SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
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 2009

The Committee presents its Sixth Report of 2009 to the Senate.

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

Appropriation Bill (No. 2) 2009-2010 *****

Coordinator-General for Remote Indigenous Services Bill 2009 *

Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009

Nation Building Program (National Land Transport) Amendment Bill 2009

Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009

* Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to these bills, under Standing Order 24(9).

Appropriation Bill (No. 2) 2009-2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Finance and Deregulation responded to the Committee's comments in a letter dated 15 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2009

Introduced into the House of Representatives on 12 May 2009
Portfolio: Finance and Deregulation

Background

This bill appropriates $10.6 billion to meet payments to or for the states, territories and local government, and payments for new administered expenses and non-operating expenses for the financial year ending 30 June 2010.

Legislative Instruments Act—exemption
Subclause 14(6)

Clauses 12-15 provide for the adjustment of appropriation items. Clause 14 provides a process for the reduction of payment items of bodies within the meaning of the *Commonwealth Authorities and Companies Act 1997* (CAC Act bodies). Subclause 14(1) allows for a request to be made to the Finance Minister to reduce a CAC Act body payment item. Subclause 14(6) provides that such a request is not a legislative instrument.

The explanatory memorandum (at paragraph 39) repeats the substance of subclause 14(6) but does not indicate the reason for the request not being a legislative instrument. The explanation may be the same as that in paragraph 35 of the explanatory memorandum in relation to subclause 13(5) (reducing payments to CAC Act bodies for departmental items), that is, to assist readers.

The Committee **seeks the Minister's advice** whether subclause 14(6) has been inserted solely for the benefit of readers, or whether it is designed to exempt the request from the provisions of the *Legislative Instruments Act 2003*.

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 14(6) of the Bill, as the *Alert Digest* correctly suggests, has been included to assist readers. As the *Alert Digest* also notes, subclause 14(6) has the same effect as subclause 13(5), which also states that requests to me, as Finance Minister, to reduce certain departmental items for an agency are not legislative instruments.

The reason that these requests are not legislative instruments is because the requests are not an exercise of legislative power, but a requirement that must be met before I, as Finance Minister, may reduce an appropriation under clause 14.

In contrast, any determination made by me, as Finance Minister, to reduce a CAC Act body payment in accordance with section 14 of the Bill (once enacted) would be a legislative instrument that must be tabled in Parliament and is disallowable.

As with subclause 13(5), I have asked my department to include this information in the explanatory memoranda for future Appropriation Bills, clarifying that subclause 14(6) has been inserted to assist readers. Such provisions have been included in Appropriation Acts since the 2003-2004 Additional Estimates.

The Committee thanks the Minister for this response and is pleased to note his undertaking to include a full explanation of such provisions in the explanatory memoranda for future Appropriation Bills.

Coordinator-General for Remote Indigenous Services Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Families, Housing, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 16 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2009

Introduced into the House of Representatives on 27 May 2009
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

In November 2008, the Council of Australian Governments (COAG) signed a National Partnership Agreement on Remote Service Delivery to commit the Commonwealth, the states and the Northern Territory to work together with Indigenous communities to improve Indigenous Australians' access to government services, including early childhood, health, housing and welfare services, through a single government interface.

This bill establishes a statutory position of Coordinator-General for Remote Indigenous Services (Coordinator-General) to provide strategic central leadership and coordination of the overall Remote Service Delivery Strategy in Indigenous communities specified by the Minister.

Wide delegation of power
Clause 29

The bill gives the Coordinator-General various powers, including the power to request persons to produce information and documents (paragraph 9(2)(a)), to request persons to attend meetings (paragraph 9(2)(b)), and to report failures to comply with requests made by the Coordinator-General to the Minister (paragraph 9(2)(d)).

Clause 29 provides that the Coordinator-General may delegate 'all or any of his or her powers' under the bill (other than clause 27) 'to a member of the Coordinator-General's staff'.

This is a delegation to a large class of persons with no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Therefore, the Committee **seeks the Minister's advice** regarding the potential delegation of powers to a junior officer of the Coordinator-General's staff and why this is considered to be appropriate.

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

Relevant extract from the response from the Minister

In *Alert Digest No. 6 of 2009* the Committee noted that the delegation power at clause 29 of the Bill would allow the Coordinator-General to delegate 'all or any of his or her powers' under the Bill (other than clause 27) 'to a member of the Coordinator-General's staff'. The Committee stated that it 'prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated'.

The Committee seeks my advice regarding the potential delegation of powers to a junior officer of the Coordinator-General's staff and why this is considered to be appropriate.

In summary, it is not anticipated that the Coordinator-General would, as a matter of routine, delegate his or her powers to staff below Senior Executive Service (SES) level. However, given the Coordinator-General will have a very small number of staff, only one of whom will be employed at SES level, it was considered impractical and inappropriate to restrict the Coordinator-General's power of delegation to staff at a particular level.

The Coordinator-General will have a very small number of staff available from the Department of Families, Housing, Community Services and Indigenous Affairs to assist him or her (probably no more than 10). Only one of the Coordinator-General's

staff will be a member of the SES. The majority of the Coordinator-General's staff will be employed at the Executive Level.

In the ordinary course of events, it is expected that the Coordinator-General would delegate powers (if any) firstly to his or her SES staff member. However, given there will be only one such staff member, it is also anticipated that there may be some circumstances in which it would be necessary and appropriate to delegate a power (or powers) to non-SES staff.

In addition, I note that the powers of the Coordinator-General that may be delegated are, broadly speaking, facilitative in nature, in that they involve the ability to make inquiries, request assistance and report. The powers may be exercised only in connection with the Coordinator-General's functions of monitoring, assessing, advising in relation to, and driving the development and delivery of services and progress towards achieving the Closing the Gap targets.

Having regard to the factors mentioned above, it was considered appropriate to give the Coordinator-General a relatively broad power of delegation in the terms of clause 29.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

The Committee thanks the Minister for this response.

Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. Senator Ludlam responded to the Committee's comments in a letter received on 16 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2009

Introduced into the Senate on 14 May 2009
By Senator Ludlam

Background

This bill provides for the environmentally sustainable use of resources and best practice in waste management by establishing a national Beverage Container Deposit and Recovery Scheme. The scheme would include an environmental levy for beverage containers.

Among other things, the bill:

- sets out the functions of the relevant Department in administering the scheme;
- sets a beverage container environmental levy at 10 cents and also allows a higher amount to be prescribed by regulation;
- requires the levy to be paid within 14 days after the end of the month in which the beverage container was sold to enable the funds to be received by the Department before refunds are reimbursed to authorised depots and transfer stations;
- provides penalties for non-payment of the levy;
- requires all beverage containers to be labelled as refundable;

- requires an authorised collection depot or transfer station to pay a refund of the levy to a person returning a used beverage container;

- requires the Department to review the amount of the refund value at least once every five years; and

- enables the Department to grant exemptions to pay the levy in certain circumstances.

Imposing a levy by regulation
Clause 12

The second reading speech and explanatory memorandum explain that the bill establishes a scheme, administered by the relevant Department, to collect a beverage container levy and authorise collection depots and transfer stations. The bill provides for regulations to give effect to the scheme (clause 40). Clause 12 provides that the environmental deposit on each container is 10 cents or a higher amount if prescribed by the regulations. The Committee notes that this could result in imposing a levy by regulation, with no upper limit being set in the bill.

The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. The Committee recognises that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated.

The vice to be avoided is delegating an unfettered power to impose fees. In this instance, the Committee notes that the explanatory memorandum provides no explanation as to why the rate of the levy would need to be set by regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of the power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. Therefore, the Committee **seeks the Senator's advice** in respect of these matters.

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 Senator

Thank you for your letter of 3 June 2009 regarding the Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009 outlining the Committee's concerns with the setting of a deposit refund amount.

In the consultation and drafting process of this Bill, I was most cognisant of the fact that the Senate cannot impose a levy. After seeking clarification from a variety of sources, it is my understanding that a deposit is neither a levy nor a fee. A deposit is refunded to the consumer.

That being the case, I would like to indicate to the Committee that I will happily move an amendment to this Bill to provide an upper limit to the deposit when it is debated in the Senate.

The Committee thanks the Senator for this response, which addresses its concerns, and is pleased to note his undertaking to move an amendment to set an upper limit on the deposit.

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 11 June 2009. A copy of the letter is attached to this report.

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

Extract from Alert Digest No. 5 of 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Education, Employment and Workplace Relations

Background

This bill is the first of two bills which make transitional and consequential provisions in relation to the new federal workplace relations system set out in the *Fair Work Act 2009* (Fair Work Act). A second bill will deal with consequential amendments to other Commonwealth legislation and amendments consequential on state referrals of power.

In particular, the bill:

- repeals the *Workplace Relations Act 1996* (Workplace Relations Act) (other than Schedules 1 and 10) and renames it the *Fair Work (Registered Organisations) Act 2009* to reflect its remaining content;
- makes transitional provisions to move employers, employees and organisations from the old Workplace Relations Act system to the new system; and
- makes consequential amendments to Commonwealth legislation considered essential to the operation of the Fair Work Act (being the creation of the Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia).

The transitional provisions in the bill cover such issues as:

- preservation of existing workplace instruments and setting out how these instruments interact with the new system, including the new National Employment Standards and modern awards;

- arrangements to enable bargaining under the new system to commence in an orderly manner; and

- arrangements for the transfer of assets, functions and proceedings from Workplace Relations Act institutions to Fair Work Australia and the Fair Work Ombudsman.

'Henry VIII' clauses
Schedule 2, items 7 and 8

Item 7 of Schedule 2 contains a general power for regulations to deal with transitional matters and item 8 of Schedule 2 allows regulations to modify provisions of the transitional Schedules. These are 'Henry VIII' clauses as they enable delegated legislation to override an earlier Act.

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

In this case, the Committee notes that the effect of the provisions is ameliorated by item 9 in Schedule 2 which places a limitation on the power to make regulations. As the explanatory memorandum explains (at paragraph 18) 'regulations made under items 7 and 8 cannot change the right of entry regime set out in the [Fair Work Act] and this Bill or give inspectors additional compliance powers'.

The Committee also notes that any regulations will be subject to scrutiny by the Senate Regulations and Ordinances Committee.

In the circumstances, the Committee makes no further comment on these provisions.

Insufficient parliamentary scrutiny
Schedule 2, subitem 10(2)

Schedule 2 is an overarching schedule about transitional matters related to the Fair Work Act. Subitem 10(2) of Schedule 2 provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations may be expressed to take effect before the regulations are registered under that Act. The Committee notes that the explanatory memorandum (at paragraph 17) states that the regulations can 'modify the transitional provisions in this Bill'. Since this would allow regulations to cover important matters without having the benefit of parliamentary scrutiny, the Committee **seeks the Minister's advice** as to the reasons for the use of regulations for these purposes.

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

Items 7 to 10 of Schedule 2 of the T&C Bill allow for regulations of a transitional, application or saving nature, including the power to make regulations which modify provisions of the *Fair Work Act 2009* (Fair Work Act), the transitional Schedules of the T&C Bill or provisions of the *Workplace Relations Act 1996* (WR Act). This includes regulations that may take effect before they are registered under the *Legislative Instruments Act 2003*.

Item 9 and 10 of Schedule 2 make it clear that the regulations cannot confer additional compliance powers on Fair Work Inspectors, modify the right of entry provisions in the T&C Bill or the Fair Work Act or allow a court to impose a pecuniary penalty or convict a person in relation to a regulation that has a retrospective effect.

As you would be aware, the Fair Work Act establishes a new workplace relations system. The T&C Bill repeals the majority of the current WR Act, and addresses the significant transitional and consequential issues arising from this repeal. The T&C Bill deals with a range of both complex and technical issues, including issues that affect the entitlements of employees and the obligations of employers.

For example, it has to provide for saving provisions dealing with over a dozen industrial instruments, some of which date back to 1993. Given this complexity, I consider it both necessary and appropriate to include these broad regulation making

powers to allow the Government to deal with unexpected consequences relating to transitional arrangements and to ensure a smooth transition to the new Fair Work system.

I do not anticipate that the power to make regulations that take effect before they are registered to be relied upon except in the most extraordinary of circumstances, for example, if employee entitlements were not properly preserved under the provisions of the T&C Bill, it would be important to reinstate these entitlements from commencement.

The Committee thanks the Minister for this response.

'Henry VIII' clause
Schedule 3, item 8

Item 8 of Schedule 3 provides for transitional instruments to displace Commonwealth laws. Regulations may prescribe Commonwealth laws containing conditions of employment and this will have the effect of displacing them. Commonwealth law is defined in subitem 8(2) as 'as Act or any regulations or other instrument made under an Act'. This is also a 'Henry VIII' clause and, as outlined in the commentary above, such provisions are a concern to the Committee. The Committee **seeks the Minister's comments** as to the reasons for the use of regulations for these purposes.

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

Item 8 of Schedule 3 of the T&C Bill provides that certain transitional instruments displace prescribed conditions of employment specified in a Commonwealth law that is prescribed in the regulations. This item substantially replicates section 350 of the

WR Act and provides Commonwealth employers and employees with the flexibility to determine certain employment conditions in the workplace.

Any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

The Committee thanks the Minister for this response.

Wide delegation of power
Schedule 6, item 10

Schedule 6 of the bill covers modern enterprise awards. Enterprise instruments are to be modernised and subitem 10(1) of Schedule 6 requires that, at least six months prior to the expiration of an enterprise instrument, Fair Work Australia (FWA) must notify a person covered by such an instrument that the instrument is about to end. Subitem 10(2) gives FWA a discretion to give that advice in 'any way it considers appropriate'. Subitem 10(3) incorporates the delegation power of the FWA President in section 625 of the Fair Work Act which means that the notification power could be exercised by the General Manager, a Senior Executive Service employee or a staff member of FWA in a class prescribed by regulations.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. The Committee notes that there is no such explanation of the broad delegation power in this case. The Committee **seeks the Minister's advice** regarding the potential delegation of a discretion about the notification of rights to a junior officer of FWA.

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

Relevant extract from the response from the Minister

Under Schedule 6 of the T&C Bill, a person covered by an enterprise instrument has until the end of 31 December 2013 to apply to Fair Work Australia (FWA) for the instrument to be modernised or terminated. If no application is made, the instrument will terminate at the end of 31 December 2013. To ensure that those covered by such instruments make an informed decision about whether to seek a modern enterprise award, item 10 requires FWA to advise those covered by unmodernised enterprise instruments 6 months before 31 December 2013 of the deadline for making an application and the consequences for the enterprise instrument if they do not do so.

Subitem 10(3) of Schedule 6 applies section 625 of the Fair Work Act to FWA's advisory function concerning the enterprise instrument modernisation process and relevantly permits the President to delegate particular powers to the General Manager, SES staff or acting SES staff or to a member of FWA staff who is in a class of persons prescribed by the regulations. Subsection 625(3) enables regulations to prescribe a class of person to whom FWA powers may be delegated as there may be limited circumstances where it is appropriate for members of FWA staff who are not SES employees to exercise FWA functions. The explanatory memorandum to the *Fair Work Bill 2008* noted that this would enable, for example, powers to be delegated to managers for regional offices who may not be SES staff.

The provision of advice about the enterprise instrument modernisation process is a purely administrative function which does not have an effect on a person's rights. FWA is a quasi-judicial tribunal which must perform its functions and exercise its powers in a way that is fair and just, and open and transparent (see section 577 of the Fair Work Act). It will exercise discretion about how to notify persons relevant to its proceedings in a wide range of contexts, subject to these principles.

Where power is delegated under section 625 of the Fair Work Act, the power will be exercised subject to any directions of the President. The provision of advice about the enterprise instrument modernisation process will only be able to be undertaken by FWA staff who are not SES employees where the regulations have prescribed a class of employee (such as managers of regional offices) to whom FWA powers may be delegated.

The Committee thanks the Minister for this comprehensive response.

Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Minister for Education responded to the Committee's comments in a letter dated 9 June 2009. A copy of the letter is attached to this report.

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

Extract from Alert Digest No. 5 of 2009

Introduced into the House of Representatives on 18 March 2009
Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* (Higher Education Support Act) to make minor technical amendments in relation to the operation of the FEE-HELP and VET FEE-HELP Assistance Schemes.

In particular, the bill:

- clarifies that a student cannot access VET FEE-HELP assistance to undertake a VET unit of study, unless that VET unit of study is required to be undertaken in order for the student to receive the award associated with that course of study;

- ensures that the Minister can revoke the approval as a VET provider of a body corporate if the body corporate does not maintain certain standards set by the Higher Education Support Act, and provides protections for the Minister and the Commonwealth in relation to revocation of such approval;

- allows higher education and VET provider notices of approval to take effect on the day immediately following the day the relevant notice is registered on the Federal Register of Legislative Instruments, and provides for the repeal of provisions governing the date of effect for such notices; and

- ensures that higher education VET providers will be able to offer FEE-HELP or VET FEE-HELP assistance to students immediately following the registration of the relevant notice of higher education or VET provider approval.

The bill also contains application and transitional provisions.

Rights and non-reviewable decisions
Schedule 1, item 5, new clause 32A of Schedule 1A

Proposed new clause 32A of Schedule 1A of the Higher Education Support Act, to be inserted by item 5 of Schedule 1, would enable the Minister to revoke approval of a body as a VET provider if the body no longer offers any VET courses of study and the Minister complies with the requirements of clause 34 of Schedule 1A. The explanatory memorandum explains that compliance with clause 34 includes giving notice to the body before revocation and inviting the body to make written submissions. However, the Committee notes that the explanatory memorandum does not explain whether the Minister's decision is reviewable, nor whether such a decision is non-delegable. The Committee **seeks the Minister's advice** about the availability of review rights in relation to decisions by the Minister under new clause 32A of Schedule 1A.

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

Relevant extract from the response from the Minister

> I note the Committee has raised concerns about proposed new clause 32A of Schedule 1A, to be inserted by item 5 of Schedule 1 of the Bill, which would enable the Minister to revoke a body's approval as a VET provider if the body no longer offers any VET courses of study and the Minister complies with the requirements of

clause 34 of Schedule 1A of the *Higher Education Support Act 2003* (the Act) to provide procedural fairness to the affected provider.

I understand the Committee's concern relates to the availability of review rights in relation to decisions to be made by the Minister under new clause 32A.

The decision of the Minister to revoke a body's approval as a VET provider is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), which provides a statutory regime for the review of decisions of an administrative character, made under an enactment, which are final or operative and determinative (*Griffith University v Tang* [2005] HCA 7). Indeed, the Minister's initial decision whether or not the applicant is approved as VET provider is also subject to review under the ADJR Act.

Further, the decisions of the Minister to both approve and revoke the approval of a body as a VET or higher education provider are also subject to Parliamentary scrutiny. The notices by which the Minister must notify a body of these decisions are legislative instruments under the Act. In relation to notices of approval and revocation for VET providers see subclauses 12(1) and 38(1) of Schedule 1A of the Act respectively; and in relation to notices of approval and revocation for higher education providers see subsections 16-55(1) and 22-35(1) of the Act respectively.

Under the Act, a decision of the Minister to revoke a body's approval as a VET (or higher education) provider takes effect on the day immediately after the last day on which a resolution to disallow the legislative instrument could be moved in a House of Parliament. Therefore, the revocation of a provider's approval does not take legal effect until after Parliament has had adequate opportunity to scrutinise and examine the decision during the disallowance period in both Houses of Parliament.

Clause 34 of Schedule 1A and section 22-20 of the Act also require that the Minister affords the VET or higher education provider, procedural fairness including an opportunity to make submissions in respect of a notified intention to revoke approval, before the Minister makes a final decision to revoke the approval of the VET or higher education provider. The Act further requires that the Minister must consider any submissions received from the provider in making such a decision – see subclause 34(2) of Schedule 1A and subsection 22-20(2) of the Act.

Information regarding the VET provider approval process is contained in the *VET Provider Handbook*, which is available publicly from the 'useful publications' section of the VET FEE–HELP webpage on my department's website at http://www.dest.gov.au/sectors/training_skills/programmes_funding/Programme_categories/key_skills_priorities/vet_fee_help/Approved_VET_providers.htm#publications.

I trust this information enables the Committee to finalise its consideration of the Bill.

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

Nation Building Program (National Land Transport) Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 16 June 2009. A copy of the letter is attached to this report.

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

Extract from Alert Digest No. 6 of 2009

Introduced into the House of Representatives on 13 May 2009
Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill makes technical amendments to the *AusLink (National Land Transport) Act 2005*, so that references to AusLink are replaced with references to the National Building Program. This includes changing the name of the *AusLink (National Land Transport) Act 2005* to the *National Building Program (National Land Transport) Act 2009*.

The bill also:

- allows for funding to be approved for projects which are off the National Land Transport Network in both regional and metropolitan areas of Australia;

- allows the Minister to incorporate into any funding conditions set for relevant projects, the terms of a particular matter contained in an instrument or other writing, as in force or existing from to time;

- allows for a regulation to be made to set a prescribed threshold amount which may provide the Minister with an additional criterion by which to exempt a funding recipient from having to call for public tenders on a project approved under section 9;

- allows the Minister to increase amounts of money payable to a person or body that is specified in the Roads to Recovery Program; and

- allows sites that are on the National Land Transport Network to become eligible for Black Spot Projects' funding.

The bill also contains application and transitional provisions to clarify that AusLink projects are able to continue to receive funding in relation to public tenders for certain work, the National Land Transport Network, National Projects, Transport Development and Innovation Projects, land transport research entities, Strategic Regional Projects, Black Spot Projects and the Roads to Recovery Program.

Legislative Instruments Act—disallowance
Omission in explanatory memorandum
Schedule 1, items 107 and 109

Proposed new subsection 88(2B), to be inserted by item 107 of Schedule 1, would allow the Minister to vary an amount in the Nation Building Program Roads to Recovery List (List) to increase that amount. Item 109 amends subsection 88(4) to include a new subsection (2B) as an authorised variation of the List. There is no change to existing subsection 88(5) that states that a variation to the List is a legislative instrument but is not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003*.

The explanatory memorandum does not explain that the variation in new subsection (2B) is a legislative instrument, or that it is not subject to disallowance. The Committee **draws this omission to the attention of the Minister** and **seeks his advice** as to whether the explanatory memorandum might be amended to include such a statement to provide greater assistance to readers and those affected by the operation of the legislation.

Relevant extract from the response from the Minister

I have considered the comments raised by the Committee in the Alert Digest that the explanatory memorandum does not explain that the proposed subsection 88(2B) is a legislative instrument and that it is not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003.*

Subsection 88(5) of the *AusLink (National Land Transport) Act 2005* provides:

> "An instrument varying an AusLink Roads to Recovery List is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the instrument."

The Bill does not propose amendments to this subsection and therefore it will apply to the proposed addition of subsection 88(2B).

Given this, I do not believe that amendments to the existing explanatory memorandum for the Bill are required.

Thank you for raising this matter.

The Committee thanks the Minister for his response but reiterates the point that inclusion of this information in the explanatory memorandum to the bill would provide greater clarity to readers and those affected by the operation of the legislation. The Committee would expect that this type of omission does not occur in explanatory memoranda. If omissions such as this do occur in the future, the Committee will continue to draw them to the attention of Ministers.

Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Parliamentary Secretary to the Minister for Health and Ageing responded to the Committee's comments in a letter dated 5 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Health and Ageing

Background

This bill amends the *Therapeutic Goods Act 1989* (Therapeutic Goods Act) to:

- allow the Secretary to suspend the registration or listing on the Australian Register of Therapeutic Goods of a medicine if there are concerns about its safety;
- amend the manufacturing licence provisions for the issuing of single site licences and enable the transfer of licences between owners and variations to licence authorisations;
- extend the powers of authorised officers who can enter manufacturing premises to monitor for safety and quality to allow such officers to take samples of therapeutic goods and any thing (such as ingredients) that relates to those goods, and enable the taking of any still or moving image or any recording to assist in providing a record of the observations made;
- provide a framework for the improved regulation of homoeopathic and anthroposophic medicines, as recommended by the Expert Committee on Complementary Medicines in the Health System in 2003;

- allow the Minister to list, by legislative instrument, various permitted and prohibited ingredients in listed medicines which are currently covered as a class in the regulations but are not individually identified;

- amend references to legislative instruments in the Therapeutic Goods Act to reflect the *Legislative Instruments Act 2003*, and current terminology;

- clarify arrangements for the setting of conditions imposed on registered and listed therapeutic goods;

- strengthen scrutiny of overseas manufacturing of listed medicines;

- clarify that decisions may be made using computer software under the Therapeutic Goods Act, such as for the listing of medicines;

- clarify the definition of accessory to a medical device; and

- clarify arrangements for the Minister to make a code relating to the advertising of therapeutic goods.

The bill also contains application, saving and transitional provisions.

Exclusion of rights
Schedule 1, item 2, new paragraph 29D(1)(b)

Schedule 1 of the bill inserts new provisions in the Therapeutic Goods Act to enable the suspension of registered or listed therapeutic goods from the Register. (This power already exists in relation to medical devices). Proposed new paragraph 29D(1)(b), to be inserted by item 2 of Schedule 1, gives the Secretary power to suspend goods if he or she is satisfied that there are grounds for cancelling the registration or listing of goods under section 30 of the Therapeutic Goods Act.

One of the existing grounds for cancellation under the Therapeutic Goods Act is a request from a person for cancellation (paragraph 30(1)(c)). The Committee notes that the right of a person to request a suspension is not included in the grounds available to the Secretary for granting a suspension under proposed new paragraph 29D(1)(b). The Committee **seeks the Minister's advice** as to the justification for this exclusion of the exercise of a right that exists elsewhere in the Therapeutic Goods Act.

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 Parliamentary Secretary

As Parliamentary Secretary with executive responsibility for the Therapeutic Goods Administration, I am responding on behalf of the Australian Government.

The Committee commented that the Bill includes a new provision empowering the Secretary to suspend medicines from the Register where there are grounds for doing so as set out in new subsection 29D(1). However, the Committee expressed concern that a provision had not been included enabling a sponsor to apply to the Secretary to seek suspension of their good from the Register having noted a similar provision exists for sponsors seeking cancellation from the Register.

Such a provision is not necessary for suspension as the effect of a suspension is to temporarily prevent supply of the good to the market. Sponsors are able to temporarily halt supply of their good to the market on their own volition and, therefore, do not require the Secretary to impose a formal suspension. Annual charges that would otherwise be due and payable in relation to the therapeutic good remain so, as the good is not removed from the Register.

A provision to enable sponsors to seek cancellation of their good from the Register by the Secretary is, however, necessary as this enables a sponsor to cease to be the sponsor for a good and as a result future annual charges would not accrue and be payable after the cancellation takes effect. This reflects business decisions made by sponsors to permanently cease supply of a good to the market.

The Committee thanks the Parliamentary Secretary for this response.

Excluding merits review
Schedule 1, item 2, new sections 29D, 29E and 29F

Item 2 of Schedule 1 inserts new sections into Part 3-2 of the Therapeutic Goods Act to allow the Secretary to suspend the registration and listing of therapeutic goods (proposed new sections 29D and 29E), extend the suspension (proposed new subsection 29E(3)) and revoke the suspension (proposed new section 29F).

Section 60 of the Therapeutic Goods Act provides for review of decisions which include decisions made 'under Part 3-2 (registration and listing of therapeutic goods)' (paragraph 60(1)(c)) and decisions made 'under Part 4-6 (suspension and cancellation from the Register)' (paragraph 60(1)(g)). Since Part 3-2 of the Therapeutic Goods Act currently includes decisions on the suspension from the Register, the Committee considers that the proposed new sections could be reflected in section 60 to remove doubt about the availability of internal review and merits review for decisions on suspension under that Part.

This need is underscored by the statement in the explanatory memorandum (at page 7) on the operation of item 7 of Schedule 1 which sets out the application of the amendments made by item 2 of Schedule 1: 'Once the registration or listing of the goods is officially cancelled under section 30, the *only* option for the sponsor of those goods would be to re-apply for registration or listing' (emphasis added).

Since other options for the sponsor would include seeking merits and/or judicial review of the decision, item 7 of Schedule 1 (the Application provision) could not purport to remove these rights. The Committee **seeks the Minister's advice** as to the availability of merits review of the new decisions inserted by Schedule 1 of the bill.

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

Relevant extract from the response from the Parliamentary Secretary

> The Committee expressed concern that there was doubt whether decisions regarding suspension of medicines would not be reviewable.
>
> Paragraph 60(1)(c) provides that decisions under Part 3-2 of the Act are reviewable. The provisions for cancellation and the new provisions for suspension are both within this Part and will, therefore, be subject to the review provisions under section 60.

The Committee thanks the Parliamentary Secretary for this response, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

Wide delegation of power
Schedule 2, item 19, new sections 40A and 40B

Schedule 2 of the bill inserts new provisions amending Part 3-3 of the Therapeutic Goods Act in relation to manufacturing licences held by people who manufacture therapeutic goods. New provisions in item 19 of Schedule 2 give the Secretary a range of new powers such as the power to vary a site authorisation (proposed new section 40A), vary a licence (proposed new subsection 40B(3)), determine a reasonable time for compliance with a notice (proposed new subsection 40B(10)), and approve forms (proposed new subsection 40B(11)).

The Secretary's powers could potentially be exercised by junior officers because section 57 of the current Therapeutic Goods Act enables the Secretary to delegate 'all or any of his or her powers and functions' under the Act to '(b) an officer of an authority of the Commonwealth that has functions in relation to therapeutic goods' and '(ba) an APS employee in an Agency (within the meaning of the *Public Service Act 1999*) that has functions in relation to therapeutic goods'.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the Committee notes that the explanatory memorandum does not explain the level of the officers who will be applying the new powers. The Committee **seeks the Minister's advice** on the level of officers who will have the delegation to exercise these powers.

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

Relevant extract from the response from the Parliamentary Secretary

> In relation to new provisions for manufacturing licensing the Committee sought advice regarding the level of officers to whom the Secretary's decision making powers would be expected to be delegated.
>
> Certain powers conferred by the Act and Regulations made under it on the Minister and Secretary have traditionally been delegated to the National Manager, Senior Executive Officers and relevant senior officers within the TGA.
>
> Consistent with the current delegation of decision making powers under the Act, decisions relating to the new manufacturing licensing provisions would be delegated to the National Manager, the Principal Medical Advisor, the Branch Head of the Office of Manufacturing Quality and other appropriate officers at a level commensurate with the responsibility required to exercise the delegation.

The Committee thanks the Parliamentary Secretary for this response.

Schedule 3, item 16
Retrospective application

Item 16 of Schedule 3 explains the application of amendments relating to: conditions of registration or listing of goods (section 28); conditions of medical device conformity assessment certificates (section 41EJ) and medical devices included in the Register (section 41FN). The amendments are stated to apply 'before, on or after the commencement' of those provisions. The explanatory memorandum does not explain why there is a need for retrospective application of the legislation. The Committee therefore **seeks the Minister's advice** on the need for retrospective application of the relevant provisions.

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 Parliamentary Secretary

> The Bill includes new provisions to clarify and strengthen monitoring arrangements for therapeutic goods. The Committee commented that the amendments giving effect to the expanded powers are expressed to take effect retrospectively.
>
> The effect of this change is to ensure that all goods in the Register prior to Royal Assent will be subject to the new arrangements; however, the use of the amended monitoring provisions will not have effect retrospectively to past inspections. The new arrangements and powers will only apply to inspections occurring following Royal Assent.
>
> The application of the provision to all goods in the Register, including those in the Register prior to Royal Assent of the Bill, is necessary to ensure that future inspections occur consistently across premises associated with therapeutic goods. The application of the provisions is not in practical terms retrospective as the intent is to ensure all premises are treated equally in future inspections.

The Committee thanks the Parliamentary Secretary for this response.

Delegation of legislative power
Schedule 4, item 1, subsection 3(1)

Item 1 of Schedule 4 inserts a definition of 'anthroposophic pharmacopoeia' into subsection 3(1) of the Therapeutic Goods Act. The definition includes a pharmacopoeia publication as 'in force from time to time'. The explanatory memorandum explains (at page 20) that anthroposophic pharmacopoeia is a publication or a part of a publication specified by the Minister, by legislative instrument, under proposed new paragraphs 3AB(3)(a) or (b), respectively. The legislative instrument applies, adopts or incorporates, with or without modification, any matter contained in the publication or part of the publication specified in the instrument as in force from time to time.

The Minister's second reading speech refers to homeopathic and anthroposophic medicines and explains that the amendments in Schedule 4 put 'in place a framework allowing standards for these medicines to be set by reference to various pharmacopaeias from July 2011'.

This means the legislative power to make standards for therapeutic goods has the potential to be delegated, to some extent, to overseas pharmacopaeias. However, the Committee **leaves to the Senate as a whole** the question of whether this is an appropriate delegation of legislative power in the circumstances.

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

Relevant extract from the response from the Parliamentary Secretary

> The Committee drew attention to the fact that item l and item 9 in Schedule 4 will allow the Minister to determine standards by reference to the Anthroposophic Pharmacopoeia "as in force from time to time".
>
> This is necessary as if new editions of Anthroposophic Pharmacopoeias were only applicable for use as a Standard after they have been specified by the Minister in the Gazette there would be a lag between when the Pharmacopoeias come into force in the country of publication and when they are adopted in Australia. This time lag would be a source of potential confusion for persons dealing in anthroposophic medicines, who are accustomed to complying with the Pharmacopoeia in other countries as soon as they come into force.

The proposed amendments in Schedule 4 will result in both Homoeopathic and Anthroposophic pharmacopoeias applying in Australia as soon as they come into force in their "home jurisdiction". This will prevent confusion for manufacturers, importers and others, and is strongly supported by industry.

This reflects the approach taken in the Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008 (2009), currently awaiting Royal Assent, where the British Pharmacopoeia, European Pharmacopoeia and the United States Pharmacopoeia – National Formulary were expressed as being in force from time to time as standards for therapeutic goods. The Homoeopathic and Anthroposophic Pharmacopoeia will provide specific standards relevant to these complementary medicines.

The Committee thanks the Parliamentary Secretary for this response.

Senator the Hon Helen Coonan
Chair

THE HON LINDSAY TANNER MP

Minister for Finance and Deregulation
Member for Melbourne

Senator the Hon Helen Coonan
Chairperson, Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan,

I refer to the Scrutiny of Bills Committee *Alert Digest No. 6 of 2009*, and the question regarding subclause 14(6) of the *Appropriation Bill (No. 2) 2009-2010* (the Bill).

Subclause 14(6) of the Bill, as the *Alert Digest* correctly suggests, has been included to assist readers. As the *Alert Digest* also notes, subclause 14(6) has the same effect as subclause 13(5), which also states that requests to me, as Finance Minister, to reduce certain departmental items for an agency are not legislative instruments.

The reason that these requests are not legislative instruments is because the requests are not an exercise of legislative power, but a requirement that must be met before I, as Finance Minister, may reduce an appropriation under clause 14.

In contrast, any determination made by me, as Finance Minister, to reduce a CAC Act body payment in accordance with section 14 of the Bill (once enacted) would be a legislative instrument that must be tabled in Parliament and is disallowable.

As with subclause 13(5), I have asked my department to include this information in the explanatory memoranda for future Appropriation Bills, clarifying that subclause 14(6) has been inserted to assist readers. Such provisions have been included in Appropriation Acts since the 2003-2004 Additional Estimates.

Yours sincerely

Lindsay Tanner
15 JUN 2009

Parliament House, Canberra ACT ~ Telephone: (02) 6277 7400 ~ Facsimile: (02) 6273 4110

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

16 JUN 2009

MN09-002269

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

Dear Senator

Thank you for the letter of 3 June 2009, from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee), about the Coordinator-General for Remote Indigenous Services Bill 2009 (Bill).

In *Alert Digest No. 6 of 2009* the Committee noted that the delegation power at clause 29 of the Bill would allow the Coordinator-General to delegate 'all or any of his or her powers' under the Bill (other than clause 27) 'to a member of the Coordinator-General's staff'. The Committee stated that it 'prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated'.

The Committee seeks my advice regarding the potential delegation of powers to a junior officer of the Coordinator-General's staff and why this is considered to be appropriate.

In summary, it is not anticipated that the Coordinator-General would, as a matter of routine, delegate his or her powers to staff below Senior Executive Service (SES) level. However, given the Coordinator-General will have a very small number of staff, only one of whom will be employed at SES level, it was considered impractical and inappropriate to restrict the Coordinator-General's power of delegation to staff at a particular level.

The Coordinator-General will have a very small number of staff available from the Department of Families, Housing, Community Services and Indigenous Affairs to assist him or her (probably no more than 10). Only one of the Coordinator-General's staff will be a member of the SES. The majority of the Coordinator-General's staff will be employed at the Executive Level.

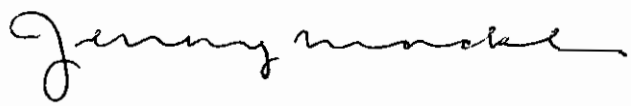
In the ordinary course of events, it is expected that the Coordinator-General would delegate powers (if any) firstly to his or her SES staff member. However, given there will be only one such staff member, it is also anticipated that there may be some circumstances in which it would be necessary and appropriate to delegate a power (or powers) to non-SES staff.

In addition, I note that the powers of the Coordinator-General that may be delegated are, broadly speaking, facilitative in nature, in that they involve the ability to make inquiries, request assistance and report. The powers may be exercised only in connection with the Coordinator-General's functions of monitoring, assessing, advising in relation to, and driving the development and delivery of services and progress towards achieving the Closing the Gap targets.

Having regard to the factors mentioned above, it was considered appropriate to give the Coordinator-General a relatively broad power of delegation in the terms of clause 29.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely



JENNY MACKLIN MP

SENATOR SCOTT LUDLAM
AUSTRALIAN GREENS
SENATOR FOR WESTERN AUSTRALIA

Ms. Julie Dennett
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House,
Canberra, ACT 2600

16 June 2009

Dear Ms. Dennett,

Thank you for your letter of 3 June 2009 regarding the Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009 outlining the Committee's concerns with the setting of a deposit refund amount.

In the consultation and drafting process of this Bill, I was most cognisant of the fact that the Senate cannot impose a levy. After seeking clarification from a variety of sources, it is my understanding that a deposit is neither a levy nor a fee. A deposit is refunded to the consumer.

That being the case, I would like to indicate to the Committee that I will happily move an amendment to this Bill to provide an upper limit to the deposit when it is debated in the Senate.

Sincerely

Senator Ludlam

8 Cantonment Street,
Fremantle, Western Australia 6160
Ph: 08 9335 7477 | toll free 1300 733 450
Fax: 08 9335 7499

Suite S1.36, Parliament House CANBERRA ACT 2600
Ph: (+61) 02 6277 3467
Fax: (+61) 02 6277 5821
Senator.Ludlam@aph.gov.au | scottludlam.org.au

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

11 JUN 2009

Ms Julie Dennett
Secretary
Standing Committee for the Scrunity of Bills
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Thank you for your letter of 14 May 2009, drawing my attention to the Standing Committee's comments on the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (T&C Bill), contained in the Scrutiny of Bills *Alert Digest No. 5 of 2009* (13 May 2009).

Please find attached my reply to the Committee's concerns.

I trust the Committee finds this information useful.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

Encl.

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

Items 7 to 10 of Schedule 2 – General regulation-making powers

Items 7 to 10 of Schedule 2 of the T&C Bill allow for regulations of a transitional, application or saving nature, including the power to make regulations which modify provisions of the *Fair Work Act 2009* (Fair Work Act), the transitional Schedules of the T&C Bill or provisions of the *Workplace Relations Act 1996* (WR Act). This includes regulations that may take effect before they are registered under the *Legislative Instruments Act 2003.*

Item 9 and 10 of Schedule 2 make it clear that the regulations cannot confer additional compliance powers on Fair Work Inspectors, modify the right of entry provisions in the T&C Bill or the Fair Work Act or allow a court to impose a pecuniary penalty or convict a person in relation to a regulation that has a retrospective effect.

As you would be aware, the Fair Work Act establishes a new workplace relations system. The T&C Bill repeals the majority of the current WR Act, and addresses the significant transitional and consequential issues arising from this repeal. The T&C Bill deals with a range of both complex and technical issues, including issues that affect the entitlements of employees and the obligations of employers.

For example, it has to provide for saving provisions dealing with over a dozen industrial instruments, some of which date back to 1993. Given this complexity, I consider it both necessary and appropriate to include these broad regulation making powers to allow the Government to deal with unexpected consequences relating to transitional arrangements and to ensure a smooth transition to the new Fair Work system.

I do not anticipate that the power to make regulations that take effect before they are registered to be relied upon except in the most extraordinary of circumstances, for example, if employee entitlements were not properly preserved under the provisions of the T&C Bill, it would be important to reinstate these entitlements from commencement.

Item 8 of Schedule 3 – Certain transitional instruments displace certain Commonwealth laws

Item 8 of Schedule 3 of the T&C Bill provides that certain transitional instruments displace prescribed conditions of employment specified in a Commonwealth law that is prescribed in the regulations. This item substantially replicates section 350 of the WR Act and provides Commonwealth employers and employees with the flexibility to determine certain employment conditions in the workplace.

Any regulations made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

Item 10 of Schedule 6 – Notification of the cut-off for the enterprise instrument modernisation process

Under Schedule 6 of the T&C Bill, a person covered by an enterprise instrument has until the end of 31 December 2013 to apply to Fair Work Australia (FWA) for the instrument to be modernised or terminated. If no application is made, the instrument will terminate at the end of 31 December 2013. To ensure that those covered such instruments make an informed decision about whether to seek a modern enterprise award, item 10 requires FWA to advise those covered by unmodernised enterprise instruments 6 months before 31 December 2013 of the deadline for making an application and the consequences for the enterprise instrument if they do not do so.

Subitem 10(3) of Schedule 6 applies section 625 of the Fair Work Act to FWA's advisory function concerning the enterprise instrument modernisation process and relevantly permits the President to delegate particular powers to the General Manager, SES staff or acting SES staff or to a member of FWA staff who is in a class of persons prescribed by the regulations. Subsection 625(3) enables regulations to prescribe a class of person to whom FWA powers may be delegated as there may be limited circumstances where it is appropriate for members of FWA staff who are not SES employees to exercise FWA functions. The explanatory memorandum to the *Fair Work Bill 2008* noted that this would enable, for example, powers to be delegated to managers for regional offices who may not be SES staff.

The provision of advice about the enterprise instrument modernisation process is a purely administrative function which does not have an effect on a person's rights. FWA is a quasi-judicial tribunal which will must perform its functions and exercise its powers in a way that is fair and just, and open and transparent (see section 577 of the Fair Work Act). It will exercise discretion about how to notify persons relevant to its proceedings in a wide range of contexts, subject to these principles.

Where power is delegated under section 625 of the Fair Work Act, the power will be exercised subject to any directions of the President. The provision of advice about the enterprise instrument modernisation process will only be able to be undertaken by FWA staff who are not SES employees where the regulations have prescribed a class of employee (such as managers of regional offices) to whom FWA powers may be delegated.

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Senator the Hon Helen Coonan
Senator for New South Wales
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Coonan

I refer to the letter dated 14 May 2009 from the Secretary of the Standing Committee for the Scrutiny of Bills to my office regarding the Committee's comments in *Alert Digest No. 5 of 2009* concerning the Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009 (the Bill).

I note the Committee has raised concerns about proposed new clause 32A of Schedule 1A, to be inserted by item 5 of Schedule 1 of the Bill, which would enable the Minister to revoke a body's approval as a VET provider if the body no longer offers any VET courses of study and the Minister complies with the requirements of clause 34 of Schedule 1A of the *Higher Education Support Act 2003* (the Act) to provide procedural fairness to the affected provider.

I understand the Committee's concern relates to the availability of review rights in relation to decisions to be made by the Minister under new clause 32A.

The decision of the Minister to revoke a body's approval as a VET provider is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), which provides a statutory regime for the review of decisions of an administrative character, made under an enactment, which are final or operative and determinative.[1] Indeed, the Minister's initial decision whether or not the applicant is approved as VET provider is also subject to review under the ADJR Act.

Further, the decisions of the Minister to both approve and revoke the approval of a body as a VET or higher education provider are also subject to Parliamentary scrutiny. The notices by which the Minister must notify a body of these decisions are legislative instruments under the Act. In relation to notices of approval and revocation for VET providers see subclauses 12(1) and 38(1) of Schedule 1A of the Act respectively; and in relation to notices of approval and revocation for higher education providers see subsections 16-55(1) and 22-35(1) of the Act respectively.

[1] *Griffith University v Tang* [2005] HCA 7.

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

Under the Act, a decision of the Minister to revoke a body's approval as a VET (or higher education) provider takes effect on the day immediately after the last day on which a resolution to disallow the legislative instrument could be moved in a House of Parliament. Therefore, the revocation of a provider's approval does not take legal effect until after Parliament has had adequate opportunity to scrutinise and examine the decision during the disallowance period in both Houses of Parliament.

Clause 34 of Schedule 1A and section 22-20 of the Act also require that the Minister affords the VET or higher education provider, procedural fairness including an opportunity to make submissions in respect of a notified intention to revoke approval, before the Minister makes a final decision to revoke the approval of the VET or higher education provider. The Act further requires that the Minister must consider any submissions received from the provider in making such a decision – see subclause 34(2) of Schedule 1A and subsection 22-20(2) of the Act.

Information regarding the VET provider approval process is contained in the *VET Provider Handbook*, which is available publicly from the 'useful publications' section of the VET FEE-HELP webpage on my department's website at http://www.dest.gov.au/sectors/training_skills/programmes_funding/Programme_categories/key_skills_priorities/vet_fee_help/Approved_VET_providers.htm#publications.

I trust this information enables the Committee to finalise its consideration of the Bill.

Yours sincerely

Julia Gillard
Minister for Education

[illegible] 2009

The Hon Anthony Albanese MP
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

Reference: 04191-2009

Ms Julie Dennett
Committee Secretary
Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

16 JUN 2009

Dear Ms Dennett Julie,

Thank you for your letter dated 3 June 2009, about comments made by the Standing Committee for the Scrutiny of Bills in their Alert Digest No. 6 of 2009, in relation to the Nation Building Program (National Land Transport) Amendment Bill 2009 (the Bill).

I have considered the comments raised by the Committee in the Alerts Digest that the explanatory memorandum does not explain that the proposed subsection 88(2B) is a legislative instrument and that it is not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003*.

Subsection 88(5) of the *AusLink (National Land Transport) Act 2005* provides:

> *"An instrument varying an AusLink Roads to Recovery List is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the instrument."*

The Bill does not propose amendments to this subsection and therefore it will apply to the proposed addition of subsection 88(2B).

Given this, I do not believe that amendments to the existing explanatory memorandum for the Bill are required.

The contact officer in my Department for this matter is Richard Farmer, General Manager, Policy Planning and Development on 6274 6482.

Thank you for raising this matter.

Yours sincerely

ANTHONY ALBANESE

PARLIAMENT HOUSE CANBERRA ACT 2600
Telephone: 02 6277 7680 Facsimile: 02 6273 4126

Senator the Hon Jan McLucas
Parliamentary Secretary to the Minister for Health and Ageing

Senator the Hon Helen Coonan
Chair
Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

I refer to a letter of 14 May 2009 to the Senior Adviser of the Minister for Health and Ageing, the Hon Nicola Roxon MP, from Ms Julie Dennett, Secretary of the Standing Committee for the Scrutiny of Bills, regarding the comments of the Scrutiny of Bills Committee contained in the Scrutiny of Bills *Alert Digest No. 5 of 2009* concerning the Therapeutic Goods Amendment (2009 Measures No 1) Bill 2009 (the Bill). As Parliamentary Secretary with executive responsibility for the Therapeutic Goods Administration, I am responding on behalf of the Australian Government.

The response to specific comments by the Committee in relation to the relevant provisions in the Bill is attached.

Yours sincerely

Jan McLucas.

Jan McLucas
5 JUN 2009
Encl

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 3680 Facsimile: (02) 6277 5721

Response to the Scrutiny of Bills Committee Report on the *Therapeutic Goods Amendment (2009 Measures No 1) Bill 2009*
Alert Digest No 5 of 2009 (13 May 2009)

Exclusion of rights – Schedule 1, item 2, new paragraph 29D(1)(b)
The Committee commented that the Bill includes a new provision empowering the Secretary to suspend medicines from the Register where there are grounds for doing so as set out in new subsection 29D(1). However, the Committee expressed concern that a provision had not been included enabling a sponsor to apply to the Secretary to seek suspension of their good from the Register having noted a similar provision exists for sponsors seeking cancellation from the Register.

Such a provision is not necessary for suspension as the effect of a suspension is to temporarily prevent supply of the good to the market. Sponsors are able to temporarily halt supply of their good to the market on their own volition and, therefore, do not require the Secretary to impose a formal suspension. Annual charges that would otherwise be due and payable in relation to the therapeutic good remain so, as the good is not removed from the Register.

A provision to enable sponsors to seek cancellation of their good from the Register by the Secretary is, however, necessary as this enables a sponsor to cease to be the sponsor for a good and as a result future annual charges would not accrue and be payable after the cancellation takes effect. This reflects business decisions made by sponsors to permanently cease supply of a good to the market.

Excluding merits review – Schedule 1, item2, new sections 29D, 29E and 29F
The Committee expressed concern that there was doubt whether decisions regarding suspension of medicines would not be reviewable.

Paragraph 60(1)(c) provides that decisions under Part 3-2 of the Act are reviewable. The provisions for cancellation and the new provisions for suspension are both within this Part and will, therefore, be subject to the review provisions under section 60.

Wide delegation of power – Schedule 2, item 19, new sections 40A and 40B
In relation to new provisions for manufacturing licensing the Committee sought advice regarding the level of officers to whom the Secretary's decision making powers would be expected to be delegated.

Certain powers conferred by the Act and Regulations made under it on the Minister and Secretary have traditionally been delegated to the National Manager, Senior Executive Officers and relevant senior officers within the TGA.

Consistent with the current delegation of decision making powers under the Act, decisions relating to the new manufacturing licensing provisions would be delegated to the National Manager, the Principal Medical Advisor, the Branch Head of the Office of Manufacturing Quality and other appropriate officers at a level commensurate with the responsibility required to exercise the delegation.

Retrospective application of amended monitoring powers – Schedule 3, item 16
The Bill includes new provisions to clarify and strengthen monitoring arrangements for therapeutic goods. The Committee commented that the amendments giving effect to the expanded powers are expressed to take effect retrospectively.

The effect of this change is to ensure that all goods in the Register prior to Royal Assent will be subject to the new arrangements; however, the use of the amended monitoring provisions will not

have effect retrospectively to past inspections. The new arrangements and powers will only apply to inspections occurring following Royal Assent.

The application of the provision to all goods in the Register, including those in the Register prior to Royal Assent of the Bill, is necessary to ensure that future inspections occur consistently across premises associated with therapeutic goods. The application of the provisions is not in practical terms retrospective as the intent is to ensure all premises are treated equally in future inspections.

Delegation of legislative power - Schedule 4, item 1, subsection 3(1)
The Committee drew attention to the fact that item1 and item 9 in Schedule 4 will allow the Minister to determine standards by reference to the Anthroposophic Pharmacopoeia "as in force from time to time".

This is necessary as if new editions of Anthroposophic Pharmacopoeias were only applicable for use as a Standard after they have been specified by the Minister in the Gazette there would be a lag between when the Pharmacopoeias come into force in the country of publication and when they are adopted in Australia. This time lag would be a source of potential confusion for persons dealing in anthroposophic medicines, who are accustomed to complying with the Pharmacopoeia in other countries as soon as they come into force.

The proposed amendments in Schedule 4 will result in both Homoeopathic and Anthroposophic pharmacopoeias applying in Australia as soon as they come into force in their "home jurisdiction". This will prevent confusion for manufacturers, importers and others, and is strongly supported by industry.

This reflects the approach taken in the Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008 (2009), currently awaiting Royal Assent, where the British Pharmacopoeia, European Pharmacopoeia and the United States Pharmacopoeia – National Formulary were expressed as being in force from time to time as standards for therapeutic goods. The Homoeopathic and Anthroposophic Pharmacopoeia will provide specific standards relevant to these complementary medicines.