



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

**THIRD REPORT**  
**OF**  
**2010**

**10 March 2010**



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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

## THIRD REPORT OF 2010

The Committee presents its Third Report of 2010 to the Senate.

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

Antarctic Treaty (Environment Protection) Amendment Bill 2010

Australian Astronomical Observatory Bill 2009

Fisheries Legislation Amendment Bill 2009

Freedom of Information Amendment (Reform) Bill 2009

Information Commissioner Bill 2009

Occupational Health and Safety and Other Legislation Amendment Bill 2009

Social Security and Family Assistance Legislation Amendment (Weekly Payments) Bill 2010

Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009

# Antarctic Treaty (Environment Protection) Amendment Bill 2010

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Environment, Protection, Heritage and the Arts responded to the Committee's comments in a letter dated received 9 March 2010. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 2 of 2010***

Introduced into the House of Representatives on 10 February 2010

Portfolio: Environment, Heritage and the Arts

#### **Background**

This bill amends the *Antarctic Treaty (Environment Protection) Act 1980* ('the Act') to implement Australia's international obligations arising from revisions made to Annex II to the *Protocol on Environmental Protection to the Antarctic Treaty* [1998] ATS 6 ('the Madrid Protocol').

The Madrid Protocol is a multilateral agreement under the *Antarctic Treaty* [1961] ATS 12. It commits parties to the comprehensive protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science. Annex II outlines provisions for the conservation of Antarctic fauna and flora.

The primary purpose of the amendments to Annex II is to extend the protection afforded to Antarctic native fauna and flora by creating a number of provisions to better regulate the taking of native fauna and flora, and through reducing the risk to native fauna and flora from the introduction of non-indigenous organisms.

## **Reversal of onus**

### **Schedule 1, proposed subsections 19AC(2) and (3), 19AD(4) and 19AE(3) and (5)**

As a general principle in criminal law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. This is reflected in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. However, the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

In this bill proposed subsections 19AC, 19AD and 19AE create new offences about dealing with organisms and food appropriately in the Antarctic which all attract penalties of up to 2 years imprisonment or 120 penalty units or both. In each case there are circumstances outlined in which it is stated that the provision creating the offence 'does not apply'. For example, subsection 19AC(1) will make it an offence to introduce an organism into the Antarctic that is not indigenous to the area. However, this does not apply if the organism is brought in for use as food (19AC(2)(a)), the person has taken all reasonable precautions to prevent the introduction (19AC(2)(b)) or in an emergency (19AC(3)).

These 'do not apply' provisions are not specifically framed as defences and are not described as such in the explanatory memorandum. However, it appears to the Committee that these provisions will operate, in effect, like defences and place the burden of proof for these matters on the defendant. As it seems likely that the details of these matters are peculiarly within the knowledge of the defendant, the Committee agrees that the burden of adducing evidence of that defence or matter might be placed on the accused. However, the Committee considers that it is desirable that the level of burden of proof the defendant is expected to meet is articulated in each provision (ie an 'evidential' burden or 'legal' burden in each case) and that the explanatory memorandum describes the reason for the reversal of onus in each case.

Therefore, the Committee **seeks the Minister's advice** on the rationale for the current approach in these proposed subsections; whether the recommendations in the *Guide* were considered in the drafting of these provisions; whether the onus of establishing these matters rests with the defendant; whether the applicable legal burden intended to apply to the defendant can be articulated in the bill for each proposed subsection; and whether more information about these matters can be included in the explanatory memorandum.

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

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

Item 30 of the Bill proposes to amend the *Antarctic Treaty (Environment Protection) Act 1980 (the Act)* to introduce new offences under section 19AC, 19AD and 19AE. I understand that the Office of the Parliamentary Counsel was cognisant of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* when drafting the Bill. The following outlines the rationale underpinning the reversal of onus proposed in subsections 19AC(2) and (3), 19AD(4) and 19AE(3) and (5).

#### **General basis for the reversal of onus**

The facts-in-issue in relation to each offence remain wholly within the knowledge of the person who has allegedly committed the offence. In addition, the feasibility and expense of adducing evidence in relation to an alleged offence within the Antarctic is excessively prohibitive due to the remote locality and limited access. Section 6A of the Act indicates

that the general principles of criminal responsibility, as outlined in Chapter 2 of the *Criminal Code*, apply to all offences against the legislation. The subsections in question create exceptions that would therefore trigger subsection 13.3(3) of the Criminal Code. Accordingly, the burden of proof for the defence is evidential, while the prosecution bears a legal burden to prove its case beyond a reasonable doubt.

### **Relevant links to Australia's international obligations**

The reversal of onus also reflects Australia's international obligations under Antarctic Treaty system arrangements, in particular Annex II to the Madrid Protocol (see below).

#### Section 19AC - Offence relating to the accidental introduction of micro-organisms

Paragraph 19AC(2)(a) provides a defence where the organism or article was brought to Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

Paragraph 19AC(2)(b) provides a defence where the person has taken all reasonable precautions to prevent the introduction of the micro-organism to the Antarctic. This is consistent with Article 4(7) of Annex II to the Madrid Protocol that aims to prevent the accidental introduction to the Antarctic of micro-organisms not present naturally in the Antarctic.

Paragraph 19AC(2)(c) provides a defence where the person has a permit or a recognised foreign authority to bring the micro-organisms into the Antarctic. This gives effect to the understanding among Contracting Parties to the Antarctic Treaty that each party enforces its national law only over its own nationals. It also recognises that if a micro-organism is brought into the Antarctic under a permit it is not an accidental introduction.

Subsection 19AC(3) provides a defence in emergency situations. This is consistent with Article 2 of Annex II to the Madrid Protocol and the existing emergency provisions under the Act at subsection 19(3Xa) - *offences relating to the environment*.

#### Section 19AD - Offences relating to bringing food into the Antarctic

Subsection 19AD(4) provides a defence where the person has taken reasonable precautions to prevent bringing a disease into the Antarctic where the person brings poultry or other bird products into the Antarctic for food. This is consistent with Article 4(8) of Annex II to the Madrid Protocol that aims to prevent the introduction of diseases harmful to Antarctic fauna and flora by requiring that all appropriate efforts are made to ensure that poultry or other bird products brought into the Antarctic as food are free from disease contaminants.

#### Section 19AE - Offences relating to destruction of organisms brought into Antarctica without a permit

Paragraph 19AE(3)(a) provides a defence where it is infeasible to remove or destroy a non-indigenous organism (or its progeny) that has been brought into the Antarctic. This is consistent with Article 4(5) of Annex II to the Madrid Protocol which aims to ensure the removal or disposal where feasible of any non-native species (including progeny) that is brought into the Antarctic without a permit.

Paragraph 19AE(3)(b) provides a defence where removal or destruction of the organism (or its progeny) would lead to a greater environmental impact than not doing so. This is also consistent with Article 4(5) of Annex II to the Madrid Protocol which recognises that in some instances more harm may occur where efforts are made to remove or destroy any non-native species (including progeny) that are brought into the Antarctic without a permit.

Paragraph 19AE(3)(c) provides a defence where the organism (or its progeny) was brought to Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

Subsection 19AE(5) provides a defence where the organism was brought to (or kept in) Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

I do not envisage amendment to the explanatory memorandum at this time.

The Committee thanks the Minister for this response.

# Australian Astronomical Observatory Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Minister for Innovation, Industry, Science and Research responded to the Committee's comments in a letter dated 3 March 2010. A copy of the letter is attached to this report.

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

### *Extract from Alert Digest No. 1 of 2010*

Introduced into the House of Representatives on 25 November 2009  
Portfolio: Innovation, Industry, Science and Research

#### **Background**

Introduced with the Australian Astronomical Observatory (Transitional Provisions) Bill 2009, this bill establishes the Australian Astronomical Observatory (AAO) as an Australian-owned and operated facility when the joint Australia-UK Anglo-Australian Observatory ceases operations on 1 July 2010.

The bill establishes the AAO as a business unit within the Department of Innovation, Industry, Science and Research. The main functions of the AAO will be to operate Australia's national observatory for optical astronomy and to undertake research and development into, and manufacture of, astronomical observing instruments.

#### **Wide discretion**

##### **Subclause 15(4)**

The bill establishes an Advisory Committee (see clause 13) to advise the Secretary of the Department of Innovation, Industry, Science and Research about the performance of the functions conferred on the Secretary under clause 11. Committee members are appointed by the Secretary (clause 15) and their remuneration is determined by the Remuneration Tribunal or by regulations (subclause 17(1)). Subclause 15(4) provides that the Secretary 'may terminate the appointment of an Advisory Committee member'.

The bill provides no reason for termination of a committee member's appointment and the explanatory memorandum does not provide any guidance as to the intended operation of subclause 15(4). The Committee **seeks the Minister's advice** on how subclause 15(4) is intended to operate and whether the explanatory memorandum might be amended to provide information on the grounds for termination of appointment.

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

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

In particular, the Committee seeks my advice on three clauses of the Bill that provide for the appointment, leave of absence and other terms and conditions of the Advisory Committee, established by clause 13 of the Bill. I address these concerns below.

By way of background, the Advisory Committee will provide expert advice to the Secretary of the Department of Innovation, Industry, Science and Research, Mr Mark Paterson AO, on the performance of the astronomical functions defined in clause 11 of the Bill. It will meet regularly to consider and provide advice on the scientific direction, strategies and capabilities of the Australian Astronomical Observatory (the Observatory), its delivery of services to the astronomy community and its research activities and collaborations, among other matters.

Given the specialised nature and scope of matters on which the Advisory Committee is expected to advise, the Secretary requires discretion in determining the composition, terms of reference and operations of the Advisory Committee.

The Committee reports that subclause 15(4) of the Bill may constitute a wide discretion in terminating the appointment of an Advisory Committee member.

The intention of clause 15(4) is to provide for the Secretary to terminate the appointment of a member whose circumstances prevent him or her from discharging his or her function in the Advisory Committee.

The Committee thanks the Minister for this response, but notes that it would have been helpful if this information had been included in the explanatory memorandum. Although this bill has already been passed by both Houses of Parliament the Minister's response is drawn to the attention of Senators for information.

## **Wide discretion**

### **Clause 18**

Clause 18 provides that the Secretary may grant leave of absence to an Advisory Committee member 'on the terms and conditions that the Secretary determines'. This gives the Secretary broad scope to determine whether an Advisory Committee member can perform his or her role. The explanatory memorandum does not provide any guidance as to the intended operation of the provision. The Committee **seeks the Minister's advice** on how clause 18 is intended to operate and whether the explanatory memorandum might be amended to provide guidance on the exercise of this power.

*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 reported that clause 18 of the Bill gives the Secretary broad scope to determine whether an Advisory Committee member can perform his or her role, by providing that the Secretary may grant leave of absence to a member 'on the terms and conditions that the Secretary determines'.

The intention of clause 18 is that a member may be granted leave to be absent from meetings of the Advisory Committee, in response to a request from the member, or if the member becomes incapacitated for a short period of time, in which case it allows the Secretary to determine the period of leave of absence.

The Committee thanks the Minister for this response, but notes that it would have been helpful if this information had been included in the explanatory memorandum. Although this bill has already been passed by both Houses of Parliament the Minister's response is drawn to the attention of Senators for information.

## **Wide discretion**

### **Clause 22**

Similarly, clause 22 provides that Advisory Committee members hold office 'on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Secretary'. The explanatory memorandum provides no guidance as to the intended operation of the provision. The Committee **seeks the Minister's advice** on the operation of clause 22 and whether the explanatory memorandum might be amended to provide guidance on the exercise of this power.

*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***

Similarly, the Committee reported that clause 22 of the Bill may also constitute wide discretion, in providing that the Advisory Committee members hold office 'on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Secretary'.

The intention of clause 22 is to enable the Secretary to determine or to vary the operating requirements for the Advisory Committee including, for example, its composition, frequency of meetings, reporting requirements, terms of reference, and general considerations or emerging issues on which the Advisory Committee should provide its advice.

The Committee thanks the Minister for this response. Usually the Committee would have sought further clarification from the Minister about how the intended operation of clause 22 as described above (such as the frequency of Advisory Committee meetings and reporting requirements) relates to the substance of clause 22 as the matters referred to seem more directly relevant to clause 16 (relating to the procedure of the Advisory Committee). However, as this bill has already been passed by both Houses of Parliament the Committee draws its comments to the attention of the Senate for information and would appreciate it if the Minister would draw its comments to the attention of the department.

### **Wide delegation of power**

#### **Clause 23**

Clause 23 provides that the Secretary may delegate all or any of his or her powers to the Director (who must be an Senior Executive Service employee under subclause 9(2)) or to ‘an APS employee within the Australian Astronomical Observatory who has the expertise appropriate to the function or power delegated’. Generally, the Committee prefers that delegates be confined to members of the Senior Executive Service. However, in this case, the Committee notes that the delegation to APS employees has been confined to those APS employees with appropriate expertise.

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

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

Finally, the Committee noted that clause 23 provides for the Secretary to delegate all or any of his or her functions of powers under this Act to the Director or to an APS employee within the Australian Astronomical Observatory with appropriate expertise. I note the Committee's general preference that delegates be confined to members of the Senior Executive Service.

The intention of clause 23 is to provide for the delegation of powers during short absences of the Director, in order to ensure continuity of functions that require an intimate knowledge of the business operations of the Observatory, or astronomical functions that require particular scientific expertise or standing in the astronomy community. In such circumstances, a suitable member of the Senior Executive Service may not be available.

The Committee thanks the Minister for this response. Although this bill has already been passed by both Houses of Parliament the Minister's response is drawn to the attention of Senators for information.

# Fisheries Legislation Amendment Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter received on 9 March 2010. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 1 of 2010***

Introduced into the House of Representatives on 25 November 2009  
Portfolio: Agriculture, Fisheries and Forestry

#### **Background**

This bill amends the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* to:

- improve the ability of the Australian Fisheries Management Authority (AFMA) to provide an efficient and cost-effective fisheries management service through changes to the administration of fisheries licensing and the introduction of electronic decision-making;
- ensure that fisheries officers engaged in investigating suspected illegal fishing can be properly equipped to safely perform that function; and
- provide for consolidated arrangements regarding holders of fish receiver licences in the Torres Strait.

#### **Appropriate penalty for misuse of power**

##### **Schedule 1, item 20, new section 89A**

Proposed new section 89A of the Fisheries Management Act, to be inserted by item 20 of Schedule 1, provides for the supply and use of defensive equipment by officers of the AFMA who are appointed under section 83 of that Act. Defensive equipment includes handcuffs (proposed paragraph 89A(2)(c)) and other equipment prescribed under the regulations (proposed paragraph 89A(2)(d)). An officer who has been issued with defensive equipment and fails to return it commits an offence of strict liability under proposed new subsection 89A(8).

The need for this provision is clearly explained in the explanatory memorandum (at page 8): its purpose is to ensure that defensive equipment that has been issued to an officer is returned as soon as practicable if an officer ceases to be an officer and, if strict liability did not apply, it could be difficult for the prosecution to prove the fault element (knowledge) of the offence.

While an officer may only use the equipment if it is reasonably necessary to do so (proposed paragraph 89A(5)), the Committee notes that misuse of defensive equipment could result in, for example, a deprivation of liberty. However, there appears to be no legislative penalty for using the defensive equipment when it is 'unreasonable' to do so. The Committee **seeks the Minister's advice** in relation to any action that would be taken against an officer who misuses defensive equipment and whether this might be provided for specifically in proposed section 89A.

*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 intent of the amendments regarding defensive equipment was not to create an avenue for offence but to clarify the use of the equipment and thus limit the risk that the use of some defensive equipment—for example, batons—could be unlawful.

The Fisheries Legislation Amendment Bill 2009 specifies that Australian Fisheries Management Authority (AFMA) officers would be able to use defensive equipment where it is 'reasonably necessary to perform functions or exercise powers under the Act/regulations'. Therefore, if an AFMA officer who has completed the appropriate training and has been approved to carry and use the equipment does no more than what is reasonably necessary to carry out their functions, they will be protected under the legislation. As specified in the Bill, the AFMA officer will have to have undertaken appropriate training in using the equipment and will have to have approval to use the equipment from the Chief Executive Officer of AFMA.

As AFMA officers are public servants, they are subject to the APS Code of Conduct. If an officer does more than what is reasonably necessary in a given situation, the officer will be in breach of their duties and in breach of the Act (Bill), and the officer can be subject to misconduct action under the Code of Conduct.

An officer who goes beyond the 'reasonably necessary' threshold could also be subject to criminal penalties, depending on what exactly the officer has done and the availability of

defences such as self-defence. The officer will be subject to the legislation of the state or territory in which the incident occurred—for example, if the incident happened in Sydney Harbour, the officer would be subject to New South Wales criminal legislation. If the incident occurred in Commonwealth waters—for example, more than 12 nautical miles from a state/territory—the Commonwealth law would apply the criminal laws of the adjacent state/territory.

The exact criminal penalty applied in any given case would depend on what exactly the officer was accused of—the most likely possible charge would probably be assault. If the officer's actions constituted a breach of law, the officer could be subject to civil action by the person against whom the act was committed. The Commonwealth could also be subject to civil action as the officer's employer.

For example, if an AFMA officer boarded a ship in Queensland waters and used more force than reasonably necessary against a person on board, the officer would be subject to disciplinary action under AFMA processes. If what the officer had done was serious, the officer could be prosecuted for an offence (for instance, assault) under the Queensland Criminal Code 1899 (Qld). The person who was the subject of the officer's actions could also bring a civil action against both the officer and the Commonwealth (for instance, sue for damages for assault).

The Committee thanks the Minister for this response, noting that there is a range of sanctions that could apply to the misuse of defensive equipment, the details of which will depend on the specific circumstances in each case.

# Freedom of Information Amendment (Reform) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Cabinet Secretary responded to the Committee's comments in a letter dated 8 March 2010. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 1 of 2010*

Introduced into the House of Representatives on 26 November 2009  
Portfolio: Cabinet Secretary

#### **Background**

Introduced with the Information Commissioner Bill 2009, this bill amends the *Freedom of Information Act 1982* (FOI Act) to introduce a new regime for access to government information. The measures in the bill arise from the Federal Government's election commitment in 2007, set out in the policy statement *Government information: restoring trust and integrity*. The bill also implements a number of recommendations from the 1995 joint Australian Law Reform Commission and Administrative Review Council *Open government report* on the FOI Act, as well as other initiatives.

The bill complements the proposed structural reforms to be implemented by the Information Commissioner Bill 2009 (which include the establishment of the Office of the Information Commissioner and the new independent statutory positions of Information Commissioner and FOI Commissioner).

In particular, the bill:

- aims to ensure that the right of access to documents under the FOI Act is as comprehensive as possible, limited only where a stronger public interest lies in withholding access to documents;
- gives greater weight to the role that the FOI Act serves in pro-active publication of government information; and
- aims to improve the request process under the FOI Act.

## **Insufficiently defined administrative power**

### **Schedule 6, item 25, new paragraph 15(2A)(a)**

Proposed new subsection 15(2A) of the *Freedom of Information Act 1982*, to be inserted by item 25 of Schedule 6, sets out the means for sending a request for access to a document. Proposed new paragraph 15(2A)(a) provides that the request may be delivered 'to an officer of the [relevant] agency, or a member of the staff of the [relevant] Minister'. A member of staff of the Minister would, in these circumstances, be acting as an agent for the Minister and may not be a member of the Australian Public Service. The Committee **seeks the Cabinet Secretary's advice** as to whether the explanatory memorandum might be amended to provide clarification about the legal status of Ministerial staff.

*Pending the Cabinet Secretary'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 has identified proposed paragraph 15(2A)(a) (item 25 of Schedule 6 to the Bill) and proposed paragraph 24AB(2)(c) (item 32 of Schedule 6 to the Bill) as provisions that may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. The Committee seeks my advice as to whether the explanatory memorandum might be amended to provide clarification about the legal status of Ministerial staff.

Proposed paragraph 15(2A)(a) retains the existing rule in paragraph 15(2)(d) of the FOI Act that an FOI request may be delivered to a member of staff of a Minister. Both the existing provision and proposed paragraph 15(2A)(a) are facilitative and recognise that a Minister is unlikely to be available to take delivery of an FOI request personally.

...It is therefore difficult to see how proposed paragraph 15(2A)(a) or proposed paragraph 24AB(2)(c) may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. Nevertheless, I intend to amend the relevant parts of the explanatory memorandum to the Bill to provide clarification about the legal status of Ministerial staff. I propose to include words along the lines of 'Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984*. The provision recognises that a Minister may not be personally available to perform this function and that it would be facilitative to this function if performed by a member of the Minister's staff.

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

**Insufficiently defined administrative power**  
**Schedule 6, item 32, new section 24**

Similarly, Ministerial staff may have a role pursuant to proposed new section 24AB of the FOI Act, to be inserted by item 32 of Schedule 6. Proposed new sections 24, 24AA and 24AB replace existing section 24 which allows for an access request to be refused if the work involved in processing the request is excessive. Proposed new paragraph 24AB(2)(c) provides that, during a request consultation process, the agency or Minister must give an applicant a written notice which states the name of an officer of the agency or member of staff of the Minister (the ‘contact person’) with whom the applicant may consult during a period.

In these circumstances, a member of the Minister’s staff would be acting as the Minister’s agent. The Committee notes that the explanatory memorandum does not refer to the specific role of Ministerial staff members in this regard. The Committee **seeks the Cabinet Secretary’s advice** as to whether the explanatory memorandum might be amended to provide clarification about the legal status of Ministerial staff.

*Pending the Cabinet Secretary’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***

Similarly, proposed paragraph 24AB(2)(c) recognises that a Minister is unlikely to be available to consult with an FOI applicant personally about narrowing an onerous FOI request. For that reason consultation will be undertaken by a member of the Minister's staff. Similar provision is made in existing subparagraph 24(6)(c)(ii) of the FOI Act. Under the existing provision and proposed paragraph 24AB(2)(c), there is no power in the staff member to refuse a request.

It is therefore difficult to see how proposed paragraph 15(2A)(a) or proposed paragraph 24AB(2)(c) may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. Nevertheless, I intend to amend the relevant parts of the explanatory memorandum to the Bill to provide clarification about the legal status of Ministerial staff. I propose to include words along the lines of 'Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984*. The provision recognises that a Minister may not be personally available to perform this function and that it would be facilitative to this function if performed by a member of the Minister's staff.

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

# Information Commissioner Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Cabinet Secretary responded to the Committee's comments in a letter dated 8 March 2010. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 1 of 2010*

Introduced into the House of Representatives on 26 November 2009  
Portfolio: Cabinet Secretary

#### **Background**

Introduced with the Freedom of Information (Reform) Bill 2009, this bill establishes the Office of the Information Commissioner and creates two new independent statutory office holders – the Information Commissioner and the Freedom of Information (FOI) Commissioner. The bill also makes provision for the appointment of the Privacy Commissioner (an existing statutory office holder), instead of under the *Privacy Act 1988*.

The Office of the Information Commissioner will bring together the independent oversight functions for privacy protection, principally regulated by the *Privacy Act 1988*, and for access to government information, regulated by the *Freedom of Information Act 1982*. This is consistent with the Federal Government's 2007 election commitments set out in the policy statement *Government information: restoring trust and integrity*.

#### **Insufficiently defined administrative powers**

##### **Clause 27**

Part 4 of the bill provides for the establishment of an Information Advisory Committee (IAC) to assist and advise the Information Commissioner on matters relating to the performance of the Information Commissioner's functions. Clause 27 provides for the IAC's establishment (subclause 27(1)), membership (subclause 27(2)), payment of travel allowance (subclause 27(3)), and the non-payment of remuneration or allowances (subclause 27(4)).

The Committee notes that there is no provision for disclosure of interests by IAC members or written directions about the way the IAC is required to carry out its functions. This may be contrasted with the Advisory Committee established in the Australian Astronomical Observatory Bill 2009 (discussed earlier in this *Alert Digest*). The Committee **seeks the Cabinet Secretary's** advice on whether further guidance for the IAC's operation might be provided in the bill.

*Pending the Cabinet Secretary'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 has identified clause 27 of the Bill as a provision that may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. The Committee seeks my advice on whether further guidance for the Information Advisory Committee (IAC's) operation might be provided in the Bill

I do not consider clause 27 of the Bill requires provision for written directions to be issued about the way the IAC is required to carry out its function. The Australian Astronomical Observatory Bill 2009, which is referred to in the Digest, provides for an Advisory Committee to advise the Secretary. The Secretary is not a member of the Advisory Committee. The Secretary may give written directions about the way in which the Advisory Committee is to carry out its function and meeting procedures. In contrast, the IAC's function is to assist and advise the Information Commissioner in matters relating to the performance of the 'information commissioner functions' (subclause 27(1)). Those functions are concerned with reporting to the Minister on a wide range of issues associated with government information, extending beyond FOI and privacy (clause 7). As the Information Commissioner is Chair of the IAC (paragraph 27(2)(a)), it is not necessary for the Bill to make provision for either the Minister or the Information Commissioner to issue written directions about the way the IAC is to carry out its function. The Information Commissioner, as Chair of the IAC, will in practice be responsible for the way in which the IAC is to carry out its function and meeting procedures.

The Information Commissioner is required to disclose interests to the Minister generally by virtue of clause 22 of the Bill. Government members of the IAC appointed under paragraph 27(2)(b) will be bound by the Australian Public Service (APS) Code of Conduct, which requires employees to 'disclose, and take reasonable steps to avoid, any conflict of interest

(real or apparent) in connection with APS employment'. However, no similar requirement will apply to non-Government members of the IAC appointed under paragraph 27(2)(c). I intend to seek amendment of the Bill so that members of the IAC (both government members and non-government members) other than the Information Commissioner will be required to disclose interests.

The Committee thanks the Minister for this response and particularly acknowledges the Minister's commitment to amend the bill to ensure that all IAC members will be required to disclose interests.

# Occupational Health and Safety and Other Legislation Amendment Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 24 February 2010. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 1 of 2010*

Introduced into the House of Representatives on 26 November 2009  
Portfolio: Education, Employment and Workplace Relations

#### **Background**

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), the *Occupational Health and Safety Act 1991*, the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992* to implement the Federal Government's response to the review of the Comcare scheme, and some associated amendments.

The bill will amend the SRC Act to:

- enable Comcare to access the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of diseases with long latency period (such as asbestos-related disease) where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date;
- re-instate claims arising from off-site recess injuries;
- allow for compensation for medical expenses to be paid, where payment of other compensation is suspended; and
- allow for time limits for claim determination.

The bill amends the *Occupational Health and Safety Act 1991* to provide that ‘lifts’ are interpreted as being within the definition of ‘plant’ for the purposes of that Act.

The bill also makes a number of minor technical amendments to the Acts, other than the SRC Act, which are consequential on the commencement of the *Legislative Instruments Act 2003*.

### **Standing appropriation Schedule 3, subitem 10(5)**

Subitem 10(5) of Schedule 3 provides for payments to be made under section 90B of the SRC Act by enabling appropriation from the CRF for the purpose of paying certain amounts to Comcare. In his second reading speech, the Minister explains that a court decision had the indirect result of closing Comcare’s access to the CRF. Item 10 provides for money that was previously invalidly paid to Comcare to be recovered as a debt to the Commonwealth (subitem 10(2)); Comcare will then be paid an equivalent amount from the CRF (subitem 10(3)).

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be so appropriated and a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this case, the explanatory memorandum provides (at pages 6 and 7) some explanation of the reasons for the standing appropriation. However, there is no reference to any limitation on amounts to be appropriated, nor provision for further parliamentary scrutiny. The Committee **seeks the Minister’s comments** on the reason for the standing appropriation, any limitation that may be placed on the appropriated amount, and how parliamentary scrutiny of the appropriation will be secured.

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

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

The OHSOLA Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* that will restore Comcare's access to the Consolidated Revenue Fund (CRF) to pay for liabilities arising from claims attributable to employment before 1 December 1988 (pre-1988 liabilities). These amendments respond to the 2006 Federal Court decision in *Comcare v Etheridge* [2006] FCAFC 27 (Etheridge) which had the indirect effect of closing off Comcare's access to the CRF to pay for certain pre-1988 long-latency disease liabilities.

A ramification of the decision was to retrospectively invalidate drawings from the CRF which Comcare had made from 1988 to 2006 to pay for the abovementioned liabilities. These invalidated drawings constitute a debt due to the Commonwealth which the Commonwealth is obliged to recover.

The Committee has raised concerns about the amendments in Item 10 which seek to validate these drawings from the CRF.

The Item 10 amendments set up a mechanism whereby the Commonwealth can offset the total unauthorised drawings (namely, the debt, subclauses 10(1) and 10(2)) against a notional entitlement conferred on Comcare (subclause 10(3)), drawn from the CRF and equivalent to the unauthorised drawings.

The Committee has sought my comments about why there is no limit on the amounts to be appropriated and why no provision has been made for future appropriations to be subjected to Parliamentary scrutiny. The Committee has also noted that the explanatory memorandum does not provide an adequate explanation of the reasons for the appropriation.

My response to the Committee is that the Item 10 amendments involve a notional rather than any actual drawing on the CRF. Item 10 creates a new entitlement for Comcare equivalent to any unauthorised payments made by it. This new entitlement is then set off against Comcare's liability to repay the unauthorised drawings to the Commonwealth. This is a one-off transaction. The amount to be appropriated under item 10(5) is equal to the amount paid by Comcare prior to 2006. There is no need, therefore, for the amendments to provide for ongoing Parliamentary scrutiny of the appropriation or to place a cap on the appropriated amount.

I should emphasise that the Item 10 amendments recognise that it had always been the intention of the SRC Act to give Comcare access to CRF moneys to pay for all pre-1988 claims. I am advised that the amount of the recovery and offsetting of the debt is unquantified because it would be difficult to identify all of the cases in which relevant payments have been made by Comcare and therefore reliably estimate the potential liability to the Commonwealth, particularly given the almost 20 years that have elapsed since payments started.

The amendments have been drafted on legal advice from the Australian Government Solicitor.

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

# Social Security and Family Assistance Legislation Amendment (Weekly Payments) Bill 2010

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Families, Housing, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated received 9 March 2010. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 2 of 2010*

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Families, Housing, Community Services and Indigenous Affairs

#### **Background**

This bill provides for weekly payments to be made under the *Social Security (Administration) Act 1999* for a 'class of persons' who receive a social security periodic payment, family tax benefit or baby bonus and is also intended to include people who are assessed as being vulnerable, such as those who are homeless or at risk of homelessness.

The bill also makes minor technical corrections.

#### **Merits review**

##### **Schedule 1, Part 1, items 3 and 5**

Items 3 and 5 provide in relation to the family tax benefit and the baby bonus respectively that the Secretary may determine that a claimant who is a member of a class of persons under specified subsections 'has weekly instalment periods'. In both cases, the Secretary must subsequently revoke a determination to this effect if he or she is satisfied that the claimant is no longer a member of a class of persons specified under the relevant subsection.

Neither the bill nor the explanatory memorandum provide information about whether or not the Secretary is required to provide reasons for the revocation of a determination or whether the revocation is reviewable. The Committee **seeks the Minister's advice** as to whether merits review is available in relation to these provisions and, if not, what the rationale is for this approach.

*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.*

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

Under the Bill, the Minister may determine in a legislative instrument a class of persons who may have 'weekly instalment periods' for baby bonus and family tax benefit. The Secretary of my Department, Dr Jeff Harmer AO, may then determine that a claimant who is a member of that class of persons has weekly instalment periods. The Secretary must subsequently revoke a determination to this effect if satisfied that a claimant is no longer a member of the defined class of persons.

The Committee has noted that neither the Bill nor the explanatory memorandum state whether the Secretary is required to provide reasons for the revocation. The Committee has also asked whether or not the Secretary's revocation is subject to merits review and if not, what is the rationale for this approach.

A revocation by the Secretary (or a delegate) occurs if the Secretary is satisfied that the claimant is no longer in the class of persons determined by the Minister who may receive weekly instalment periods. This is a 'decision' of an officer under the family assistance law. Consistent with other decisions under the family assistance law, the Secretary is not required to give reasons for this decision.

A person affected by such a decision may apply to the Secretary for review of the decision. Ordinarily, an Authorised Review Officer (ARO) will review the decision. The decision-maker on review is required to give the claimant written notice of the outcome of the review. In practice, this includes reasons for their decisions and then the Administrative Appeal Tribunal (the AAT) is available. A claimant may obtain reasons for the decision of the SSAT and the AAT.

I note that a decision by the Secretary to revoke a determination that a claimant is a member of a class of persons which may have weekly instalment periods will have no effect on the claimant's entitlement to or rate of family tax benefit or baby bonus,

The Committee thanks the Minister for this response.

# **Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009**

## ***Introduction***

The Committee dealt with this bill in *Alert Digest No. 1 of 2010*. The Minister for Innovation, Industry, Science and Research responded to the Committee's comments in a letter dated 9 March 2010. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 1 of 2010***

Introduced into the House of Representatives on 25 November 2009  
Portfolio: Innovation, Industry, Science and Research

#### **Background**

This bill amends the *Textile, Clothing and Footwear Strategic Investment Program Act 1999* to provide legislative authority for the formulation of the new Clothing and Household Textile (Building Innovative Capability) scheme which will replace the TCF Post-2005 (SIP) Scheme for the 2010-2011 to 2014-2015 program years.

The object of the new scheme is to foster the development of a sustainable and internationally competitive manufacturing industry and design industry for clothing and household textiles in Australia by providing incentives which will promote innovation.

#### **Wide delegation of power**

##### **Schedule 1, item 32, new section 37ZZK**

Proposed new section 37ZZK, to be inserted by item 32 of Schedule 1, provides that the Clothing and Household Textile (BIC) scheme may confer on the Secretary a power to make a decision of an administrative character in order to facilitate the administration of the scheme. The scheme must contain provisions for review of decisions of the Secretary that affect an entity (proposed new subsection 37ZZF(2)) but may also specify circumstances when review does not apply (proposed new subsection 37ZZF(3)).

Under the *Textile, Clothing and Footwear Strategic Investment Program Act 1999*, the Secretary may delegate all of his or her functions or powers to ‘one or more senior officers’ (subsection 52(2)) or to contractors (in relation to functions or powers under the Textile, Clothing and Footwear (Strategic Investment Program) scheme (subsection 52(3)). In the circumstances, and having regard to the Committee’s preference for delegation to Senior Executive Service officers, the Committee **seeks the Minister’s advice** on the intended extent of the delegation of powers under the proposed scheme by the Secretary, in circumstances where there may be no review of the exercise of those powers under proposed new section 37ZZK.

*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 seeks my advice on the intended extent of the delegation of powers under the proposed Clothing and Household Textile (Building Innovative Capability) scheme by the Secretary, in circumstances where there may be no review of the exercise of those powers.

In working out the amount of an entity's claim for an innovation grant or deciding the amount of an advance on account of an innovation grant, the Secretary will be required to take into account, as far as is applicable, the caps on maximum amounts, the expenditure threshold and the modulation factor that is worked out in accordance with the modulation formula.

The Secretary's functions and powers in relation to working out or deciding the amount of an innovation grant or advance (in accordance with the caps, threshold and modulation factor) will be delegated to members of the Senior Executive Service holding the office of General Manager Customer Service AusIndustry, AusIndustry State Manager and General Manager Competitive Industries Branch and to the Executive Level 2 officers holding the office of AusIndustry State Manager, AusIndustry Deputy State Manager and Manager TCF Policy Group.

In working out or deciding the amounts, the Secretary (or his delegate) must apply the caps, threshold and modulation factor that will be prescribed in the scheme.

Whilst it might be argued that the application of the caps, threshold and modulation factor will be prescribed actions that do not involve a decision of the Secretary, the scheme will make it clear that decisions arising from their application will be exempted from merits review.

All other decisions (such as those relating to the eligibility of clothing and household textile activity and expenditure) leading up to deciding the amount of an advance or determining the amount of an innovation grant will not be so exempted.

The Committee thanks the Minister for this response, noting that it is intended that delegation of the Secretary's functions will be limited to specific SES and Executive Level 2 positions and that only decisions with little, if any, discretion (because of the application of the prescribed modulation formula) will be exempt from merit review.

Senator the Hon Helen Coonan  
Chair



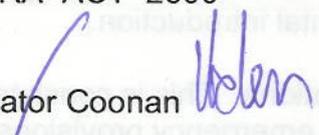
# The Hon Peter Garrett AM MP

Minister for Environment Protection, Heritage and the Arts

C10/4140

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

09 MAR 2010

Dear Senator Coonan 

Thank you for your letter of 24 February 2010 concerning commentary on the Antarctic Treaty (Environment Protection) Amendment Bill 2010 (the Bill) within the *Alert Digest No. 2 of 2010* of the Standing Committee for the Scrutiny of Bills.

Item 30 of the Bill proposes to amend the *Antarctic Treaty (Environment Protection) Act 1980* (the Act) to introduce new offences under section 19AC, 19AD and 19AE. I understand that the Office of the Parliamentary Counsel was cognisant of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* when drafting the Bill. The following outlines the rationale underpinning the reversal of onus proposed in subsections 19AC(2) and (3), 19AD(4) and 19AE(3) and (5).

## General basis for the reversal of onus

The facts-in-issue in relation to each offence remain wholly within the knowledge of the person who has allegedly committed the offence. In addition, the feasibility and expense of adducing evidence in relation to an alleged offence within the Antarctic is excessively prohibitive due to the remote locality and limited access. Section 6A of the Act indicates that the general principles of criminal responsibility, as outlined in Chapter 2 of the *Criminal Code*, apply to all offences against the legislation. The subsections in question create exceptions that would therefore trigger subsection 13.3(3) of the *Criminal Code*. Accordingly, the burden of proof for the defence is evidential, while the prosecution bears a legal burden to prove its case beyond a reasonable doubt.

## Relevant links to Australia's international obligations

The reversal of onus also reflects Australia's international obligations under Antarctic Treaty system arrangements, in particular Annex II to the Madrid Protocol (see below).

## Section 19AC – Offence relating to the accidental introduction of micro-organisms

Paragraph 19AC(2)(a) provides a defence where the organism or article was brought to Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

Paragraph 19AC(2)(b) provides a defence where the person has taken all reasonable precautions to prevent the introduction of the micro-organism to the Antarctic. This is consistent with Article 4(7) of Annex II to the Madrid Protocol that aims to prevent the accidental introduction to the Antarctic of micro-organisms not present naturally in the Antarctic.

Paragraph 19AC(2)(c) provides a defence where the person has a permit or a recognised foreign authority to bring the micro-organisms into the Antarctic. This gives effect to the understanding among Contracting Parties to the Antarctic Treaty that each party enforces its national law only over its own nationals. It also recognises that if a micro-organism is brought into the Antarctic under a permit it is not an accidental introduction.

Subsection 19AC(3) provides a defence in emergency situations. This is consistent with Article 2 of Annex II to the Madrid Protocol and the existing emergency provisions under the Act at subsection 19(3)(a) – *offences relating to the environment*.

## Section 19AD – Offences relating to bringing food into the Antarctic

Subsection 19AD(4) provides a defence where the person has taken reasonable precautions to prevent bringing a disease into the Antarctic where the person brings poultry or other bird products into the Antarctic for food. This is consistent with Article 4(8) of Annex II to the Madrid Protocol that aims to prevent the introduction of diseases harmful to Antarctic fauna and flora by requiring that all appropriate efforts are made to ensure that poultry or other bird products brought into the Antarctic as food are free from disease contaminants.

## Section 19AE – Offences relating to destruction of organisms brought into Antarctica without a permit

Paragraph 19AE(3)(a) provides a defence where it is infeasible to remove or destroy a non-indigenous organism (or its progeny) that has been brought into the Antarctic. This is consistent with Article 4(5) of Annex II to the Madrid Protocol which aims to ensure the removal or disposal where feasible of any non-native species (including progeny) that is brought into the Antarctic without a permit.

Paragraph 19AE(3)(b) provides a defence where removal or destruction of the organism (or its progeny) would lead to a greater environmental impact than not doing so. This is also consistent with Article 4(5) of Annex II to the Madrid Protocol which recognises that in some instances more harm may occur where efforts are made to remove or destroy any non-native species (including progeny) that are brought into the Antarctic without a permit.

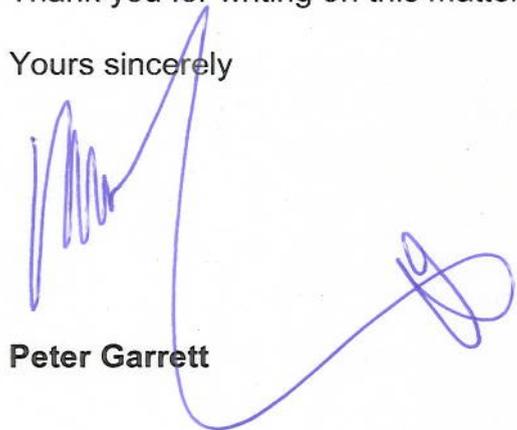
Paragraph 19AE(3)(c) provides a defence where the organism (or its progeny) was brought to Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

Subsection 19AE(5) provides a defence where the organism was brought to (or kept in) Antarctica for use as food. This is consistent with Article 4(6) of Annex II to the Madrid Protocol that allows (subject to certain conditions) the importation of food into the Antarctic.

I do not envisage amendment to the explanatory memorandum at this time.

Thank you for writing on this matter.

Yours sincerely

A handwritten signature in blue ink, consisting of several vertical strokes followed by a large loop and a smaller loop at the end.

**Peter Garrett**



**SENATOR THE HON KIM CARR**

**MINISTER FOR INNOVATION, INDUSTRY,  
SCIENCE AND RESEARCH**

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

3 MAR 2009

Dear Senator Coonan

Thank you for the letter of 4 February 2010 from your Committee Secretary, Ms Toni Dawes, drawing my attention to comments contained in Committee's *Alert Digest No. 1 of 2010* (3 February 2010) regarding the *Australian Astronomical Observatory Bill 2009* (the Bill).

In particular, the Committee seeks my advice on three clauses of the Bill that provide for the appointment, leave of absence and other terms and conditions of the Advisory Committee, established by clause 13 of the Bill. I address these concerns below.

By way of background, the Advisory Committee will provide expert advice to the Secretary of the Department of Innovation, Industry, Science and Research, Mr Mark Paterson AO, on the performance of the astronomical functions defined in clause 11 of the Bill. It will meet regularly to consider and provide advice on the scientific direction, strategies and capabilities of the Australian Astronomical Observatory (the Observatory), its delivery of services to the astronomy community and its research activities and collaborations, among other matters.

Given the specialised nature and scope of matters on which the Advisory Committee is expected to advise, the Secretary requires discretion in determining the composition, terms of reference and operations of the Advisory Committee.

The Committee reports that subclause 15(4) of the Bill may constitute a wide discretion in terminating the appointment of an Advisory Committee member.

The intention of clause 15(4) is to provide for the Secretary to terminate the appointment of a member whose circumstances prevent him or her from discharging his or her function in the Advisory Committee.

The Committee reported that clause 18 of the Bill gives the Secretary broad scope to determine whether an Advisory Committee member can perform his or her role, by providing that the Secretary may grant leave of absence to a member 'on the terms and conditions that the Secretary determines'.

The intention of clause 18 is that a member may be granted leave to be absent from meetings of the Advisory Committee, in response to a request from the member, or if the member becomes incapacitated for a short period of time, in which case it allows the Secretary to determine the period of leave of absence.

Similarly, the Committee reported that clause 22 of the Bill may also constitute wide discretion, in providing that the Advisory Committee members hold office 'on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Secretary'.

The intention of clause 22 is to enable the Secretary to determine or to vary the operating requirements for the Advisory Committee including, for example, its composition, frequency of meetings, reporting requirements, terms of reference, and general considerations or emerging issues on which the Advisory Committee should provide its advice.

Finally, the Committee noted that clause 23 provides for the Secretary to delegate all or any of his or her functions or powers under this Act to the Director or to an APS employee within the Australian Astronomical Observatory with appropriate expertise. I note the Committee's general preference that delegates be confined to members of the Senior Executive Service.

The intention of clause 23 is to provide for the delegation of powers during short absences of the Director, in order to ensure continuity of functions that require an intimate knowledge of the business operations of the Observatory, or astronomical functions that require particular scientific expertise or standing in the astronomy community. In such circumstances, a suitable member of the Senior Executive Service may not be available.

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kim Carr', written over a horizontal line.

Kim Carr



## The Hon. Tony Burke MP

Minister for Agriculture, Fisheries and Forestry

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

Dear Senator Coonan

Thank you for the letter of 4 February 2010 from Ms Toni Dawes about comments concerning the Fisheries Legislation Amendment Bill 2009.

The intent of the amendments regarding defensive equipment was not to create an avenue for offence but to clarify the use of the equipment and thus limit the risk that the use of some defensive equipment—for example, batons—could be unlawful.

The Fisheries Legislation Amendment Bill 2009 specifies that Australian Fisheries Management Authority (AFMA) officers would be able to use defensive equipment where it is 'reasonably necessary to perform functions or exercise powers under the Act/regulations'. Therefore, if an AFMA officer who has completed the appropriate training and has been approved to carry and use the equipment does no more than what is reasonably necessary to carry out their functions, they will be protected under the legislation. As specified in the Bill, the AFMA officer will have to have undertaken appropriate training in using the equipment and will have to have approval to use the equipment from the Chief Executive Officer of AFMA.

As AFMA officers are public servants, they are subject to the APS Code of Conduct. If an officer does more than what is reasonably necessary in a given situation, the officer will be in breach of their duties and in breach of the Act (Bill), and the officer can be subject to misconduct action under the Code of Conduct.

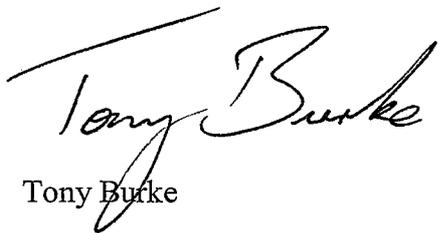
An officer who goes beyond the 'reasonably necessary' threshold could also be subject to criminal penalties, depending on what exactly the officer has done and the availability of defences such as self-defence. The officer will be subject to the legislation of the state or territory in which the incident occurred—for example, if the incident happened in Sydney Harbour, the officer would be subject to New South Wales criminal legislation. If the incident occurred in Commonwealth waters—for example, more than 12 nautical miles from a state/territory—the Commonwealth law would apply the criminal laws of the adjacent state/territory.

The exact criminal penalty applied in any given case would depend on what exactly the officer was accused of—the most likely possible charge would probably be assault. If the officer's actions constituted a breach of law, the officer could be subject to civil action by the person against whom the act was committed. The Commonwealth could also be subject to civil action as the officer's employer.

For example, if an AFMA officer boarded a ship in Queensland waters and used more force than reasonably necessary against a person on board, the officer would be subject to disciplinary action under AFMA processes. If what the officer had done was serious, the officer could be prosecuted for an offence (for instance, assault) under the Queensland Criminal Code 1899 (Qld). The person who was the subject of the officer's actions could also bring a civil action against both the officer and the Commonwealth (for instance, sue for damages for assault).

I trust this information is of assistance.

Yours sincerely

A handwritten signature in cursive script that reads "Tony Burke". The signature is written in black ink and is positioned above the printed name.

Tony Burke



**SENATOR THE HON JOE LUDWIG**

Cabinet Secretary  
Special Minister of State  
Manager of Government Business in the Senate  
Senator for Queensland

RECEIVED

- 9 MAR 2010

Senate Standing Committee  
for the Scrutiny of Bills

Reference no: C10/7024

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 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No. 1 of 2010*. The Committee has asked for my response to matters it identified in the Digest regarding the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009.

Freedom of Information Amendment (Reform) Bill 2009

The Committee has identified proposed paragraph 15(2A)(a) (item 25 of Schedule 6 to the Bill) and proposed paragraph 24AB(2)(c) (item 32 of Schedule 6 to the Bill) as provisions that may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. The Committee seeks my advice as to whether the explanatory memorandum might be amended to provide clarification about the legal status of Ministerial staff.

Proposed paragraph 15(2A)(a) retains the existing rule in paragraph 15(2)(d) of the FOI Act that an FOI request may be delivered to a member of staff of a Minister. Both the existing provision and proposed paragraph 15(2A)(a) are facilitative and recognise that a Minister is unlikely to be available to take delivery of an FOI request personally.

Similarly, proposed paragraph 24AB(2)(c) recognises that a Minister is unlikely to be available to consult with an FOI applicant personally about narrowing an onerous FOI request. For that reason consultation will be undertaken by a member of the Minister's staff. Similar provision is made in existing subparagraph 24(6)(c)(ii) of the FOI Act. Under the existing provision and proposed paragraph 24AB(2)(c), there is no power in the staff member to refuse a request.

It is therefore difficult to see how proposed paragraph 15(2A)(a) or proposed paragraph 24AB(2)(c) may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. Nevertheless, I intend to amend the relevant parts of the explanatory memorandum to the Bill to provide clarification about the legal status of Ministerial staff. I propose to include words along the lines of 'Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984*. The provision recognises that a Minister may not be personally available to perform this function and that it would be facilitative to this function if performed by a member of the Minister's staff'.

#### Information Commissioner Bill 2009

The Committee has identified clause 27 of the Bill as a provision that may be 'considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'. The Committee seeks my advice on whether further guidance for the Information Advisory Committee (IAC's) operation might be provided in the Bill.

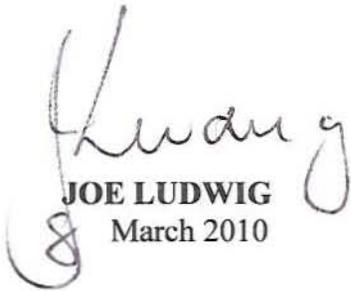
I do not consider clause 27 of the Bill requires provision for written directions to be issued about the way the IAC is required to carry out its function. The Australian Astronomical Observatory Bill 2009, which is referred to in the Digest, provides for an Advisory Committee to advise the Secretary. The Secretary is not a member of the Advisory Committee. The Secretary may give written directions about the way in which the Advisory Committee is to carry out its function and meeting procedures. In contrast, the IAC's function is to assist and advise the Information Commissioner in matters relating to the performance of the 'information commissioner functions' (subclause 27(1)). Those functions are concerned with reporting to the Minister on a wide range of issues associated with government information, extending beyond FOI and privacy (clause 7). As the Information Commissioner is Chair of the IAC (paragraph 27(2)(a)), it is not necessary for the Bill to make provision for either the Minister or the Information Commissioner to issue written directions about the way the IAC is to carry out its function. The Information Commissioner, as Chair of the IAC, will in practice be responsible for the way in which the IAC is to carry out its function and meeting procedures.

The Information Commissioner is required to disclose interests to the Minister generally by virtue of clause 22 of the Bill. Government members of the IAC appointed under paragraph 27(2)(b) will be bound by the Australian Public Service (APS) Code of Conduct, which requires employees to 'disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment'. However, no similar requirement will apply to non-Government members of the IAC appointed under paragraph 27(2)(c). I intend to seek amendment of the Bill so that members of the IAC (both government members and non-government members) other than the Information Commissioner will be required to disclose interests.

The contact officer for the Bills in the Department of the Prime Minister and Cabinet is Joan Sheedy, telephone 6271 5591.

I thank the Committee for its diligence.

Yours sincerely



**JOE LUDWIG**  
March 2010



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

Parliament House  
Canberra ACT 2600

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

**24 FEB 2010**

Dear Senator Coonan

Thank you for your letter dated 4 February 2010 seeking my comments on proposed amendments in Item 10 of Schedule 3 of the Occupational Health and Safety and Other Legislation Amendment Bill 2009 (OHSOLA Bill).

The OHSOLA Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* that will restore Comcare's access to the Consolidated Revenue Fund (CRF) to pay for liabilities arising from claims attributable to employment before 1 December 1988 (pre-1988 liabilities). These amendments respond to the 2006 Federal Court decision in *Comcare v Etheridge* [2006] FCAFC 27 (Etheridge) which had the indirect effect of closing off Comcare's access to the CRF to pay for certain pre-1988 long-latency disease liabilities.

A ramification of the decision was to retrospectively invalidate drawings from the CRF which Comcare had made from 1988 to 2006 to pay for the abovementioned liabilities. These invalidated drawings constitute a debt due to the Commonwealth which the Commonwealth is obliged to recover.

The Committee has raised concerns about the amendments in Item 10 which seek to validate these drawings from the CRF.

The Item 10 amendments set up a mechanism whereby the Commonwealth can offset the total unauthorised drawings (namely, the debt, subclauses 10(1) and 10(2)) against a notional entitlement conferred on Comcare (subclause 10(3)), drawn from the CRF and equivalent to the unauthorised drawings.

The Committee has sought my comments about why there is no limit on the amounts to be appropriated and why no provision has been made for future appropriations to be subjected to Parliamentary scrutiny. The Committee has also noted that the explanatory memorandum does not provide an adequate explanation of the reasons for the appropriation.

My response to the Committee is that the Item 10 amendments involve a notional rather than any actual drawing on the CRF. Item 10 creates a new entitlement for Comcare equivalent to any unauthorised payments made by it. This new entitlement is then set off against Comcare's liability to repay the unauthorised drawings to the Commonwealth. This is a one-off transaction. The amount to be appropriated under item 10(5) is equal to the amount paid by Comcare prior to 2006. There is no need, therefore, for the amendments to provide for ongoing Parliamentary scrutiny of the appropriation or to place a cap on the appropriated amount.

I should emphasise that the Item 10 amendments recognise that it had always been the intention of the SRC Act to give Comcare access to CRF moneys to pay for all pre-1988 claims. I am advised that the amount of the recovery and offsetting of the debt is unquantified because it would be difficult to identify all of the cases in which relevant payments have been made by Comcare and therefore reliably estimate the potential liability to the Commonwealth, particularly given the almost 20 years that have elapsed since payments started.

The amendments have been drafted on legal advice from the Australian Government Solicitor.

Yours sincerely

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



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

*Parliament House*  
*CANBERRA ACT 2600*

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MN10-000420

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

Dear Senator Coonan

On 24 February 2010 the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee) drew my attention to comments made by the Committee about the Social Security and Family Assistance Legislation Amendment (Weekly Payments) Bill 2010 (the Bill).

Under the Bill, the Minister may determine in a legislative instrument a class of persons who may have 'weekly instalment periods' for baby bonus and family tax benefit. The Secretary of my Department, Dr Jeff Harmer AO, may then determine that a claimant who is a member of that class of persons has weekly instalment periods. The Secretary must subsequently revoke a determination to this effect if satisfied that a claimant is no longer a member of the defined class of persons.

The Committee has noted that neither the Bill nor the explanatory memorandum state whether the Secretary is required to provide reasons for the revocation. The Committee has also asked whether or not the Secretary's revocation is subject to merits review and if not, what is the rationale for this approach.

A revocation by the Secretary (or a delegate) occurs if the Secretary is satisfied that the claimant is no longer in the class of persons determined by the Minister who may receive weekly instalment periods. This is a 'decision' of an officer under the family assistance law. Consistent with other decisions under the family assistance law, the Secretary is not required to give reasons for this decision.

A person affected by such a decision may apply to the Secretary for review of the decision. Ordinarily, an Authorised Review Officer (ARO) will review the decision. The decision-maker on review is required to give the claimant written notice of the outcome of the review. In practice, this includes reasons for their decisions.

and then the Administrative Appeal Tribunal (the AAT) is available. A claimant may obtain reasons for the decision of the SSAT and the AAT.

I note that a decision by the Secretary to revoke a determination that a claimant is a member of a class of persons which may have weekly instalment periods will have no effect on the claimant's entitlement to or rate of family tax benefit or baby bonus.

Again, thank you for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jenny Macklin', with a long horizontal flourish extending to the right.

**JENNY MACKLIN MP**



**SENATOR THE HON KIM CARR**

**MINISTER FOR INNOVATION, INDUSTRY,  
SCIENCE AND RESEARCH**

09 MAR 2010

Senator the Hon Helen Coonan  
Chair  
Senate Committee for the Scrutiny of Bills  
Parliament House  
PO Box 6022  
CANBERRA ACT 2600

  
Dear Senator Coonan

I refer to the letter of 4 February 2010 from Ms Toni Dawes, Secretary of the Senate Committee for the Scrutiny of Bills, concerning the Committee's *Alert Digest No.1 of 2010* in relation to the Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009.

The Committee seeks my advice on the intended extent of the delegation of powers under the proposed Clothing and Household Textile (Building Innovative Capability) scheme by the Secretary, in circumstances where there may be no review of the exercise of those powers.

In working out the amount of an entity's claim for an innovation grant or deciding the amount of an advance on account of an innovation grant, the Secretary will be required to take into account, as far as is applicable, the caps on maximum amounts, the expenditure threshold and the modulation factor that is worked out in accordance with the modulation formula.

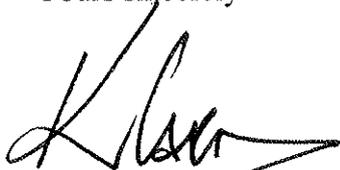
The Secretary's functions and powers in relation to working out or deciding the amount of an innovation grant or advance (in accordance with the caps, threshold and modulation factor) will be delegated to members of the Senior Executive Service holding the office of General Manager Customer Service AusIndustry, AusIndustry State Manager and General Manager Competitive Industries Branch and to the Executive Level 2 officers holding the office of AusIndustry State Manager, AusIndustry Deputy State Manager and Manager TCF Policy Group.

In working out or deciding the amounts, the Secretary (or his delegate) must apply the caps, threshold and modulation factor that will be prescribed in the scheme.

Whilst it might be argued that the application of the caps, threshold and modulation factor will be prescribed actions that do not involve a decision of the Secretary, the scheme will make it clear that decisions arising from their application will be exempted from merits review.

All other decisions (such as those relating to the eligibility of clothing and household textile activity and expenditure) leading up to deciding the amount of an advance or determining the amount of an innovation grant will not be so exempted.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kim Carr', with a long horizontal flourish extending to the right.

Kim Carr