
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## SIXTH REPORT

## OF

## 2008

## 25 June 2008

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### MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)
Senator M Bishop (Deputy Chair)
Senator J Collins
Senator A McEwen
Senator A Murray
Senator the Hon J Troeth

### 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

## SIXTH REPORT OF 2008

The Committee presents its Sixth Report of 2008 to the Senate.

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

*Australian Crime Commission Amendment Act 2007*

Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008

Dental Benefits Bill 2008

Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008

National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008

Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008

# *Australian Crime Commission Amendment Act 2007*

## *Introduction*

The Committee dealt with this Act in *Alert Digest No. 3 of 2008*. The Minister for Home Affairs responded to the Committee's comments in a letter dated 19 June 2008. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses and received Royal Assent on 28 September 2007 the response may, nevertheless, be of interest to Senators.

## *Extract from Alert Digest No. 3 of 2008*

At its meeting of 19 September 2007, the Committee noted that it had not yet been able to consider this bill, which had been introduced into and passed by, the Senate on 18 September 2007. The bill was subsequently passed by the House of Representatives on 20 September 2007.

The Parliament was prorogued on 15 October 2007, prior to the Committee's next meeting and, as such, the Committee did not get the opportunity to consider this bill at all during the 41st Parliament. As the Committee normally comments on every bill introduced into the Parliament, the following comments in relation to this bill are provided for the information of Senators, notwithstanding that the bill has already become an Act.

### Background

This bill amends the *Australian Crime Commission Act 2002* (ACC) to clarify that an Australian Crime Commission examiner can record their reasons for issuing a summons or notice to produce before, at the same time as, or as soon as practicable after, the summons or notice has been issued.

The bill also provides that:

- summonses or notices issued after the commencement of the ACC Act, but prior to the commencement of this bill, are not invalid merely because reasons were recorded subsequent to their issue;

- a summons or notice will not be invalid merely because it fails to comply with technical requirements in the Act; and

- a witness may appear before an examiner, or produce documents to an examiner, who may not be the same examiner who issued the summons or notice to produce.

These amendments were developed in response to findings made by Justice Smith of the Victorian Supreme Court in *ACC v Brereton* [2007] BSC 297, which was handed down on 23 August 2007. Justice Smith held that for a summons to be valid, reasons for issuing the summons must have been recorded prior to the time it was actually issued.

## Trespass on personal rights and liberties
## Schedule 1, items 5 and 8

Proposed new paragraphs 28(8)(a) and 29(5)(a) of the *Australian Crime Commission Act 2002*, to be added by items 5 and 8 respectively of Schedule 1, provide that a failure to comply with either of proposed new subsections 28(1A) or 29(1A) of the Act 'does not affect the validity of' a summons under subsection 28(1) or a notice under subsection 29(1) respectively, insofar as those subsections relate to the making of a record.

It appears that if an examiner issues a summons under section 28 or a notice under section 29, the effect of these amendments is that the summons or notice is still valid, even though the examiner never made a record of the reasons for issuing the summons or notice. If this interpretation is correct, these proposed new paragraphs would go much further than merely limiting the effect of the decision in *ACC v Brereton*, and would render ineffective the second sentence of both subsection 28(1A) and 29(1A), which provide that an examiner must record in writing the reasons for the issue of a summons or notice.

The Committee **seeks the Minister's advice** whether that is the intended effect of these proposed amendments and, if so, whether they trespass *unduly* on personal rights and liberties.

*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*

I refer to your letter of 15 May 2008 in which you seek, on behalf of the Senate Standing Committee for the Scrutiny of Bills, my advice in relation to the intended effect of items 5 and 8 of Schedule 1 of the *Australian Crime Commission Amendment Act 2007* (the ACC Amendment Act).

In particular, you seek my advice as to whether the view put forth by the Committee (in pages 9 and 10 of the Alert Digest) regarding the effect of the validation clauses contained in items 5 and 8 is that which was intended by the Government.

Items 5 and 8 added new paragraphs 28(8)(a) and 29(5)(a), respectively, to the *Australian Crime Commission Act 2002* (ACC Act), to provide that a failure to comply with amended subsections 28(1A) (in relation to summons) and 29(1A) (in relation to notices) does not affect the validity of the summons or notice, insofar as those subsections relate to the making of a record of reasons for issuing the summons or notice.

The Committee has suggested that the effect of the amendments in items 5 and 8 is to render any summons or notice issued under subsections 28(1) and 29(1) of the ACC Act valid, even in circumstances where an examiner never makes a record of reasons for issuing the summons or notice. Further, the Committee comments that if this interpretation is correct, the new paragraphs would do more than limit the impact of Justice Smith's findings in *ACC v Brereton*, but rather, would render ineffective the second sentence of both subsections 28(1A) and 29(1A), which provide that an examiner must record in writing the reasons for issuing the summons or notice.

As the Committee is aware, the Australian Crime Commission Amendment Bill 2007 (the Bill) was introduced as an urgent Bill by the previous Coalition Government and passed in the Senate on 18 September 2007. The Bill was subsequently passed two days later by the House of Representatives.

When in Opposition, the Australian Labor Party supported the amendments, on the understanding that the operational requirements of the Australian Crime Commission (ACC) sometimes necessitate the issuing of a summons or notice prior to the recording of reasons, and that the amendments would remove the risk, arising from findings made in *ACC v Brereton*, to a significant number of prosecutions and other litigation before the courts at the time.

That support for the Bill was given with the qualification that the amendments should not mask unreasonable and unacceptable practices by the ACC. Among other matters, we expressed the same concern now identified by the Committee that items 5 and 8 might effectively nullify the obligation for the examiner to be satisfied that it is reasonable in all the circumstances to issue the summons or notice before doing so. We insisted that the operation of the amendments, once enacted, should be subject to close Parliamentary scrutiny.

The Committee would be aware that the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) is currently conducting an inquiry into the ACC Amendment Act. A number of submissions to the PJC-ACC have also queried the operation of the amendments, insofar as they provide that a failure to comply with the requirement to record reasons does not render a summons or notice invalid. The Government will await the findings of the PJC-ACC, and then decide how to proceed in relation to this and other issues.

I would be pleased to provide further advice on the question of whether the amendments referred to above trespass unduly on personal rights and liberties, following the PJC-ACC's final report, taking into account any issues highlighted by its inquiry, and any recommendations of that Committee.

The Committee thanks the Minister for this response, and for the commitment to consider this matter further following the outcomes of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) inquiry into this Act. The Committee will ensure that the PJC-ACC is aware of our concerns in respect of this matter.

# Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 19 June 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 3 of 2008*

Introduced into the House of Representatives on 20 March 2008
Portfolio: Infrastructure, Transport, Regional Development and Local Government

### Background

This bill amends the *Civil Aviation (Carriers' Liability) Act 1959*, the *Air Accidents (Commonwealth Government Liability) Act 1963* and the *Civil Aviation Act 1988* to give effect to the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. This will allow Australia to accede to the 1999 Convention.

The bill:

- inserts a definition of 'family member' into the *Civil Aviation (Carriers' Liability) Act 1959*, which will expand the categories of family members of a passenger killed in an air incident who are eligible to bring an action against a carrier;
- allows regulations to be made to: include other groups of people in the proposed definition of 'family member'; increase insurance levels for air carriers; and increase the liability limits for Australian international carriers; and
- enables the Minister to give notice in the *Gazette* of a variety of matters relevant to the new Part relating to the Montreal Convention.

The bill also contains technical provisions.

**Uncertainty of commencement**
**Schedules 1 and 2**

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedules 1 and 2 will commence on Proclamation, and further provides that commencement must not occur prior to the 1999 Montreal Convention entering into force for Australia, but must occur within 6 months after that Convention enters into force for Australia. The Committee notes that this item is clearly premised on the fact that this Convention will at some stage enter into force for Australia, but there is no certainty that it will do so at any particular time.

The Committee has for some time been concerned that measures may be passed by the Parliament and the first few sections then commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence. The Committee **seeks the Minister's advice** whether item 2 might also provide that, if the Convention does not enter into force for Australia within some fixed period after assent, this bill will never commence, thus providing some certainty.

*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*

> I have noted the concerns of the Committee in relation to the commencement provisions of the Bill. However, I believe it is not appropriate to amend the Bill so that it would effectively expire if the 1999 Montreal Convention (the Convention) does not enter into force for Australia by a specified date.
>
> In many instances, legislation is required to be passed by Parliament before Australia can become a party to a treaty. It is sometimes the case that Australia will become a party to a treaty which will not enter into force until a specified number of States have become parties to it. Unfortunately, this means that it is not always possible to predict with any certainty when a treaty may enter into force. As a result, where the commencement of a Bill is contingent on the entry into force of a treaty, it may be some years before the operative provisions of the particular Bill commence.

As a general comment, providing that a Bill will never commence if a treaty does not enter into force for Australia within a fixed period after assent may be problematic. If a treaty to which Australia was a party entered into force, and the legislation that was intended to implement the treaty in Australia had expired, then Australia could be in breach of its international obligations. It is therefore necessary for the commencement provisions of Bills implementing international treaties to be flexible.

In this instance, however, the Convention has already entered into force generally. Article 53(7) of the Convention provides that it shall enter into force for acceding States sixty days after the date of deposit of the instrument of accession. It is accordingly unlikely that there will be an inordinate time lapse between assent to the Bill and the commencement of its operative provisions, following Australia's accession to the Convention.

The Government is committed to promptly bringing the Convention into force for Australia. This will be achieved by progressing the matter through the Federal Executive Council and lodging the instrument of accession with the International Civil Aviation Organisation without delay. The Government would be happy to place this commitment on the public record during the debate of the Bill, if this were to ease Members' concerns.

The Committee thanks the Minister for this response. The Committee notes that it would have been helpful if a summary of this advice had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

## Legislative Instruments Act - declarations
## Schedule 1, item 3

Proposed new subsection 9K(3) of the *Civil Aviation (Carriers' Liability) Act 1959*, to be inserted by item 3 of Schedule 1, provides that a notice made under proposed new subsection 9K(1) is not a legislative instrument. As outlined in Drafting Direction No. 3.8, 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.*

The Committee notes that, in this instance, the explanatory memorandum makes no mention of the proposed new subsection, let alone indicating whether it is purely declaratory or not. 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*

> Finally, I note the Committee's query about the status of the notices which may be issued under section 9K(l) of the Bill. Section 9K(3) of the Bill, which advises that such notices are not legislative instruments, is declaratory of the law. It is intended merely to assist readers of the *Civil Aviation (Carriers' Liability) Act 1959.*
>
> Thank you for raising these matters.

The Committee thanks the Minister for this response. The Committee notes that it would have been helpful if this information had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

# Dental Benefits Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 23 June 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 4 of 2008*

Introduced into the House of Representatives on 29 May 2008
Portfolio: Health and Ageing

### Background

Introduced with the Dental Benefits (Consequential Amendments) Bill 2008, this bill establishes a legislative framework for the payment of dental benefits under a new government program known as the Teen Dental Plan. The bill:

- establishes an entitlement to dental benefits and provides for the payment of such benefits;
- provides a framework for the issuing of vouchers;
- provides for the protection (and, where authorised, the disclosure) of protected information;
- creates general offence provisions relating to assignment of benefit agreements and the giving of false or misleading information;
- allows the Minister to make Dental Benefits Rules through a legislative instrument; and
- appropriates the Consolidated Revenue Fund to pay for amounts of dental benefits payable under the Act.

**Strict liability**
**Subclauses 48(2), 49(2), 50(2) and 51(2)**

Subclauses 48(2), 49(2), 50(2) and 51(2) create offences of strict liability. 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.

The Committee notes that the explanatory memorandum to this bill (pages 19-20) seeks to justify each of these provisions by asserting that, apart from some minor changes that were made 'to reflect current criminal law policy', the provisions are consistent with the existing strict liability offences in the *Health Insurance Act 1973* relating to offences in relation to Medicare benefits. The Committee **seeks the Minister's advice** whether the 'current criminal law policy' which is referred to is that set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, and, if so, whether the explanatory memorandum might have made that fact clear.

*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*

As indicated on pages 18-22 of the Explanatory Memorandum, proposed sections 48-51 of the Bill have been cast as strict liability offences because these provisions are modelled on existing strict liability offences in the *Health Insurance Act 1973*.

The offences in the Bill are aligned with current *Health Insurance Act 1973* offences, to the extent possible, to ensure consistent treatment of practitioners and patients under the proposed dental benefit arrangements and the current Medicare benefit arrangements, particularly in terms of the regulation of their billing and claiming conduct.

The references to 'current criminal law policy' appearing in the Explanatory Memorandum are intended to be references to the current criminal law policy set out in the document entitled *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.* This fact could have been noted in the Explanatory Memorandum.

The Committee thanks the Minister for this response, and notes the acknowledgement that the information could have been included in the explanatory memorandum.

**Incorporation of extrinsic material**
**Subclause 60(3)**

Subclause 60(3) would permit the Dental Benefits Rules – which the Minister is to make by legislative instrument – to apply, adopt or incorporate, with or without modification, any matter contained in any other instrument as in force from time to time, in derogation of subsection 14(2) of the *Legislative Instruments Act 2003*. The Committee routinely draws attention to provisions that seek to incorporate into delegated legislation material 'as in force from time to time' where that incorporation involves material that appears not to be subject to sufficient parliamentary scrutiny.

The Committee notes that the explanatory memorandum (page 27) seeks to justify the incorporation of extrinsic material as in force from time to time on the basis that it 'may be of assistance, for example, if the Dental Benefits Rules should refer to instruments made under State or Territory Acts, or other documents, relating to registration, licensing or accreditation, when specifying a class of persons to be dental providers for the purpose of paragraph 6(1)(b)' of the bill. The Committee notes, however, that the bill does not place any limits on the extrinsic material that may be applied, adopted or incorporated. That is, it does not limit it to the sorts of material cited in the example.

As such, the Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister's advice** as to whether there might not be some limit put upon the exercise of this power.

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

## *Relevant extract from the response from the Minister*

Subclause 60(3) provides:

'The Dental Benefits Rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing:

a) as in force or existing at a particular time; or
b) as in force or existing from time to time.'

As indicated on pages 26 and 27 of the Explanatory Memorandum, proposed subsection 60(3) would allow the Dental Benefits Rules to make an 'ambulatory' reference to an instrument which is not a legislative instrument, that is, a reference which includes amendments to the instrument that are made from time to time.

An example is provided on page 27 of the Explanatory Memorandum which relates to specifying a class of persons to be 'dental providers' for the purpose of paragraph 6(1)(b) of the proposed *Dental Benefits Act 2008*, by reference to instruments made under State or Territory Acts, or other instruments, relating to registration, licensing or accreditation.

If it is possible to avoid an 'ambulatory' reference to a non-legislative instrument, then this approach would be adopted. It is anticipated, however, that due to the targeted nature of the Dental Benefits Schedule, at times, it will be necessary for the Dental Benefits Rules to make an ambulatory reference to an instrument which is not a legislative instrument. The situations where this need might arise are not confined to Dental Benefits Rules made for the purpose of specifying a class of persons to be 'dental providers'. For example, patient eligibility for a dental benefit may be dependent on a person or family receiving a pension, benefit or allowance under another government program. These programs may not be completely described in legislative instruments.

In cases where the Dental Benefits Rules refer to a document which is not itself a legislative instrument, in accordance with the *Legislative Instruments Act 2003*, the Explanatory Statement to the Dental Benefits Rules will contain a description of the document, the purpose of the reference, and indicate how the document (including any future amendments) may be obtained.

The Dental Benefits Rules would itself be a legislative instrument which is required to be tabled in Parliament and subject to disallowance. The power to make Dental Benefits Rules is not exercisable by a departmental delegate. Any situation where I consider it necessary to make an ambulatory reference to a non-legislative instrument in the Dental Benefits Rules will be subject to parliamentary scrutiny on a case-by-case basis when the ambulatory reference is placed in the Dental Benefits Rules. In addition, an updated reference to a document would usually appear before Parliament again for scrutiny when the Dental Benefits Rules are changed, since the usual practice is, when changing a legislative instrument, to re-make the whole of the Rules to keep them in consolidated form.

In light of the above, I am of the view that subclause 60(3) should not be limited to the circumstances described in the example provided in the Explanatory Memorandum, or otherwise limited.

I appreciate the opportunity to address the Committee's comments on the Bill.

The Committee thanks the Minister for this comprehensive response, which addresses its concerns. The Committee notes that it would have been helpful if a summary of this advice had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

# Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Minister for Education responded to the Committee's comments in a letter dated 18 June 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 4 of 2008*

Introduced into the House of Representatives on 29 May 2008
Portfolio: Education, Employment and Workplace Relations

### Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to give effect to a number of government commitments. The bill:

- increases, from 1 July 2008, the percentage of allowable out-of-pocket child care expenses that an individual can be paid per income year as a child care tax rebate (CCTR), from 30 per cent to 50 per cent;
- increases the annual CCTR limit for a child from $4,354 to $7,500, commencing 2008-09;
- allows the CCTR to be paid quarterly in certain circumstances;
- clarifies the nature of family assistance amounts that can be set off against debts and provides that child care benefit (CCB) amounts, which are currently available only for recovery of CCB debts, are also available for recovery of CCTR debts;
- establishes a civil penalties scheme which will regulate approved child care services and former approved child care services, with the aim of ensuring that they comply with a range of obligations under the family assistance law; and

- expands the purposes for which authorised officers may enter premises of approved child care services.

The bill also contains application and transitional provisions.

**Strict liability**
**Schedule 4, item 33**

Proposed new subsection 219F(2B) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 33 of Schedule 4, creates an offence of strict liability. 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 which accompanies the bill.

In this case, the Committee notes that the explanatory memorandum (page 50) merely states that this new subsection 'ensures that the offence [created by subsection 219F(2A)] is one of strict liability.' There is no indication as to why it is considered necessary for the offence to be one of strict liability. Nor does the explanatory memorandum provide advice on whether the imposition of strict liability in this case is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and whether the *Guide* was taken into account in framing this provision.

*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 response to the Committee's concern that the imposition of strict liability is not adequately justified in relation to items 33 and 45 of Schedule 4 to the Bill and whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was taken into account in framing these provisions, I provide the following comments:

- in relation to item 33, this provides for a new offence which extends the time period during which approved child care services must keep records. Services are already obliged under section 219F of the *A New Tax System (Family Assistance Administration) Act 1999* to keep records during the period of care, and failure to do so is an offence of strict liability. Under the proposed new offence at item 33 services will also be required to keep records for at least 36 months after the end of the year in which care was provided or until a time ordered by a court during civil or criminal proceedings. For the purposes of consistency with the current offence provision this extension of the obligation should remain one of strict liability;…

- the *Guide* was taken into account in framing all new provisions under the revised compliance scheme under Schedule 4 including the new offences in items 33 and 45; and

- the provisions relating to the new compliance scheme, including items 33 and 45, were drafted in consultation with officers of the Criminal Law Branch of the Attorney-General's Department, and were approved by the Minister for Home Affairs.

The Committee thanks the Minister for this response. The Committee notes that it would have been helpful if this information had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

**Strict liability**
**Schedule 4, item 45**

Proposed new subsection 219J(4) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 45 of Schedule 4, creates an offence of strict liability. 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 which accompanies the bill.

The Committee notes that, in respect of this provision, the explanatory memorandum (page 50) makes no reference to the fact that the provision creates an offence of strict liability. Consequently, there is no indication of why it is considered necessary for the offence to be one of strict liability, nor whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the course of framing this offence.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and whether the *Guide* was taken into account in framing this provision.

*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 item 45, the proposed new subsection 219J(3) imposes an obligation on former authorised officers to return their identity cards when they cease to be an authorised officer. It is reasonable to provide that failure to do so is an offence of strict liability due to the sensitive nature of the role of authorised officers in monitoring approved child care providers' compliance, and in the context of the broader entry powers which this Bill provides under proposed new section 291K in Schedule 4. The offence is designed to place current and former authorised officers on notice to guard against breach, due to the foreseeable risk of fraudulent use of any card which has not been returned. I contend that these are legitimate grounds for penalising persons who may otherwise lack 'fault' or a deliberate intention to contravene the law. I also draw the Committee's attention to proposed subsection 219J(4) which makes clear that the offence does not apply if the identity card was lost or destroyed, and to the fact that the defence of honest or reasonable mistake of fact may always be raised if relevant;

- the *Guide* was taken into account in framing all new provisions under the revised compliance scheme under Schedule 4 including the new offences in items 33 and 45; and

- the provisions relating to the new compliance scheme, including items 33 and 45, were drafted in consultation with officers of the Criminal Law Branch of the Attorney-General's Department, and were approved by the Minister for Home Affairs.

The Committee thanks the Minister for this response. The Committee notes that it would have been helpful if this information had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

**Retrospective application**
**Schedule 5, item 28**

In part 2 of Schedule 5, item 28 provides that the amendment made by item 3 of that Schedule applies to care provided by an approved child care service on or after 1 July 2006. 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.

In this instance, the Committee notes that the explanatory memorandum does not indicate whether the amendment made by item 3 is beneficial or adverse to recipients of child care services and, therefore, **seeks the Minister's advice** whether this retrospective application will adversely affect any individual.

*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 response to the Committee's concern as to whether the retrospective application of the amendment made by item 3 of Schedule 5 to the Bill will adversely affect any individual, I provide the following additional comments:

- this amendment will not adversely affect any individual because it validates the Child Care Tax Rebate (CCTR) entitlement amounts already determined for the 2006-2007 income year and does not alter in any way the determined amounts;

- item 28 of Schedule 5 to the Bill provides that the amendment made by item 3 applies to care provided by an approved child care service on or after 1 July 2006. Item 3 corrects a drafting error in section 84A of the *A New Tax System*

*(Family Assistance) Act 1999* (Family Assistance Act) by inserting a reference to section 65EC of the *A New Tax System (Family Assistance) (Administration) Act 1999*;

- sections 65EA, 65EB and 65EC of the *A New Tax System (Family Assistance) (Administration) Act 1999*, which provide for the making of determinations of CCTR entitlement for an individual for an income year, require the Secretary to determine the amount of the rebate to which the individual is entitled for the income year under any of these determinations. The provisions relevant to the calculation of the amount of the rebate are included in Division 4A of the Family Assistance Act (sections 84A - 84F); however, as a result of a drafting error, section 84A, which provides a method for calculation of the rebate, refers only to entitlement determinations under section 65EA or 65EB and fails to make a reference to a determination of entitlement under section 65EC; and

- as a matter of administration, the method of calculation of the rebate specified in Division 4A of the Family Assistance Act has been applied for the purpose of determining the CCTR entitlement amount under section 65EC for the 2006-2007 income year (the first year for which CCTR applies). The retrospective amendment to section 84A of the Family Assistance Act, correcting the drafting error, validates the CCTR entitlement amounts already determined under section 65EC and does not alter in any way the determined amounts.

I trust this information addresses the Committee's concerns regarding the Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008.

The Committee thanks the Minister for this comprehensive response. The Committee notes that it would have been helpful if a summary of this advice had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

# National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 4 of 2008*. The Assistant Treasurer responded to the Committee's comments in a letter dated 23 June 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 4 of 2008*

Introduced into the House of Representatives on 29 May 2008
Portfolio: Treasury

### Background

Introduced with the National Fuelwatch (Empowering Consumers) Bill 2008, this bill makes amendments to the *Trade Practices Act 1974* (TPA) consequential to the implementation of a National Fuelwatch scheme. The bill:

- allows the Australian Consumer and Competition Commission (ACCC) to delegate to a member of the ACCC any of its powers under the National Fuelwatch (Empowering Consumers) Bill 2008;
- enables the Minister to give a direction to the ACCC connected with the performance of its functions or the exercise of its powers under the National Fuelwatch (Empowering Consumers) Bill 2008;
- provides for the ACCC to seek and execute a search warrant in relation to suspected contraventions of the National Fuelwatch (Empowering Consumers) Bill 2008;
- enables the ACCC to require a person to provide information or documents, or answer any question put to the person it has reason to believe they are capable of providing in relation to a contravention of the National Fuelwatch (Empowering Consumers) Bill 2008; and

- provides for the protection of information obtained by the ACCC in the course of administering and enforcing the National Fuelwatch (Empowering Consumers) Bill 2008 against unauthorised disclosure.

## Abrogation of the privilege against self-incrimination
## Schedule 1, item 6

Section 155 of the *Trade Practices Act 1974* enables the ACCC to require a person to provide information, produce documents, or appear before the ACCC in relation to a suspected contravention of the Trade Practices Act, or other Acts, as listed in subsection 155(1). Item 6 of Schedule 1 of this bill provides that a reference to 'the *National Fuelwatch (Empowering Consumers) Act 2008* be inserted into subsection 155(1) of the *Trade Practices Act 1974.* Subsection 155(7) of the Trade Practices Act, provides that 'a person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person…'

The effect of this amendment is, therefore, to abrogate the privilege against self–incrimination for a person required to provide information under subsection 155(1) of the Trade Practices Act, in relation to a suspected contravention of the National Fuelwatch (Empowering Consumers) Bill 2008. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, the Committee notes that subsection 155(7) of the *Trade Practices Act 1974* limits the circumstances in which information so provided is admissible in evidence in proceedings against an affected person or body corporate. However, that limitation applies only to information directly supplied by the person, and not to information gained indirectly from the statement or document provided by the person. The immunity is, in other words, only a 'use immunity' and not a 'derivative use immunity'.

The Committee notes that the explanatory memorandum does not provide any information on why the bill provides only a 'use immunity' and not a 'derivative use immunity' in respect of information or documents required to be furnished under these provisions. The Committee **seeks the Treasurer's advice** as to the reasons why use immunity, rather than both use and derivative use immunity, applies in these circumstances.

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

## *Relevant extract from the response from the Assistant Treasurer*

The Consequential Amendments Bill amends section 155 of the *Trade Practices Act 1974* (TPA) to refer explicitly to the *National Fuelwatch (Empowering Consumers) Act 2008* (the Act). As outlined by the Committee, an effect of this amendment is to abrogate the privilege against self-incrimination for a person required to provide information to the Australian Competition and Consumer Commission (ACCC) in relation to a suspected contravention of the Act.

I note that the Committee expressed concern that the amendment provides 'use immunity' for affected persons, and not 'derivative use immunity', in respect of information or documents required to be furnished to the ACCC under the Act. The Committee has sought advice as to the reason why only the 'use immunity' applies in these circumstances.

As the Committee would be aware, the ACCC will be responsible for the implementation and administration of the National Fuelwatch Scheme under the Act. The purpose of the amendment to section 155 of the TPA is to provide the ACCC with appropriate powers of investigation to carry out effectively its compliance and enforcement activities under the National Fuelwatch Scheme.

This amendment will ensure consistency with the investigation powers the ACCC already has under section 155 for suspected contraventions of the TPA, in addition to certain parts of the *Radiocommunications Act 1992, Telecommunications Act 1997, Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Water Act 2007*.

The May 2008 *Administrative Review Council* report No 48 on the coercive information-gathering powers of government agencies considered the common law privilege against self incrimination and the circumstances in which the privilege should be modified.

In relation to coercive information-gathering powers, the ARC is of the view that the privilege against self-incrimination is a fundamental principle that should be upheld through legislation, and that the abrogation of this privilege should only occur rarely, in circumstances that are clearly defined, compelling and limited in scope. However, in its report, I note that the ARC recognised that limitations in the privilege had been shown to be warranted in certain circumstances (particularly in relation to corporate regulation) and indicated that the "derivative use immunities and, in some instances, use immunities would constitute an unacceptable fetter on the investigation and prosecution of corporate misconduct offences".

I have been advised by the ACCC that, in its view, extending the immunity beyond that currently existing in section 155 could interfere with the ACCC's ability to investigate and enforce relevant statutory provisions effectively.

Thank you for writing to the Government concerning this matter.

The Committee thanks the Assistant Treasurer for this response. The Committee notes that it would have been helpful if this information had been included in the explanatory memorandum, and trusts that the Assistant Treasurer will draw this issue to the attention of the department.

# Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter dated 23 June 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 3 of 2008*

Introduced into the House of Representatives on 19 March 2008
Portfolio: Veterans' Affairs

### Background

Schedule 1 of this bill amends the *Veterans' Entitlements Act 1986* (VEA) to:

- give effect to revised arrangements for entering into agreements with the Governments of certain other countries in relation to the payment of pensions and the provision of assistance and benefits to eligible overseas veterans or dependants now resident in Australia;
- authorise the use of funds from the Consolidated Revenue Fund for the initial payment of pensions and the provision of assistance and benefits to eligible overseas veterans and dependants resident in Australia;
- further align the Veterans' entitlements means test with the social security means test; and
- make a number of minor and technical amendments, including as a consequence of the enactment of the *Legislative Instruments Act 2003.*

Schedule 2 amends the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* to extend the period for which Commonwealth or Australian Federal Police may be considered to be a nuclear test participant.

Schedule 3 amends the *Military Rehabilitation and Compensation Act 2004* to correct minor errors and anomalies.

The bill also contains application provisions.

**Retrospective application**
**Schedule 1, item 7**

Proposed new paragraph 5H(8)(hab) of the *Veterans' Entitlements Act 1986*, to be inserted by item 7 of Schedule 1, provides that one of the items to be excluded from the income test applicable for the purpose of a pension under that Act is an approved scholarship 'awarded on or after 1 September 1990.'

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. In this instance, however, the Committee notes that there is no application provision relating to this amendment, and it is not clear wheher it applies to someone who, for example, has been paid a part pension since, say 1998, and who now is entitled to a greater pension because his or her scholarship is no longer included in the income test for that pension.

The Committee notes that there is also no indication of whether, in such circumstances, the pensioner would be entitled to recover the difference between those two pension amounts for the past 10 years. The Committee **seeks the Minister's advice** about when this amendment is intended to apply from.

*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*

> Item 7 of Schedule 1 inserts new paragraph 5H(8)(hab) into the *Veterans' Entitlements Act 1986* (VEA) to provide that a payment of an approved scholarship of the type defined in subsection 8(1) of the *Social Security Act 1991*, that was awarded on or after 1 September 1990, will not be treated as the income of a person for the purposes of the VEA.

There is no intention for the amendment to operate retrospectively as no application provision concerning the amendment was included in the Bill and the amendment is to commence from the day after the Bill attains Royal Assent.

The purpose of the amendment is to align the VEA with the equivalent provisions of the *Social Security Act 1991*. Paragraph (8)(8)(zj) of the *Social Security Act 1991* specifically refers to payments from an approved scholarship that had been awarded on or after "1 September 1990".

An "approved scholarship" is defined in subsection 8(1) of the *Social Security Act 1991* as being "a scholarship in relation to which a determination under section 24A is in force".

The relevance of the date "1 September 1990" is that it was the date on which the policy concerning payments of approved scholarships was announced in relation to persons in receipt of income support under the *Social Security Act 1947* (the predecessor of the current Act). An exact use of the wording to that in the Social Security Act is to ensure consistent statutory interpretation of the provision in both Acts.

I am advised that there is no adverse affect on a person's assessment of income support payment under the VEA by having this provision operate from the day after Royal Assent as my Department has not identified anyone in receipt of a service pension or income support supplement who also received a payment under an approved scholarship. This is not surprising as those persons likely to be in receipt of such payments are unlikely to be part of the group of people in receipt of income support payments under the VEA.

It should also be noted that determinations under section 24A of the *Social Security Act 1991* that a scholarship is an "approved scholarship" are infrequently made with the last such determination being the *Social Security (Rotary Foundation Ambassadorial Scholarship) Determination 2000* made on 13 December 2000.

The Committee thanks the Minister for this comprehensive response, which addresses the Committee's concerns. The Committee notes that it would have been helpful if a summary of this information had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

**Retrospective application**
**Schedule 1, items 43 and 83**

The effect of proposed new subsections 29(10) and 29(11) of the *Veterans' Entitlements Act 1986*, to be inserted by item 43 of Schedule 1, is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, the document prepared by the Repatriation Commission, known as the *Guide to the Assessment of Rates of Veterans' Pensions*, may be expressed to take effect from the day that the Minister approves it, even though that is a date earlier than its registration under the *Legislative Instruments Act 2003*, which is the date on which such a determination would normally take effect.

Similarly, the effect of proposed new subsection 196B(13) of the *Veterans' Entitlements Act 1986*, to be inserted by item 83 of Schedule 1, is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Statement of Principles made by the Repatriation Medical Authority takes effect from the day on which a decision of the Specialist Medical Review Council was notified in the *Gazette*, even though that is a date earlier than its registration under the *Legislative Instruments Act 2003*, which is the date on which such a determination would normally take effect.

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 notes from the explanatory memorandum (pages 9 and 16 respectively) that these proposed new provisions preserve the effect of the existing sections of the *Veterans' Entitlements Act 1986*, and that the rights of a person could be affected so as to disadvantage that person from the date of the approval by the Minister of the Guide, or notification of a decision of the Specialist Medical Review Council in the *Commonwealth Gazette*, rather than from the later date of registration.

The Committee therefore notes that the effect of these provisions is that the 'Guide to the Assessment of Rates of Veterans' Pensions' and a 'Statement of Principles' made by the Repatriation Medical Authority will to some degree apply retrospectively. The Committee further notes that the explanatory memorandum makes it clear that this may disadvantage some people.

As such, notwithstanding that these amendments are consistent with existing provisions in the *Veterans' Entitlements Act 1986*, the Committee **seeks the Minister's advice** as to the rationale for requiring these instruments to take effect from the date of ministerial approval or publication in the *Commonwealth Gazette* respectively, rather than from the date that they are registered under the *Legislative Instruments Act 2003*, which is the date on which such determinations would normally take effect.

*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*

**Schedule 1, item 43**

Items 43 and 83 of Schedule 1 of the Bill repeal subsections 29(9) and (10) of the VEA and substitute new subsections 29(9), (10) and (11) and amend subsection 196B(13).

The effect of new subsections 29(9), (10) and (11) is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, the document prepared by the Repatriation Commission and known as the *Guide to the Assessment of Rates of Veterans' Pensions* (the *Guide*), may be expressed to take effect from the day on which the Minister for Veterans' Affairs approves it. This applies even though that date may be earlier than its registration under *Legislative Instruments Act 2003*.

The Committee noted that the Explanatory Memorandum stated that the *Guide* may apply retrospectively which may result in disadvantage to a person and sought advice as to the rationale for requiring that the instrument take effect from the date of ministerial approval rather than the date of registration under the *Legislative Instruments Act 2003*.

As noted by the Committee, the amendments do not make any changes to the current arrangements and preserve the operation of the existing provisions. It should also be noted that the amendments are being made only as a consequence of the passing of the *Legislative Instruments Act 2003* and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003* and as such there is no authority or mandate to change current policy or the operation of the existing provisions. Under these circumstances, there was no review undertaken by my Department in relation to the date of effect of the *Guide*.

Furthermore, it should be noted that the date of effect of the *Guide* may be set by the Minister as a date that is later than the date the *Guide* is approved. The current *Guide* (referred to as the Fifth Edition) was approved by the then Minister for Veterans' Affairs on 1 October 1997 and commenced from 18 April 1998. The current *Guide* was tabled in both Houses of Parliament on 20 October 1997.

In the preparation of the Fifth Edition of the Guide, there was substantial consultation with the key ex-service organisations and other interested parties. The consultation was extensive and is evident in the time taken to prepare the Guide being approximately 18 months. The ex-service community would continue to expect this level of consultation with any further edition of the Guide.

Any potential disadvantage faced by a person who is subject to the application of a new *Guide* from the date of the approval by the Minister is mitigated by the provisions of the Instrument that provides for the revocation of the previous *Guide*. This provision prevents the pension of a person assessed under a new *Guide* from being reduced if the previous *Guide* allowed them a higher rate of pension.

The Instrument of Revocation (No. 8 of 1997) of the previous *Guide* provides at Clause (3) that:

> In the course of re-assessing or reviewing the assessment or re-assessment of the rate at which a pension is payable, the degree of incapacity of the person to whom that pension is payable shall not be a percentage that is less than the percentage of the general rate of pension constituted by the rate at which that pension was, immediately before 18 April 1998, payable unless:
>
> (a) the degree of incapacity of that person from war-caused or defence-caused injury or disease has decreased (as assessed under the old *Guide*) since the rate of pension was previously assessed or last assessed; or
>
> (b) the previous assessment or last assessment would not have been made but for a false statement or misrepresentation of a person.

The effect of that provision is that for existing disability pensioners any review or re-assessment of the rate of pension will not result in a reduction in the rate of pension unless there has been a decrease in the incapacity of the person (as assessed under the old *Guide*) or the previous assessment was based on a false statement or misrepresentation.

The only persons who may potentially be disadvantaged by the application of a new *Guide* that has been approved and comes into effect before it has been registered will be those veterans making a first claim for a disability pension that will be assessed using the new *Guide*. Any potential disadvantage could only occur during the time difference between Ministerial approval and registration.

**Schedule 1, item 83**

The effect of the amendments to subsection 196B(13) by item 83 of Schedule 1 of the Bill is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, an amendment to or a new Statement of Principles made by the Repatriation Medical Authority (under subsections 196B(10), (11) or (12)) at the direction of the Specialist Medical Review Council (under subsection 196W(4)) will take effect from the day on which the determination of the Specialist Medical Review Council was notified in the *Commonwealth Gazette*.

The Committee noted that the Explanatory Memorandum had referred to the potential for the retrospective application of a Statement of Principles and the potential disadvantage and sought advice as to the rationale for requiring that the instrument take effect from the date of notification of in the *Commonwealth Gazette* rather than the date of registration under the *Legislative Instruments Act 2003*. As noted by the Committee, the amendments do not make any changes to the current arrangements and the effect of the amendments is to preserve the operation of the existing provisions.

The retrospective commencement of the amended or new Statement of Principles will apply only to those Statements for which a determination by the Specialist Medical Review Council has been notified in the *Commonwealth Gazette* that directs the Repatriation Medical Authority to amend an existing Statement or issue a new Statement.

It should be noted that of the dozens of Statements of Principles that are issued each year under the provisions of section 196B of the VEA rarely do they have a retrospective application. It is only those Statements that are amended or issued at the direction of the Specialist Medical Review Council that will retrospectively apply from the date of the notification of the determination in the *Commonwealth Gazette.*

In addition, while it may appear that a person may be disadvantaged by the retrospective operation of this provision, it should be noted that there is clear legal precedent established by the Full Federal Court of Australia that ensures applicants' interests are protected. The Full Federal Court has held, in a number of cases, that a person has an accrued right under section 50 of the *Acts Interpretation Act 1901* (now section 15 of the *Legislative Instruments Act 2003*) to the benefit of the Statement of Principles that applied when the Repatriation Commission made its primary decision if the person's claim cannot succeed by applying the current Statement of Principles.

The relevant cases are *Repatriation Commission v Keeley* [2000] FCA 532 and *Repatriation Commission v Gorton* [2001] FCA 1194. Those decisions mean that a person is not disadvantaged under the VEA by the amendment or the issue, with retrospective effect, of a subsequent Statement of Principles. Instead, they effectively have the advantage of applying the more beneficial Statement of Principles, whichever of the two that might be. This advantage may not necessarily be the

earlier one. It will depend on the specific factors in the Statements of Principles and particular circumstances of the person's claim.

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this comprehensive response, which addresses its concerns. The Committee notes that it would have been helpful if a summary of this information had been included in the explanatory memorandum, and trusts that the Minister will draw this issue to the attention of the department.

Chris Ellison
Chair

THE HON BOB DEBUS
Minister for Home Affairs

RECEIVED
20 JUN 2008
Senate Standing C'ttee for the Scrutiny of Bills

19 JUN 2008

07/19799

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

Dear Senator

I refer to your letter of 15 May 2008 in which you seek, on behalf of the Senate Standing Committee for the Scrutiny of Bills, my advice in relation to the intended effect of items 5 and 8 of Schedule 1 of the *Australian Crime Commission Amendment Act 2007* (the ACC Amendment Act).

In particular, you seek my advice as to whether the view put forth by the Committee (in pages 9 and 10 of the Alert Digest) regarding the effect of the validation clauses contained in items 5 and 8 is that which was intended by the Government.

Items 5 and 8 added new paragraphs 28(8)(a) and 29(5)(a), respectively, to the *Australian Crime Commission Act 2002* (ACC Act), to provide that a failure to comply with amended subsections 28(1A) (in relation to summons) and 29(1A) (in relation to notices) does not affect the validity of the summons or notice, insofar as those subsections relate to the making of a record of reasons for issuing the summons or notice.

The Committee has suggested that the effect of the amendments in items 5 and 8 is to render any summons or notice issued under subsections 28(1) and 29(1) of the ACC Act valid, even in circumstances where an examiner never makes a record of reasons for issuing the summons or notice. Further, the Committee comments that if this interpretation is correct, the new paragraphs would do more than limit the impact of Justice Smith's findings in *ACC v Brereton*, but rather, would render ineffective the second sentence of both subsections 28(1A) and 29(1A), which provide that an examiner must record in writing the reasons for issuing the summons or notice.

As the Committee is aware, the Australian Crime Commission Amendment Bill 2007 (the Bill) was introduced as an urgent Bill by the previous Coalition Government and passed in the Senate on 18 September 2007. The Bill was subsequently passed two days later by the House of Representatives.

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When in Opposition, the Australian Labor Party supported the amendments, on the understanding that the operational requirements of the Australian Crime Commission (ACC) sometimes necessitate the issuing of a summons or notice prior to the recording of reasons, and that the amendments would remove the risk, arising from findings made in *ACC v Brereton*, to a significant number of prosecutions and other litigation before the courts at the time.

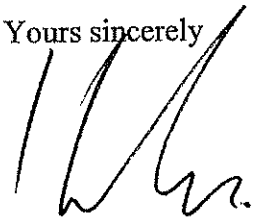
That support for the Bill was given with the qualification that the amendments should not mask unreasonable and unacceptable practices by the ACC. Among other matters, we expressed the same concern now identified by the Committee that items 5 and 8 might effectively nullify the obligation for the examiner to be satisfied that it is reasonable in all the circumstances to issue the summons or notice before doing so. We insisted that the operation of the amendments, once enacted, should be subject to close Parliamentary scrutiny.

The Committee would be aware that the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) is currently conducting an inquiry into the ACC Amendment Act. A number of submissions to the PJC-ACC have also queried the operation of the amendments, insofar as they provide that a failure to comply with the requirement to record reasons does not render a summons or notice invalid. The Government will await the findings of the PJC-ACC, and then decide how to proceed in relation to this and other issues.

I would be pleased to provide further advice on the question of whether the amendments referred to above trespass unduly on personal rights and liberties, following the PJC-ACC's final report, taking into account any issues highlighted by its inquiry, and any recommendations of that Committee.

The action officer for this matter in the Attorney-General's Department is Karl Alderson who can be contacted on (02) 6250 6395.

Yours sincerely



**Bob Debus**

**Office of the Hon Anthony Albanese MP**

Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House



*Reference: 05140-2008*

19 JUN 2008

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

Dear ~~Senator Ellison~~ Chris,

I refer to the comments in the Scrutiny of Bills *Alert Digest No.* 3 (14 May 2008) about the Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008.

I have noted the concerns of the Committee in relation to the commencement provisions of the Bill. However, I believe it is not appropriate to amend the Bill so that it would effectively expire if the 1999 Montreal Convention (the Convention) does not enter into force for Australia by a specified date.

In many instances, legislation is required to be passed by Parliament before Australia can become a party to a treaty. It is sometimes the case that Australia will become a party to a treaty which will not enter into force until a specified number of States have become parties to it. Unfortunately, this means that it is not always possible to predict with any certainty when a treaty may enter into force. As a result, where the commencement of a Bill is contingent on the entry into force of a treaty, it may be some years before the operative provisions of the particular Bill commence.

As a general comment, providing that a Bill will never commence if a treaty does not enter into force for Australia within a fixed period after assent may be problematic. If a treaty to which Australia was a party entered into force, and the legislation that was intended to implement the treaty in Australia had expired, then Australia could be in breach of its international obligations. It is therefore necessary for the commencement provisions of Bills implementing international treaties to be flexible.

In this instance, however, the Convention has already entered into force generally. Article 53(7) of the Convention provides that it shall enter into force for acceding States sixty days after the date of deposit of the instrument of accession. It is accordingly unlikely that there will be an inordinate time lapse between assent to the Bill and the

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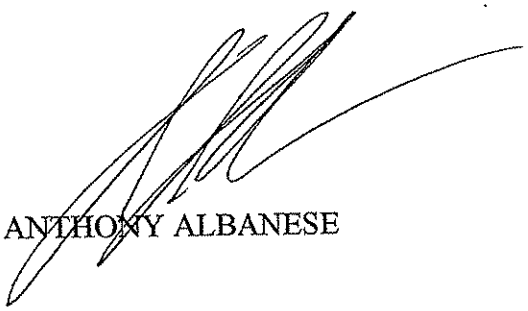
commencement of its operative provisions, following Australia's accession to the Convention.

The Government is committed to promptly bringing the Convention into force for Australia. This will be achieved by progressing the matter through the Federal Executive Council and lodging the instrument of accession with the International Civil Aviation Organisation without delay. The Government would be happy to place this commitment on the public record during the debate of the Bill, if this were to ease Members' concerns.

Finally, I note the Committee's query about the status of the notices which may be issued under section 9K(1) of the Bill. Section 9K(3) of the Bill, which advises that such notices are not legislative instruments, is declaratory of the law. It is intended merely to assist readers of the *Civil Aviation (Carriers' Liability) Act 1959*.

Thank you for raising these matters.

Yours sincerely



ANTHONY ALBANESE

# THE HON NICOLA ROXON MP
# MINISTER FOR HEALTH AND AGEING



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

Dear Senator Ellison

I refer to a letter of 5 June 2008 to my Senior Adviser, from Ms Cheryl Wilson, Secretary of the Standing Committee for the Scrutiny of Bills, drawing attention to the Senate Standing Committee for the Scrutiny of Bills' comments on the Dental Benefits Bill 2008 (the Bill).

The Committee has raised two matters in relation to the Bill, regarding the creation of strict liability offences and the incorporation of extrinsic material. I trust that that the following information will be of assistance to the Committee.

Strict liability offences (subclauses 48(2), 49(2), 50(2) and 51(2))

As indicated on pages 18-22 of the Explanatory Memorandum, proposed sections 48-51 of the Bill have been cast as strict liability offences because these provisions are modelled on existing strict liability offences in the *Health Insurance Act 1973*.

The offences in the Bill are aligned with current *Health Insurance Act 1973* offences, to the extent possible, to ensure consistent treatment of practitioners and patients under the proposed dental benefit arrangements and the current Medicare benefit arrangements, particularly in terms of the regulation of their billing and claiming conduct.

The references to 'current criminal law policy' appearing in the Explanatory Memorandum are intended to be references to the current criminal law policy set out in the document entitled *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. This fact could have been noted in the Explanatory Memorandum.

Extrinsic material (subclause 60(3))

Subclause 60(3) provides:

'The Dental Benefits Rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing:

a) as in force or existing at a particular time; or
b) as in force or existing from time to time.'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As indicated on pages 26 and 27 of the Explanatory Memorandum, proposed subsection 60(3) would allow the Dental Benefits Rules to make an 'ambulatory' reference to an instrument which is not a legislative instrument, that is, a reference which includes amendments to the instrument that are made from time to time.

An example is provided on page 27 of the Explanatory Memorandum which relates to specifying a class of persons to be 'dental providers' for the purpose of paragraph 6(1)(b) of the proposed *Dental Benefits Act 2008*, by reference to instruments made under State or Territory Acts, or other instruments, relating to registration, licensing or accreditation.

If it is possible to avoid an 'ambulatory' reference to a non-legislative instrument, then this approach would be adopted. It is anticipated, however, that due to the targeted nature of the Dental Benefits Schedule, at times, it will be necessary for the Dental Benefits Rules to make an ambulatory reference to an instrument which is not a legislative instrument. The situations where this need might arise are not confined to Dental Benefits Rules made for the purpose of specifying a class of persons to be 'dental providers'. For example, patient eligibility for a dental benefit may be dependent on a person or family receiving a pension, benefit or allowance under another government program. These programs may not be completely described in legislative instruments.

In cases where the Dental Benefits Rules refer to a document which is not itself a legislative instrument, in accordance with the *Legislative Instruments Act 2003*, the Explanatory Statement to the Dental Benefits Rules will contain a description of the document, the purpose of the reference, and indicate how the document (including any future amendments) may be obtained.

The Dental Benefits Rules would itself be a legislative instrument which is required to be tabled in Parliament and subject to disallowance. The power to make Dental Benefits Rules is not exercisable by a departmental delegate. Any situation where I consider it necessary to make an ambulatory reference to a non-legislative instrument in the Dental Benefits Rules will be subject to parliamentary scrutiny on a case-by-case basis when the ambulatory reference is placed in the Dental Benefits Rules. In addition, an updated reference to a document would usually appear before Parliament again for scrutiny when the Dental Benefits Rules are changed, since the usual practice is, when changing a legislative instrument, to re-make the whole of the Rules to keep them in consolidated form.

In light of the above, I am of the view that subclause 60(3) should not be limited to the circumstances described in the example provided in the Explanatory Memorandum, or otherwise limited.

I appreciate the opportunity to address the Committee's comments on the Bill.

Yours sincerely

**NICOLA ROXON**

23 JUN 2008

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600



18 JUN 2008

Senator Chris Ellison
Chair, Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I refer to the letter of 5 June 2008 from the Secretary of the Standing Committee for the Scrutiny of Bills, Ms Cheryl Wilson, drawing my attention to the comments contained in the Scrutiny of Bills *Alert Digest No. 4 of 2008* concerning certain provisions of the Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008.

In response to the Committee's concern that the imposition of strict liability is not adequately justified in relation to items 33 and 45 of Schedule 4 to the Bill and whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was taken into account in framing these provisions, I provide the following comments:

- in relation to item 33, this provides for a new offence which extends the time period during which approved child care services must keep records. Services are already obliged under section 219F of the *A New Tax System (Family Assistance Administration) Act 1999* to keep records during the period of care, and failure to do so is an offence of strict liability. Under the proposed new offence at item 33 services will also be required to keep records for at least 36 months after the end of the year in which care was provided or until a time ordered by a court during civil or criminal proceedings. For the purposes of consistency with the current offence provision this extension of the obligation should remain one of strict liability;

- in relation to item 45, the proposed new subsection 219J(3) imposes an obligation on former authorised officers to return their identity cards when they cease to be an authorised officer. It is reasonable to provide that failure to do so is an offence of strict liability due to the sensitive nature of the role of authorised officers in monitoring approved child care providers' compliance, and in the context of the broader entry powers which this Bill provides under proposed new section 291K in Schedule 4. The offence is designed to place current and former authorised officers on notice to guard against breach, due to the foreseeable risk of fraudulent use of any card which has not been returned. I contend that these are legitimate grounds for penalising persons



Telephone: (02) 6277 7320 Facsimile: (02) 6273 4115 Email: dpm@dpm.gov.au

who may otherwise lack 'fault' or a deliberate intention to contravene the law. I also draw the Committee's attention to proposed subsection 219J (4) which makes clear that the offence does not apply if the identity card was lost or destroyed, and to the fact that the defence of honest or reasonable mistake of fact may always be raised if relevant;

- the *Guide* was taken into account in framing all new provisions under the revised compliance scheme under Schedule 4 including the new offences in items 33 and 45; and

- the provisions relating to the new compliance scheme, including items 33 and 45, were drafted in consultation with officers of the Criminal Law Branch of the Attorney-General's Department, and were approved by the Minister for Home Affairs.

In response to the Committee's concern as to whether the retrospective application of the amendment made by item 3 of Schedule 5 to the Bill will adversely affect any individual, I provide the following additional comments:

- this amendment will not adversely affect any individual because it validates the Child Care Tax Rebate (CCTR) entitlement amounts already determined for the 2006-2007 income year and does not alter in any way the determined amounts;

- item 28 of Schedule 5 to the Bill provides that the amendment made by item 3 applies to care provided by an approved child care service on or after 1 July 2006. Item 3 corrects a drafting error in section 84A of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) by inserting a reference to section 65EC of the *A New Tax System (Family Assistance) (Administration) Act 1999*;

- sections 65EA, 65EB and 65EC of the *A New Tax System (Family Assistance) (Administration) Act 1999*, which provide for the making of determinations of CCTR entitlement for an individual for an income year, require the Secretary to determine the amount of the rebate to which the individual is entitled for the income year under any of these determinations. The provisions relevant to the calculation of the amount of the rebate are included in Division 4A of the Family Assistance Act (sections 84A – 84F); however, as a result of a drafting error, section 84A, which provides a method for calculation of the rebate, refers only to entitlement determinations under section 65EA or 65EB and fails to make a reference to a determination of entitlement under section 65EC; and

- as a matter of administration, the method of calculation of the rebate specified in Division 4A of the Family Assistance Act has been applied for the purpose of determining the CCTR entitlement amount under section 65EC for the 2006-2007 income year (the first year for which CCTR applies). The retrospective amendment to section 84A of the Family Assistance Act, correcting the drafting error, validates the CCTR entitlement amounts already determined under section 65EC and does not alter in any way the determined amounts.

I trust this information addresses the Committee's concerns regarding the Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008.

Yours sincerely

**Julia Gillard**
**Minister for Education**

**The Hon Chris Bowen MP**
**Assistant Treasurer**
**Minister for Competition Policy and Consumer Affairs**

23 JUN 2008

**Senator Christopher Ellison**
**Chair**
**Standing Committee for the Scrutiny of Bills**
**Parliament House**
**CANBERRA ACT 2600**

Dear Senator

Thank you for the letter of 5 June 2008 from the Secretary to the Standing Committee for the Scrutiny of Bills, drawing my attention to the Standing Committee's comments on the National Fuelwatch (Empowering Consumers)(Consequential Amendments) Bill 2008, contained in the Scrutiny of Bills *Alert Digest No. 4 of 2008.*

The Consequential Amendments Bill amends section 155 of the *Trade Practices Act 1974* (TPA) to refer explicitly to the *National Fuelwatch (Empowering Consumers) Act 2008* (the Act). As outlined by the Committee, an effect of this amendment is to abrogate the privilege against self-incrimination for a person required to provide information to the Australian Competition and Consumer Commission (ACCC) in relation to a suspected contravention of the Act.

I note that the Committee expressed concern that the amendment provides 'use immunity' for affected persons, and not 'derivative use immunity', in respect of information or documents required to be furnished to the ACCC under the Act. The Committee has sought advice as to the reason why only the 'use immunity' applies in these circumstances.

As the Committee would be aware, the ACCC will be responsible for the implementation and administration of the National Fuelwatch Scheme under the Act. The purpose of the amendment to section 155 of the TPA is to provide the ACCC with appropriate powers of investigation to carry out effectively its compliance and enforcement activities under the National Fuelwatch Scheme.

This amendment will ensure consistency with the investigation powers the ACCC already has under section 155 for suspected contraventions of the TPA, in addition to certain parts of the *Radiocommunications Act 1992, Telecommunications Act 1997, Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Water Act 2007.*

The May 2008 *Administrative Review Council* report No 48 on the coercive information-gathering powers of government agencies considered the common law

PO Box 6022
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7360
Facsimile: 02 6273 4125
http://assistant.treasurer.gov.au

privilege against self incrimination and the circumstances in which the privilege should be modified.

In relation to coercive information-gathering powers, the ARC is of the view that the privilege against self-incrimination is a fundamental principle that should be upheld through legislation, and that the abrogation of this privilege should only occur rarely, in circumstances that are clearly defined, compelling and limited in scope. However, in its report, I note that the ARC recognised that limitations in the privilege had been shown to be warranted in certain circumstances (particularly in relation to corporate regulation) and indicated that the "derivative use immunities and, in some instances, use immunities would constitute an unacceptable fetter on the investigation and prosecution of corporate misconduct offences".

I have been advised by the ACCC that, in its view, extending the immunity beyond that currently existing in section 155 could interfere with the ACCC's ability to investigate and enforce relevant statutory provisions effectively.

Thank you for writing to the Government concerning this matter.

Yours sincerely

**CHRIS BOWEN**

**The Hon Alan Griffin MP**
Minister for Veterans' Affairs
Federal Member for Bruce



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

Dear Senator Ellison

I refer to the Committee's letter of 15 May 2008 concerning comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest (No. 3 of 2008) of 14 May 2008, relating to item 7 and to items 43 and 83 of Schedule 1 of the Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 (the Bill).

The Committee has raised concerns about the retrospective impact of the amendments made by items 7, 43 and 83 of Schedule 1 of the Bill. It is the view of the Committee that the amendments may be considered to trespass unduly on personal rights and liberties.

**Retrospective application - Schedule 1, item 7**

Item 7 of Schedule 1 inserts new paragraph 5H(8)(hab) into the *Veterans' Entitlements Act 1986* (VEA) to provide that a payment of an approved scholarship of the type defined in subsection 8(1) of the *Social Security Act 1991*, that was awarded on or after 1 September 1990, will not be treated as the income of a person for the purposes of the VEA.

There is no intention for the amendment to operate retrospectively as no application provision concerning the amendment was included in the Bill and the amendment is to commence from the day after the Bill attains Royal Assent.

The purpose of the amendment is to align the VEA with the equivalent provisions of the *Social Security Act 1991*. Paragraph (8)(8)(zj) of the *Social Security Act 1991* specifically refers to payments from an approved scholarship that had been awarded on or after "1 September 1990".

An "approved scholarship" is defined in subsection 8(1) of the *Social Security Act 1991* as being "a scholarship in relation to which a determination under section 24A is in force".

The relevance of the date "1 September 1990" is that it was the date on which the policy concerning payments of approved scholarships was announced in relation to persons in receipt of income support under the *Social Security Act 1947* (the predecessor of the current Act). An exact use of the wording to that in the Social Security Act is to ensure consistent statutory interpretation of the provision in both Acts.

Parliament House, Canberra ACT 2600
Tel: (02) 6277 7820 Fax: (02) 6273 4140
alan.griffin.mp@aph.gov.au

I am advised that there is no adverse affect on a person's assessment of income support payment under the VEA by having this provision operate from the day after Royal Assent as my Department has not identified anyone in receipt of a service pension or income support supplement who also received a payment under an approved scholarship. This is not surprising as those persons likely to be in receipt of such payments are unlikely to be part of the group of people in receipt of income support payments under the VEA.

It should also be noted that determinations under section 24A of the *Social Security Act 1991* that a scholarship is an "approved scholarship" are infrequently made with the last such determination being the *Social Security (Rotary Foundation Ambassadorial Scholarship) Determination 2000* made on 13 December 2000.

**Retrospective application - Schedule 1, item 43**

Items 43 and 83 of Schedule 1 of the Bill repeal subsections 29(9) and (10) of the VEA and substitute new subsections 29(9), (10) and (11) and amend subsection 196B(13).

The effect of new subsections 29(9), (10) and (11) is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, the document prepared by the Repatriation Commission and known as the *Guide to the Assessment of Rates of Veterans' Pensions* (the *Guide*), may be expressed to take effect from the day on which the Minister for Veterans' Affairs approves it. This applies even though that date may be earlier than its registration under *Legislative Instruments Act 2003*.

The Committee noted that the Explanatory Memorandum stated that the *Guide* may apply retrospectively which may result in disadvantage to a person and sought advice as to the rationale for requiring that the instrument take effect from the date of ministerial approval rather than the date of registration under the *Legislative Instruments Act 2003*.

As noted by the Committee, the amendments do not make any changes to the current arrangements and preserve the operation of the existing provisions. It should also be noted that the amendments are being made only as a consequence of the passing of the *Legislative Instruments Act 2003* and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003* and as such there is no authority or mandate to change current policy or the operation of the existing provisions. Under these circumstances, there was no review undertaken by my Department in relation to the date of effect of the *Guide*.

Furthermore, it should be noted that the date of effect of the *Guide* may be set by the Minister as a date that is later than the date the *Guide* is approved. The current *Guide* (referred to as the Fifth Edition) was approved by the then Minister for Veterans' Affairs on 1 October 1997 and commenced from 18 April 1998. The current *Guide* was tabled in both Houses of Parliament on 20 October 1997.

In the preparation of the Fifth Edition of the Guide, there was substantial consultation with the key ex-service organisations and other interested parties. The consultation was extensive and is evident in the time taken to prepare the Guide being approximately 18 months. The ex-service community would continue to expect this level of consultation with any further edition of the Guide.

Any potential disadvantage faced by a person who is subject to the application of a new *Guide* from the date of the approval by the Minister is mitigated by the provisions of the Instrument that provides for the revocation of the previous *Guide*. This provision prevents the pension of a person assessed under a new *Guide* from being reduced if the previous *Guide* allowed them a higher rate of pension.

The Instrument of Revocation (No. 8 of 1997) of the previous *Guide* provides at Clause (3) that:

> In the course of re-assessing or reviewing the assessment or re-assessment of the rate at which a pension is payable, the degree of incapacity of the person to whom that pension is payable shall not be a percentage that is less than the percentage of the general rate of pension constituted by the rate at which that pension was, immediately before 18 April 1998, payable unless:
>
> (a) the degree of incapacity of that person from war-caused or defence-caused injury or disease has decreased (as assessed under the old *Guide*) since the rate of pension was previously assessed or last assessed; or
>
> (b) the previous assessment or last assessment would not have been made but for a false statement or misrepresentation of a person.

The effect of that provision is that for existing disability pensioners any review or re-assessment of the rate of pension will not result in a reduction in the rate of pension unless there has been a decrease in the incapacity of the person (as assessed under the old *Guide*) or the previous assessment was based on a false statement or misrepresentation.

The only persons who may potentially be disadvantaged by the application of a new *Guide* that has been approved and comes into effect before it has been registered will be those veterans making a first claim for a disability pension that will be assessed using the new *Guide*. Any potential disadvantage could only occur during the time difference between Ministerial approval and registration.

**Retrospective application - Schedule 1, item 83**

The effect of the amendments to subsection 196B(13) by item 83 of Schedule 1 of the Bill is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, an amendment to or a new Statement of Principles made by the Repatriation Medical Authority (under subsections 196B(10), (11) or (12)) at the direction of the Specialist Medical Review Council (under subsection 196W(4)) will take effect from the day on which the determination of the Specialist Medical Review Council was notified in the *Commonwealth Gazette*.

The Committee noted that the Explanatory Memorandum had referred to the potential for the retrospective application of a Statement of Principles and the potential disadvantage and sought advice as to the rationale for requiring that the instrument take effect from the date of notification of in the *Commonwealth Gazette* rather than the date of registration under the *Legislative Instruments Act 2003*. As noted by the Committee, the amendments do not make any changes to the current arrangements and the effect of the amendments is to preserve the operation of the existing provisions.

The retrospective commencement of the amended or new Statement of Principles will apply only to those Statements for which a determination by the Specialist Medical Review Council has been notified in the *Commonwealth Gazette* that directs the Repatriation Medical Authority to amend an existing Statement or issue a new Statement.

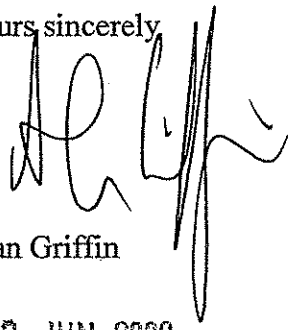
It should be noted that of the dozens of Statements of Principles that are issued each year under the provisions of section 196B of the VEA rarely do they have a retrospective application. It is only those Statements that are amended or issued at the direction of the Specialist Medical Review Council that will retrospectively apply from the date of the notification of the determination in the *Commonwealth Gazette*.

In addition, while it may appear that a person may be disadvantaged by the retrospective operation of this provision, it should be noted that there is clear legal precedent established by the Full Federal Court of Australia that ensures applicants' interests are protected. The Full Federal Court has held, in a number of cases, that a person has an accrued right under section 50 of the *Acts Interpretation Act 1901* (now section 15 of the *Legislative Instruments Act 2003*) to the benefit of the Statement of Principles that applied when the Repatriation Commission made its primary decision if the person's claim cannot succeed by applying the current Statement of Principles.

The relevant cases are *Repatriation Commission v Keeley* [2000] FCA 532 and *Repatriation Commission v Gorton* [2001] FCA 1194. Those decisions mean that a person is not disadvantaged under the VEA by the amendment or the issue, with retrospective effect, of a subsequent Statement of Principles. Instead, they effectively have the advantage of applying the more beneficial Statement of Principles, whichever of the two that might be. This advantage may not necessarily be the earlier one. It will depend on the specific factors in the Statements of Principles and particular circumstances of the person's claim.

I trust this information is of assistance to the Committee.

Yours sincerely



Alan Griffin

23 JUN 2008