



**SENATE STANDING COMMITTEE  
FOR THE  
SCRUTINY OF BILLS**

**THIRTEENTH REPORT  
OF  
2009**

**18 November 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

## THIRTEENTH REPORT OF 2009

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

The Committee draws the attention of the Senate to 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:

Fair Work Amendment (State Referrals and Other Measures)  
Bill 2009\*

*Military Justice (Interim Measures) Act (No. 1) 2009*

Personal Property Securities (Consequential Amendments)  
Bill 2009

Safe Climate (Energy Efficient Non-Residential Buildings  
Scheme) Bill 2009

Tax Laws Amendment (2009 Budget Measures No. 2)  
Bill 2009\*

Telecommunications (Interception and Access) Amendment  
Bill 2009

Telecommunications Legislation Amendment (Competition  
and Consumer Safeguards) Bill 2009

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

# Fair Work Amendment (State Referrals and Other Measures) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 11 November 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 13 of 2009*

Introduced into the House of Representatives on 21 October 2009  
Portfolio: Education, Employment and Workplace Relations

#### **Background**

This bill amends the *Fair Work Act 2009* (Fair Work Act) to enable the states to refer workplace relations matters to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.

The bill also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to establish arrangements for employees and employers transitioning from referring state systems to the national workplace relations system; and makes consequential amendments to the *Age Discrimination Act 2004*, the *Australian Human Rights Commission Act 1986*, the *Disability Discrimination Act 1992*, the *Legislative Instruments Act 2003*, the *Sex Discrimination Act 1984* and the *Superannuation Guarantee (Administration) Act 1992* which are required as a result of these arrangements.

## **Retrospective application**

### **Possible error in explanatory memorandum**

#### **Determination of important matters by regulation**

#### **Schedule 2, item 56; item 22 of new Division 2, Part 3, Schedule 4**

New item 22 of proposed new Division 2 of Part 3 of Schedule 4 of the Fair Work (Transitional Provisions and Consequential Amendments) Act provides for regulations which ‘may make provision in relation to how the National Employment Standards apply to, or are affected by, things done or matters occurring *before* the Division 2B referral commencement’ (emphasis added).

The explanatory memorandum appears to contradict the words in item 22 because it refers (at paragraph 341) to regulations which may ‘provide for how the N[atational]E[mployment]S[tandards] apply to, or are affected by, things done or matters occurring *on or after* Division 2B referral commencement’ (emphasis added). Item 22 itself clearly provides for retrospective application of the National Employment Standards under a broad regulation-making power.

While noting that any regulations would be subject to the usual scrutiny and disallowance regime, the Committee **draws to the Minister’s attention** the inconsistency between item 22 and the explanatory memorandum. The Committee also **seeks the Minister’s advice** on the reasons why any retrospective application is considered necessary in the circumstances and whether the retrospectivity will have an adverse impact on any individual.

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

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

Schedule 4 to the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (the T&C Act) ensures that service completed and entitlements accrued by employees on transitional instruments given effect under the *Workplace Relations Act 1996* prior to the commencement of the new National Employment Standards (NES) are recognised and saved for the purpose of applying the NES. The Schedule also ensures that if employees have taken steps to access entitlements prior to the commencement of the NES (for example, where an employee has provided notice to their employer of their intention to take parental

leave), then those steps are recognised as having been taken in relation to the equivalent NES entitlement and do not need to be taken again.

The amendments to Schedule 4 as proposed by the Bill would insert equivalent rules for Division 2B State referral employees.

Item 14 of Schedule 4 to the T&C Act currently contains an equivalent regulation making power to the one proposed in item 22 to deal with the transition from the *Workplace Relations Act 1996* (WR Act) regime to the *Fair Work Act 2009* (FW Act) regime.

In developing the T&C Act I considered that it was both necessary and appropriate to include a regulation making power of this nature to ensure that any unintended consequences flowing from the operation of Schedule 4 to the T&C Act could be remedied in a timely manner. I consider that a similar regulation making power is required to ensure a smooth transition for Division 2B State referral employees from their respective State workplace relations frameworks to the federal workplace relations system.

It is not intended that the regulation making power would be used to disadvantage employees and in this respect I note that any regulations made under the provision 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.

In relation to the Committee's concerns regarding the Explanatory Memorandum, I note that this aspect will be corrected in the Revised Explanatory Memorandum to be provided when the Bill is introduced into the Senate.

The Committee thanks the Minister for this response, and notes that a correction to resolve the discrepancy between item 22 and the explanatory memorandum will be included in a revised explanatory memorandum (which will be provided when the bill is introduced into the Senate).

## **Insufficiently defined administrative powers**

### **Rights and non-reviewable decisions**

#### **Schedule 3, item 14, proposed new subsection 604(1)**

Proposed new subsection 604(1), to be inserted by item 14 of Schedule 3, would enable an appeal by a person aggrieved by a decision made by Fair Work Australia (FWA), or by the General Manager (including a delegate of the General Manager) of FWA under the *Fair Work (Registered Organisations) Act 2009*. However, an appeal can only occur ‘with the permission of FWA’.

The explanatory memorandum merely states (at page 66) that the provision allows for appeal and review of decisions. While this may be true, the right of appeal and review is potentially limited since it can only be exercised with the permission of the body against whose decision the appeal would be lodged. The Committee **seeks the Minister’s advice** on the reasons for granting this broad discretion to FWA and why the right of review and appeal is contingent upon FWA granting its permission. The Committee also **requests that the explanatory memorandum be amended** to include this explanation in order to assist those whose rights may be affected by the provision.

*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; and 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***

Items 14-16 of Schedule 3 to the Bill amend sections 604, 607 and 613 of the FW Act to ensure that decisions of the General Manager of Fair Work Australia (FWA) (or a delegate of the General Manager) made under the *Fair Work (Registered Organisations) Act 2009* (FW(RO) Act) may be appealed or reviewed. The amendments restore an avenue of appeal from these administrative decisions that existed under the analogous provisions in the WR Act and which was unintentionally removed in the creation of the FW Act and FW(RO) Act.

Under the FW Act, all appeals to FWA are instituted by permission of FWA. In this context, I refer the Committee to paragraph 2327 of the Explanatory Memorandum to the Fair Work Bill 2008 which explains that the concept of ‘permission’ is

intended to replace the concept of 'leave' that was used in the WR Act, using more modern terminology. Paragraph 2327 also makes clear that the changed terminology is not intended to and should not alter existing jurisprudence about granting leave to appeal.

In relation to the Committee's concerns regarding the Explanatory Memorandum, I note that a further explanation will be included in the Revised Explanatory Memorandum to be provided when the Bill is introduced into the Senate.

I trust my comments are of assistance to the Committee.

The Committee thanks the Minister for this response, and is pleased to note that a more detailed explanation of review and appeal rights will be included in the revised explanatory memorandum.

# ***Military Justice (Interim Measures) Act (No. 1) 2009***

## ***Introduction***

The Committee dealt with the bill for this Act in *Alert Digest No. 12 of 2009*. The Minister for Defence responded to the Committee's comments in a letter dated 30 October 2009. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 22 September 2009, the Minister's response may, nevertheless, be of interest to Senators.

### ***Extract from Alert Digest No. 12 of 2009***

Introduced into the Senate on 9 September 2009 and passed on 10 September 2009  
Introduced into, and passed by, the House of Representatives on 14 September 2009  
Portfolio: Defence

#### **Background**

Introduced with the Military Justice (Interim Measures) Bill (No. 2) 2009, this bill reinstates the service tribunal system that existed before the creation of the Australian Military Court (AMC), following the High Court decision of *Lane v Morrison* on 26 August 2009 which held the AMC to be invalid.

The bill amends the *Defence Force Discipline Act 1982*, the *Defence Force Discipline Appeals Act 1955*, the *Defence Act 1903*, the *Migration Act 1958* and the *Judges Pensions Act 1968* to reinstate provisions in each of those Acts that existed prior to the enactment of the *Defence Legislation Amendment Act 2006* (which established the AMC). The re-instatement of the previous military justice scheme is an interim measure until the Federal Government can legislate for a court which meets the requirements of Chapter III of the Australian Constitution.

In particular, the measures will:

- re-establish trials by courts martial and Defence Force magistrates;

- reinstate the positions of Chief Judge Advocate, Judge Advocates and the Registrar of Military Justice (Registrar);
- reinstate the system of reviews and petitions in respect of both summary trials and trials held by Courts martial or Defence Force magistrates; and
- reinstate the powers of reviewing authorities.

### **Trespass unduly on rights and liberties**

#### **Schedule 1, item 103, new subsection 145A(2)**

#### **Schedule 1, item 72, new subsection 120(1)**

Proposed new section 145A of the *Defence Force Discipline Act 1982*, to be inserted by item 103 of Schedule 1, provides for an accused person to be notified of the convening of a court martial or reference of a charge to a Defence Force magistrate for trial (proposed new subsection 145A(1)); and to be given an opportunity to provide particulars of an alibi (proposed new subsection 145A(2)). Under new subsection 145A(2), an accused person has 14 days to provide the particulars, commencing on the day of the making of the order convening the court martial or the referring of the charge to the Defence Force magistrate. This timeframe can be extended with the leave of the Judge Advocate or Defence Force magistrate.

Proposed new subsection 120(1), to be inserted by item 72 of Schedule 1, provides that the Registrar must, 'as soon as practicable' after making an order convening a court martial, cause a copy of that order to be given to the accused person. However, there does not appear to be an obligation on the Registrar to notify the accused of the reference of the charge to a Defence Force magistrate. In addition, there is no explanation as to why the 14 days available to the accused does not run from the date of giving him or her a copy of the order, as opposed to the date of the making of the order.

The Committee is of course mindful that the bill has passed both Houses of the Parliament, is considered urgent and contains measures which are interim in nature. Nevertheless, the Committee considers that new subsections 145A(2) and 120(1) contain serious defects. The Committee **seeks the Minister's advice** on why a statutory obligation has not been imposed on the Registrar to notify the accused of the reference of a charge to a Defence Force magistrate; and why the notice period in new subsection 145A(2) does not run from the time of providing a copy of the order or reference to the accused. The Committee also holds the strong view that these issues should be given proper consideration when the Federal Government legislates to establish a Chapter III court so that the defects may be remedied.

*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 Committee sought my advice on certain provisions in the *Defence Force Discipline Act 1982* (DFDA), as amended by the Interim Measures Act. Specifically, advice was sought concerning two provisions. Firstly the absence of a statutory obligation on the Registrar of Military Justice (RMJ), in sub-section 120(1) of the DFDA to notify an accused of a reference of a charge to a Defence Force magistrate (DFM) and secondly, why the notice period in subsection 145A(2) of the DFDA does not commence from the time of providing a copy of a (convening) order or reference to a DFM to an accused.

The amendments contained in items 72 and 103 of the Interim Measures Act reinstate subsections 145A(2) and 120(1) of the DFDA, without modification, as they existed prior to the commencement of the *Defence Legislation Amendment Act 2006*. The provisions with which the Committee is concerned will operate substantively as they did when the DFDA was introduced in 1985 and the amendments made by the Interim Measures Act have not sought to modify or change that operation, other than as necessary to reflect the abolition of convening authorities.

#### *Subsection 120(1)*

The obligation in subsection 120(1) (originally imposed on a convening authority and subsequently on the RMJ), to provide an accused with a copy of a reference of a charge to a DFM, arose under the then Defence Force Discipline Rules. Under these Rules, rule 28 outlined the information that was to be included in the order referring the charge or case to a DFM. Rule 29 provided for the convening

authority (later, the RMJ) to provide certain documents to the accused including, in the case of a charge referred to a DFM, that reference and the charge sheet. No time limit was provided, but the accused's presence was required at the trial in accordance with section 139 of the DFDA.

Rules 28 and 29 were replicated, in part, in the Australian Military Court Rules 2007 (Part 7) and outlined the same requirements. Furthermore, the proposed 'Court martial and Defence Force Magistrate Rules', to be made under section 149 of the DFDA, will substantially replicate the Defence Force Discipline Rules; these are currently being developed. These Rules will support the reinstated system of trials by court martial or Defence Force magistrate, including rules which reflect previous rules 28 and 29.

I should also note that paragraph 141(1)(a) of the DFDA provided, and will continue to provide, the accused with the right to make applications or objections in connection with inadequate time to prepare his or her defence or to choose a person to represent or advise him or her or to secure the attendance of witnesses.

The combined effect of the operation of these provisions was, and continues to be, to provide an accused person with appropriate legal and procedural safeguards, for the timely notification of matters required in respect of his or her defence of a charge.

#### *Subsection 145A(2)*

I note the Committee's concerns in respect of subsection 145A(2) and that they have sought my advice concerning why the notice period in that sub-section does not run from the time of providing a copy of the order or reference to the accused. This was not the approach adopted at the inception, and through the subsequent operation, of the DFDA. In practice, a notice of alibi is extremely rare in Defence matters; the former Chief Military Judge (and past Chief Judge Advocate) has advised that he cannot recall an occasion since the commencement of the DFDA in 1985 in which this has occurred.

While the time limit based on the making of a convening order or of a reference may not be ideal, section 145A itself allows a Judge Advocate or DFM to grant leave for alibi evidence to be called, notwithstanding non-compliance with the time limit, and the rights given to an accused under paragraph 141(1)(a) of the DFDA enable the various applications referred to above, provide appropriate safeguards in this context.

However, I understand that this matter will be considered in the context of the current review being undertaken jointly by my Department and the Attorney-General's Department to resolve the long term future of the service tribunal system.

The Committee thanks the Minister for this comprehensive response, and notes that the issues raised by the Committee will be considered in the context of the current review being undertaken by the Department of Defence and the Attorney-General's Department to resolve the long-term future of the service tribunal system.

**Trespass unduly on rights and liberties**  
**Schedule 1, item 82, new subsection 137(1)**

Proposed new subsection 137(1) of Schedule 1 provides that: 'The Chief of the Defence Force shall if, and to the extent that, the exigencies of service permit, cause an accused person awaiting trial by a court martial or by a Defence Force magistrate to be afforded the opportunity...to be advised before the trial, by a legal officer'. The Committee notes that there is no time limit on when this advice would be provided. This means, for example, that 14 days for the provision of alibi particulars (as discussed above) might elapse before legal advice is available to the accused.

The Committee has abiding concerns about how this provision would operate in practice and considers that appropriate safeguards must be in place to protect an accused person's rights and liberties (for example, in situations where he or she may not be contactable). Further, it is not clear exactly what the phrase 'the exigencies of service' would cover. The Committee **seeks the Minister's advice** on precisely what this phrase means and, specifically, whether 'the exigencies of service' would include provision of legal advice as soon as possible after the making of an order convening a court martial or the reference of a charge to a Defence Force magistrate.

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

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

The Committee expressed concern about the operation of subsection 137(1) of the DFDA, which provides for an accused person to be afforded the opportunity to be advised by a legal officer.

The combined operation of subsection 137(1) and paragraph 141(1)(a) of the DFDA provides an accused with robust safeguards. The accused is provided with an opportunity to avail him or herself of legal representation and, if necessary, to make a formal application for an adjournment on the basis that, among other things, he or she has not had an adequate opportunity to choose a person to represent or advise him or her. Furthermore, the provision of legal representation for an accused person has been, and will continue to be, coordinated through Defence's Directorate of Defence Counsel Services. Established arrangements are in place for this to occur. Also, there is close liaison between the offices of the RMJ, the Directorate of Defence Counsel Services and the Director of Military Prosecutions before and after a charge is referred to the RMJ, to ensure that an accused person has timely legal advice and representation.

The Committee also sought advice about the meaning of the concept of 'the exigencies of service'. This needs to be read in both an historical context and in the operational situation that may exist from time to time. Historically, an accused person was represented by a regimental officer without legal qualifications. In time, this became the exception and, with the introduction of the DFDA in 1985, the standard for military trials was that the accused person would ordinarily be represented by a legal officer.

Section 137 gives legislative effect to this concept and safeguard, while at the same time recognising (as do other provisions in the DFDA) that allowing for the 'exigencies of service' may mean that this is not always possible. The Explanatory Memorandum to the Defence Force Discipline Bill 1982 (at paragraph 785) noted that, *The expression 'exigencies of service' is not defined and bears its ordinary meaning in a Defence Force context of pressing or urgent requirements or needs of the particular part of the Defence Force.*

Given the number of legal officers now in the Australian Defence Force, and the current practice of deploying legal officers with any substantial body of troops, it would be extremely unlikely that the 'exigencies of service' could ever be such that an accused person might face trial without a legal officer.

I am advised that there has only been one instance, since the inception of the DFDA in 1985, of an accused person facing trial at the court martial or DFM level without being formally represented by a legal officer. This case involved a plea of guilty in the Middle East theatre of operations by a senior officer accused of a disciplinary offence. The officer, having been offered the services of a legal officer, preferred to use a regimental officer to represent him. However, in that case, a legal officer was made available to provide assistance to the accused and the regimental defending officer, if required.

As mentioned above, the accused still has the additional protection of the right to make an application pursuant to subparagraph 141(1)(a)(i) of the DFDA (to seek an adjournment on the basis that he or she has not been able to choose a person to represent or advise them).

The Committee thanks the Minister for this response, and notes his advice that it would be extremely unlikely that the ‘exigencies of service’ could ever be such that an accused person could face trial without a legal officer. The Committee also notes that the accused could seek an adjournment on the basis that he or she had not been able to choose a person to represent or advise them.

### **Wide discretion**

#### **Schedule 1, item 227, new section 36**

Proposed new section 36 of the *Defence Force Discipline Appeals Act 1955*, to be inserted by item 227 of Schedule 1, enables the Defence Force Discipline Appeal Tribunal, when it is hearing an appeal against a conviction or prescribed acquittal by a court martial or a Defence Force magistrate, to obtain reports to assist in the determination of appeals. Section 36 enables the Tribunal to: ‘direct such steps to be taken as are necessary to obtain from the person who was the judge advocate of the court martial or from the Defence Force magistrate, a report giving his or her opinion upon the case, or upon a point arising in the case, or containing a statement as to any facts the ascertainment of which appears to the Tribunal to be material for the purpose of the determination of the appeal’.

The Committee notes that this gives the Tribunal a broad power and that any failure to comply with the Tribunal’s direction may constitute contempt. It is unclear what the provision is seeking to achieve and the explanatory memorandum does not provide any explanation or context. Accordingly, the Committee **seeks the Minister’s advice** in relation to the context and background to the provision, the specific reasons for granting such a broad power to the Tribunal, and whether any alternatives were (or might be) considered.

*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 Committee sought advice on the Defence Force Discipline Appeal Tribunal's (the DFDAT) powers under section 36 of the *Defence Force Discipline Appeals Act 1955* (the Appeals Act) to obtain information that may be material to the determination of an appeal. 'New' section 36 enables the DFDAT to obtain information from the Judge Advocate of a court martial or a Defence Force magistrate. The Committee was concerned that a failure to comply with a direction of the DFDAT may constitute contempt of the DFDAT. The Committee has also asked for the context and background to this provision and the reasons why such a broad power exists and whether any alternatives exist or might be considered.

Section 36 has been reinstated in the Appeals Act as it existed prior to the *Defence Legislation Amendment Act 2006*. I am advised that the DFDAT has not exercised its powers under section 36 since the inception of the DFDA in 1985 (together with its operation with the Appeals Act). Furthermore, as section 36 is directed towards a Judge Advocate of a court martial or a DFM, should the DFDAT exercise its discretion under the section, it could be expected to do so appropriately, having regard to the nature, role and functions of these appointments. Also, it would be unusual for either a Judge Advocate or a DFM to fail to comply with a direction of the DFDAT and therefore, be held to be in contempt.

Of interest, I understand that in relevant South Australian legislation dealing with appeals to the Court of Appeal, that Court has, on occasions, called for reports from the trial judge (presumably concerning observations that would not be apparent in the transcript of proceedings). Advice to me is that, historically, the communications were made privately but in more recent years the decision was taken that if a report were to be obtained, then counsel for the parties should see it and have the opportunity to be heard in relation to its contents. This position has some merit and could be considered in any future review or amendment of the Appeals Act.

As the Appeals Act falls within the portfolio responsibility of the Attorney-General, the Hon Robert McClelland MP, his Department may be better placed to provide background information in respect of the policy context of section 36 and of the more general matters raised above. I should also note that in the development of the amendments to the Interim Measures Act, the Attorney-General's Department was consulted concerning legislation (including the Appeals Act) administered by that Department. It did not make any observations in respect of this provision.

I thank the Committee for drawing the above matters to my attention and also for its interest in military justice issues in the context of the provisions of the Interim Measures Act. I trust that the information provided above has addressed the Committee's concerns.

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

# **Personal Property Securities (Consequential Amendments) Bill 2009**

## ***Introduction***

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 17 November 2009. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 13 of 2009***

Introduced into the House of Representatives on 21 October 2009  
Portfolio: Attorney-General

#### **Background**

This bill amends 25 Commonwealth Acts that deal with the creation, registration, priority, extinguishment or enforcement of interests in personal property. The bill clarifies the operation of legislation that will operate concurrently with the Personal Property Securities Bill 2009 (PPS Bill) (considered by the Committee in *Alert Digest No. 9 of 2009* and the *Eleventh Report of 2009*).

The bill contains measures designed to:

- harmonise language and concepts with the PPS Bill where appropriate;
- support a seamless transition to the PPS Register to be established by the PPS Bill, including removing provisions providing for the registration of security interests on a separate Commonwealth register;
- resolve conflicts between the PPS Bill and other Commonwealth legislation that provides for security interests or other interests in personal property;
- determine the priority between Commonwealth statutory interests in personal property, other than security interests, and security interests in the same property;

- clarify the rights of secured parties and other parties in particular situations, including statutory detention of personal property that may be subject to a security interest; and
- ensure that current rights are preserved on implementation of the amendments.

### **Retrospective application**

#### **Schedule 1, items 16 and 20, new subsections 108A(2) and 52J(2)**

Item 16 of Schedule 1 substitutes a new Subdivision F of Division 6 of Part 6 of the *Fisheries Management Act 1991*. Proposed new subsection 108A(2) provides for the seizure, detention or forfeiture of a boat or any other property (including fish) to have effect despite proceedings under the *Admiralty Act 1988* or enforcement actions under the *Personal Property Securities Act 2009* (PPSA), regardless of whether the seizure, detention or forfeiture, or the event on which it is based, occurred before or after the admiralty event or the PPSA event. Item 20 of Schedule 1 substitutes a new section 52J in the *Torres Strait Fisheries Act 1984*, and contains proposed new subsection 52J(2) which is expressed in identical terms to proposed new subsection 108A(2).

The Committee notes that these provisions appear to have retrospective application. The explanatory memorandum does not explain the reasons for retrospectivity, merely repeating (at paragraphs 5.19 and 5.22) the words in the provisions. The Committee **seeks the Attorney-General's advice** on the reasons for the retrospective application of proposed new subsections 108A(2) and 52J(2); and whether the retrospectivity will have an adverse effect on any individual.

*Pending the Attorney-General'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 Attorney-General***

The Committee is concerned that proposed replacement section 108A of the *Fisheries Management Act 1991* and section 52J of the *Torres Strait Fisheries Act 1984* would have retrospective application. This is not the case.

These provisions would ensure that seizure, detention or forfeiture of personal property under these two Acts has effect despite any enforcement action being taken under the proposed *Personal Property Securities Act 2009* (the PPS Act). The new provisions replace existing provisions that have this effect in relation to proceedings under the *Admiralty Act 1988*. Relevantly, the existing provisions are expressed to have effect regardless of whether the fisheries enforcement event occurred before or after the admiralty event. The amendments in the Consequential Bill do not alter this.

The effect of the Consequential Bill is to add enforcement actions under the PPS Act as actions over which fisheries enforcement actions will prevail. The relevant provisions of the Consequential Bill would commence at the same time as the PPS Act starts to apply to security interests. It would therefore not be possible for there to be any PPS Act enforcement actions in train before the amendments commence. Accordingly, these provisions could operate only prospectively in respect of PPS Act enforcement actions and would continue the current position with respect to proceedings under the Admiralty Act.

The Committee thanks the Attorney-General for this response, which addresses its concerns.

# Safe Climate (Energy Efficient Non-Residential Buildings Scheme) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. Senator Milne responded to the Committee's comments in a letter dated 17 November 2009. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 13 of 2009*

Introduced into the Senate on 17 September 2009  
By Senator Milne

### **Background**

This bill introduces an emissions intensity cap and building efficiency certificate trading scheme for non-residential buildings in order to provide an economic incentive for investment in energy efficiency.

### **Inappropriate delegation of legislative power**

#### **Subclause 7(1)**

Subclause 7(1) provides that the Act is intended to apply to the exclusion of a state or territory law that is prescribed by regulations. Section 109 of the Constitution provides that, when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. In these circumstances, subclause 7(1) need have only a declaratory effect which could be achieved through means other than regulations. The Committee **seeks the Senator's comments** on whether an alternative method of identifying inconsistent state and territory laws might be considered.

*Pending the Senator'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 Senator***

As noted by the committee, under section 109 of the Constitution, a law of the Commonwealth prevails over an inconsistent law of a state, to the extent of the inconsistency. It is not the intention of the bill to exclude or limit concurrent operation of any state and territory laws that are consistent with the Bill (see subclause 7(2) of the bill).

The intention of subclause 7(1) is to allow any future laws that are contrary to the intent of the bill to be excluded by the regulations. There appear to be no current laws that are contrary to the intent of the bill, and none are expected in the future.

The Committee thanks the Senator for this response.

#### **Drafting note**

#### **Apparent typographical errors**

#### **Paragraphs 12(2)(b) and 15(2)(b)**

Paragraphs 12(2)(b) and 15(2)(b) make reference to subsection 10(3) of the bill. However, the Committee notes that subsection 10(3) does not exist. There is a proposed new paragraph 10(c) which provides for the Minister to determine, by legislative instrument, conditions relating to the use of methods to meet criteria to measure emissions intensities from non-residential buildings. Both paragraphs 12(2)(b) and 15(2)(b) seem to relate to paragraph 10(c) because they refer to 'methods determined by the Minister'. The Committee **draws to the Senator's attention** these apparent typographical errors.

### ***Relevant extract from the response from the Senator***

Noted, the references should in fact be to section 10 not subsection 10(3). I will make the appropriate corrections.

The Committee thanks the Senator for this response.

**Inappropriate delegation of legislative power**  
**Subclauses 12(3) and 15(3)**

Clause 12 provides for transitional reporting by owners to the Greenhouse and Energy Data Officer (GEDO) on emissions relating to their non-residential building. Subclause 12(3) provides that regulations made for the purposes of paragraph 12(2)(c) (which states that transitional reports must include ‘any information specified by the regulations for the purposes of this paragraph’) ‘may specify different requirements for different circumstances’.

Similarly, clause 15 provides for annual reporting by building owners to the GEDO on emissions in relation to their building. Subclause 15(3) provides that regulations may specify ‘different requirements for different circumstances’ for the purposes of providing information pursuant to paragraph 15(2)(c).

These provisions contain very broad delegations of legislative power and it is not clear what type of circumstances the power is intended to cover. While noting that the regulations would be subject to the usual scrutiny and disallowance regime provided for under the *Legislative Instruments Act 2003*, the Committee nevertheless **seeks the Senator’s comments** on whether the scope of the proposed powers might be limited (or at least explained) in some way.

Pending the Senator’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

***Relevant extract from the response from the Senator***

The broad delegation is intended to allow for different levels of reporting specificity, primarily depending on the size of the entity in question. I take your advice on board and will consider clarification in light of evidence expected to be presented to the Economics Committee inquiry in this Bill.

The Committee thanks the Senator for this response.

# Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter dated 17 November 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 13 of 2009*

Introduced into the House of Representatives on 21 October 2009  
Portfolio: Treasury

#### **Background**

Introduced with the Income Tax (TFN Withholding Tax (ESS)) Bill 2009, this bill amends various taxation laws to reform the taxation rules that apply to shares or rights granted under an employee share scheme.

Schedule 1 replaces the current Division 13A of Part III of the *Income Tax Assessment Act 1936*; inserts a new Division 83A into the *Income Tax Assessment Act 1997* dealing with employee share schemes; and inserts new provisions in the *Taxation Administration Act 1953* dealing with the employee share scheme withholding tax and employee share scheme reporting. These measures are aimed at better targeting the employee share scheme tax concessions to low and middle income earners and decreasing taxpayers' ability to evade or avoid tax. Schedule 1 also makes consequential amendments to several other Acts.

Schedule 2 amends the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997* to tighten the application of the non-commercial losses rule in relation to individuals with an adjusted taxable income over \$250,000 to prevent those individuals from offsetting deductions from non-commercial business activities against their salary, wage or other income.

Schedule 3 amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to require superannuation providers to transfer the balance of a lost member's account to the Commissioner of Taxation where the account balance is less than \$200, or where the account has been inactive for a period of five years and the provider is satisfied that it will never be possible to pay an amount to the member.

### **Rights and non-reviewable decisions** **Schedule 2, items 6 and 13**

Subsection 35-55 of the *Income Tax Assessment Act 1997* currently provides that the Commissioner of Taxation may decide to exercise a discretion not to apply the non-commercial losses rule. Item 6 of Schedule 2 would insert a requirement in subsection 35-55(1) that an application be made for the exercise of the discretion; and proposed new subsection 35-55(3), to be inserted by item 13 of Schedule 1, will require that the application be made 'in the approved form'. This will trigger consideration by the Commissioner of the exercise of the discretion.

The explanatory memorandum does not refer to any right the taxpayer may have to seek informal review of the exercise of the discretion under the Taxpayers' Charter; or whether the decision may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*; or whether it is possible to apply for a private ruling. The Committee therefore **seeks the Treasurer's advice** on the rights of review in relation to the exercise of the Commissioner's discretion and **requests that the explanatory memorandum be amended** to inform taxpayers of their rights in this regard.

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

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

The Committee has expressed concerns in relation to Schedule 2 to the Bill (non-commercial losses). Schedule 2 to the Bill amends the *Income Tax Assessment Act 1997* to tighten the application of the non-commercial losses rules in relation to individuals with an adjusted taxable income of \$250,000 or more.

Under the non-commercial losses rules, the Commissioner of Taxation has a broad discretion to *not* apply the rules where there are exceptional circumstances or where a taxpayer can satisfy the Commissioner, based on an objective expectation, that the business activity will become profitable in a commercially viable period. The discretion is being amended to ensure that it continues to apply to those affected by the Bill.

I understand that the Committee is concerned that the explanatory memorandum does not refer to any right that taxpayers may have to seek review of the exercise of the discretion by the Commissioner and has asked for my advice on this matter and requested that the explanatory memorandum be amended.

The Commissioner's exercise of a discretion under the non-commercial losses rules (including a decision not to exercise a discretion) is a matter leading up to or forming part of the making of an income tax assessment. All decisions leading up to or forming part of the making of an income tax assessment are subject to a formal review process (including internal review and review by the Administrative Appeals Tribunal and Federal Court).

As the proposed amendments do not affect the existing formal review processes, the matter was not discussed in the explanatory memorandum. However, given the concerns raised by the Committee, I will arrange for the explanatory memorandum to be amended.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this response, and for his undertaking to amend the explanatory memorandum to include clarification of review rights relating to the Commissioner's exercise of discretion under the non-commercial losses rules.

# Telecommunications (Interception and Access) Amendment Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 16 November 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 13 of 2009*

Introduced into the House of Representatives on 16 September 2009  
Portfolio: Attorney-General

#### **Background**

This bill amends the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to implement a full legislative framework to clarify the basis on which communications can be accessed for the purposes of protecting a computer network.

The TIA Act currently includes special exemptions that enable interception and security agencies, as well as certain government departments, to access communications on their own computer network for network protection activities. However, these provisions are not permanent and were intended to operate on an interim basis while a comprehensive solution covering both the public and private sectors was developed. The interim provisions cease to have effect after 12 December 2009.

Specifically, the bill:

- enables all owners and operators of computer networks to undertake activities to operate, maintain and protect their networks;
- enables Commonwealth agencies, security authorities and eligible state authorities to ensure that their computer network is appropriately used by employees, office holders or contractors of the agency or authority;

- limits secondary use and disclosure of information obtained through network protection activities for certain prescribed purposes;
- requires the destruction of records obtained by undertaking network protection activities when the information is no longer required for those purposes;
- extends the evidentiary certificate regime to lawful access to telecommunications data authorised under Chapter 4 of the TIA Act and allows the managing director or the secretary of a carrier to delegate their evidentiary certificate functions;
- clarifies that lawfully intercepted information can be used, communicated and used in proceedings by the Australian Federal Police in applications for interim and final control orders, and initial and final preventative detention orders under Divisions 104 and 105 of the *Criminal Code Act 1995*; and
- makes consequential amendments to reflect amendments to the *Police Integrity Commission Act 1996* (NSW) in relation to the investigation of the corrupt conduct of an administrative officer of the NSW Police Force, or the misconduct of an officer of the NSW Crime Commission.

### **Drafting note**

#### **Personal rights and liberties**

#### **Schedule 1, item 15, new sections 63C, 63D and 63E**

Item 15 of Schedule 1 inserts three new provisions, 63C, 63D and 63E, into the TIA Act. These provisions relate to communicating, making use of, or disclosing lawfully intercepted information for specified purposes. A consequential amendment to section 72, to be inserted by item 16 of Schedule 1, allows those who communicate information in accordance with sections 63C, 63D and 63E to make a record of that information.

The Committee notes that section 105 of the TIA Act provides that contravention of existing section 63 is an indictable offence punishable by imprisonment for a period of not more than two years. Since proposed new sections 63C, 63D and 63E expand opportunities to deal with intercepted information, the Committee **seeks the Attorney-General's advice** on whether a note might be inserted at the end of those provisions about sanctions; or, alternatively, whether the explanatory memorandum might be amended to refer to the sanctions in the TIA Act for misuse of intercepted information.

More generally, the Committee **seeks the Attorney-General's clarification** in relation to which particular non-Commonwealth entities will be provided with interception information pursuant to the bill, and the specific purposes for which the information will be provided. In addition, the Committee **requests that the Attorney-General clarify** the limitations and safeguards imposed to govern use or disclosure of intercepted information by non-Commonwealth agencies; and the oversight mechanisms in place to ensure compliance with applicable laws (and any other requirements) by these agencies.

*Pending the Attorney-General'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 Attorney-General***

Specifically, the Committee requested clarification of the application of sanctions in dealing with intercepted information and advice about which non-Commonwealth entities will receive interception information pursuant to the Bill, and the limitations on non-Government agencies on the use and disclosure of intercepted information. Responses to these concerns are set out below.

#### *Application of sanctions*

The Committee rightly notes that the effect of section 105 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) is to make the contravention of section 63, which limits the use and disclosure of interception information, an indictable offence. The Bill expands the operation of this provision to cover information obtained through network protection activities.

The Committee has suggested inserting a note at the end of Item 15 of Schedule 1 of the Bill to advise on the application of these sanctions or, alternatively, amending the

explanatory memorandum to refer to the application of sanctions for the misuse of intercepted information.

Amending the TIA Act to include a specific note would create inconsistencies within the Act that could cause confusion about the legislative effect of Part 2-6. The Part is intended to create a general prohibition against dealing in intercepted information except where one of the limited exceptions available under that Part applies. Under the TIA Act as amended by this Bill, the prohibition will apply irrespective of whether the information was obtained under an interception warrant, network protection activities or any other means. However, including a note in the Act that relates only to one aspect of Part 2-6 could mistakenly be taken to mean that contraventions of section 63 of the TIA Act in relation to information obtained through network protection activities are more serious than contraventions relating to information obtained under warrant.

I appreciate that extending the network protection regime beyond security and other designated government agencies will extend the relevance of the TIA Act to a broad range of stakeholders. Many of these stakeholders may not be familiar with the operation of the interception regime or the serious penalties that arise from the mishandling or misuse of interception information. Although amending the explanatory memorandum is possible, I am concerned that this document, being limited to the content of this Bill, will not adequately convey vital information about the broader context within which these reforms operate.

In my view, informing stakeholders about these consequences is best achieved through education rather than legislative amendment as a number of these stakeholders will not be familiar with interpreting legislation. My Department has prepared a number of fact sheets that address key aspects of the TIA Act. These sheets are available on the Departmental website and a new sheet will be prepared for the network protection reforms.

#### *Interception information and non-Commonwealth entities*

The Bill operates within the broader context of Part 2-6 of the TIA Act. This means that the existing limitations on the use and disclosure of intercepted information will apply to information obtained through network protection activities.

In addition, proposed new section 63C allows a person undertaking network protection duties to communicate intercepted information to the person responsible for the computer network and to another person if the information is reasonably necessary to enable the other person to perform their network protection duties in relation to the network. This takes into account the fact that more than one person may be engaged to undertake network protection duties and will need access to the information in order to effectively perform their functions.

Given the extension of the network protection regime to non-government sector entities, this will mean that the disclosure of intercepted information may occur within any non-Commonwealth entity which utilises the network protection regime to operate, protect and maintain their network. Where an organisation engages a non-

Commonwealth third party entity to undertake network protection activities on their behalf, intercepted information will be able to be disclosed between the organisation and the third party for the purpose of performing network protection duties. For example, this will be the case when an organisation has outsourced its network operations to a commercial entity.

Proposed section 63D allows designated government security authorities and law enforcement agencies (including State and Territory law enforcement agencies) to undertake network protection activities for the purpose of monitoring appropriate use of the network by employees. This exception reflects the sensitive nature of work undertaken by employees in these particular organisations and the additional professional standards and statutory requirements that are not applicable to other public sector or non-government organisations.

Network protection activities for disciplinary purposes will be limited to the conditions set out in a written user agreement, provided those conditions are reasonable. A person who receives lawfully intercepted information obtained through network protection activities, cannot use or disclose the information for disciplinary purposes if to do so would contravene another Commonwealth, State or Territory law.

Proposed section 63E provides for the use and disclosure of information accessed for network protection purposes to the person responsible for a network as they may have to make a decision regarding ongoing network protection duties or consider whether information should be referred to an enforcement agency (including State and Territory government agencies) if he or she reasonably suspects that the information is relevant to determining whether someone has committed certain criminal offences. Importantly, there is no requirement for a person responsible for a network to refer any such information to an agency. Rather, the provision provides discretion to network operators to alert relevant law enforcement authorities where information suggests a particular offence may have been committed.

*Limitations on the use and disclosure of intercepted information by non-Commonwealth agencies*

As stated above, the communication and use of interception information obtained through network protection activities are subject to the broader limitations on the use and disclosure of intercepted information set out in Part 2-6 of the TIA Act. These provisions limit the capacity of all organisations to use and disclose information accessed under the proposed network protection regime. Specifically, the proposed amendments to section 73 of the TIA Act restrict the further use and disclosure of this information to the purpose for which it was originally disclosed.

Additionally, proposed new section 79A of the Bill requires a responsible person for a network to cause all lawfully intercepted information under the proposed network protection regime to be destroyed as soon as practicable after becoming satisfied that the information is not likely to be required for the purpose of performing network protection duties.

By operating within the broader context of the interception regime, the proposed network protection reforms provide significant accountability mechanisms while balancing the need to protect networks from malicious attack with clear limitations on the circumstances in which the access, use and disclosure of information will be permitted.

The Committee thanks the Attorney-General for this extremely comprehensive response, and is particularly pleased to note that an information sheet will be prepared and made available on the Department's website to explain the network protection reforms to affected stakeholders.

# Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Acting Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter dated 17 November 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 13 of 2009*

Introduced into the House of Representatives on 15 September 2009  
Portfolio: Broadband, Communications and the Digital Economy

#### **Background**

This bill amends the *Telecommunications Act 1997*, the *Trade Practices Act 1974* (Trade Practices Act), the *Radiocommunications Act 1992*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *National Transmission Network Sale Act 1998*, with the stated aim of enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards.

The bill has three primary parts:

- addressing Telstra's vertical and horizontal integration by implementing a functional separation regime that requires Telstra to do a number of things (for example, conduct its network operations and wholesale functions at 'arm's length' from the rest of Telstra);
- streamlining the telecommunications access and anti-competitive conduct regimes; and
- strengthening consumer safeguard measures, such as the Universal Service Obligation, the Customer Service Guarantee and Priority Assistance.

## **Insufficient parliamentary scrutiny**

### **Schedule 1, items 93 and 98**

Part 2 of Schedule 1 contains provisions amending Part XIC of the Trade Practices Act. Part XIC of the Trade Practices Act provides for the telecommunications access regime, with Division 3 of Part XIC containing standard access obligations. Existing section 152AS and subsection 152ASA(12) are repealed by items 93 and 98 of Schedule 1, respectively. This effectively means that ordinary class exemptions from standard access obligations made by legislative instrument are no longer available. Proposed new subsection 152ASA(12), to be inserted by item 98 of Schedule 1, provides specifically that a determination under subsection 152ASA(1) (to exempt from standard access obligations) is *not* a legislative instrument.

The explanatory memorandum states (at page 135) that disallowance by the Parliament 'would not be appropriate for instruments made under Part XIC' and that '(w)here the A[ustralian]C[onsumer and]C[ompetition]C[ommission] uses a number of inter-related instruments to deal with a matter, disallowance of one instrument could result in inconsistent and undesirable regulatory outcomes'. Further, 'the Bill provides for consultation and termination of the instruments (other key features of the L[egislative]I[nstruments]A[ct]'

The Committee considers that, if the Parliament were to continue to have the capacity to consider the disallowance of determinations made under subsection 152ASA(1), the Australian Consumer and Competition Commission (ACCC) could draw to its attention, or provide advice upon, any 'inconsistent' or 'undesirable' regulatory outcomes. The Committee **seeks the Minister's advice** on whether this type of approach might be considered, as opposed to the absolute removal of legislative scrutiny of determinations made under the proposed new system of exemptions.

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

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

Please note that references to statutory provisions [in this response] are to provisions of the *Trade Practices Act 1974*, unless otherwise indicated.

Anticipatory individual exemptions and anticipatory class exemptions (which are made under section 152ATA and section 152ASA respectively) exempt a person, or class of persons, from having to provide access to a telecommunications service that is not a declared service under Part XIC of the Trade Practices Act, in the event that the service is declared subsequently to the granting of the exemption. Anticipatory exemptions play an important role in encouraging investment in facilities used to supply telecommunications services, by providing a mechanism to obtain regulatory certainty for persons proposing to invest in such facilities.

Currently subsection 152ASA(12) provides that an anticipatory class exemption is a disallowable instrument. The Bill replaces the existing subsection (12) with a new subsection (12) which provides that an anticipatory class exemption is not a legislative instrument. By contrast, anticipatory individual exemptions are not currently specified to be disallowable instruments; and there is no suggestion that they are legislative instruments within the meaning of the *Legislative Instruments Act 2003*.

I consider that it is appropriate to amend subsection 152ASA(12) to provide that anticipatory class exemptions are not legislative instruments (and hence are not subject to disallowance), for the following reasons.

Firstly, decisions about granting anticipatory class exemptions require consideration of complex and technical regulatory issues and, for the same reasons as those given below in relation to access determinations, are best left to the ACCC as the independent expert regulator.

Secondly, disallowability for anticipatory class exemptions creates a potential incongruity with anticipatory individual exemptions, which are not disallowable. Sometimes the ACCC grants interrelated individual and class exemptions. (For example, the ACCC is currently undertaking public consultation on a draft ordinary class exemption dated October 2009 in respect of three declared fixed line services which is intended to complement an ordinary individual exemption which the ACCC granted to Telstra last year.) If the ACCC grants an anticipatory individual exemption in response to an application by a particular telecommunications provider and decides to also grant a similar anticipatory class exemption to other providers who are in the same position, disallowance of the class exemption will result in different regulatory rules applying to the holder of the individual exemption compared to other providers. This may be unfair and create an unlevel competitive playing field.

I appreciate the Committee's suggestion that the risk of inconsistent regulatory outcomes of the kind just mentioned could be reduced if the ACCC could provide appropriate advice about the risk when an anticipatory class exemption is tabled. However, I do not think this would offer a satisfactory solution, as it would still be

open to either House to disallow the class exemption. Further, this suggested solution would merely draw Parliament further into the complexities of technical regulation which, for the reasons outlined below, I would not consider desirable.

The Committee thanks the Acting Minister for this helpful response, which clarifies the operation of proposed new subsection 152ASA(12) of the Trade Practices Act.

**Legislative Instruments Act—exemption  
Schedule 1, item 116, new subsection 152BC(9)**

Item 116 of Schedule 1 contains provisions enabling the ACCC to make access determinations. Proposed new section 152BC provides for the ACCC to make written determinations relating to access to a declared service. Proposed new section 152BC(9) provides that such a determination is not a legislative instrument. As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee expects the explanatory memorandum to explain whether the provision is merely declaratory of the law (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying its need.

In this case, the explanatory memorandum does not appear to explain whether or not a determination under new section 152BC is intended to be a substantive exemption and, if so, the reasons for that exemption. Therefore, the Committee **seeks the Minister's advice** on this issue and **requests that the explanatory memorandum be amended** to include the relevant explanation.

*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 Acting Minister***

I confirm that proposed subsection 152BC(9), which provides that an access determination is not a legislative instrument, is a substantive exemption, insofar as access determinations will usually determine regulatory requirements for a class of telecommunications providers. An addendum to the explanatory memorandum will be issued to indicate this and set out the justification for the exemption. The justification is as follows.

### *Exemption from disallowability*

The telecommunications sector supplies a diverse and evolving range of services which are simultaneously expanding in number while converging in terms of the functionalities they provide. Access determinations (which will be made by the ACCC under proposed section 152BC) will be one of the key regulatory instruments under the telecommunications-specific access regime in Part XIC. They will set the terms and conditions for the supply of a declared service, including the access price, as regards all access providers and access seekers of the service, and they may also impose access obligations on access providers in addition to the standard access obligations in section 152AR and/or limit the application of the standard access obligations to access providers. They may make different provision for different access providers and/or access seekers, or for different classes of access providers and/or access seekers. The matters the ACCC will have to consider when making an access determination are wide-ranging and often technical and complex (see proposed section 152BCA). The ACCC will have to undertake an assessment of the costs of supplying the declared service, the current state of competition and investment in relation to the supply of the service, and the likely effect of the determination on future competition and investment.

Access determinations will be made after a public inquiry involving public consultation. Further, an access determination will not only affect the supply of the declared service to which it relates but will have implications for the supply of other declared and non-declared services, especially those that are provided by the same network or facility.

It should be noted that an access determination imposes detailed regulatory requirements on a relatively small number of telecommunications providers who supply a given declared service.

The ACCC, as the independent expert regulator responsible for administering the access regime in Part XIC, is best placed to make these kinds of regulatory decisions. Making access determinations disallowable would subject these regulatory decisions to the risk of selective parliamentary override, which could undermine the perceived integrity and effectiveness of the access regime.

Access determinations will be subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, and the ACCC will also be accountable for its performance of its regulatory functions under Part XIC through

established accountability mechanisms such as Senate Estimates hearings, oversight by the Auditor-General, annual reporting obligations and Ministerial responsibility.

It should be noted that access declarations, which are made by the ACCC under subsection 152AL(3) and which have the effect of making the declared service subject to the standard access obligations in section 152AR, have also been exempted from the Legislative Instruments Act (subsections 152AL(9) to (11)).

A precedent for exempting similar regulatory instruments from the Legislative Instruments Act is provided by the *Payment Systems (Regulation) Act 1997*. A range of regulatory instruments made by the Reserve Bank of Australia under that Act are exempt from disallowability, by virtue of section 44 of the Legislative Instruments Act – including a determination under section 12, which imposes a regulatory regime (comprising rules relating to the provision of access) on participants in a payment system.

#### *Exemption from the consultation requirement*

The Bill provides for access determinations to be made after a public inquiry, which will involve detailed consultation (proposed section 152BCH). This substitutes for the general consultation requirement in the Legislative Instruments Act.

#### *Exemption from the registration requirement*

The Bill requires the ACCC to maintain an electronic register of access determinations which is publicly accessible on its website (section 152BCW). This substitutes for the registration requirement in the Legislative Instruments Act.

#### *Exemption from the sunseting requirement*

There is no limit on the maximum duration of access determinations; the Bill indicates that the duration should generally be three to five years, unless the ACCC considers that a different duration is appropriate (proposed subsection 152BCF(6), read with proposed subsection 152ALA(2)). It is possible that the ACCC could make an access determination with a duration in excess of ten years if it considers this is necessary to provide investment certainty. Automatic sunseting under the Legislative Instruments Act would therefore not be appropriate for access determinations.

The Committee thanks the Acting Minister for this comprehensive response, and is very pleased to note that an addendum to the explanatory memorandum will be issued which explains the justification for the exemption of access determinations from the Legislative Instruments Act.

The Committee considers that the example of a precedent for exempting similar instruments made by the Reserve Bank under the *Payment Systems (Regulation) Act 1997* is particularly useful, and also notes the advice of the Minister in relation to the role of the ACCC as the independent expert regulator of the access determination regime.

### **Legislative Instruments Act—exemption**

#### **Schedule 1, item 116, new subsection 152BCF(15) and (16)**

Proposed new section 152BCF provides for the ACCC to make written determinations relating to the duration of access to a declared service. Proposed new subsections 152BCF(10) and (12) provide for declarations by the ACCC of extensions to, or expiry of, original access determinations. Under proposed new subsections 152BCF(15) and (16), declarations made under subsections 152BCF(10) and (12) are not legislative instruments.

The explanatory memorandum does not appear to explain whether or not determinations under proposed new subsections 152BCF(10) and (12) are intended to be substantive exemptions and, if so, the reasons for those exemptions. Therefore, the Committee **seeks the Minister's advice** on this issue and **requests that the explanatory memorandum be amended** to include the relevant explanation.

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

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

New subsections 152BCF(15) and (16), which provide that declarations made under proposed subsection 152BCF(10) and instruments made under proposed subsection 152BCF(12) are not legislative instruments, are substantive exemptions. An addendum to the explanatory memorandum will be issued to indicate this and justify the exemptions.

A determination under proposed subsection 152BCF(10) extends the duration of an existing access determination in circumstances where the ACCC thinks it may not be able to make a replacement access determination before the existing one expires. An instrument under proposed subsection 152BCF(12) extends the duration of an existing access determination for up to twelve months in circumstances where the ACCC has decided to allow the declaration of the service concerned to expire after an extension of up to 12 months.

These determinations are essentially procedural stop-gap measures which are necessary to ensure that there is no gap in time during which a declared service is not covered by any access determination. These determinations cannot change the content of the existing access determinations but merely extend their duration for a short period. Disallowance of these determinations would result in there being no access determination in place for the relevant period. This would create regulatory uncertainty for suppliers and users of the declared service as well as opportunities for access providers to exploit their market power in respect of the declared service while an access determination is not in place.

The Committee thanks the Acting Minister for this comprehensive response, which addresses its concerns. The Committee is very pleased to note that an addendum to the explanatory memorandum will be issued to fully explain and justify proposed new subsections 152BCF(15) and (16).

**Denial of procedural fairness**  
**Schedule 1, item 116, new section 152BCG**

Proposed new section 152BCG, to be inserted by item 116 of Schedule 1, provides for interim access determinations. The circumstances in which the ACCC is required to make an interim access determination are set out in proposed new subsection 152BCG(1). Proposed new subsection 152BCG(4) provides that the ACCC 'is not required to observe any requirements of procedural fairness in relation to the making of an interim access determination'.

The Committee prefers that legislation provides for the requirements of procedural fairness to be followed, and would expect clear and convincing justification for a variation from this standard. The explanatory memorandum states (at page 146) that procedural fairness does not apply because of the ‘urgent and temporary nature’ of interim access determinations. However, interim access determinations can be issued when it will be at least six months until a final determination is issued (proposed new subparagraph 152BCG(1)(d)(i)); and they are issued in circumstances where a service is being declared for the first time (proposed new paragraph 152BCG(1)(b)).

The Committee is concerned that issuing interim access determinations without regard to procedural fairness may mean that consultations to determine whether a substantive access determination should be issued may commence with a ‘lack of trust’ on the part of those carriers, carriage service providers and others who are involved in the process. The Committee **seeks the Minister’s comments** on this issue and whether any alternatives to the approach taken in the bill were, or might be, considered.

*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 Acting Minister***

Interim access determinations under proposed section 152BCG can only be made in relation to a declared service where no access determination has previously been made in relation to the service — that is, an interim access declaration can only be made *once* in relation to any given declared service. Interim access determinations are made either as a temporary stop-gap measure (proposed subparagraph 152BCG(1)(d)(i) and proposed subsection 152BCG(2)) or where the ACCC considers that there is an urgent need (proposed subparagraph 152BCG(1)(d)(ii)).

A requirement for the ACCC to observe the requirements of procedural fairness before making an interim access determination could defeat or undermine the objectives of section 152BCG by delaying the making of an interim access determination, resulting in a period of regulatory uncertainty for access providers and access seekers as well as opportunities for abuse of market power.

I refer to the statement on page 73 of the Alert Digest that:

“The Committee is concerned that issuing interim access determinations without regard to procedural fairness may mean that consultations *to determine whether a substantive access determination should be issued* may commence with a ‘lack of trust’ on the part of those carriers, carriage service providers and others who are involved in the process.” (italics added)

As regards the italicised words in this passage, it should be noted that the ACCC is *required* to make a final access determination in relation to each service that is the subject of a declaration under section 152AL within the timeframes specified in the Bill — it has no discretion in the matter (see proposed section 152BCI and proposed subsection 152BCK(2)).

As regards the Committee’s concern that the issuing of an interim access determination without according procedural fairness may create a ‘lack of trust’ in the ACCC during the process of making the final determination, I believe that the participants in the public inquiry process will be able to have confidence that the ACCC will determine the terms and conditions of access that are to be included in the final access determination in an objective, transparent and professional manner, in accordance with its legislative mandate.

It should also be noted that existing subsection 152CPA(12) provides that the ACCC is not required to observe the requirements of procedural fairness when making an interim arbitration determination. Interim arbitration determinations perform a comparable function to interim access determinations.

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

**Denial of procedural fairness**  
**Legislative Instruments Act—exemption**  
**Schedule 1, item 116, new subsections 152BD(8) and (11)**

Item 116 of Schedule 1 inserts a new Division 4A into the Trade Practices Act for binding rules of conduct. Proposed new section 152BD relates to binding rules of conduct for access to a declared service.

When making any rules, the ACCC is not required to observe any requirements of procedural fairness (proposed new subsection 152BD(8)) and does not have a duty to consider whether to consider making any rules, whether at the request of a person or in any other circumstances (proposed new subsection 152BD(9)). The rules 'may provide for the [ACCC] to perform functions, and exercise powers, under the rules' (proposed new subsection 152BD(10)).

The rules are not a legislative instrument (proposed new subsection 152BD(11)), so they would not be subject to tabling and disallowance. The ACCC is also not obliged to observe any requirements of procedural fairness in relation to the making of binding rules of conduct. The explanatory memorandum explains (at page 154) that the rules are necessary to give the ACCC 'flexibility in how it will deal with technical, complex and changing matters'. However, the Committee notes that the provisions will result in the ACCC having extremely broad discretion.

The Committee **seeks the Minister's advice** on how the discretion exercised by the ACCC under proposed new section 152BD will be monitored.

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

Binding rules of conduct are intended to give the ACCC the flexibility to respond quickly in cases where problems arise relating to the supply of declared services. The power to make binding rules of conduct is similar in scope to the power to make access determinations. Because the telecommunications sector is characterised by rapid market developments and technological advances which can create strong first-mover advantages, it is particularly important that the ACCC be able to act quickly to address competition problems or other issues as they arise.

For similar reasons to those given above in relation to access determinations, I consider that it would be inappropriate for binding rules of conduct to be legislative instruments and, as such, to be disallowable. Further, the need for binding rules of conduct to be able to be made urgently is incompatible with both disallowability and a requirement to observe procedural fairness.

Binding rules of conduct are intended to be a temporary measure, hence they will have a maximum duration of 12 months (proposed subsection 152BDC(3)).

While the Committee's comments on the Bill note that "the provisions will result in the ACCC having extremely broad discretion", it should be noted that the ACCC will be obliged to exercise its discretion to make binding rules of conduct in a way that is consistent with the object of Part XIC (which is the promotion of the long-term interests of end-users: section 152AB), and that the discretion will be subject to similar restrictions to those that apply to access determinations (compare proposed sections 152BDA and 152BCB).

The exercise of the discretion will be subject to judicial review by the Federal Court under the Administrative Decisions (Judicial Review) Act.

The Committee thanks the Acting Minister for this helpful response, noting the temporary nature of binding rules of conduct and the statutory limitations imposed on the ACCC's apparent broad discretion in making them.

Senator the Hon Helen Coonan  
Chair



**THE HON JULIA GILLARD MP**  
**DEPUTY PRIME MINISTER**

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11 NOV 2009

Senate Standing C'ttee  
for the Scrutiny of Bills

Parliament House  
Canberra ACT 2600

11 NOV 2009

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

Dear Senator

I refer to a letter of 29 October 2009 from Ms Julie Dennett, Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), concerning the Committee's comments in relation to the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (the Bill).

My response to the matters raised by the Committee my response is outlined below.

Schedule 2, item 56; item 22 of new Division 2, Part 3, Schedule 4

Schedule 4 to the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (the T&C Act) ensures that service completed and entitlements accrued by employees on transitional instruments given effect under the *Workplace Relations Act 1996* prior to the commencement of the new National Employment Standards (NES) are recognised and saved for the purpose of applying the NES. The Schedule also ensures that if employees have taken steps to access entitlements prior to the commencement of the NES (for example, where an employee has provided notice to their employer of their intention to take parental leave), then those steps are recognised as having been taken in relation to the equivalent NES entitlement and do not need to be taken again.

The amendments to Schedule 4 as proposed by the Bill would insert equivalent rules for Division 2B State referral employees.

Item 14 of Schedule 4 to the T&C Act currently contains an equivalent regulation making power to the one proposed in item 22 to deal with the transition from the *Workplace Relations Act 1996* (WR Act) regime to the *Fair Work Act 2009* (FW Act) regime.

In developing the T&C Act I considered that it was both necessary and appropriate to include a regulation making power of this nature to ensure that any unintended consequences flowing from the operation of Schedule 4 to the T&C Act could be remedied in a timely manner. I consider that a similar regulation making power is required to ensure a smooth transition for Division 2B State referral employees from their respective State workplace relations frameworks to the federal workplace relations system.

It is not intended that the regulation making power would be used to disadvantage employees and in this respect I note that any regulations made under the provision 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.

In relation to the Committee's concerns regarding the Explanatory Memorandum, I note that this aspect will be corrected in the Revised Explanatory Memorandum to be provided when the Bill is introduced into the Senate.

Schedule 3, item 14, proposed new subsection 604(1)

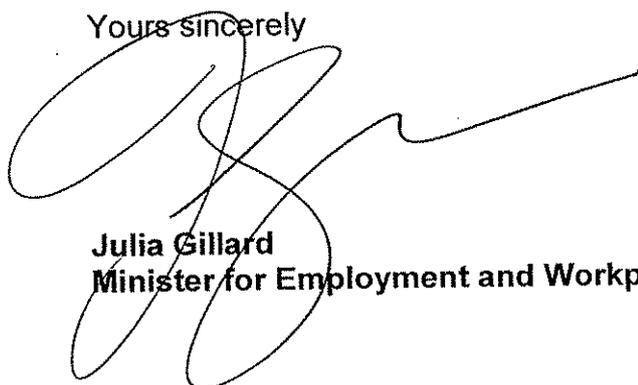
Items 14-16 of Schedule 3 to the Bill amend sections 604, 607 and 613 of the FW Act to ensure that decisions of the General Manager of Fair Work Australia (FWA) (or a delegate of the General Manager) made under the *Fair Work (Registered Organisations) Act 2009* (FW(RO) Act) may be appealed or reviewed. The amendments restore an avenue of appeal from these administrative decisions that existed under the analogous provisions in the WR Act and which was unintentionally removed in the creation of the FW Act and FW(RO) Act.

Under the FW Act, all appeals to FWA are instituted by permission of FWA. In this context, I refer the Committee to paragraph 2327 of the Explanatory Memorandum to the Fair Work Bill 2008 which explains that the concept of 'permission' is intended to replace the concept of 'leave' that was used in the WR Act, using more modern terminology. Paragraph 2327 also makes clear that the changed terminology is not intended to and should not alter existing jurisprudence about granting leave to appeal.

In relation to the Committee's concerns regarding the Explanatory Memorandum, I note that a further explanation will be included in the Revised Explanatory Memorandum to be provided when the Bill is introduced into the Senate.

I trust my comments are of assistance to the Committee.

Yours sincerely



**Julia Gillard**  
Minister for Employment and Workplace Relations



30 OCT 2009  
30 OCT

**Senator the Hon John Faulkner  
Minister for Defence**

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4 NOV 2009

Senate Standing Office  
for the Scrutiny of Bills

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

Dear Senator Coonan

I write in response to a letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills of 17 September 2009, seeking clarification on behalf of your Committee of certain aspects of the *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Measures Act). Your Secretary noted that the Committee is concerned that certain provisions contained in the Interim Measures Act may be contrary to its terms of reference. In responding, I have addressed each of the Committee's issues separately.

The Committee sought my advice on certain provisions in the *Defence Force Discipline Act 1982* (DFDA), as amended by the Interim Measures Act. Specifically, advice was sought concerning two provisions. Firstly the absence of a statutory obligation on the Registrar of Military Justice (RMJ), in sub-section 120 (1) of the DFDA to notify an accused of a reference of a charge to a Defence Force magistrate (DFM) and secondly, why the notice period in subsection 145 A (2) of the DFDA does not commence from the time of providing a copy of a (convening) order or reference to a DFM to an accused.

The amendments contained in items 72 and 103 of the Interim Measures Act reinstate subsections 145 A (2) and 120 (1) of the DFDA, without modification, as they existed prior to the commencement of the *Defence Legislation Amendment Act 2006*. The provisions with which the Committee is concerned will operate substantively as they did when the DFDA was introduced in 1985 and the amendments made by the Interim Measures Act have not sought to modify or change that operation, other than as necessary to reflect the abolition of convening authorities.

*Subsection 120 (1)*

The obligation in subsection 120 (1) (originally imposed on a convening authority and subsequently on the RMJ), to provide an accused with a copy of a reference of a charge to a DFM, arose under the then Defence Force Discipline Rules. Under these Rules, rule 28 outlined the information that was to be included in the order referring the charge or case to a DFM. Rule 29 provided for the convening authority (later, the RMJ) to provide certain documents to the accused including, in the case of a charge referred to a DFM, that reference and the charge sheet. No time limit was provided, but the accused's presence was required at the trial in accordance with section 139 of the DFDA.

Rules 28 and 29 were replicated, in part, in the Australian Military Court Rules 2007 (Part 7) and outlined the same requirements. Furthermore, the proposed 'Court martial and Defence Force Magistrate Rules', to be made under section 149 of the DFDA, will substantially replicate the Defence Force Discipline Rules; these are currently being developed. These Rules will support the reinstated system of trials by court martial or Defence Force magistrate, including rules which reflect previous rules 28 and 29.

I should also note that paragraph 141 (1) (a) of the DFDA provided, and will continue to provide, the accused with the right to make applications or objections in connection with inadequate time to prepare his or her defence or to choose a person to represent or advise him or her or to secure the attendance of witnesses.

The combined effect of the operation of these provisions was, and continues to be, to provide an accused person with appropriate legal and procedural safeguards, for the timely notification of matters required in respect of his or her defence of a charge.

*Subsection 145 A (2)*

I note the Committee's concerns in respect of subsection 145 A (2) and that they have sought my advice concerning why the notice period in that sub-section does not run from the time of providing a copy of the order or reference to the accused. This was not the approach adopted at the inception, and through the subsequent operation, of the DFDA. In practice, a notice of alibi is extremely rare in Defence matters; the former Chief Military Judge (and past Chief Judge Advocate) has advised that he cannot recall an occasion since the commencement of the DFDA in 1985 in which this has occurred.

While the time limit based on the making of a convening order or of a reference may not be ideal, section 145 A itself allows a Judge Advocate or DFM to grant leave for alibi evidence to be called, notwithstanding non-compliance with the time limit, and the rights given to an accused under paragraph 141 (1) (a) of the DFDA enable the various applications referred to above, provide appropriate safeguards in this context.

However, I understand that this matter will be considered in the context of the current review being undertaken jointly by my Department and the Attorney-General's Department to resolve the long term future of the service tribunal system.

*Subsection 137 (1)*

The Committee expressed concern about the operation of subsection 137 (1) of the DFDA, which provides for an accused person to be afforded the opportunity to be advised by a legal officer.

The combined operation of subsection 137 (1) and paragraph 141 (1) (a) of the DFDA provides an accused with robust safeguards. The accused is provided with an opportunity to avail him or herself of legal representation and, if necessary, to make a formal application for an adjournment on the basis that, among other things, he or she has not had an adequate opportunity to choose a person to represent or advise him or her. Furthermore, the provision of legal representation for an accused person has been, and will continue to be, coordinated through Defence's Directorate of Defence Counsel Services. Established arrangements are in place for this to occur. Also, there is close liaison between the offices of the RMJ, the Directorate of Defence Counsel Services and the Director of Military Prosecutions before and after a charge is referred to the RMJ, to ensure that an accused person has timely legal advice and representation.

The Committee also sought advice about the meaning of the concept of 'the exigencies of service'. This needs to be read in both an historical context and in the operational situation that may exist from time to time. Historically, an accused person was represented by a regimental officer without legal qualifications. In time, this became the exception and, with the introduction of the DFDA in 1985, the standard for military trials was that the accused person would ordinarily be represented by a legal officer.

Section 137 gives legislative effect to this concept and safeguard, while at the same time recognising (as do other provisions in the DFDA) that allowing for the 'exigencies of service' may mean that this is not always be possible. The Explanatory Memorandum to the Defence Force Discipline Bill 1982 (at paragraph 785) noted that, *The expression 'exigencies of service' is not defined and bears its ordinary meaning in a Defence Force context of pressing or urgent requirements or needs of the particular part of the Defence Force.*

Given the number of legal officers now in the Australian Defence Force, and the current practice of deploying legal officers with any substantial body of troops, it would be extremely unlikely that the 'exigencies of service' could ever be such that an accused person might face trial without a legal officer.

I am advised that there has only been one instance, since the inception of the DFDA in 1985, of an accused person facing trial at the court martial or DFM level without being formally represented by a legal officer. This case involved a plea of guilty in the Middle East theatre of operations by a senior officer accused of a disciplinary offence. The officer, having been offered the services of a legal officer, preferred to use a regimental officer to represent him. However, in that case, a legal officer was made available to provide assistance to the accused and the regimental defending officer, if required.

As mentioned above, the accused still has the additional protection of the right to make an application pursuant to subparagraph 141 (1) (a) (i) of the DFDA (to seek an adjournment on the basis that he or she has not been able to choose a person to represent or advise them).

*Wide discretion*

*Defence Force Discipline Appeals Act 1955, section 36*

The Committee sought advice on the Defence Force Discipline Appeal Tribunal's (the DFDAT) powers under section 36 of the *Defence Force Discipline Appeals Act 1955* (the Appeals Act) to obtain information that may be material to the determination of an appeal. 'New' section 36 enables the DFDAT to obtain information from the Judge Advocate of a court martial or a Defence Force magistrate. The Committee was concerned that a failure to comply with a direction of the DFDAT may constitute contempt of the DFDAT. The Committee has also asked for the context and background to this provision and the reasons why such a broad power exists and whether any alternatives exist or might be considered.

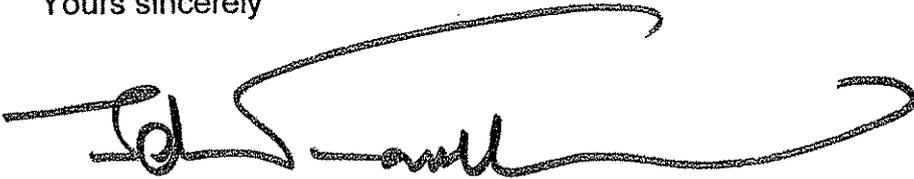
Section 36 has been reinstated in the Appeals Act as it existed prior to the *Defence Legislation Amendment Act 2006*. I am advised that the DFDAT has not exercised its powers under section 36 since the inception of the DFDA in 1985 (together with its operation with the Appeals Act). Furthermore, as section 36 is directed towards a Judge Advocate of a court martial or a DFM, should the DFDAT exercise its discretion under the section, it could be expected to do so appropriately, having regard to the nature, role and functions of these appointments. Also, it would be unusual for either a Judge Advocate or a DFM to fail to comply with a direction of the DFDAT and therefore, be held to be in contempt.

Of interest, I understand that in relevant South Australian legislation dealing with appeals to the Court of Appeal, that Court has, on occasions, called for reports from the trial judge (presumably concerning observations that would not be apparent in the transcript of proceedings). Advice to me is that, historically, the communications were made privately but in more recent years the decision was taken that if a report were to be obtained, then counsel for the parties should see it and have the opportunity to be heard in relation to its contents. This position has some merit and could be considered in any future review or amendment of the Appeals Act.

As the Appeals Act falls within the portfolio responsibility of the Attorney-General, the Hon Robert McClelland MP, his Department may be better placed to provide background information in respect of the policy context of section 36 and of the more general matters raised above. I should also note that in the development of the amendments to the Interim Measures Act, the Attorney-General's Department was consulted concerning legislation (including the Appeals Act) administered by that Department. It did not make any observations in respect of this provision.

I thank the Committee for drawing the above matters to my attention and also for its interest in military justice issues in the context of the provisions of the Interim Measures Act. I trust that the information provided above has addressed the Committee's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Faulkner', with a long, sweeping flourish extending to the right.

**JOHN FAULKNER**



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

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17 NOV 2009

Senate Standing Office  
for the Scrutiny of Bills

09/21494-03, MC09/21516

17 NOV 2009

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

Dear Senator Coonan

The Secretary of the Standing Committee for the Scrutiny of Bills wrote on 29 October 2009 inviting my response to comments on the Personal Property Securities (Consequential Amendments) Bill 2009 (the Consequential Bill) in *Alert Digest No 13 of 2009*.

The Committee is concerned that proposed replacement section 108A of the *Fisheries Management Act 1991* and section 52J of the *Torres Strait Fisheries Act 1984* would have retrospective application. This is not the case.

These provisions would ensure that seizure, detention or forfeiture of personal property under these two Acts has effect despite any enforcement action being taken under the proposed *Personal Property Securities Act 2009* (the PPS Act). The new provisions replace existing provisions that have this effect in relation to proceedings under the *Admiralty Act 1988*. Relevantly, the existing provisions are expressed to have effect regardless of whether the fisheries enforcement event occurred before or after the admiralty event. The amendments in the Consequential Bill do not alter this.

The effect of the Consequential Bill is to add enforcement actions under the PPS Act as actions over which fisheries enforcement actions will prevail. The relevant provisions of the Consequential Bill would commence at the same time as the PPS Act starts to apply to security interests. It would therefore not be possible for there to be any PPS Act enforcement actions in train before the amendments commence. Accordingly, these provisions could operate only prospectively in respect of PPS Act enforcement actions and would continue the current position with respect to proceedings under the Admiralty Act.

The action officer for this matter in my Department is Adele Rentsch who can be contacted on 02 6141 3628.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. McClelland', written in a cursive style.

Robert McClelland



**CHRISTINE MILNE**

**Australian Greens Senator for Tasmania**

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**17 NOV 2009**

Senate Standing Order  
for the Scrutiny of Bills

Chair of the Scrutiny of Bills Committee, Senator the Hon Helen Coonan  
17 November 2009

Dear Senator

Thank you for your advice in relation to the Safe Climate (Energy Efficient Non-Residential Building Scheme) Bill 2009 contained in Alert Digest 13 of 2009. Please find my responses below.

**Inappropriate delegation of legislative power**

**Subclause 7(1)**

As noted by the committee, under section 109 of the Constitution, a law of the Commonwealth prevails over an inconsistent law of a state, to the extent of the inconsistency. It is not the intention of the bill to exclude or limit concurrent operation of any state and territory laws that are consistent with the Bill (see subclause 7(2) of the bill).

The intention of subclause 7(1) is to allow any future laws that are contrary to the intent of the bill to be excluded by the regulations. There appear to be no current laws that are contrary to the intent of the Bill, and none are expected in the future.

**Drafting note**

**Apparent typographical errors**

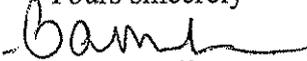
Noted, the references should in fact be to section 10 not subsection 10(3). I will make the appropriate corrections.

**Inappropriate delegation of legislative power**

**Subclauses 12(3) and 15(3)**

The broad delegation is intended to allow for different levels of reporting specificity, primarily depending on the size of the entity in question. I take your advice on board and consider clarification in light of evidence expected to be presented to the Economics Committee inquiry into this Bill.

Yours sincerely

  
Senator Milne



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17 NOV 2009

Senate Standing Committee  
for the Scrutiny of Bills

ASSISTANT TREASURER  
SENATOR THE HON NICK SHERRY

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



Dear ~~Senator~~ Coonan 

I refer to the Scrutiny of Bills Committee's *Alert Digest No. 13 of 2009* (28 October 2009) concerning Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009.

The Committee has expressed concerns in relation to Schedule 2 to the Bill (non-commercial losses). Schedule 2 to the Bill amends the *Income Tax Assessment Act 1997* to tighten the application of the non-commercial losses rules in relation to individuals with an adjusted taxable income of \$250,000 or more.

Under the non-commercial losses rules, the Commissioner of Taxation has a broad discretion to *not* apply the rules where there are exceptional circumstances or where a taxpayer can satisfy the Commissioner, based on an objective expectation, that the business activity will become profitable in a commercially viable period. The discretion is being amended to ensure that it continues to apply to those affected by the Bill.

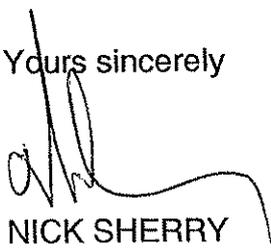
I understand that the Committee is concerned that the explanatory memorandum does not refer to any right that taxpayers may have to seek review of the exercise of the discretion by the Commissioner and has asked for my advice on this matter and requested that the explanatory memorandum be amended.

The Commissioner's exercise of a discretion under the non-commercial losses rules (including a decision not to exercise a discretion) is a matter leading up to or forming part of the making of an income tax assessment. All decisions leading up to or forming part of the making of an income tax assessment are subject to a formal review process (including internal review and review by the Administrative Appeals Tribunal and Federal Court).

As the proposed amendments do not affect the existing formal review processes, the matter was not discussed in the explanatory memorandum. However, given the concerns raised by the Committee, I will arrange for the explanatory memorandum to be amended.

I trust this information will be of assistance to you.

Yours sincerely

  
NICK SHERRY



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

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17 NOV 2009

Senate Standing C'ttee  
for the Scrutiny of Bills

08/16531

16 NOV 2009

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

Dear Senator Coonan

The Standing Committee for the Scrutiny of Bills (the Committee) has raised several issues about the Telecommunications (Interception and Access) Amendment Bill 2009 (the Bill) in *Alert Digest No. 13 of 2009* (28 October 2009).

Specifically, the Committee requested clarification of the application of sanctions in dealing with intercepted information and advice about which non-Commonwealth entities will receive interception information pursuant to the Bill, and the limitations on non-Government agencies on the use and disclosure of intercepted information. Responses to these concerns are set out below.

*Application of sanctions*

The Committee rightly notes that the effect of section 105 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) is to make the contravention of section 63, which limits the use and disclosure of interception information, an indictable offence. The Bill expands the operation of this provision to cover information obtained through network protection activities.

The Committee has suggested inserting a note at the end of Item 15 of Schedule 1 of the Bill to advise on the application of these sanctions or, alternatively, amending the explanatory memorandum to refer to the application of sanctions for the misuse of intercepted information.

Amending the TIA Act to include a specific note would create inconsistencies within the Act that could cause confusion about the legislative effect of Part 2-6. The Part is intended to create a general prohibition against dealing in intercepted information except where one of the limited exceptions available under that Part applies. Under the TIA Act as amended by this

Bill, the prohibition will apply irrespective of whether the information was obtained under an interception warrant, network protection activities or any other means. However, including a note in the Act that relates only to one aspect of Part 2-6 could mistakenly be taken to mean that contraventions of section 63 of the TIA Act in relation to information obtained through network protection activities are more serious than contraventions relating to information obtained under warrant.

I appreciate that extending the network protection regime beyond security and other designated government agencies will extend the relevance of the TIA Act to a broad range of stakeholders. Many of these stakeholders may not be familiar with the operation of the interception regime or the serious penalties that arise from the mishandling or misuse of interception information. Although amending the explanatory memorandum is possible, I am concerned that this document, being limited to the content of this Bill, will not adequately convey vital information about the broader context within which these reforms operate.

In my view, informing stakeholders about these consequences is best achieved through education rather than legislative amendment as a number of these stakeholders will not be familiar with interpreting legislation. My Department has prepared a number of fact sheets that address key aspects of the TIA Act. These sheets are available on the Departmental website and a new sheet will be prepared for the network protection reforms.

#### *Interception information and non-Commonwealth entities*

The Bill operates within the broader context of Part 2-6 of the TIA Act. This means that the existing limitations on the use and disclosure of intercepted information will apply to information obtained through network protection activities.

In addition, proposed new section 63C allows a person undertaking network protection duties to communicate intercepted information to the person responsible for the computer network and to another person if the information is reasonably necessary to enable the other person to perform their network protection duties in relation to the network. This takes into account the fact that more than one person may be engaged to undertake network protection duties and will need access to the information in order to effectively perform their functions.

Given the extension of the network protection regime to non-government sector entities, this will mean that the disclosure of intercepted information may occur within any non-Commonwealth entity which utilises the network protection regime to operate, protect and maintain their network. Where an organisation engages a non-Commonwealth third party entity to undertake network protection activities on their behalf, intercepted information will be able to be disclosed between the organisation and the third party for the purpose of performing network protection duties. For example, this will be the case when an organisation has outsourced its network operations to a commercial entity.

Proposed section 63D allows designated government security authorities and law enforcement agencies (including State and Territory law enforcement agencies) to undertake network protection activities for the purpose of monitoring appropriate use of the network by employees. This exception reflects the sensitive nature of work undertaken by employees in these particular organisations and the additional

professional standards and statutory requirements that are not applicable to other public sector or non-government organisations.

Network protection activities for disciplinary purposes will be limited to the conditions set out in a written user agreement, provided those conditions are reasonable. A person who receives lawfully intercepted information obtained through network protection activities, cannot use or disclose the information for disciplinary purposes if to do so would contravene another Commonwealth, State or Territory law.

Proposed section 63E provides for the use and disclosure of information accessed for network protection purposes to the person responsible for a network as they may have to make a decision regarding ongoing network protection duties or consider whether information should be referred to an enforcement agency (including State and Territory government agencies) if he or she reasonably suspects that the information is relevant to determining whether someone has committed certain criminal offences. Importantly, there is no requirement for a person responsible for a network to refer any such information to an agency. Rather, the provision provides discretion to network operators to alert relevant law enforcement authorities where information suggests a particular offence may have been committed.

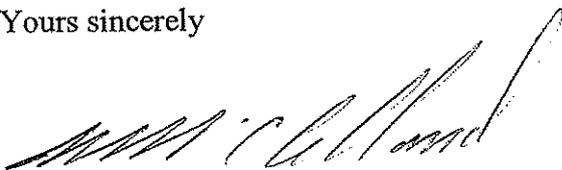
*Limitations on the use and disclosure of intercepted information by non-Commonwealth agencies*

As stated above, the communication and use of interception information obtained through network protection activities are subject to the broader limitations on the use and disclosure of intercepted information set out in Part 2-6 of the TIA Act. These provisions limit the capacity of all organisations to use and disclose information accessed under the proposed network protection regime. Specifically, the proposed amendments to section 73 of the TIA Act restricts the further use and disclosure of this information to the purpose for which it was originally disclosed.

Additionally, the proposed new section 79A of the Bill requires a responsible person for a network to cause all lawfully intercepted information under the proposed network protection regime to be destroyed as soon as practicable after becoming satisfied that the information is not likely to be required for the purpose of performing network protection duties.

By operating within the broader context of the interception regime, the proposed network protection reforms provide significant accountability mechanisms while balancing the need to protect networks from malicious attack with clear limitations on the circumstances in which the access, use and disclosure of information will be permitted.

Yours sincerely



Robert McClelland



**The Hon Anthony Albanese MP**

Acting Minister Broadband, Communications and  
the Digital Economy

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**17 NOV 2009**

Senate Standing Committee  
for the Scrutiny of Bills

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

Dear Senator Coonan

**Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009**

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 29 October 2009, requesting a response to issues relating to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the Bill) identified in the Committee's *Alert Digest* No 13 of 2009. My response follows.

Please note that references to statutory provisions are to provisions of the *Trade Practices Act 1974*, unless otherwise indicated.

***Insufficient parliamentary scrutiny  
Schedule 1, items 93 and 98***

Anticipatory individual exemptions and anticipatory class exemptions (which are made under section 152ATA and section 152ASA respectively) exempt a person, or class of persons, from having to provide access to a telecommunications service that is not a declared service under Part XIC of the Trade Practices Act, in the event that the service is declared subsequently to the granting of the exemption. Anticipatory exemptions play an important role in encouraging investment in facilities used to supply telecommunications services, by providing a mechanism to obtain regulatory certainty for persons proposing to invest in such facilities.

Currently subsection 152ASA(12) provides that an anticipatory class exemption is a disallowable instrument. The Bill replaces the existing subsection (12) with a new subsection (12) which provides that an anticipatory class exemption is not a legislative instrument. By contrast, anticipatory individual exemptions are not currently specified to be disallowable instruments; and there is no suggestion that they

are legislative instruments within the meaning of the *Legislative Instruments Act 2003*.

I consider that it is appropriate to amend subsection 152ASA(12) to provide that anticipatory class exemptions are not legislative instruments (and hence are not subject to disallowance), for the following reasons.

Firstly, decisions about granting anticipatory class exemptions require consideration of complex and technical regulatory issues and, for the same reasons as those given below in relation to access determinations, are best left to the ACCC as the independent expert regulator.

Secondly, disallowability for anticipatory class exemptions creates a potential incongruity with anticipatory individual exemptions, which are not disallowable. Sometimes the ACCC grants interrelated individual and class exemptions. (For example, the ACCC is currently undertaking public consultation on a draft ordinary class exemption dated October 2009 in respect of three declared fixed line services which is intended to complement an ordinary individual exemption which the ACCC granted to Telstra last year.) If the ACCC grants an anticipatory individual exemption in response to an application by a particular telecommunications provider and decides to also grant a similar anticipatory class exemption to other providers who are in the same position, disallowance of the class exemption will result in different regulatory rules applying to the holder of the individual exemption compared to other providers. This may be unfair and create an unlevel competitive playing field.

I appreciate the Committee's suggestion that the risk of inconsistent regulatory outcomes of the kind just mentioned could be reduced if the ACCC could provide appropriate advice about the risk when an anticipatory class exemption is tabled. However, I do not think this would offer a satisfactory solution, as it would still be open to either House to disallow the class exemption. Further, this suggested solution would merely draw Parliament further into the complexities of technical regulation which, for the reasons outlined below, I would not consider desirable.

***Legislative Instruments Act – exemption  
Schedule 1, item 116, new subsection 152BC(9)***

I confirm that proposed subsection 152BC(9), which provides that an access determination is not a legislative instrument, is a substantive exemption, insofar as access determinations will usually determine regulatory requirements for a class of telecommunications providers. An addendum to the explanatory memorandum will be issued to indicate this and set out the justification for the exemption. The justification is as follows.

***Exemption from disallowability***

The telecommunications sector supplies a diverse and evolving range of services which are simultaneously expanding in number while converging in terms of the functionalities they provide. Access determinations (which will be made by the ACCC under proposed section 152BC) will be one of the key regulatory instruments under the telecommunications-specific access regime in Part XIC. They will set the

terms and conditions for the supply of a declared service, including the access price, as regards all access providers and access seekers of the service, and they may also impose access obligations on access providers in addition to the standard access obligations in section 152AR and/or limit the application of the standard access obligations to access providers. They may make different provision for different access providers and/or access seekers, or for different classes of access providers and/or access seekers. The matters the ACCC will have to consider when making an access determination are wide-ranging and often technical and complex (see proposed section 152BCA). The ACCC will have to undertake an assessment of the costs of supplying the declared service, the current state of competition and investment in relation to the supply of the service, and the likely effect of the determination on future competition and investment.

Access determinations will be made after a public inquiry involving public consultation. Further, an access determination will not only affect the supply of the declared service to which it relates but will have implications for the supply of other declared and non-declared services, especially those that are provided by the same network or facility.

It should be noted that an access determination imposes detailed regulatory requirements on a relatively small number of telecommunications providers who supply a given declared service.

The ACCC, as the independent expert regulator responsible for administering the access regime in Part XIC, is best placed to make these kinds of regulatory decisions. Making access determinations disallowable would subject these regulatory decisions to the risk of selective parliamentary override, which could undermine the perceived integrity and effectiveness of the access regime.

Access determinations will be subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, and the ACCC will also be accountable for its performance of its regulatory functions under Part XIC through established accountability mechanisms such as Senate Estimates hearings, oversight by the Auditor-General, annual reporting obligations and Ministerial responsibility.

It should be noted that access declarations, which are made by the ACCC under subsection 152AL(3) and which have the effect of making the declared service subject to the standard access obligations in section 152AR, have also been exempted from the Legislative Instruments Act (subsections 152AL(9) to (11)).

A precedent for exempting similar regulatory instruments from the Legislative Instruments Act is provided by the *Payment Systems (Regulation) Act 1997*. A range of regulatory instruments made by the Reserve Bank of Australia under that Act are exempt from disallowability, by virtue of section 44 of the Legislative Instruments Act – including a determination under section 12, which imposes a regulatory regime (comprising rules relating to the provision of access) on participants in a payment system.

*Exemption from the consultation requirement*

The Bill provides for access determinations to be made after a public inquiry, which will involve detailed consultation (proposed section 152BCH). This substitutes for the general consultation requirement in the Legislative Instruments Act.

*Exemption from the registration requirement*

The Bill requires the ACCC to maintain an electronic register of access determinations which is publicly accessible on its website (section 152BCW). This substitutes for the registration requirement in the Legislative Instruments Act.

*Exemption from the sunseting requirement*

There is no limit on the maximum duration of access determinations; the Bill indicates that the duration should generally be three to five years, unless the ACCC considers that a different duration is appropriate (proposed subsection 152BCF(6), read with proposed subsection 152ALA(2)). It is possible that the ACCC could make an access determination with a duration in excess of ten years if it considers this is necessary to provide investment certainty. Automatic sunseting under the Legislative Instruments Act would therefore not be appropriate for access determinations.

*Legislative Instruments Act – exemption**Schedule 1, item 116, new subsection 152BCF(15) and (16)*

New subsections 152BCF(15) and (16), which provide that declarations made under proposed subsection 152BCF(10) and instruments made under proposed subsection 152BCF (12) are not legislative instruments, are substantive exemptions. An addendum to the explanatory memorandum will be issued to indicate this and justify the exemptions.

A determination under proposed subsection 152BCF(10) extends the duration of an existing access determination in circumstances where the ACCC thinks it may not be able to make a replacement access determination before the existing one expires. An instrument under proposed subsection 152BCF(12) extends the duration of an existing access determination for up to twelve months in circumstances where the ACCC has decided to allow the declaration of the service concerned to expire after an extension of up to 12 months.

These determinations are essentially procedural stop-gap measures which are necessary to ensure that there is no gap in time during which a declared service is not covered by any access determination. These determinations cannot change the content of the existing access determinations but merely extend their duration for a short period. Disallowance of these determinations would result in there being no access determination in place for the relevant period. This would create regulatory uncertainty for suppliers and users of the declared service as well as opportunities for access providers to exploit their market power in respect of the declared service while an access determination is not in place.

***Denial of procedural fairness***  
***Schedule 1, item 116, new section 152BCG***

Interim access determinations under proposed section 152BCG can only be made in relation to a declared service where no access determination has previously been made in relation to the service – that is, an interim access declaration can only be made *once* in relation to any given declared service. Interim access determinations are made either as a temporary stop-gap measure (proposed subparagraph 152BCG(1)(d)(i) and proposed subsection 152BCG(2)) or where the ACCC considers that there is an urgent need (proposed subparagraph 152BCG(1)(d)(ii)).

A requirement for the ACCC to observe the requirements of procedural fairness before making an interim access determination could defeat or undermine the objectives of section 152BCG by delaying the making of an interim access determination, resulting in a period of regulatory uncertainty for access providers and access seekers as well as opportunities for abuse of market power.

I refer to the statement on page 73 of the Alert Digest that:

“ The Committee is concerned that issuing interim access determinations without regard to procedural fairness may mean that consultations *to determine whether a substantive access determination should be issued* may commence with a ‘lack of trust’ on the part of those carriers, carriage service providers and others who are involved in the process.” (italics added)

As regards the italicised words in this passage, it should be noted that the ACCC is *required* to make a final access determination in relation to each service that is the subject of a declaration under section 152AL within the timeframes specified in the Bill – it has no discretion in the matter (see proposed section 152BCI and proposed subsection 152BCK(2)).

As regards the Committee’s concern that the issuing of an interim access determination without according procedural fairness may create a ‘lack of trust’ in the ACCC during the process of making the final determination, I believe that the participants in the public inquiry process will be able to have confidence that the ACCC will determine the terms and conditions of access that are to be included in the final access determination in an objective, transparent and professional manner, in accordance with its legislative mandate.

It should also be noted that existing subsection 152CPA(12) provides that the ACCC is not required to observe the requirements of procedural fairness when making an interim arbitration determination. Interim arbitration determinations perform a comparable function to interim access determinations.

***Denial of procedural fairness - Legislative Instruments Act – exemption***  
***Schedule 1, item 116, new subsections 152BD(8) and (11)***

Binding rules of conduct are intended to give the ACCC the flexibility to respond quickly in cases where problems arise relating to the supply of declared services. The power to make binding rules of conduct is similar in scope to the power to make access determinations. Because the telecommunications sector is characterised by

rapid market developments and technological advances which can create strong first-mover advantages, it is particularly important that the ACCC be able to act quickly to address competition problems or other issues as they arise.

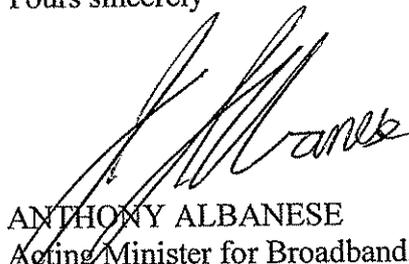
For similar reasons to those given above in relation to access determinations, I consider that it would be inappropriate for binding rules of conduct to be legislative instruments and, as such, to be disallowable. Further, the need for binding rules of conduct to be able to be made urgently is incompatible with both disallowability and a requirement to observe procedural fairness.

Binding rules of conduct are intended to be a temporary measure, hence they will have a maximum duration of 12 months (proposed subsection 152BDC(3)).

While the Committee's comments on the Bill note that "the provisions will result in the ACCC having extremely broad discretion", it should be noted that the ACCC will be obliged to exercise its discretion to make binding rules of conduct in a way that is consistent with the object of Part XIC (which is the promotion of the long-term interests of end-users: section 152AB), and that the discretion will be subject to similar restrictions to those that apply to access determinations (compare proposed sections 152BDA and 152BCB).

The exercise of the discretion will be subject to judicial review by the Federal Court under the Administrative Decisions (Judicial Review) Act.

Yours sincerely



ANTHONY ALBANESE  
Acting Minister for Broadband, Communications  
and the Digital Economy

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