SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2007

19 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

TENTH REPORT OF 2007

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

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

Financial Framework Legislation Amendment Bill (No. 1) 2007

Higher Education Endowment Fund Bill 2007

National Market Driven Energy Efficiency Target Bill 2007

Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007

Financial Framework Legislation Amendment Bill (No. 1) 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2007*. The Minister for Finance and Administration responded to the Committee's comments in a letter dated 12 September 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2007

Introduced into the House of Representatives on 10 May 2007
Portfolio: Finance and Administration

Background

This bill amends the *Financial Management and Accountability Act 1997*, with the aim of reducing red tape in internal Australian Government administration, and makes consequential amendments to the *Auditor-General Act 1997* and the *Legislative Instruments Act 2003.*

The bill also contains application, saving and transitional provisions.

'Henry VIII' clause
Schedule 1, item 9

Proposed new subsection 32(2) of the *Financial Management and Accountability Act 1997*, to be inserted by item 9 of Schedule 1, is a 'Henry VIII' clause. 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.

Proposed new subsection 32(2) creates such a delegation of legislative power in that it would permit the Finance Minister to amend one or more of the Schedules to an Appropriation Act by legislative instrument.

Paragraphs 20 and 21 of the explanatory memorandum, which relate to proposed new section 32, do not explain why a 'Henry VIII' clause was considered necessary. The Committee **seeks the Minister's advice** as to why a 'Henry VIII' clause was considered necessary and whether this explanation 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The committee seeks my advice as to why a Henry VIII clause and why the possible retrospectivity was considered necessary. The committee also asks if the reasoning can be included in the explanatory memorandum.

In short, the answers are, first, that the current provision already operates as a Henry VIII clause, but its effect is not explicit and needs clarification and, second, the retrospectivity applies only for recognising administrative and practical matters arising from a transfer of functions, and does not apply to the substantive operation of appropriations. The following, more detailed reasoning, will be included in the explanatory memorandum, as you request.

Section 32 plays an important role in terms of dealing with appropriation issues that arise from a transfer of functions, such as from a machinery of government change occurring after a general election.

This means that section 32 already needs to operate, in effect, as a "Henry VIII" clause, as it affects the way in which agencies are required to interpret annual appropriations. However, the current provision does not deal explicitly with all of the situations that might arise in practice. In considering these issues, the Government received legal advice that confirmed a need to amend section 32 to clarify its operation.

Among matters, the new subsection 32(2) replaces a direction with a determination that is expressly described as a legislative instrument, which must be published on the Federal Register of Legislative Instruments.

Moreover, the new provision will ensure that agencies are able to assess their financial position against the actual revised schedules of Appropriation Acts, rather than needing to interpret the effect of a direction that, potentially, did not operate to change the text of the Schedules, but clearly affected their interpretation.

Accordingly, the proposed amendment gives clearer legislative authority to address a range of practical situations that can arise with a transfer of functions.

The Committee thanks the Minister for this comprehensive response and for undertaking to include this information in the explanatory memorandum.

Retrospective application
Item 9

Proposed new subsection 32(8) of the *Financial Management and Accountability Act 1997*, also to be inserted by item 9, would permit a determination under subsection (2) to be expressed to take effect before the day that it is registered under the *Legislative Instruments Act 2003*, in derogation of subsection 12(2) of that Act. The explanatory memorandum provides no explanation for why this possible retrospectivity is necessary. The Committee **seeks the Minister's advice** as to why this possible retrospectivity is considered necessary and whether this information 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 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

Regarding subsection 32(8), this provision does have scope for retrospective operation to the extent that is necessary for appropriate administrative, accounting and practical reasons that arise in the context of a transfer of functions, such as a machinery of government change.

For example, it is not uncommon for a Prime Minister to announce changes to the functions and titles of Departments of State after a general election. Those details

may, soon afterwards, be reflected in an update to the Administrative Arrangements Order (AAO). The making of an instrument under section 32 may, however, be somewhat delayed in order to allow agencies and departments to consider practical, administrative and accounting issues regarding the specific financial aspects of a change in functions.

Importantly, proposed section 32(9) makes clear that nothing in section 32(8) authorises expenditure under an appropriation that did not exist at the time of the expenditure. Accordingly, subsection 32(8) allows for situations where clarity about the date of a change in functions may require reference to a day of an announcement or a change to the AAO, but this cannot replace the need for existing appropriations only to be used by agencies when they spend public money.

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

The Committee thanks the Minister for this response.

Higher Education Endowment Fund Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2007*. The Minister for Education, Science and Training responded to the Committee's comments in a letter dated 17 September 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2007

Introduced into the House of Representatives on 16 August 2007
Portfolio: Education, Science and Training

Background

This bill establishes the Higher Education Endowment Fund (HEEF) to generate earnings for the provision of grants to higher education institutions for capital expenditure and research facilities. The bill:

- grants the Treasurer and Finance Minister (the responsible Ministers) the power to credit cash amounts (initially $5 billion) to the HEEF through a Special Account, which is also established by this bill;
- grants the Future Fund Board of Guardians statutory responsibility for managing the investments of the HEEF;
- provides for the responsible Ministers to issue directions to the Board about the performance of its investment functions and to determine rules for the maximum level of payments from the HEEF;
- expands the operations of the Future Fund Management Agency to include the operational activities associated with the investment of the HEEF;
- provides for the Education Minister to authorise grants of financial assistance to eligible higher education institutions;

- establishes the Higher Education Endowment Fund Advisory Board, to be appointed by the Minister for Education, to provide advice to the Minister on matters referred to it; and

- specifies the Future Fund Board's reporting obligations to nominated Ministers.

Legislative Instruments Act—determinations
Subclauses 13(3), 14(2), 15(4), 45(5) and 47(7)

Subclauses 13(3), 14(2), 15(4) and 45(5) each provide that a Ministerial determination or authorisation referred to elsewhere in the respective clause is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. In each case, the explanatory memorandum states that the determination or authorisation, as a Ministerial direction or authorisation, 'is not disallowable (see section 42 of the *Legislative Instruments Act 2003*) and this policy decision to exempt the instrument from the operation of the disallowance provisions has the approval of the Attorney-General.'

Similarly, subclause 47(7) provides that the Maximum Grants Rules to be made under subclause 47(1) are legislative instruments but are not subject to disallowance, and the explanatory memorandum states that the rules 'are not disallowable (see section 42 of the *Legislative Instruments Act 2003*) and this policy decision to exempt the rules from the operation of the disallowance provisions has the approval of the Attorney-General.'

The Committee notes that item 41 in the table in subsection 44(2) of the *Legislative Instruments Act 2003* provides that 'Ministerial directions to any person or body' are not subject to disallowance. The instruments referred to in subclauses 13(3) and 14(2) appear to fall within this category and the explanatory memorandum (page 9) indicates that this is the case. Given the *Legislative Instruments Act 2003* already exempts these ministerial directions from disallowance, it is unclear to the Committee why the explanatory memorandum states that 'this policy decision to exempt the instrument[s] from the operation of the disallowance provisions has the approval of the Attorney-General.' This seems to imply that the instruments may be being made exempt from disallowance for reasons other than the fact that they are ministerial directions.

The Committee **seeks the Minister's clarification** whether the instruments referred to in subclauses 13(3) and 14(2) are exempt from disallowance because they are ministerial directions and, if so, why the explanatory memorandum refers to policy decisions approved by the Attorney-General.

In relation to the remaining subclauses 15(4), 45(5) and 47(7), the Committee notes that, in each case, the explanatory memorandum refers to a 'policy decision to exempt the instrument from the operation of the disallowance provisions [which] has the approval of the Attorney-General.' 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 takes the view that Parliament is responsible for determining whether a legislative instrument should be exempt from the disallowance provisions of the *Legislative Instruments Act 2003*. Where provisions express a policy intention to exempt instruments that are legislative in character from the usual tabling and disallowance regime set out in the Legislative Instruments Act, as is the case in these subclauses, the Committee expects to see a full explanation in the explanatory memorandum justifying the need for the exemptions.

The Committee **seeks the Minister's advice** regarding the rationale for exempting each of the instruments referred to in subclauses 15(4), 45(5) and 47(7) from disallowance 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 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

Instruments referred to in subclauses 13(3) and 14(2)

Clause 13 provides for the initial credit of $5 billion to the HEEF while clause 14 provides for subsequent credits through determinations by the responsible Ministers (the Treasurer and the Minister for Finance and Administration). Subclauses 13(3) and 14(2) provide, inter alia, that these determinations are legislative instruments but are not subject to disallowance.

As these determinations merely provide a mechanism for transferring the funds required to establish the HEEF and for future transfers to the HEEF, such instruments are not appropriate to be disallowable as a matter of policy because they are "one-off" instruments made when funds are about to be transferred. This mirrors the approach taken with the analogous provisions in the *Future Fund Act 2006.*

Clauses 13 and 14 were closely based on clauses 2 and 3 of Part 2 of Schedule 1 to the *Future Fund Act 2006* and the explanatory memorandum to that Act described those analogous provisions by reference to "ministerial directions" in a form repeated in my explanatory memorandum. However, subclauses 13(3) and 14(2) do not rely on any characterisation of the determinations they relate to as "ministerial directions" to provide exemption from disallowance. The exemptions are intended to be provided by the operation of the subclauses themselves.

Instruments referred to in subclauses 15(4), 45(5) and 47(7)

As with clauses 13 and 14, clause 15 deals with crediting amounts to the HEEF - in the case of clause 15 it permits the HEEF to accept gifts of money, provided they are authorised by me under subsection 15(2). Clause 15 is based on clause 5 of Part 2 of Schedule 1 to the *Future Fund Act 2006* and the analogous instrument under that Act is also not disallowable. I believe no public policy interest would be served by allowing for the disallowance of a gift to the HEEF once it has already been made (which would be the position in most cases).

Similarly I do not believe it would be sensible policy to provide for disallowance of an instrument approving grants to particular institutions under clause 45.

The Maximum Grant Rules made by the responsible Ministers under clause 47 are analogous to the Investment Mandate made by the responsible Ministers under the *Future Fund Act 2006.* The Investment Mandate under the *Future Fund Act 2006* is a non-disallowable instrument.

As with my comments on clauses 13 and 14 the explanatory memorandum should not have referred to "ministerial directions" as the basis for the instruments under subclauses 15(4), 45(5) and 47(7) being disallowable and the explanatory memorandum could also have more fully explained the rationale for disallowance. Although the Attorney-General did give policy approval for the instruments under Clauses 13, 14, 15, 45 and 47 of the Bill to be exempt from disallowance, this was not relevant to the operation of subclauses 13(3), 14(2), 15(4), 45(5) and 47(7) and should not have been referred to in the explanation of those provisions in the explanatory memorandum.

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. The Committee remains concerned at the reference to the Attorney-General giving 'policy approval for the instruments…to be exempt from disallowance' as the Committee is not aware of the legislative basis for such approvals being provided.

Special (Standing) Appropriation
Clause 14

Clause 14 provides for the responsible Ministers to determine, in writing, that a specified amount is to be credited to the Fund Account on a specified day or in specified instalments. While this determination is a legislative instrument, it is excluded from disallowance by subclause 14 (2).

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 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

> As with the Future Fund, the Government's policy is to make transfers to the Higher Education Endowment Fund (HEEF) on an ex-post basis; i.e. out of realised surpluses or proceeds from asset sales and subject to other policy priorities. Because there are no legislated ongoing contributions to the HEEF and no mandated level for

the HEEF to reach at any point in time, it is appropriate to provide a mechanism such as clause 14 of the Bill to allow for future transfers to the HEEF at a time and at a level determined by future Budget conditions. I agree that this explanation could have usefully been included in the Explanatory Memorandum.

No limit has been forecast as to the total amount which may ultimately be transferred into the HEEF.

I trust this information addresses your concerns over the Higher Education Endowment Fund Bill 2007.

The Committee thanks the Minister for this response.

National Market Driven Energy Efficiency Target Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2007*. Senator Allison responded to the Committee's comments in a letter dated 17 September 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2007

Introduced into the Senate on 14 August 2007
By Senator Allison

Background

This bill amends the *Renewable Energy (Electricity) Act 2000* to create a market for energy savings from investment in energy efficiency activities that are in addition to actions required by current regulations. The bill sets a mandated National Market Driven Efficiency Target and provides for the creation, acquisition and trading of Energy Efficiency Certificates.

Strict liability
Schedule 1, item 3

Proposed new subsection 30ZA(2) of the *Renewable Energy (Electricity) Act 2000*, to be inserted by item 3 of Schedule 1, would impose strict criminal liability for the offence created by subsection 30ZA(1). The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill. In this instance, the Committee notes that the explanatory memorandum does not make any reference to this subsection.

The Committee **seeks the advice of the proposer of the bill** as to whether the imposition of strict liability is justified in these circumstances and, further, whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered in the framing of these offences.

Pending the Senator'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 Senator Allison

Thank you for your letter of 13 September 2007 in which you note the scrutiny committee's concern about strict liability in Schedule 1, item 3 of the National Market Driven Energy Efficiency Target Bill 2007.

It is true that strict liability, while being a concern of the Committee, is also a concern of the Australian Democrats. However in drafting the bill I was concerned to ensure that the language and construction of the bill mirrored provisions in the principle Act, the *Renewable Energy (Electricity) Act 2000.* You will recall that this Act went before the Committee in August 2000 and at that time the Committee had raised the same concern with the Minister about the imposition of strict liability. At that time the Minister wrote back setting out the reasons for the imposition of that strict liability and the Committee then made no further comment on the matter.

As proposed new subsection 30ZA(2) mirrors the drafting of section 24 of the principle Act, providing as it does for another certificate in the same administrative structure as section 24, the reasons provided by the Minister for strict liability in 2000 also apply to Schedule 1, item 3 of the National Market Driven Energy Efficiency Target Bill 2007.

I acknowledge that it would have been helpful to readers who were unaware of the additional information provided by the Minister in 2000 for those reasons to have been referred to in the explanatory memorandum.

The Committee thanks the Senator for this response.

Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2007*. The Minister for Industry, Tourism and Resources responded to the Committee's comments in a letter dated 17 September 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2007

Introduced into the Senate on 15 August 2007
Portfolio: Industry, Tourism and Resources

Background

This bill amends the *Offshore Petroleum Act 2006* to:

- make some technical corrections following the rewrite of the *Petroleum (Submerged Lands) Act 1967;*
- convert geodetic data references of area descriptions to the current Geocentric Datum of Australia references; and
- repeal section 327 of the Act, which allows the Minister to exercise his emergency powers in the 'Area to be Avoided' (offshore Victoria in the Gippsland Basin).

Possible retrospectivity
Subclause 2(1)

Items 2 to 5 in the table to subclause 2(1) of this bill provide that a number of the amendments proposed in the bill will commence immediately after the commencement of various provisions in the *Offshore Petroleum Act 2006*.

The Committee notes that the explanatory memorandum does not acknowledge the existence of any of clauses 1, 2 or 3 of this bill and, as such, no information is provided to inform the reader whether the amendments proposed in this bill are intended to be retrospective or whether the substantive provisions of the *Offshore Petroleum Act 2006* have not yet been proclaimed to commence.

The Committee **seeks the Minister's advice** whether any of the provisions of this bill are intended to apply retrospectively and, if so, whether an explanation for the retrospectivity and an assessment of its likely impact on individuals, could be included in the explanatory memorandum.

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

> The *Offshore Petroleum Act 2006* (OPA) has not yet come into force and will not prior to these amendments being passed by Parliament (and receiving Royal Assent). Accordingly, none of the provisions of the Bill will apply retrospectively and thus there is no need to include this matter in the explanatory memorandum.
>
> Further, the OPA can not be proclaimed until all the States and the Northern Territory have updated State mirror legislation. This is because the Commonwealth legislation recognises the State or Northern Territory Minister as having functions and powers under the Commonwealth Act itself, but these functions and powers are tied to what appears in the mirror State and Territory Acts.

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

Robert Ray
Chair

SENATOR THE HON NICK MINCHIN

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

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

12 SEP 2007

Dear Robert,

Thank you for the letter of 14 June 2007 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the *Financial Framework Legislation Amendment Bill (No. 1) 2007* (FFLA Bill).

In particular, there was a reference to a comment on the FFLA Bill in the Scrutiny of Bills *Alert Digest No.6 of 2007* (13 June 2007) (the Digest).

The Digest makes two primary comments on the FFLA Bill, both relating to amendments to section 32 of the *Financial Management and Accountability Act 1997* (FMA Act). The first comment relates to a clarification of section 32 as a 'Henry VIII' clause (subsection 32(2)) and the second relates to the possible retrospectivity of the new provision (subsection 32(8)).

The committee seeks my advice as to why a Henry VIII clause and why the possible retrospectivity was considered necessary. The committee also asks if the reasoning can be included in the explanatory memorandum.

In short, the answers are, first, that the current provision already operates as a Henry VIII clause, but its effect is not explicit and needs clarification and, second, the retrospectivity applies only for recognising administrative and practical matters arising from a transfer of functions, and does not apply to the substantive operation of appropriations. The following, more detailed reasoning, will be included in the explanatory memorandum, as you request.

Section 32 plays an important role in terms of dealing with appropriation issues that arise from a transfer of functions, such as from a machinery of government change occurring after a general election.

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This means that section 32 already needs to operate, in effect, as a "Henry VIII" clause, as it affects the way in which agencies are required to interpret annual appropriations. However, the current provision does not deal explicitly with all of the situations that might arise in practice. In considering these issues, the Government received legal advice that confirmed a need to amend section 32 to clarify its operation.

Among matters, the new subsection 32(2) replaces a direction with a determination that is expressly described as a legislative instrument, which must be published on the Federal Register of Legislative Instruments.

Moreover, the new provision will ensure that agencies are able to assess their financial position against the actual revised schedules of Appropriation Acts, rather than needing to interpret the effect of a direction that, potentially, did not operate to change the text of the Schedules, but clearly affected their interpretation.

Accordingly, the proposed amendment gives clearer legislative authority to address a range of practical situations that can arise with a transfer of functions.

Regarding subsection 32(8), this provision does have scope for retrospective operation to the extent that is necessary for appropriate administrative, accounting and practical reasons that arise in the context of a transfer of functions, such as a machinery of government change.

For example, it is not uncommon for a Prime Minister to announce changes to the functions and titles of Departments of State after a general election. Those details may, soon afterwards, be reflected in an update to the Administrative Arrangements Order (AAO). The making of an instrument under section 32 may, however, be somewhat delayed in order to allow agencies and departments to consider practical, administrative and accounting issues regarding the specific financial aspects of a change in functions.

Importantly, proposed section 32(9) makes clear that nothing in section 32(8) authorises expenditure under an appropriation that did not exist at the time of the expenditure. Accordingly, subsection 32(8) allows for situations where clarity about the date of a change in functions may require reference to a day of an announcement or a change to the AAO, but this cannot replace the need for existing appropriations only to be used by agencies when they spend public money.

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

Yours sincerely

Nick Minchin

The Hon Julie Bishop MP

Minister for Education, Science and Training
Minister Assisting the Prime Minister for Women's Issues

17 SEP 2007

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

Copy to: scrutiny@sen.aph.gov.au

Dear Senator Ray

Higher Education Endowment Fund Bill 2007

I refer to a letter from the Secretary to your Committee to my office dated 13 September 2007 concerning certain provisions of the Higher Education Endowment Fund Bill 2007.

Instruments referred to in subclauses 13(3) and 14(2)
Clause 13 provides for the initial credit of $5 billion to the HEEF while clause 14 provides for subsequent credits through determinations by the responsible Ministers (the Treasurer and the Minister for Finance and Administration). Subclauses 13(3) and 14(2) provide, inter alia, that these determinations are legislative instruments but are not subject to disallowance.

As these determinations merely provide a mechanism for transferring the funds required to establish the HEEF and for future transfers to the HEEF, such instruments are not appropriate to be disallowable as a matter of policy because they are "one-off" instruments made when funds are about to be transferred. This mirrors the approach taken with the analogous provisions in the *Future Fund Act 2006*.

Clauses 13 and 14 were closely based on clauses 2 and 3 of Part 2 of Schedule 1 to the *Future Fund Act 2006* and the explanatory memorandum to that Act described those analogous provisions by reference to "ministerial directions" in a form repeated in my explanatory memorandum. However, subclauses 13(3) and 14(2) do not rely on any characterisation of the determinations they relate to as "ministerial directions" to provide exemption from disallowance. The exemptions are intended to be provided by the operation of the subclauses themselves.

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Instruments referred to in subclauses 15(4), 45(5) and 47(7)

As with clauses 13 and 14, clause 15 deals with crediting amounts to the HEEF – in the case of clause 15 it permits the HEEF to accept gifts of money, provided they are authorised by me under subsection 15(2). Clause 15 is based on clause 5 of Part 2 of Schedule 1 to the *Future Fund Act 2006* and the analogous instrument under that Act is also not disallowable. I believe no public policy interest would be served by allowing for the disallowance of a gift to the HEEF once it has already been made (which would be the position in most cases).

Similarly I do not believe it would be sensible policy to provide for disallowance of an instrument approving grants to particular institutions under clause 45.

The Maximum Grant Rules made by the responsible Ministers under clause 47 are analogous to the Investment Mandate made by the responsible Ministers under the *Future Fund Act 2006*. The Investment Mandate under the *Future Fund Act 2006* is a non-disallowable instrument.

As with my comments on clauses 13 and 14 the explanatory memorandum should not have referred to "ministerial directions" as the basis for the instruments under subclauses 15(4), 45(5) and 47(7) being disallowable and the explanatory memorandum could also have more fully explained the rationale for disallowance. Although the Attorney-General did give policy approval for the instruments under Clauses 13, 14, 15, 45 and 47 of the Bill to be exempt from disallowance, this was not relevant to the operation of subclauses 13(3), 14(2), 15(4), 45(5) and 47(7) and should not have been referred to in the explanation of those provisions in the explanatory memorandum.

Standing Appropriation (Clause 14)

As with the Future Fund, the Government's policy is to make transfers to the Higher Education Endowment Fund (HEEF) on an ex-post basis; i.e. out of realised surpluses or proceeds from asset sales and subject to other policy priorities. Because there are no legislated ongoing contributions to the HEEF and no mandated level for the HEEF to reach at any point in time, it is appropriate to provide a mechanism such as clause 14 of the Bill to allow for future transfers to the HEEF at a time and at a level determined by future Budget conditions. I agree that this explanation could have usefully been included in the Explanatory Memorandum.

No limit has been forecast as to the total amount which may ultimately be transferred into the HEEF.

I trust this information addresses your concerns over the Higher Education Endowment Fund Bill 2007.

Yours sincerely

JULIE BISHOP

PARLIAMENT OF AUSTRALIA - **THE SENATE**

SENATOR LYN ALLISON
Leader of the
Australian Democrats
Senator for Victoria

17 September 2007

Chair
Scrutiny of Bills Committee
SG.49

Dear Senator Ray

National Market Driven Energy Efficiency Target Bill 2007

Thank you for your letter of 13 September 2007 in which you note the scrutiny committee's concern about strict liability in Schedule 1, item 3 of the National Market Driven Energy Efficiency Target Bill 2007.

It is true that strict liability, while being a concern of the Committee, is also a concern of the Australian Democrats. However in drafting the bill I was concerned to ensure that the language and construction of the bill mirrored provisions in the principle Act, the *Renewable Energy (Electricity) Act 2000.* You will recall that this Act went before the Committee in August 2000 and at that time the Committee had raised the same concern with the Minister about the imposition of strict liability. At that time the Minister wrote back setting out the reasons for the imposition of that strict liability and the Committee then made no further comment on the matter.

As proposed new subsection 30ZA(2) mirrors the drafting of section 24 of the principle Act, providing as it does for another certificate in the same administrative structure as section 24, the reasons provided by the Minister for strict liability in 2000 also apply to Schedule 1, item 3 of the National Market Driven Energy Efficiency Target Bill 2007.

I acknowledge that it would have been helpful to readers who were unaware of the additional information provided by the Minister in 2000 for those reasons to have been referred to in the explanatory memorandum.

Senator Lyn Allison
Senator for Victoria

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

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17 SEP 2007

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

Dear Senator Ray

I refer to the issue of the potential retrospective application of the Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2007 ('the Bill') raised by your Committee in the Scrutiny of Bills Alert Digest No. 11 of 2007 (12 September 2007).

The *Offshore Petroleum Act 2006* (OPA) has not yet come into force and will not prior to these amendments being passed by Parliament (and receiving Royal Assent). Accordingly, none of the provisions of the Bill will apply retrospectively and thus there is no need to include this matter in the explanatory memorandum.

Further, the OPA can not be proclaimed until all the States and the Northern Territory have updated State mirror legislation. This is because the Commonwealth legislation recognises the State or Northern Territory Minister as having functions and powers under the Commonwealth Act itself, but these functions and powers are tied to what appears in the mirror State and Territory Acts.

Yours sincerely

Ian Macfarlane

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