administration) Act 1999*.

Excluding merits review
Schedule 1, item 17

Proposed new paragraph 123UF(1)(b) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, would allow the Queensland Commission (an authority defined merely as 'a body or agency established by the law of Queensland') to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by proposed new Part 3B of that Act. The Committee notes that the *Social Security (Administration) Act 1999* makes provision for review by the Social Security Appeals Tribunal of 'all decisions of an officer under the social security law' (with some specified exceptions). However, it is unclear to the Committee if 'the Queensland Commission' would be classified as 'an officer under the social security law'.

The Committee further notes that the explanatory memorandum does not give any indication whether a person subject to such a notice has any right to seek the review of the exercise of the discretion by the Queensland Commission. The Committee **seeks the Minister's advice** whether there is any such right of review and, if there is none, whether it should be provided for.

Pending the Minister's advice the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In relation to Schedule 1 item 17 new paragraphs 123UC(b) and 123UF(1)(b) (see pages 34 to 35), the Committee seeks advice on whether there is any right of review by, respectively, a Child Protection Officer or the Queensland Commission…
>
> In the case of the Cape York Trial, a person will be able to appeal a decision of an officer under new Part 3B to an authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.
>
> An officer for this purpose does not include the Queensland Commission, as the latter would not be performing duties, or exercising powers or functions, under or in relation to the social security law. A decision of an officer for appeal purposes would

include decisions made by Centrelink employees as a result of the delegation to Centrelink employees of the powers of the Secretary under the social security law.

The Australian Government will also be seeking to ensure, in its negotiations with the Queensland Government, that affected individuals will have access to appropriate appeal mechanisms under Queensland law for decisions taken by the Queensland Commission.

The Australian Government is required to specify the Queensland Commission in a legislative instrument before the Commission is able to issue an effective notice to place a person in income management.

This legislative instrument is subject to disallowance by the Parliament. This will allow the Parliament to assure itself that arrangements for the Cape York Trial are appropriate.

The Committee thanks the Minister for this response and notes the Minister's advice that the Australian Government will be seeking to ensure, in its negotiations with the Queensland Government, that affected individuals will have access to appropriate appeal mechanisms under Queensland law for decisions taken by the Queensland Commission.

Personal rights and liberties
Schedule 1, item 17

Proposed new section 123WA of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, provides for the establishment of a 'separate notional account' within the Special Account in the names of persons subject to the income management regime established by proposed new Part 3B of that Act, also to be inserted by item 17 of Schedule 1.

Division 5 of that Act, also to be inserted by item 17 of Schedule 1, provides for deductions of between 50% and 100% to be made from the welfare payments of people subject to the income management regime, for 'deposit' in these notional accounts. The second reading speech (page 3) indicates that 'the bill makes it quite clear individuals [subject to the income management regime] will not lose any of their entitlements'. However, the Committee notes that the bill does not appear to make any reference to the payment of bank interest in respect of funds deducted and

held in an income management account. This is income that would have been available to the individual had these funds been deposited in their own bank account.

The Committee **seeks the Minister's advice** whether persons subject to the income management regime will be paid interest on their funds held in income management accounts and, if not, why not.

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

Relevant extract from the response from the Minister

In relation to Schedule 1, item 17, new section 123WA (see pages 36 to 37), the Committee seeks advice on whether people subject to income management will be paid interest on their funds held in income management accounts and, if not, why not.

The Government's intention is to ensure that welfare payments are spent on the priority needs of a person and their family - such as secure housing, food, education and clothing. Funds are being kept in an individual's income management account within a 'special account' to ensure that:

- individuals are able to keep track of their funds through access to account statements;
- there is proper accountability for the funds of each individual; and
- funds are not used by the Commonwealth for other purposes.

I can confirm that persons subject to the income management regime will not be paid interest on amounts in their income management accounts. The intention is not that an income management account be used as a bank account. The Australian Government does not expect that, in general, people would have significant funds in these accounts that otherwise might have attracted interest, though it is possible that periodically lump sums may be placed in such accounts. The intention is that people use their funds for their priority needs. Once priority needs are met, Centrelink cannot unreasonably refuse a person access to their entitlements, provided the funds will not used to purchase excluded items. The Australian Government will not be charging any fees on these accounts.

The Committee thanks the Minister for this response.

Special (Standing) Appropriation
Schedule 1, item 17

Proposed new section 123ZN of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, makes a special appropriation out of Consolidated Revenue for the amounts payable under various provisions of proposed new Part 3B of the Act. In its *Fourteenth Report of 2005*, the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum merely records the operation of the clause and does not provide any further reason for the special appropriation.

The Committee **seeks the Minister's advice** as to why this special (standing) appropriation was considered necessary and whether an explanation should have been included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to this 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 and 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

> Lastly, in relation to Schedule 1, item 17, new section 123ZN (see pages 37 to 38), the Committee seeks advice on why this special (standing) appropriation is considered necessary. Where a person is subject to income management, their funds are held in their income management account within a 'special account'. The special account exists within the Consolidated Revenue Fund and no funds may be paid

from consolidated revenue without an appropriation. It is therefore necessary that the Parliament authorise the appropriation of money from the special account for the purpose of paying people their entitlements. For this very reason it needs to be a special appropriation. This ensures that everyone subject to income management can be paid their entitlements. This might not occur if expenditure was limited as occurs for an annual appropriation. The arrangement will not result in the appropriation of any funds other than those that are necessary or incidental to paying people their entitlements within the income management framework.

Thank you for the opportunity to comment on these issues. I note also the Committee's suggestions that the relevant explanatory memoranda be amended to incorporate references to certain matters. I trust my comments to the Committee will clarify these issues on the public record.

I understand that the Minister for Finance and Administration is writing to you separately in relation to the Committee's commentary on the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007 and the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007.

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

Workplace Relations Amendment (A Stronger Safety Net) Act 2007

Introduction

The Committee dealt with the bill for this Act in the Amendments Section of *Alert Digest No. 8 of 2007*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 17 August 2007. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses the response may, nevertheless, be of interest to Senators.

Extract from the Amendments Section of Alert Digest No. 8 of 2007

On 20 June 2007 the Senate agreed to 46 amendments to the bill, one of which falls within the Committee's terms of reference.

Retrospective application
Amendment 46, item 11

Item 11 of part 1 of Schedule 7, to be inserted by Senate Amendment No. 46, provides for the 'amendments made [to the *Workplace Relations Act 1996*] by this Part [to] apply to agreements terminated after the commencement of item 31 of Schedule 3 to the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*'. That item commenced on 12 December 2006 and therefore these provisions have a retrospective application.

As a matter of practice the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth. As there is no explanatory memorandum in respect of these amendments, the Committee **seeks the Minister's advice** whether the retrospective application of these amendments will operate to the detriment of any person.

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 asked for my advice on whether the retrospective application of Senate Amendment No. 46 will operate to the detriment of any person, other than the Commonwealth.

The Bill was introduced into the Senate on 13 June 2007, passed with Senate amendments on 20 June 2007 and received the royal assent on 28 June 2007. Senate Amendment No. 46 was moved by Senator Fielding. As such, there was no Explanatory Memorandum provided by the Government in respect of this amendment. While Senator Fielding may be able to furnish the Committee with more detailed advice on this matter, my views on the impact of the Amendment may also be of some assistance.

Senator Fielding's Amendment extends the preservation period for redundancy entitlements that was originally introduced by the Government, from a maximum period of 12 months from the date an agreement is terminated to a maximum period of 24 months. The Government strongly supported Senator Fielding's Amendment.

The 24 month period applies retrospectively to all agreements terminated from 12 December 2006. This was when the existing 12 month obligation in respect of redundancy commenced. As 12 months have not lapsed in respect of any employer or employee, the Amendment's practical effect is to merely extend the period of operation of existing rights and responsibilities. As such, even though retrospective, the Amendment does not, in my view, detrimentally affect or trespass on the rights of any person covered by the *Workplace Relations Act 1996.* It serves to strengthen an existing protection for employees and I commend it to the Committee.

The Committee thanks the Minister for this response.

Robert Ray
Chair

SENATOR THE HON NICK MINCHIN

Minister for Finance and Administration
Leader of the Government in the Senate

15 AUG 2007

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

Dear Robert,

I refer to the Scrutiny of Bills Alert Digest No. 9 of 13 August 2007 concerning Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008 and Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.

I wish to advise that sub-section 9(10) of the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008 and sub-section 11(10) of Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008 are like clauses which make clear that in law written requests from Ministers to the Finance Minister seeking appropriation reductions are not legislative instruments. Such a written request is not an exercise of legislative power but is a requirement that must be met before the Finance Minister may reduce an appropriation under the section. Accordingly, the clauses are declaratory, to avoid doubt, rather than substantive clauses exempting instruments that are legislative in character. The provisions were first included in the annual appropriation Acts in the 2003-04 Additional Estimates.

Yours sincerely

Nick Minchin

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The Hon Mark Vaile MP

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

Reference: 07873-2007

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

Dear Senator Ray

Thank you for your letter dated 9 August 2007 concerning the Aviation Legislation Amendment (2007 Measures No.1) Bill 2007 in which the Committee requested advice about the following matters in the Bill:

- the determination of important matters by regulation (Schedule 1, item 14);
- the wide delegation of power (Schedule 1, item 25); and
- the incorporation of extrinsic material in regulations (Schedule 1, item 25).

Schedule 1, item 14 of the Bill inserts new section 38B into the *Aviation Transport Security Act 2004*. Section 38B allows the Governor-General to make regulations to create relatively minor offences with a maximum penalty of 50 penalty units (currently $5,500). This approach is used in Bills where it is not possible at the time of drafting to anticipate all forms of offensive conduct that will need to be prohibited or regulated and where a relatively low penalty will apply.

One application of new section 38B will be to prescribe a new offence to prohibit a person from shining a laser light from a place outside a security controlled airport into the airport. Laser technology is changing rapidly, so that more powerful laser devices are becoming more readily available to the general public for a wide range of lawful purposes. In such circumstances, where it is not possible to predict all of the circumstances in which a laser device might be used to disrupt airport operations or against an aircraft on the ground, the most flexible and responsive strategy is to prescribe offences by regulation so that the regulations can be amended quickly as soon as a new type of threat emerges. The new regulation making power will also be useful as a first line of regulatory response in dealing with new problems as they are identified. Every regulation that creates a new offence is subject to Parliamentary scrutiny and disallowance.

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Schedule 1, item 25 of the Bill amends the *Civil Aviation Act 1988* by inserting new Part IV dealing with drug and alcohol management plans and testing. The Committee expressed two concerns with item 25, namely:

- a potentially inappropriate delegation of administrative power (new subsection 37(2)); and
- the potential (by operation of existing subsection 98(3A)) for incorporating undisclosed extrinsic materials in any new regulations that relate to drug and alcohol management plans, and drug and alcohol tests.

New subsection 37(2) of the *Civil Aviation Act 1988* provides that the regulations may make provision for a person who is identified in regulations dealing with drug and alcohol management plans and testing to delegate their decision making powers to another person. This provision is necessary because the body that will collect, test and analyse samples will be determined by competitive tender and some of these functions may involve decisions of an administrative character under the regulations. In these circumstances, there may be a need to appoint delegates within the testing body to make certain administrative decisions. No such delegation can be conferred unless the regulations clearly prescribe the person or class of persons who may be appointed as a delegate, and any such regulation is subject to Parliamentary scrutiny and disallowance.

Subsection 98(3A) of the *Civil Aviation Act 1988* provides that regulations made under that Act may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any matter that is contained in a written instrument or other document as that document is in force at a particular time or from time to time. This mechanism has proven to be an effective and efficient means for legislation to incorporate relevant technical standards (such as Australian Standards) that have been developed and published by reputable and recognised bodies and organisations with special expertise. Because such an extrinsic document is always in written form, and its origin is explicitly identified in the regulations that adopt or incorporate it, the content of such a document at any given time is always ascertainable even though it is not included in the legislation. Every regulation that prescribes a standard or any other matter by reference to a document that is not part of the legislation is subject to Parliamentary scrutiny and disallowance.

Thank you for raising these matters in relation to the Bill. I trust that this information meets the needs of the Committee. The Departmental contact officer is Mr Peter Edsor, Acting Section Head, Legislation Reform, who can be contacted on 02 6274 6518.

Yours sincerely

MARK VAILE

The Hon Mal Brough MP
Minister for Families, Community Services and Indigenous Affairs
Minister Assisting the Prime Minister for Indigenous Affairs

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

Dear Senator Ray

The Scrutiny of Bills Alert Digest No. 9 of 2007 includes comment on the package of bills dealing with the government's welfare payment reform and Northern Territory national emergency response. The Committee has sought my advice on several aspects of the bills.

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

In relation to Schedule 4, item 12 (see pages 13 to 14), the Committee seeks clarification as to the nature of certain determinations in relation to the *Legislative Instruments Act 2003* (Legislative Instruments Act) and, in particular, why some are stated in the explanatory memorandum to have been exempted by the Attorney-General, while others are stated more simply not to be legislative instruments.

Proposed new subsections 70B(3) and 70E(4) provide that determinations related to certain roads under proposed new subsections 70B(2) and 70E(3) are not legislative instruments. The provisions assist the reader, as these determinations are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act. The determinations merely apply the law to a particular case (that is, to particular roads on Aboriginal land).

Proposed new subsections 70B(16) and 70E(20) provide that various determinations which impose temporary restrictions on access are not legislative instruments. The Attorney-General has granted an exemption for these determinations from the Legislative Instruments Act. The basis for these exemptions is that the determinations are only temporary in nature and will often need to take effect on very short notice, particularly where the restrictions are put in place to protect public health and safety. In these circumstances it would not be appropriate for the determinations to be subject to the Legislative Instruments Act.

In relation to paragraph 12(4)(a), clause 7 and subclause 12(6) (see pages 16 to 17), the Committee seeks advice about whether the reference to alcohol in subclause 12(6) and clause 20 is a reference to the volume of ethyl alcohol in liquor and whether this should be clearly

defined in the bill, along with a method for calculating it. My department was advised during the drafting of the bill that there is no need to define alcohol, as it is commonly understood, and defined in the Macquarie Dictionary, to mean ethyl alcohol with an established chemical formula. The issue of legal definition is separate from that of the need to provide supporting education and information materials for retailers and others who will be administering aspects of the new provisions. Such materials are currently being developed with input from peak liquor bodies and the Northern Territory Government.

On pages 19 to 20, the Committee seeks advice on whether subclause 26(4), in specifying that an accreditation of a filter under subclause 26(1) is not a legislative instrument, is declaratory or substantive in nature. This provision is declaratory in nature to assist the reader, as this provision is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

On page 21, the Committee seeks advice on whether certain determinations and notices mentioned in subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) are all administrative in character and, if so, whether they should be subject to merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act). These subclauses provide that various notices and determinations related to interests in land are not legislative instruments. These provisions assist readers as the determinations and notices are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act. The determinations deal with the application of the law in a particular case (that is, to a particular piece of land or to a particular right, title or interest).

It is not appropriate for these determinations and notices to be subject to merits review under the AAT Act. The potential for review by the Administrative Appeals Tribunal would create unacceptable delays for what are short-term emergency measures.

On pages 21 to 22, the Committee seeks advice on why subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) (effectively, 'Henry VIII clauses') were considered necessary. Subclauses 44(3), 46(3) and 58(3) allow regulations to modify parts of Northern Territory legislation. These powers are necessary to ensure that the emergency response measures related to land are not hindered by Northern Territory laws. The modifications can only be made by regulations which are disallowable. Subclause 64(1) allows regulations to modify Part 4 of Schedule 1 to the bill by removing town camp land from the Schedule. This is intended, for example, to allow certain town camps to be removed from the Schedule where a substantial part of the town camp lease has been subleased to a housing organisation or the Northern Territory Government on a long-term basis. In these circumstances, the Minister would no longer need to exercise the emergency powers of resuming or forfeiting the town camp leases and acquiring freehold and it is therefore appropriate for this town camp land to be removed from the Schedule.

Subclauses 78(4) and 81(4) form part of Division 4 of Part 5, which enables the Commonwealth Minister to exercise certain powers under Northern Territory legislation in relation to the appointment of external managers to community government councils and incorporated associations. The specific Northern Territory legislation is Part 13 of the *Local*

Government Act (NT), in relation to community government councils, and Division 2 of Part 9 of the *Associations Act* (NT), in relation to incorporated associations.

This bill makes necessary and appropriate modifications to those Northern Territory laws. Subclauses 78(4) and 81(4) allow for further modifications to be made by regulations, for example, if the Northern Territory laws are amended so that further modifications are required to clarify the operation of the Commonwealth Minister's powers.

The inclusion of these subclauses in the Bill is necessary and appropriate, in the context of the Northern Territory emergency response, because it will facilitate any further modifications to be made in a responsive and timely manner. This is essential so that reforms aimed at improving governance and service delivery in prescribed communities can be implemented without delay. The further modifications (if any) would be made by regulations, which are disallowable.

In relation to clause 63 (see pages 22 to 23), the Committee seeks advice on why this special (standing) appropriation is considered necessary. A special appropriation, as provided by clause 63, is necessary as the quantum of the payments under clauses 60 and 62 are dependent on the outcome of future events such as a Valuer-General's determination or a court finding on a reasonable amount of compensation. An annual appropriation is not suitable in these circumstances.

In relation to subclause 60(2) (see pages 23 to 24), the Committee seeks advice on its assessment that the amount of compensation payable does not follow closely the terms of paragraph 51(xxxi) of the Constitution. Subclause 60(2) has been drafted to ensure compliance with the Constitution and follows standard drafting precedent. Similar provisions are included in other Commonwealth laws including the *Customs Act 1901* and the *Commonwealth Radioactive Waste Management Act 2005*.

In relation to clause 78 (see page 25), the Committee seeks advice on the reason for a lack of merits review. Clause 78 is part of Subdivision A of Division 4 of Part 5, which gives the Commonwealth Minister essentially the same power as the Northern Territory Minister under Part 13 of the *Local Government Act* (NT) (with necessary and appropriate modifications) to suspend the members of a community government council. This enables the Commonwealth Minister to exercise powers under Northern Territory legislation.

I note that the *Local Government Act* (NT) currently does not provide for merits review of a decision of the Northern Territory Minister under Part 13 to suspend the members of a council. The power conferred on the Commonwealth Minister by this bill is consistent with that position. In any event, it is considered appropriate that a decision of the Commonwealth Minister under Part 13 of the *Local Government Act* (NT) should not be subject to merits review. To open such a decision to merits review would lead to uncertainty regarding the status of an affected community government council. This in turn would severely impede the capacity of the council, under the direction of the appointed external manager, to continue to perform local government functions and deliver essential services in the relevant prescribed community. In the context of the Northern Territory emergency response, this level of uncertainty and delay in implementing reform and improving governance and service delivery in prescribed communities would be unacceptable.

In relation to subclause 86(6) (see pages 25 to 26), the Committee seeks advice on whether the provision, in specifying that a requirement made under subclause 86(2) is not a legislative

instrument, is merely declaratory in nature. The statement in subclause 86(6) that a requirement made under subclause 86(2) is not a legislative instrument is declaratory only. Section 7 of the Legislative Instruments Act and regulation 7 and item 19 of Schedule 1 to the Legislative Instruments Regulations 2004 makes clear that requirements of this kind are not legislative instruments.

In relation to clauses 97 and 106 (see pages 26 to 27), the Committee seeks advice about whether a decision not to grant a community store licence to a new applicant should be subject to merits review. The Committee would seem to accept the rationale for not providing merits review in cases where the Secretary revokes a licence because the community store does not comply with the assessable matters.

The rationale for not extending merits review from either type of decision is the same. The overarching concern is to address long-standing concerns that some stores in Indigenous communities are poorly managed and have low quality goods sold at high prices. Given the geographical location of many community stores, the way they operate and the quality of the food that they provide are critical to the Australian Government's efforts to improve the lives of Indigenous people in the Northern Territory. Providing merits review to people who were refused the grant of a community store licence could prolong matters, as stated in the explanatory memorandum for the Northern Territory National Emergency Response Bill 2007, and could jeopardise the Government's attempts in its emergency response to address these concerns.

It is also important when considering this issue to put the decision not to grant a community store licence into its proper context as such a decision is likely to be taken only after all possible options have been examined and their feasibility exhausted in relation to the particular community store. For example, it may be that concerns about some stores could be addressed by imposing a condition on a licence to take such steps in relation to appointing an external or independent manager to improve the quality of the services delivered by the store and these conditions monitored.

In relation to subclause 112(6) (see pages 27 to 28), the Committee seeks advice on whether a declaration under subclause 112(2) is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977* and, if so, whether the discretion should be subject to merits review under the AAT Act.

Subclause 112(6) clarifies that any declaration made by the Minister under subclause 112(2) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is declaratory in nature to assist the reader, as this provision is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Any declarations made under subclause 112(2) will relate to the eligible assets or the liabilities of a particular community store or the eligible assets or liabilities of the owner or operator of a particular community store. The inclusion of subclause 112(6) is consistent with paragraph 5(2)(a) of the definition of 'legislative instrument' in the Legislative Instruments Act, which clarifies that an instrument is taken to be of a legislative character if it

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determines the law or alters the content of the law, rather than applying the law in a particular case, as would be the case here.

The declarations would also be likely to reflect the outcome of discussions with the operator/owner of the store concerned and may also be associated with a payment of

compensation to the owner/operator under clause 134. Given the nature of these discussions, we consider that it would not be appropriate to register the declarations on the Federal

Register of Legislative Instruments as part of the usual requirements that applies to legislative instruments.

Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007

In relation to Schedule 1, item 17, new paragraphs 123UC(b) and 123UF(1)(b) (see pages 34 to 35), the Committee seeks advice on whether there is any right of review by, respectively, a Child Protection Officer or the Queensland Commission. In the case of the child protection income management regime, a person will be able to appeal a decision of an officer under new Part 3B to an authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal. An officer for this purpose does not include a child protection officer, as the latter would not be performing duties, or exercising powers or functions, under or in relation to the social security law. A decision of an officer for appeal purposes would include decisions made by Centrelink employees as a result of the delegation to Centrelink employees of the powers of the Secretary under the social security law.

The Australian Government believes that income management provides a useful tool for State and Territory Governments who already have responsibility for child protection. In principle, the decision to issue a notice requiring income management is no different from any other decision that may be taken by a child protection officer in the interests of protecting a child. The process for review of such a decision by a child protection officer is a matter that appropriately falls within the responsibility of State and Territory Governments.

The Australian Government will work with each of the States and Territories to establish agreements guiding the operation of this tool.

The Australian Government is required to specify a State or Territory in a legislative instrument before child protection officers in that State or Territory are able to issue an effective notice to place a person in income management. This legislative instrument is subject to disallowance by the Parliament.

In the case of the Cape York Trial, a person will be able to appeal a decision of an officer under new Part 3B to an authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

An officer for this purpose does not include the Queensland Commission, as the latter would not be performing duties, or exercising powers or functions, under or in relation to the social security law. A decision of an officer for appeal purposes would include decisions made by Centrelink employees as a result of the delegation to Centrelink employees of the powers of the Secretary under the social security law.

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The Australian Government will also be seeking to ensure, in its negotiations with the Queensland Government, that affected individuals will have access to appropriate appeal mechanisms under Queensland law for decisions taken by the Queensland Commission.

The Australian Government is required to specify the Queensland Commission in a legislative instrument before the Commission is able to issue an effective notice to place a person in income management.

This legislative instrument is subject to disallowance by the Parliament. This will allow the Parliament to assure itself that arrangements for the Cape York Trial are appropriate.

In relation to Schedule 1, item 17, new section 123WA (see pages 36 to 37), the Committee seeks advice on whether people subject to income management will be paid interest on their funds held in income management accounts and, if not, why not.

The Government's intention is to ensure that welfare payments are spent on the priority needs of a person and their family – such as secure housing, food, education and clothing. Funds are being kept in an individual's income management account within a 'special account' to ensure that:

- individuals are able to keep track of their funds through access to account statements;
- there is proper accountability for the funds of each individual; and
- funds are not used by the Commonwealth for other purposes.

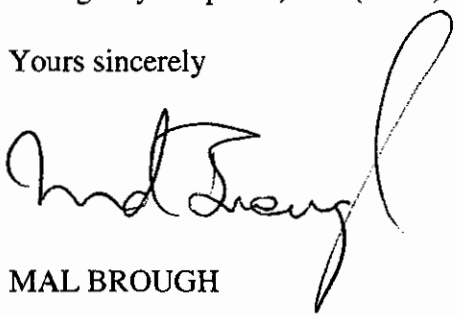
I can confirm that persons subject to the income management regime will not be paid interest on amounts in their income management accounts. The intention is not that an income management account be used as a bank account. The Australian Government does not expect that, in general, people would have significant funds in these accounts that otherwise might have attracted interest, though it is possible that periodically lump sums may be placed in such accounts. The intention is that people use their funds for their priority needs. Once priority needs are met, Centrelink cannot unreasonably refuse a person access to their entitlements, provided the funds will not used to purchase excluded items. The Australian Government will not be charging any fees on these accounts.

Lastly, in relation to Schedule 1, item 17, new section 123ZN (see pages 37 to 38), the Committee seeks advice on why this special (standing) appropriation is considered necessary. Where a person is subject to income management, their funds are held in their income management account within a 'special account'. The special account exists within the Consolidated Revenue Fund and no funds may be paid from consolidated revenue without an appropriation. It is therefore necessary that the Parliament authorise the appropriation of money from the special account for the purpose of paying people their entitlements. For this very reason it needs to be a special appropriation. This ensures that everyone subject to income management can be paid their entitlements. This might not occur if expenditure was limited as occurs for an annual appropriation. The arrangement will not result in the appropriation of any funds other than those that are necessary or incidental to paying people their entitlements within the income management framework.

Thank you for the opportunity to comment on these issues. I note also the Committee's suggestions that the relevant explanatory memoranda be amended to incorporate references to certain matters. I trust my comments to the Committee will clarify these issues on the public record.

I understand that the Minister for Finance and Administration is writing to you separately in relation to the Committee's commentary on the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007 and the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007.

Yours sincerely



MAL BROUGH

The Hon Andrew Robb AO MP
Minister for Vocational and Further Education

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

- 6 SEP 2007

Robert

Dear Senator Ray

I refer to a letter from the Secretary to your Committee to my office dated 9 August 2007 concerning certain provisions of the Higher Education Support Amendment (Extending FEE-HELP for VET Diploma and VET Advanced Diploma Courses) Bill 2007 (the Bill).

In response to the Committee's concern that proposed new clauses 12 and 38 of Schedule 1A to the Bill may be more akin to administrative decisions rather than determinations of a legislative character, I provide the following comments:

- Proposed new clause 12 provides that a notice of the Minister's decision under clause 11 to approve an application from a body corporate as a vocational education and training (VET) provider is a legislation instrument. Proposed new clause 38 provides that a notice of the Minister's decision under subclause 34(3) to revoke such an approval is a legislative instrument. Both of these determinations are legislative instruments for the purposes of section 5 of the *Legislative Instruments Act 2003*.
- Clause 12 is based on section 16-55 and clause 38 is based on section 22-35 of the *Higher Education Support Act 2003* (the Act). The purpose of item 17 of the Bill is to duplicate the regime created under the Act for higher education providers and apply that as much as possible to the VET sector. By duplicating the regime for the VET sector (as much as practicable) the Department has ensured that there is consistency between the two regimes. This is particularly important for those providers who are dual sector providers (approved in the higher education sector as well as the VET sector). It would be administratively burdensome on those providers, in particular, to have to comply with two different regimes.
- Both determinations are legislative instruments and are required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament, are subject to Parliamentary Scrutiny and to the other provisions of the *Legislative Instruments Act 2003* (for example disallowance and sunsetting). This enables the process of approving a body corporate and revoking that approval to be open, transparent and publicly accountable. It also allows either House of Parliament to move a motion to disallow the instrument, because the instrument of approval or revocation does not take effect until either it has passed through the disallowance process or at a later date specified in the instrument.
- Instruments declared to be legislative instruments are not normally made subject to merits review under the *Administrative Appeals Tribunal Act 1975*. Once again, this is consistent with the treatment of existing instruments made under sections 16-55 and 22-35 of the Act in respect of higher education providers.

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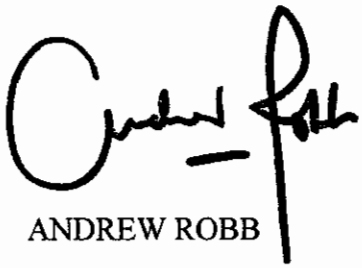
I trust this information addresses your concerns over the nature of the determinations in proposed new clauses 12 and 38 of the Bill.

Yours sincerely



ANDREW ROBB

cc: scrutiny@sen.aph.gov.au

Hon. **Joe Hockey** MP
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Minister Assisting the Prime Minister for the Public Service

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17 AUG 2007

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

Dear Senator Ray

Response to Standing Committee for the Scrutiny of Bills - Alert Digest No. 8 of 2007

Thank you for the Committee's letter of 9 August 2007 drawing my attention to comments made about the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (the Bill) in the Scrutiny of Bills Alert Digest No. 8 of 2007. The Committee has asked for my advice on whether the retrospective application of Senate Amendment No. 46 will operate to the detriment of any person, other than the Commonwealth.

The Bill was introduced into the Senate on 13 June 2007, passed with Senate amendments on 20 June 2007 and received the royal assent on 28 June 2007. Senate Amendment No. 46 was moved by Senator Fielding. As such, there was no Explanatory Memorandum provided by the Government in respect of this amendment. While Senator Fielding may be able to furnish the Committee with more detailed advice on this matter, my views on the impact of the Amendment may also be of some assistance.

Senator Fielding's Amendment extends the preservation period for redundancy entitlements that was originally introduced by the Government, from a maximum period of 12 months from the date an agreement is terminated to a maximum period of 24 months. The Government strongly supported Senator Fielding's Amendment.

The 24 month period applies retrospectively to all agreements terminated from 12 December 2006. This was when the existing 12 month obligation in respect of redundancy commenced. As 12 months have not lapsed in respect of any employer or employee, the Amendment's practical effect is to merely extend the period of operation of existing rights and responsibilities. As such, even though retrospective, the Amendment does not, in my view, detrimentally affect or trespass on the rights of any person covered by the *Workplace Relations Act 1996*. It serves to strengthen an existing protection for employees and I commend it to the Committee.

Yours sincerely