SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2009

24 June 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

SEVENTH REPORT OF 2009

The Committee presents its Seventh 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:

Australian Climate Change Regulatory Authority Bill 2009

Carbon Pollution Reduction Scheme Bill 2009

Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009

Family Assistance Legislation Amendment (Child Care) Bill 2009

National Greenhouse and Energy Reporting Amendment Bill 2009 *****

Native Title Amendment Bill 2009

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

Australian Climate Change Regulatory Authority Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Climate Change and Water responded to the Committee's comments in a letter dated 18 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 14 May 2009
Portfolio: Climate Change and Water

Background

Part of a package of 10 bills in relation to the establishment of a national emissions trading scheme, this bill establishes the Australian Climate Change Regulatory Authority (Authority) as a statutory authority. The Authority will be responsible for administering the Carbon Pollution Reduction Scheme, the Renewable Energy Target, and the National Greenhouse and Energy Reporting System.

Legislative Instruments Act—exemption
Subclause 39(5)

Part 2 (clauses 10-42) contains the provisions for the establishment and operation of the Authority. Clauses 39 and 40 contain the planning and reporting obligations of the Authority. Subclause 39(5) provides that the Minister may give written guidelines to the Chair of the Authority in relation to matters covered by paragraph 39(3)(c) or 39(4)(b) which are relevant to the Authority's corporate plan. Subclause 39(6) provides that a guideline issued under subclause 39(5) is not a legislative instrument but the explanatory memorandum does not explain why this is the case. The Committee **seeks the Minister's advice** whether subclause 39(5) has been inserted solely for the benefit of readers, or whether it is designed to exempt the guidelines 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.

Legislative Instruments Act—exemption
Subclause 47(3)

Part 3 (clauses 43-53) regulates disclosure of information under the bill. Subclause 47(1) provides for disclosure of protected information to a Royal Commission. The Chair of the Authority may, in writing, impose conditions on the disclosure (subclause 47(2)). Subclause 47(3) provides that an instrument under subclause 47(2) is not a legislative instrument but the explanatory memorandum does not explain why this is the case. The Committee **seeks the Minister's advice** whether subclause 47(3) has been inserted solely for the benefit of readers, or whether it is designed to exempt an instrument 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.

Legislative Instruments Act – exemption
Subclause 48(4)

Similarly, subclause 48(2) provides for disclosure of protected information to an 'agency, body or person' if the Chair of the Authority authorises the disclosure in writing. The Chair may, in writing, impose conditions on the disclosure (subclause 48(3)). Subclause 48(4) provides that an instrument under subclause 48(3) is not a legislative instrument. The explanatory memorandum gives no explanation why the instrument is not a legislative instrument. The Committee **seeks the Minister's advice** whether subclause 48(4) has been inserted solely for the benefit of readers, or whether it is designed to exempt an instrument 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

The following are not instruments of a legislative character within the meaning of section 5 of the *Legislative Instruments Act 2003*:

- guidelines issued by the Minister under subclause 39(5)
- written communications from the Chair of the Authority under subclause 47(2) or 48(3).

The statements in section 39(6), 47(3) and 48(4) are solely for the benefit of readers, and are not intended to provide an exemption from the *Legislative Instruments Act 2003*.

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

Carbon Pollution Reduction Scheme Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Climate Change and Water responded to the Committee's comments in a letter dated 18 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 14 May 2009
Portfolio: Climate Change and Water

Background

As the main bill in the package of 10 bills relating to the Carbon Pollution Reduction Scheme, this bill gives effect to Australia's obligations to reduce greenhouse gas emissions under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The bill contains the detailed framework of the national emissions trading scheme, including:

- the entities and emissions to be covered by the scheme;
- the obligation on liable entities to surrender emissions units corresponding to their emissions;
- limits on the number of emissions units that will be issued;
- the nature of Australian emissions units;
- allocation of Australian emissions units, including by auction and the issue of free units;
- mechanisms to contain costs, including a fixed price period and a price cap;
- linking to other emissions trading schemes;

- assistance in relation to emissions-intensive trade-exposed activities and coal-fired electricity generators;
- voluntary inclusion of reforestation activities under the scheme;
- the Australian National Registry of Emissions Units; and
- monitoring and enforcement.

Insufficiently defined administrative powers
Various clauses

The operation of the scheme established under the bill relies heavily on the use of the Australian Climate Change Regulatory Authority's website. At least fifty provisions in the bill require the Authority to publish information on its website, remove information from the website, or undertake certain action contingent on, or related to, publication of information on the website (subclauses 23(3), 30(3), 49(3), 133(3)(b), 143A(3), 157(3), 158(3), 180(6), 183(4), 186(3)(a), 186(7), 186(8), 186(9), 187(10)(a), 187(12)(a), 238(3), 261(3), 269, 270, 271(1), 271(2), 272(1), 272(2), 272(3), 272(4), 272(5), 273(1), 273(2), 273(3), 273(4), 274, 275(1), 275(2), 276(1), 276(2), 276(3), 277, 278(2), 278A(2), 278B(2), 278C(2), 278D(2), 278D(3)(d), 278D(3)(e), 278D(3)(f), 278E(2), 278F(2), 278G(1), 294(6), 343(5) and 384(3)).

The Australian Climate Change Regulation Authority Bill 2009 (the related bill in the package which establishes the Authority) gives the Authority the *power* to do all things necessary for the performance of its functions (subclause 12(1)); and its *functions* (set out in clause 11 of the related bill) would include all of the activities prescribed in the relevant sections of the Carbon Pollution Reduction Scheme Bill 2009. While there is no specific power to maintain an efficient website, it is an implied power.

However, since so many of the Authority's activities will be communicated solely via its website, and since those affected by the carbon pollution reduction scheme will be so reliant on the effective operation of the website, the Committee considers that the administrative powers and responsibilities regarding the operation of the website could perhaps be better articulated, or at the very least, closely monitored.

The Committee appreciates that the bill is reflective of a modern approach to the communication and dissemination of information. At the same time, however, the bill is seeking to implement an entirely new scheme with major implications for many stakeholders, including business and the broader community. If a website is to be exclusively relied upon as the source of vital information, it is imperative that the efficient operation of the website, including the availability of up-to-date information, is assured at all times.

The Committee **seeks the Minister's advice** on whether these issues have been considered. In particular, the Committee is interested to ascertain how the Authority will ensure that the website is reliable and up-to-date; how the Authority will make sure that the website is available to, and can be accessed by, all those affected or impacted upon by the operation of the scheme; and whether any of the administrative powers and responsibilities of the Authority regarding the operation of the website will be monitored or assessed to ensure effective operation over time. In this context, the Committee considers that it may be appropriate for a parliamentary committee to be tasked with independent assessment of the operation of the website and the broader issue of utilising the Internet as the only means of information dissemination.

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

Relevant extract from the response from the Minister

Most of the provisions cited by the Committee have been included to ensure a high level of transparency and accountability regarding the operation of the Scheme. Many of these provisions are also aimed to promote efficient price discovery by providing price-relevant information to the market in a timely manner and ensuring that the information is available to the whole market.

In a few instances, the availability of information published on the website will be required by entities to comply with Scheme obligations. For example, a supplier of an eligible upstream fuel may require access to the Obligation Transfer Number (OTN) Register, which will be available on the Authority's website, to check the OTN quoted by a customer.

The Australian Government Information Management Office has published a number of standards for the development and maintenance of Australian

Government websites. Some of these are mandatory for CEOs and agency heads, including the chair of ACCRA, to satisfy their accountabilities under the *Financial Management and Accountability Act 1997*.

These standards will be used to guide the implementation of ACCRA's website and the services it provides. The Government has already committed itself to the establishment of a stakeholder consultative committee, comprising representatives drawn from business, environmental and community stakeholders, to advise the Minister on Climate Change and Water, Senator the Hon Penny Wong, on the operational aspects of the Carbon Pollution Reduction Scheme. The committee will operate until the ACCRA is established by the proposed *Australian Climate Change Regulatory Authority Act 2009*. At that time, ACCRA is likely to consider the appropriate mechanisms by which it undertakes stakeholder consultation and reviews the implementation of the Scheme.

The operation of the website and the broader issue of utilising the internet for the purposes of the Scheme may also be examined as part of periodic reviews by independent expert advisory committees, provided for in Part 25 of the Carbon Pollution Reduction Scheme Bill.

The Committee thanks the Minister for this response, which addresses its concerns relating to the bill's heavy reliance on the use of the Australian Climate Change Regulatory Authority's website.

Apparently excessive powers
Clauses 41-43

Division 5 of Part 3 (clauses 41-68) provides for Obligation Transfer Numbers (OTNs). OTNs allow for the transfer of obligations for eligible upstream fuels and synthetic greenhouse gases down the supply chain to re-suppliers or end-users. The Authority will issue OTNs as the result of an application or on its own initiative (clause 41). An applicant must pay a fee (if any) and meet certain other requirements, some of which are prescribed by regulations (subclause 42(2)).

The Authority may also require that a person provide further information in connection with an application, within a specified period. (subclause 43(1)). If they fail to do so, the Authority has an absolute discretion to refuse to consider, or refuse to take any action or further action, in relation to the application (subclause 43(2)). Such a decision by the Authority is not reviewable (see the list of reviewable decisions contained in clause 346).

The Committee notes that there is no obligation on the Authority to assist the applicant to complete the application, and the applicant could lose their application fee and the time involved in resolution of the matter. This is an apparently excessive power, especially during the establishment phase of the scheme. The Committee **seeks the Minister's advice** as to whether it is intended that the Authority will issue guidelines in relation to the exercise of its power in these circumstances.

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

Relevant extract from the response from the Minister

> It is expected that the OTN application form approved by ACCRA and any regulations made under subclause 42(3)(c) would clearly set out the information and documents that a person would need to provide in applying for an OTN. It is intended that ACCRA would only refuse to consider the application or take any action in relation to the application if this information is not provided. ACCRA is expected to utilise a collaborative approach with the applicant to ensure that the required information was available to ACCRA to allow it to make a decision.

The Committee thanks the Minister for this response, which addresses its concerns.

Uncertainty of civil penalty regime
Clauses 50A and 330

Division 5 of Part 3 contains provisions imposing obligations on holders of OTNs. For example, clause 50A requires that, if a person who has an OTN entry in the OTN Register changes their address, they must notify the Authority in writing within 14 days of the change. If they fail to do so they are liable to a civil penalty (subclause 50A(2)), but the penalty is unspecified. (This can be compared with the more certain civil penalties in the Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009, such as those in item 172 of Schedule 1 of that bill).

Part 21 (clauses 326-338) of this bill provides for pecuniary penalties for breaches of civil penalty provisions. Clause 328 authorises the Authority to apply to the court for a civil penalty order and clause 329 allows for two or more proceedings for civil penalty orders to be heard together. Clause 330 allows for proceedings for a civil penalty order to be started no later than six years after a contravention. This means that a person who fails to notify a change of address may not know the penalty they face for some time. This is an uncertain penalty and the Committee **seeks the Minister's advice** as to how certainty in relation to the civil penalty regime is intended to be provided.

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

> The drafting approach adopted is to provide the specific penalties in Part 21.
>
> Paragraphs 327(4)(b) and 327(6)(b), which are in Part 21, provide that the maximum pecuniary penalty for a body corporate for contravention of subsection 50A(1) is 500 penalty units for each contravention, and 100 penalty units in the case of a natural person. The phrase 'penalty unit' is defined in section 5 by reference to its meaning in section 4AA of the *Crimes Act 1914.*
>
> …
>
> As indicated above, a person will know from the commencement of the Act the penalty they face for failing to notify a change of address. Allowing six years for the initiation of civil penalty proceedings is a common approach. It is to be found in the

Insurance Act 1973 (Schedule 1), *Energy Efficiency Opportunities Act 2006* (Schedule 1), *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (section 178) and the *Superannuation Industry (Supervision) Act 1993* (section 198).

A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers refers to the civil penalty provisions in the *Environment Protection and Biodiversity Conservation Act 1999* as a model. Section 481(1) of that Act provides a six year period for initiation of civil penalty proceedings.

The Committee thanks the Minister for this response, but notes that it would have been helpful if the explanatory memorandum had included specific reference to the fact that the relevant penalty provisions are contained in Part 21 of the bill.

Legislative Instruments Act—exemption
Omissions in index of explanatory memorandum
Subclauses 183(5) and 186(10)

Part 9 (clauses 174-189B) provides for coal-fired electricity generation. Subclause 186(2) provides that the Authority may make a declaration as to whether a generation asset has received a windfall gain. Subclause 186(10) provides that such a declaration is not a legislative instrument.

The explanatory memorandum explains (at paragraph 5.68) why such a declaration is not subject to parliamentary scrutiny: it is an administrative decision applicable to one entity, rather than a legislative decision of general application; and the declaration is subject to both merits and judicial review. The Committee notes that the explanation in paragraph 5.68 is not listed in the index to the explanatory memorandum (at page 282).

Clause 183 provides for a second step in the review of a windfall gain by providing the Minister with a discretion to make, or not make, a determination that prevents the issue of free Australian emissions units to a generation asset that is subject to a windfall gain declaration. Subclause 183(5) provides that such a declaration is not a legislative instrument.

The explanatory memorandum explains (at paragraph 5.70) that the Ministerial decision is, in effect, another form of review which is already subject to merits and judicial review. As is the case with the explanation in paragraph 5.68, the explanation in paragraph 5.70 is not listed in the index to the explanatory memorandum (at page 282).

The Committee **brings these matters to the Minister's attention** and **seeks her advice** as to whether the index in the explanatory memorandum might be amended to include these important explanations in order to ensure that they are not overlooked by readers.

Relevant extract from the response from the Minister

> The index in the Revised Explanatory Memorandum now includes references to these explanations in order to ensure they are not overlooked by readers.

The Committee thanks the Minister for this response and is pleased to note that references to the relevant explanations have been included in the index in the revised explanatory memorandum.

Strict liability
Subclause 307(4)

Subclause 307(4) creates an offence of strict liability where a person ceases to be an inspector and does not, within 14 days, return his or her identity card to the Authority. Inspectors have powers to monitor compliance and substantiate information provided pursuant to the bill.

The Committee will generally draw to Senators' attention any provisions which create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the explanatory memorandum refers to the offence (at paragraph 9.23) and explains that the 'evidential burden is altered' (at paragraph 9.94). The explanatory memorandum states further (at paragraph 9.94) that '(t)his is justified because the punishment is a fine of 1 penalty unit; the approach taken is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and it will place those appointed as inspectors on notice to guard against the possibility of any contravention'.

However, the explanatory memorandum does not indicate whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004 (interim new edition released in December 2007), was considered in the course of framing this strict liability offence. The Committee **seeks the Minister's advice** whether the recommendations in the *Guide* were considered in the drafting of this provision.

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

Relevant extract from the response from the Minister

The recommendations in the *Guide* were considered in the drafting of this provision. The conclusion was reached that the three criteria listed at page 25 of the *Guide* were fulfilled:

- The offence is not punishable by imprisonment and is punishable by a penalty of less than 60 units.
- It is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
- Potential offenders will be placed on notice to guard against the possibility of any contravention.

The Committee thanks the Minister for this response, noting that it would have been useful if this explanation had been included in the explanatory memorandum.

Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Climate Change and Water responded to the Committee's comments in a letter dated 18 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 14 May 2009
Portfolio: Climate Change and Water

Background

Part of a package of 10 bills in relation to the establishment of a national emissions trading scheme, this bill contains consequential amendments to the *National Greenhouse and Energy Reporting Act 2007*, and to taxation legislation, to provide the basis for emissions reporting required under the scheme.

The bill also contains transitional provisions that are necessary as the result of amendments which will transfer the functions of the Greenhouse and Energy Data Officer under the *National Greenhouse and Energy Reporting Act 2007* and the Renewable Energy Regulator under the *Renewable Energy (Electricity) Act 2000* to the Australian Climate Change Regulatory Authority.

Insufficiently defined administrative power
Schedule 1, item 110, new definition of 'activity'

Item 110 of Schedule 1 would insert a new definition of 'activity' in existing section 7 of the *National Greenhouse and Energy Reporting Act 2007*. Under section 9 of that Act, a facility 'is an activity, or a series of activities (including ancillary activities), that involve the production of greenhouse gas emissions, the production of energy or the consumption of energy'.

The definition of 'facility' applies to both the National Greenhouse and Energy Reporting Act and the Carbon Pollution Reduction Scheme Bill.

The Australian Climate Change Regulatory Authority can, on application or on its own initiative, declare that an activity or series of activities are a facility (proposed new subsection 54A(1), to be inserted by item 189 of Schedule 1). The explanatory memorandum explains (at paragraph 1.44) that a controlling corporation or a non-group entity could apply to have a facility declared by the Authority.

The new definition of activity in item 110 includes 'a condition', 'a circumstance', or 'a state of affairs' which relate to, amongst other things, 'other storage' or 'any other matter or thing'. The explanatory memorandum states (at paragraph 1.47) that the definition is expanded to allow 'for the coverage of emissions from solid waste and other things such as stockpiling and storage'.

The Committee notes that, when interpreting the words in the definition of the term 'activity', a court or tribunal would also have regard to the words surrounding it. However, the Committee considers that in this case the proposed new definition is so broad that a court or tribunal would have difficulty in doing so. The Committee therefore **seeks the Minister's advice** as to whether the scope of the definition might be limited in some way.

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

> The definition of the term 'activity' has been included to avoid doubt as to the application of the Scheme to greenhouse gas emissions in certain situations.
>
> Under the 'direct emitter' provisions in clauses 17, 18, 20 and 21 of the Carbon Pollution Reduction Scheme Bill, a person who has operational control over a facility over a specified emissions threshold is liable for greenhouse gases emitted from the operation of the facility. A 'facility' is defined in section 9 of the *National Greenhouse and Energy Reporting Act 2007* as an 'activity or series of activities' that involve, among other things, greenhouse gas emissions.

The term ‘activity’ is not currently defined in the Act. The Penguin Macquarie Dictionary provides several meanings for the word ‘activity’, including ‘the state of action; doing’. However, greenhouse gases can be emitted in situations where there may be ambiguity as to whether they involve an action or ‘activity’ in the frequently used sense. For example, emissions are released from a landfill facility after it has ceased operations, emissions may leak from a carbon storage facility after the greenhouse gases have been injected underground, natural gas may leak out of storage containers, and fugitive emissions from a coal seam are released after mining operations on the seam have stopped.

The proposed definition of ‘activity’ includes a ‘condition’, a ‘circumstance’ or ‘state of affairs’ so that situations such as those described above are not inadvertently excluded from the Scheme.

The term ‘facility’ comprising one or more ‘activity’ will therefore have a broad meaning, consistent with the Government’s policy to have broad coverage of emission sources under the Scheme. However, other provisions associated with the Scheme, such as Subdivision 4.4.3 of the National Greenhouse and Energy Reporting Regulations 2008 (Greenhouse gas emissions from particular sources), provide specific details of emission sources to be covered by reporting entities. For example, Regulation 4.11 specifies emissions sources related to oil and gas activities, including oil and gas exploration; crude oil production, transport, refining and storage; natural gas production and processing, transmission, distribution, flaring, and venting. Similarly, Regulation 4.15 requires reporting entities to report information for facilities involving the production of iron and steel, ferroalloys, aluminium, and other metals.

Further detail on emissions sources is provided in the National Greenhouse and Energy Reporting (Measurement) Determination 2008.

The combination of the proposed amendments to the *National Greenhouse and Energy Reporting Act* 2007, the associated Regulations and Measurement Determination therefore provide precision about the types of facilities and activities that will be covered by the Scheme, while avoiding unintended gaps in the Scheme.

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

Family Assistance Legislation Amendment (Child Care) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. The Minister for Education responded to the Committee's comments in a letter dated 17 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 14 May 2009
Portfolio: Education, Employment and Workplace Relations

Background

This bill makes amendments to the family assistance law as it relates to child care.

Among other things, the bill amends:

- the *A New Tax System (Family Assistance) Act 1999*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008* and the *Income Tax Assessment Act 1997* to change the name of the rebate from 'child care tax rebate' to 'child care rebate' (CCR) in recognition of the fact that the rebate is no longer a tax offset under the taxation legislation but is a benefit paid under the family assistance law;

- the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to align the operation of CCR provisions with child care benefit (CCB) provisions by extending payment of CCR for care provided by an approved child care service to a child of a deceased individual, to an individual who is eligible for CCB in respect of that care in substitution for the deceased individual; and

- the *A New Tax System (Family Assistance) (Administration) Act 1999* so that civil penalties in relation to specific obligations of approved child care services may be imposed through regulations made under that Act.

The bill also contains application, consequential and transitional provisions.

Retrospective application
Schedule 5, item 10

Item 10 of Schedule 5 contains application provisions relating to proposed new section 195A (contained in item 9 of Schedule 5). Proposed new section 195A provides that when an instrument under the family assistance law imposes an obligation, or confers a permission, on an approved child care service, that obligation or permission is taken to be conferred on the person who is operating the child care service. Subitem 10(1) purports to apply new section 195A to obligations imposed, and permissions conferred, 'before, at or after the commencement' of that section.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum explains (at page 39) that this retrospective application will impose no additional obligation on child care service operators in relation to the retrospective period but does not explain why it is considered necessary. The Committee **seeks the Minister's advice** on the need for the retrospective application of proposed new section 195A.

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

> This amendment inserts a new section 195A in the *A New Tax System (Family Assistance) (Administration) Act 1999* ('Act'), which forms part of the family assistance law. The new section provides that when an obligation is imposed or permission is conferred, by the family assistance law or an instrument under that law, on an approved child care service, that obligation is taken to be imposed or conferred on the person operating the service. The proposed new section is to apply

to obligations imposed, and permissions conferred before, at or after the commencement of that section.

The Committee seeks explanation of the need for the retrospective application of the new section.

The amendment applies to child care services approved under the family assistance law on the application for approval made by a person who operates the service.

Currently, once approved, the service is required, as the condition of its continued approval, to comply with various obligations imposed on approved child care services by the family assistance law and legislative instruments made under that law (the service may also be permitted to do certain things). These conditions continue to apply to a service from the service's approval until the cancellation of the approval.

As a service is not a legal entity, the legal responsibility for compliance with the service's obligations (or for the exercising of permissions conferred on the service, as the case may be) rests necessarily with the person who applied for approval. The proposed section 195A merely makes clear on the face of the legislation the responsibilities of the operator of an approved child care service.

A service's obligations are imposed at the time the service is granted approval. The amendment (section 195A) clarifies that the obligation or permission is taken to be imposed or conferred on the person who is operating the approved child care service. The application provision (sub item 10(1)) applies this amendment from the date of commencement of the amendment (section 195A), irrespective of whether the approval of the service, and therefore the imposition of obligations/permissions, occurred before or after the commencement of the amendment.

The Committee thanks the Minister for this response, which addresses its concerns.

National Greenhouse and Energy Reporting Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Minister for Climate Change and Water responded to the Committee's comments in a letter dated 22 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 18 March 2009
Portfolio: Climate Change and Water

Background

This bill makes minor amendments to the *National Greenhouse and Energy Reporting Act 2007* to better reflect the original policy intent of that Act, and to better facilitate its administration.

In particular, the bill:

- clarifies the definitions of a number of terms relating to greenhouse and energy audits to be conducted under the Act;
- requires results of greenhouse and energy audits to be included on the register established under section 16 of the Act;
- extends the secrecy requirements to also cover audit information;
- allows the Administrative Appeals Tribunal to review decisions by the Greenhouse and Energy Data Officer (GEDO) not to register an auditor under the Act;
- gives the GEDO authority to audit entities who report under section 20 of the Act;

- expands the scope of the legislative instrument to be determined under section 75 of the Act to include requirements for the preparation, conduct and reporting of audits, and allow for these requirements to be determined by the Minister rather than the GEDO;

- requires potential auditors under the Act to apply to the GEDO for registration and allow for detailed requirements on auditor registration to be provided in regulations and in a legislative instrument determined by the GEDO;
- makes a number of administrative amendments consequential to the substantive amendments set out above; and

- repeals the requirement for the GEDO to publish corporate level energy production information.

Determination of important matters by regulation
Schedule 1, item 15, new paragraph 56(j)

Proposed new paragraph 56(j), to be inserted by item 15 of Schedule 1, provides for merits review of a decision by the GEDO to refuse to register an individual in the register of greenhouse and energy auditors kept under section 75A (see further discussion below). The explanatory memorandum states (at paragraph 20) that '(i)t is intended that other decisions relating to the registration of auditors will also be reviewable but will be included in regulations to be developed under this section'. This means that important matters will be covered by regulations. The Committee **seeks the Minister's advice** in relation to the rationale for the proposed use of delegated legislation to determine review rights.

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

> In drafting the Bill, it was decided that the requirements for auditor registration would be provided for in regulations due to their inherently procedural nature. The regulations will include significant detail around the process for registering auditors, maintaining their registration and compliance options. As the process for decisions on these aspects will be in the regulations, it is also appropriate that the

establishment of review by the Administrative Appeals Tribunal (AAT) of any associated decisions also be placed in the regulations. It is intended that the regulations will allow for all decisions pertaining to an auditor's registration, including: deregistration, suspension, imposition of conditions, reviews and inspections to be reviewable by the AAT. A comprehensive one month consultation process on the draft regulations is planned for the end of June this year.

The Committee thanks the Minister for this comprehensive response.

Insufficient parliamentary scrutiny
Schedule 1, item 36, new section 75A

Proposed new section 74A, to be inserted by item 34 of Schedule 1, provides for the appointment of audit team leaders to audit compliance with requirements to report on greenhouse gas emissions, and energy production and consumption. Proposed new section 75A, to be inserted by item 36 of Schedule 1, requires the GEDO to establish a register of qualified auditors. Proposed new subsection 75A(2) requires that, to be on the register, an auditor must meet the requirements set out in regulations *or* in a legislative instrument. Proposed new subsection 75A(4) provides that regulations made for the purpose of subsection 75A(2) *may* authorise the GEDO to make a legislative instrument.

The explanatory memorandum states (at paragraph 48) that the GEDO is required to register an applicant who meets the requirements for qualifications, knowledge, expertise, competence and independence specified in the regulations *and* determined by the GEDO in a legislative instrument created under subsection 75A(4). The explanatory memorandum also explains that it is intended that 'this will include robust requirements for independence similar to the requirements for auditors operating under the *Corporations Act 2001'*. The Committee **seeks the Minister's advice** as to how parliamentary scrutiny of the requirements for suitable auditors will be achieved.

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

> It is intended that regulations prepared for this purpose will outline the eligibility criteria to be a registered greenhouse and energy auditor, while the instrument prepared by the GEDO will list existing qualifications and training that will be deemed to meet the set criteria. This listing of qualifications is to be made by the GEDO to allow the regulator to respond quickly and flexibly to changing circumstances, i.e. to update the list as industry responds to the need for greenhouse auditor training and new courses and qualifications are developed. The disallowable instrument will also be subject to the normal parliamentary review process undertaken by the Senate Standing Committee on Regulations and Ordinances.

The Committee thanks the Minister for this response.

Wide delegation of power
Schedule 1, item 36, subsection 75A(7)

Proposed new subsection 75A(7), to be inserted by item 36 of Schedule 1, allows the GEDO power to delegate, by signed instrument, any of his or her powers or functions under that section or regulations made under that section. The delegation can be made to 'another person (whether or not an SES employee or acting SES employee)'. The explanatory memorandum provides no explanation for the broad delegation. It states that the subsection 'allows the GEDO to delegate part or all of the administration of the auditor registration process and decision making to a third party'.

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 delegation in proposed new subsection 75A(7) is limited to a considerable degree by proposed new subsection 75A(8) which provides that the GEDO's power to delegate the making of a legislative instrument under proposed new subsection 75A(4) is limited to SES employees or acting SES employees. However, the explanatory memorandum does not explain the level of the officers who will be applying the remainder of 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 Minister

> I note the Committee's preference for delegates to be confined to the holders of nominated offices or to members of the Senior Executive Service (SES). Subsection 75A(7) is intended to provide the GEDO with a workable but accountable framework in which to perform his or her functions and needs to be considered in the context of other related audit models. Greenhouse and energy auditing is a relatively new, but growing, industry, with little or no certification / accreditation options for auditors. A number of certification bodies have, however, indicated that there will be significant interest in the future for the provision of third party certification of greenhouse auditors similar to that already established for environmental auditors. This provision allows for the regulator to delegate the registration of auditors to a third party certification body in the future if industry chooses to self-regulate. It must be noted, however, that at this stage the regulator does not intend to delegate the decision making functions to anyone other than SES officers or acting SES officers.

Thank you for bringing these issues to my attention and I trust that the Committee's concerns have been fully addressed.

The Committee thanks the Minister for this helpful response. However, the Committee reiterates its long-held view that legislation should ideally confine delegations to SES employees or acting SES employees. If the circumstances described by the Minister eventuate in the future and a wider delegation is required, the Committee considers that specific guidance or criteria about to whom the wider delegation applies should be provided. In the meantime, the Committee considers that the information contained in the Minister's response should be included in the explanatory memorandum to the bill to provide a thorough explanation of how the delegation is intended to operate in practice.

Native Title Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 22 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: Attorney-General

Background

This bill amends the *Native Title Act 1993* (Native Title Act) to improve the operation of the native title system and achieve better outcomes for participants by encouraging more negotiated settlements and providing the Federal Court of Australia with a central role in managing native title claims.

Schedule 1 contains amendments which largely implement the proposed 'institutional change' to the native title system by giving the court the role of managing all native title claims, including determining whether claims should be mediated by the court or referred to the National Native Title Tribunal (NNTT) or another individual or body. Consequential amendments accompanying this change govern the manner in which mediations are conducted and generally expand the scope of existing provisions in relation to the conduct of mediation undertaken by the NNTT to apply to all native title claim-related mediation.

Schedule 2 amends the powers of the court to enable it to:

- rely on a statement of facts agreed between the parties; and
- make consent orders that cover matters beyond native title so that parties can resolve a range of native title and related issues at the same time.

Schedule 3 allows amended evidence rules made by the *Evidence Amendment Act 2008* that concern evidence given by Aboriginal and Torres Strait Islander people to apply to native title claims in certain circumstances.

Schedule 4 expands the current assistance provisions in the Native Title Act to allow assistance in relation to all mediations.

Schedule 5 streamlines the operation of the representative body provisions in the Native Title Act.

Schedule 6 contains a range of other minor and technical amendments to improve or clarify the operation of existing provisions in relation to determinations, bank guarantees, trust regimes and penalty provisions.

The bill also contains application, saving and transitional provisions.

Denial of natural justice
Schedule 1, item 35, new section 94P

Item 35 of Schedule 1 inserts several new provisions into the Native Title Act to allow a mediator to conduct mediations referred from the Federal Court. Proposed new section 94P gives the mediator the power to report that a party 'did not act or is not acting in good faith in relation to the conduct of the mediation'. This report can be made to a range of people and organisations, including legal professional bodies and/or the Federal Court.

The Committee notes that there is no requirement that the mediator issue a warning to a party that he or she is forming this view, nor a requirement that the party be given an opportunity to be heard before the mediator's decision is then communicated to another party. However, the Committee is mindful that the purpose of the amendment is to streamline the mediation process and is satisfied that, in the circumstances, the amendment will not amount to a denial of procedural fairness.

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

Relevant extract from the response from the Attorney-General

The Bill would make a number of improvements to the native title system, including effecting institutional change. The institutional change would give the Federal Court of Australia (the Court) the central role in managing all claims, including determining whether claims would be mediated by the Court, the National Native Title Tribunal (NNTT) or another individual or body. Other amendments contained in the Bill would make changes to the powers of the Court, including enabling the Court to rely on a statement of facts agreed between the parties, and enabling the Court to make consent orders that cover matters beyond native title.

The Alert Digest No 5 of 2009 identifies three issues of concern to the Committee, and the Committee has sought my views on two matters.

1. Good faith

The Committee has commented on proposed new section 94P (Schedule 1, item 35) which would give a mediator the power to report that a party did not act, or is not acting, in good faith in relation to a mediation. This proposed new provision simply expands the application of the current provision, which applies to a NNTT member, so that the new provision applies to the wider range of mediators that the amendments would allow. This is a consequence of the institutional change. The Committee did not ask any specific questions about this provision and concluded the amendment would not amount to a denial of procedural fairness.

The Committee thanks the Attorney-General for this response.

Wide delegation of power
Schedule 4, item 2, new paragraph 213A(8)(b)

Proposed new paragraph 213A(8)(b), to be inserted by item 2 of Schedule 4, would allow the Attorney-General to delegate any or all of his or her powers to authorise assistance in relation to mediations to a person occupying a 'specified position' in the Department.

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 explanatory memorandum does not contain an explanation of the potential delegation of power below the level of a senior officer. The Committee therefore **seeks the Attorney-General's advice** as to what the term 'specified position' will mean in practice and the levels at which it is anticipated that the delegations will apply.

Pending the Attorney-General'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 Attorney-General

2. Financial assistance

The Committee raises a concern about proposed new paragraph 213A(8)(b) (Schedule 4, item 2). Item 2 would insert a new section 213A, which would replicate the effect of existing section 183 and relocate the provision to Part 13 of the *Native Title Act 1993* (the Act). This amendment would clarify that assistance may be sought in relation to any inquiry, mediation or proceeding, not just those before the NNTT. Proposed new paragraph 213A(8)(b) would replicate the effect of existing paragraph 183(7)(b), which permits the Attorney-General to delegate in writing any powers under subsection 183(4) to a person engaged under the *Public Service Act 1999* who occupies a specified position in the Department.

The Committee seeks my advice as to what the term 'specified position' will mean in practice and the levels at which it is anticipated that the delegations will apply.

Under subsection 17(2) of the *Law Officers Act 1964*, the Attorney-General may delegate all or any of his powers and functions under Commonwealth or Territory laws except the power of delegation conferred by the Act. The *Attorney-General's*

Statutory Powers — Delegation 2008 is a consolidated instrument which sets out the specific delegations approved by the Attorney-General. Currently, the delegation instrument enables officers of the Attorney-General's Department in specified positions to exercise the power to make decisions on grants of financial assistance to non-government respondents in native title matters under subsection 183(7) of the *Native Title Act 1993.*

In practice, proposed new paragraph 213A(8)(b) would bring the delegation of the decision making power into line with other financial assistance schemes for which the Attorney-General is responsible. While amendments to the 2008 delegation instrument are currently under review, it is proposed that the 'specified position' referred to in subsection 213A(8)(b) of the Act will generally reflect the 2008 delegation instrument. Accordingly, it is anticipated the new delegation instrument will limit the exercise of power to make decisions on non-government respondent grant applications to the holders of the following positions within the Department, namely, the Secretary, the Deputy Secretary of the Civil Justice and Legal Services Group, the First Assistant Secretary of the Social Inclusion Division, the Assistant Secretary of the Legal Assistance Branch, Social Inclusion Division, and two Principal Legal Officers within the Legal Assistance Branch, Social Inclusion Division. As the decision makers are all in the one chain of command, the delegations support the finalisation of a high volume of work involving the administration of the Native Title Respondent Funding Scheme in a timely and efficient manner while also imparting a high level of expertise to the decision making process.

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

No entitlement to be heard
Schedule 5, item 24, new subsection 203AD(3C)

Schedule 5 contains amendments to Part 11 of the Native Title Act which deals with representative Aboriginal and Torres Strait Islander (ATSI) bodies that assist ATSI people to undertake action in relation to native title. Items 13-39 of Schedule 5 relate to recognition of representative bodies. Bodies may be recognised in an instrument of recognition for between one and six years (proposed new subsection 203AD(3A), inserted by item 24 of Schedule 1).

Proposed new subsection 203AD(3C), also to be inserted by item 24 of Schedule 1, allows the Minister, in deciding the period of recognition for a representative body, to 'consider any information in the possession of the Minister or the Department that is relevant to that decision'. The Committee notes that there is no provision for an applicant to be given an opportunity to respond to information that may cause the period of recognition to be limited. The Committee **seeks the Attorney-General's** advice as to whether an applicant will have the opportunity to be heard on the length of the relevant recognition period.

Pending the Attorney-General'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 Attorney-General

3. Native Title Representative Body provisions

The Committee also raises a concern about proposed new subsection 203AD(3C) (Schedule 5, item 24), which would allow the Minister, in deciding the period of recognition for a representative body, to consider any information that is in the possession of the Minister or the Department that is relevant to the decision. The Committee seeks my advice as to whether an applicant will have an opportunity to be heard on the length of the relevant recognition period.

The Minister for Families, Housing, Community Services and Indigenous Affairs, the Honourable Jenny Macklin MP, has portfolio responsibility for Part 11 of the Act, which contains provisions about Representative Aboriginal/Torres Strait Bodies. This provision is within Minister Macklin's portfolio responsibilities. The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has advised that an applicant would be given an opportunity to be heard on the length of the relevant recognition period, where a period shorter than that requested or shorter than the maximum period was being contemplated. FaHCSIA advises that in developing this provision and other amendments that streamline the decision making process for recognition of representative bodies, the application of the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) to any decision made was considered. FaHCSIA also advises that the principles of natural justice would require a decision-maker to give an applicant an opportunity to respond to information to be taken into account when making any decision that may be adverse to the applicant's interests.

In FaHCSIA's view, an adverse decision would include a proposed decision that the period of recognition of a representative body was going to be shorter than the maximum requested by the applicant, or shorter than the maximum allowed for

under the Act. Therefore, in order to make a valid decision, the decision maker would give the applicant an opportunity to respond to any material held by the Minister or the Department relevant to a decision under this provision. FaHCSIA also notes that any subsequent decision made under this provision would be subject to judicial review under the AD(JR) Act.

I have copied this letter to the Minister for Families, Housing, Community Services and Indigenous Affairs.

The Committee thanks the Attorney-General for this response, noting that it would have been useful if this information had been included in the explanatory memorandum.

Senator the Hon Helen Coonan
Chair

Minister for Climate Change and Water

RECEIVED
15 JUN 2009
Senate Standing C'ttee
for the Scrutiny of Bills

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

18 JUN 2009

Dear Senator Helen

Thank you for the letters of 3 June 2009 from the Secretary of the Standing Committee for the Scrutiny of Bills concerning the Australian Climate Change Regulatory Authority Bill 2009, Carbon Pollution Reduction Scheme Bill 2009, Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009, Carbon Pollution Reduction Scheme (Charges – General) Bill 2009, Carbon Pollution Reduction Scheme (Charges – Excise) Bill 2009, and Carbon Pollution Reduction Scheme (Charges – Customs) Bill 2009.

In the letters Ms Dennett drew my attention to comments made by the Committee in *Alert Digest No. 6 of 2009* (2 June 2009) regarding these bills.

I enclose my response to these comments. My Department will also email this response to the Secretariat.

Yours sincerely

Penny Wong

Parliament House, Canberra ACT 2600 Tel 02 6277 7920 Fax 02 6273 7330

AUSTRALIAN CLIMATE CHANGE REGULATORY AUTHORITY BILL 2009

Legislative Instruments Act – exemptions - Subclauses 39(5), subclause 47(3), Subsection 48(4)

Comments

The Committee seeks the Minister's advice whether various provisions have been inserted solely for the benefit of readers, or whether they are designed to exempt instruments from the provisions of the *Legislative Instruments Act 2003*.

Response

The following are not instruments of a legislative character within the meaning of section 5 of the *Legislative Instruments Act 2003*:

- guidelines issued by the Minister under subclause 39(5)
- written communications from the Chair of the Authority under subclause 47(2) or 48(3).

The statements in section 39(6), 47(3) and 48(4) are solely for the benefit of readers, and are not intended to provide an exemption from the *Legislative Instruments Act 2003.*

RESPONSES TO COMMENTS OF SENATE SCRUTINY OF BILLS COMMITTEE – ALERT DIGEST NO. 6 OF 2009

CARBON POLLUTION REDUCTION SCHEME BILL 2009

Insufficiently defined administrative powers

Various clauses

Comments

The Committee comments on the heavy reliance on the use of the Australian Climate Change Regulatory Authority's website. The Committee expresses the view that the administrative powers and responsibilities regarding the operation of the website could perhaps be better articulated, or at the very least, closely monitored. It has stated that it is imperative that the efficient operation of the website, including the availability of up to date information, is assured at all times.

Response

Most of the provisions cited by the Committee have been included to ensure a high level of transparency and accountability regarding the operation of the Scheme. Many of these provisions are also aimed to promote efficient price discovery by providing price-relevant information to the market in a timely manner and ensuring that the information is available to the whole market.

In a few instances, the availability of information published on the website will be required by entities to comply with Scheme obligations. For example, a supplier of an eligible upstream fuel may require access to the Obligation Transfer Number (OTN) Register, which will be available on the Authority's website, to check the OTN quoted by a customer.

The Australian Government Information Management Office has published a number of standards for the development and maintenance of Australian Government websites. Some of these are mandatory for CEOs and agency heads, including the chair of ACCRA, to satisfy their accountabilities under the *Financial Management and Accountability Act 1997*.

These standards will be used to guide the implementation of ACCRA's website and the services it provides. The Government has already committed itself to the establishment of a stakeholder consultative committee, comprising representatives drawn from business, environmental and community stakeholders, to advise the Minister on Climate Change and Water, Senator the Hon Penny Wong, on the operational aspects of the Carbon Pollution Reduction Scheme. The committee will operate until the ACCRA is established by the proposed *Australian Climate Change Regulatory Authority Act 2009*. At that time, ACCRA is likely to consider the appropriate mechanisms by which it undertakes stakeholder consultation and reviews the implementation of the Scheme.

The operation of the website and the broader issue of utilising the internet for the purposes of the Scheme may also be examined as part of periodic reviews by independent expert advisory committees, provided for in Part 25 of the Carbon Pollution Reduction Scheme Bill.

Apparently excessive powers

Clauses 41-43

Comments

The Committee has drawn attention particularly to clause 43, which provides that if the applicant for an obligation transfer number does not give the Authority the further information sought, the Authority may, be written notice to the applicant, refuse to consider the application or refuse to take any action, or any further action, in relation to the application.

The Committee has asked the Minister whether it is intended that the Authority will issue guidelines in relation to the exercise of its power in these circumstances.

Response

It is expected that the OTN application form approved by ACCRA and any regulations made under subclause 42(3)(c) would clearly set out the information and documents that a person would need to provide in applying for an OTN. It is intended that ACCRA would only refuse to consider the application or take any action in relation to the application if this information is not provided. ACCRA is expected to utilise a collaborative approach with the applicant to ensure that the required information was available to ACCRA to allow it to make a decision.

Uncertainty of civil penalty regime

Clauses 50A and 330

Comment

The Committee has drawn attention to clause 50A which requires that, if a person who has an OTN entry in the OTN Register changes their address, they must notify the Authority in writing within 14 days of the change. The Committee states 'If they fail to do so they are liable to a civil penalty (subclause 50A(2)), but the penalty is unspecified.'

Response

The drafting approach adopted is to provide the specific penalties in Part 21.

Paragraphs 327(4)(b) and 327(6)(b), which are in Part 21, provide that the maximum pecuniary penalty for a body corporate for contravention of subsection 50A(1) is 500 penalty units for each contravention, and 100 penalty units in the case of a natural person. The phrase 'penalty unit' is defined in section 5 by reference to its meaning in section 4AA of the *Crimes Act 1914*.

Comment

The Committee has also drawn attention to clause 330 which allows for proceedings for a civil penalty order to be started no later than six years after a contravention. The Committee states 'This means that a person who fails to notify a change of address may not know the penalty they face for some time.'

Response

As indicated above, a person will know from the commencement of the Act the penalty they face for failing to notify a change of address. Allowing six years for the initiation of civil penalty proceedings is a common approach. It is to be found in the *Insurance Act 1973* (Schedule 1), *Energy Efficiency Opportunities Act 2006* (Schedule 1), *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (section 178) and the *Superannuation Industry (Supervision) Act 1993* (section 198).

A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers refers to the civil penalty provisions in the *Environment Protection and Biodiversity Conservation Act 1999* as a model. Section 481(1) of that Act provides a six year period for initiation of civil penalty proceedings.

Legislative Instruments Act – exemption

Omissions in index of explanatory memorandum
Subclauses 183(5) and 186(10)

Comment

The Committee referred to the failure to include two references, to provisions relating to instruments not being legislative instruments, in the index to the explanatory memorandum.

Response

The index in the Revised Explanatory Memorandum now includes references to these explanations in order to ensure they are not overlooked by readers.

Strict liability

Subclause 307(4)

Comment

Subclause 307(4) creates an offence of strict liability where a person ceases to be an inspector and does not, within 14 days, return his or her identity card to the Authority. The Committee seeks the Minister's advice whether the recommendations in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the drafting of this provision.

Response

The recommendations in the *Guide* were considered in the drafting of this provision. The conclusion was reached that the three criteria listed at page 25 of the *Guide* were fulfilled:

- The offence is not punishable by imprisonment and is punishable by a penalty of less than 60 units.
- It is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
- Potential offenders will be placed on notice to guard against the possibility of any contravention.

CARBON POLLUTION REDUCTION SCHEME (CONSEQUENTIAL AMENDMENTS) BILL 2009

Insufficiently defined administrative power
Schedule 1, item 110, new definition of 'activity'

Comment

The Committee has commented on the new definition of 'activity' to be inserted in section 7 of the *National Greenhouse and Energy Reporting Act 2007* by Item 110 of Schedule 1 of this Bill. The meaning of the word 'activity' is important in interpreting the term 'facility', a key concept in liability for and reporting of direct emissions.

The Committee quotes the explanation from the explanatory memorandum and notes that, when interpreting the words in the definition of the term 'activity', a court or tribunal would also have regard to the words surrounding it. The Committee considers that in this case the proposed new definition is so broad that a court or tribunal would have difficulty in doing so. For this reason the Committee has sought the Minister's advice as to whether the scope of the definition might be limited in some way.

Response

The definition of the term 'activity' has been included to avoid doubt as to the application of the Scheme to greenhouse gas emissions in certain situations.

Under the 'direct emitter' provisions in clauses 17, 18, 20 and 21 of the Carbon Pollution Reduction Scheme Bill, a person who has operational control over a facility over a specified emissions threshold is liable for greenhouse gases emitted from the operation of the facility. A 'facility' is defined in section 9 of the *National Greenhouse and Energy Reporting Act 2007* as an 'activity or series of activities' that involve, among other things, greenhouse gas emissions.

The term 'activity' is not currently defined in the Act. The Penguin Macquarie Dictionary provides several meanings for the word 'activity', including 'the state of action; doing'. However, greenhouse gases can be emitted in situations where there may be ambiguity as to whether they involve an action or 'activity' in the frequently used sense. For example, emissions are released from a landfill facility after it has ceased operations, emissions may leak from a carbon storage facility after the greenhouse gases have been injected underground, natural gas may leak out of storage containers, and fugitive emissions from a coal seam are released after mining operations on the seam have stopped.

The proposed definition of 'activity' includes a 'condition', a 'circumstance' or 'state of affairs' so that situations such as those described above are not inadvertently excluded from the Scheme.

The term 'facility' comprising one or more 'activity' will therefore have a broad meaning, consistent with the Government's policy to have broad coverage of emission sources under the Scheme. However, other provisions associated with the Scheme, such as Subdivision 4.4.3 of the National Greenhouse and Energy Reporting Regulations 2008 (Greenhouse gas emissions from particular sources), provide specific details of emission sources to be covered by reporting entities. For example, Regulation 4.11 specifies emissions sources related to oil and gas activities, including oil and gas exploration; crude oil production, transport, refining and storage; natural gas production and processing, transmission, distribution, flaring, and venting. Similarly, Regulation 4.15 requires reporting entities to report information for facilities involving the production of iron and steel, ferroalloys, aluminium, and other metals.

Further detail on emissions sources is provided in the National Greenhouse and Energy Reporting (Measurement) Determination 2008.

The combination of the proposed amendments to the *National Greenhouse and Energy Reporting Act 2007*, the associated Regulations and Measurement Determination therefore provide precision about the types of facilities and activities that will be covered by the Scheme, while avoiding unintended gaps in the Scheme.

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

17 JUN 2009

Dear Senator Coonan

I refer to a letter of 3 June 2009 from Ms Julie Dennett, the Secretary of the Senate Standing Committee on Regulations and Ordinances ('Committee'), concerning an amendment made by item 10 of Schedule 5 of the Family Assistance Legislation Amendment (Child Care) Bill 2009.

This amendment inserts a new section 195A in the *A New Tax System (Family Assistance)(Administration) Act 1999* ('Act'), which forms the part of the family assistance law. The new section provides that when an obligation is imposed or permission is conferred, by the family assistance law or an instrument under that law, on an approved child care service, that obligation is taken to be imposed or conferred on the person operating the service. The proposed new section is to apply to obligations imposed, and permissions conferred before, at or after the commencement of that section.

The Committee seeks explanation of the need for the retrospective application of the new section.

The amendment applies to child care services approved under the family assistance law on the application for approval made by a person who operates the service.

Currently, once approved, the service is required, as the condition of its continued approval, to comply with various obligations imposed on approved child care services by the family assistance law and legislative instruments made under that law (the service may also be permitted to do certain things). These conditions continue to apply to a service from the service's approval until the cancellation of the approval.

As a service is not a legal entity, the legal responsibility for the compliance with the service's obligations (or for the exercising of permissions conferred on the service, as the case may be) rests necessarily with the person who applied for approval. The proposed section 195A merely makes clear on the face of the legislation the responsibilities of the operator of an approved child care service.

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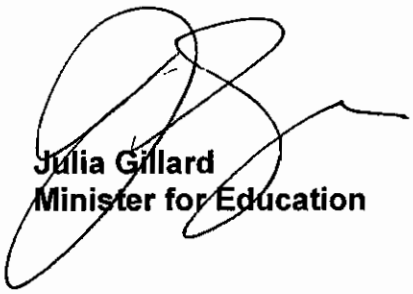
A service's obligations are imposed at the time the service is granted approval. The amendment (section 195A) clarifies that the obligation or permission is taken to be imposed or conferred on the person who is operating the approved child care service. The application provision (sub item 10(1)) applies this amendment from the date of commencement of the amendment (section 195A), irrespective of whether the approval of the service, and therefore the imposition of obligations/permissions, occurred before or after the commencement of the amendment.

Yours sincerely



Julia Gillard
Minister for Education

Minister for Climate Change and Water

22 JUN 2009

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

I refer to Ms Julie Dennett's letter of 14 May 2009 concerning a number of measures in the National Greenhouse and Energy Reporting Amendment Bill 2009 (the Bill).

I have considered the Committee's comments and respond to each of the issues raised.

Determination of important matters by regulation

The Committee has expressed concerns about the use of delegated legislation to determine review rights for auditors to be registered under the *National Greenhouse and Energy Reporting Act 2007* (the Act, as amended by the Bill). The Committee has indicated that use of delegated legislation for this purpose may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

In drafting the Bill, it was decided that the requirements for auditor registration would be provided for in regulations due to their inherently procedural nature. The regulations will include significant detail around the process for registering auditors, maintaining their registration and compliance options. As the process for decisions on these aspects will be in the regulations, it is also appropriate that the establishment of review by the Administrative Appeals Tribunal (AAT) of any associated decisions also be placed in the regulations. It is intended that the regulations will allow for all decisions pertaining to an auditor's registration, including: deregistration, suspension, imposition of conditions, reviews and inspections to be reviewable by the AAT. A comprehensive one month consultation process on the draft regulations is planned for the end of June this year.

Insufficient parliamentary scrutiny

The Committee has also expressed concern as to how parliamentary scrutiny of the requirements for suitable auditors will be achieved given the proposed new subsection 75A(4) provides that regulations made for the purpose of subsection 75A(2) *may* authorise the Greenhouse and Energy Data Officer (GEDO) to make a legislative instrument. The Committee has indicated that use of delegated legislation for this purpose 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.

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It is intended that regulations prepared for this purpose will outline the eligibility criteria to be a registered greenhouse and energy auditor, while the instrument prepared by the GEDO will list existing qualifications and training that will be deemed to meet the set criteria. This listing of qualifications is to be made by the GEDO to allow the regulator to respond quickly and flexibly to changing circumstances, i.e. to update the list as industry responds to the need for greenhouse auditor training and new courses and qualifications are developed. The disallowable instrument will also be subject to the normal parliamentary review process undertaken by the Senate Standing Committee on Regulations and Ordinances.

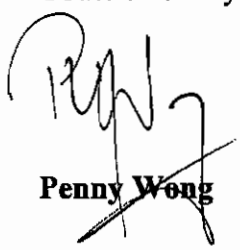
Wide delegation of power

Finally, the Committee expressed concern over the new subsection 75A(7) which allows the GEDO power to delegate, by signed instrument, any of his or her powers or functions under that section or regulations made under that section to 'another person (whether or not an SES employee or acting SES employee)'. The Committee has indicated that delegation of such authority 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.

I note the Committee's preference for delegates to be confined to the holders of nominated offices or to members of the Senior Executive Service (SES). Subsection 75A(7) is intended to provide the GEDO with a workable but accountable framework in which to perform his or her functions and needs to be considered in the context of other related audit models. Greenhouse and energy auditing is a relatively new, but growing, industry, with little or no certification / accreditation options for auditors. A number of certification bodies have, however, indicated that there will be significant interest in the future for the provision of third party certification of greenhouse auditors similar to that already established for environmental auditors. This provision allows for the regulator to delegate the registration of auditors to a third party certification body in the future if industry chooses to self-regulate. It must be noted, however, that at this stage the regulator does not intend to delegate the decision making functions to anyone other than SES officers or acting SES officers.

Thank you for bringing these issues to my attention and I trust that the Committee's concerns have been fully addressed.

Yours sincerely



Penny Wong

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

09/7776, MC09/7402

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

Dear Senator Helen

I refer to a letter of 14 May 2009 from Ms Julie Dennett, Secretary of the Standing Committee, to my office in relation to the Native Title Amendment Bill 2009 (the Bill). Ms Dennett notes the comments made by the Committee in relation to the Bill in *Alert Digest No 5 of 2009*.

The Bill would make a number of improvements to the native title system, including effecting institutional change. The institutional change would give the Federal Court of Australia (the Court) the central role in managing all claims, including determining whether claims would be mediated by the Court, the National Native Title Tribunal (NNTT) or another individual or body. Other amendments contained in the Bill would make changes to the powers of the Court, including enabling the Court to rely on a statement of facts agreed between the parties, and enabling the Court to make consent orders that cover matters beyond native title.

The Alert Digest No 5 of 2009 identifies three issues of concern to the Committee, and the Committee has sought my views on two matters.

1. Good faith

The Committee has commented on proposed new section 94P (Schedule 1, item 35) which would give a mediator the power to report that a party did not act, or is not acting, in good faith in relation to a mediation. This proposed new provision simply expands the application of the current provision, which applies to a NNTT member, so that the new provision applies to the wider range of mediators that the amendments would allow. This is a consequence of the institutional change. The Committee did not ask any specific questions about this provision and concluded the amendment would not amount to a denial of procedural fairness.

2. Financial assistance

The Committee raises a concern about proposed new paragraph 213A(8)(b) (Schedule 4, item 2). Item 2 would insert a new section 213A, which would replicate the effect of existing section 183 and relocate the provision to Part 13 of the *Native Title Act 1993* (the Act). This amendment would clarify that assistance may be sought in relation to any inquiry, mediation or proceeding, not just those before the NNTT. Proposed new paragraph 213A(8)(b) would replicate the effect of existing paragraph 183(7)(b), which permits the Attorney-General to delegate in writing any powers under subsection 183(4) to a person engaged under the *Public Service Act 1999* who occupies a specified position in the Department.

The Committee seeks my advice as to what the term 'specified position' will mean in practice and the levels at which it is anticipated that the delegations will apply.

Under subsection 17(2) of the *Law Officers Act 1964,* the Attorney-General may delegate all or any of his powers and functions under Commonwealth or Territory laws except the power of delegation conferred by the Act. The *Attorney-General's Statutory Powers — Delegation 2008* is a consolidated instrument which sets out the specific delegations approved by the Attorney-General. Currently, the delegation instrument enables officers of the Attorney-General's Department in specified positions to exercise the power to make decisions on grants of financial assistance to non-government respondents in native title matters under subsection 183(7) of the *Native Title Act 1993.*

In practice, proposed new paragraph 213A(8)(b) would bring the delegation of the decision making power into line with other financial assistance schemes for which the Attorney-General is responsible. While amendments to the 2008 delegation instrument are currently under review, it is proposed that the 'specified position' referred to in subsection 213A(8)(b) of the Act will generally reflect the 2008 delegation instrument. Accordingly, it is anticipated the new delegation instrument will limit the exercise of power to make decisions on non-government respondent grant applications to the holders of the following positions within the Department, namely, the Secretary, the Deputy Secretary of the Civil Justice and Legal Services Group, the First Assistant Secretary of the Social Inclusion Division, the Assistant Secretary of the Legal Assistance Branch, Social Inclusion Division, and two Principal Legal Officers within the Legal Assistance Branch, Social Inclusion Division. As the decision makers are all in the one chain of command, the delegations support the finalisation of a high volume of work involving the administration of the Native Title Respondent Funding Scheme in a timely and efficient manner while also imparting a high level of expertise to the decision making process.

3. Native Title Representative Body provisions

The Committee also raises a concern about proposed new subsection 203AD(3C) (Schedule 5, item 24), which would allow the Minister, in deciding the period of recognition for a representative body, to consider any information that is in the possession of the Minister or the Department that is relevant to the decision. The Committee seeks my advice as to whether an applicant will have an opportunity to be heard on the length of the relevant recognition period.

The Minister for Families, Housing, Community Services and Indigenous Affairs, the Honourable Jenny Macklin MP, has portfolio responsibility for Part 11 of the Act, which contains provisions about Representative Aboriginal/Torres Strait Bodies. This provision is

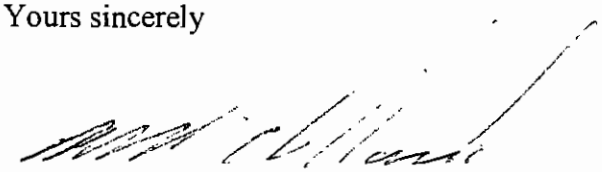
within Minister Macklin's portfolio responsibilities. The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has advised that an applicant would be given an opportunity to be heard on the length of the relevant recognition period, where a period shorter than that requested or shorter than the maximum period was being contemplated. FaHCSIA advises that in developing this provision and other amendments that streamline the decision making process for recognition of representative bodies, the application of the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) to any decision made was considered. FaHCSIA also advises that the principles of natural justice would require a decision-maker to give an applicant an opportunity to respond to information to be taken into account when making any decision that may be adverse to the applicant's interests.

In FaHCSIA's view, an adverse decision would include a proposed decision that the period of recognition of a representative body was going to be shorter than the maximum requested by the applicant, or shorter than the maximum allowed for under the Act. Therefore, in order to make a valid decision, the decision maker would give the applicant an opportunity to respond to any material held by the Minister or the Department relevant to a decision under this provision. FaHCSIA also notes that any subsequent decision made under this provision would be subject to judicial review under the AD(JR) Act.

The action officer for this matter in my Department is Zoë Sanderson who can be contacted on (02) 6218 6915. The action officer in the Department of Families, Housing, Community Services and Indigenous Affairs is Libby Bunyan who can be contacted on (03) 8620 3909.

I have copied this letter to the Minister for Families, Housing, Community Services and Indigenous Affairs.

Yours sincerely



Robert McClelland

22 JUN 2009