SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2005

5 October 2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
Senator A Murray

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

ELEVENTH REPORT OF 2005

The Committee presents its Eleventh Report of 2005 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:

Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005*****

Trade Practices Legislation Amendment Bill (No. 1) 2005

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

Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2005*. The Minister for Education, Science and Training responded to the Committee's comments in a letter dated 28 September 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Education, Science and Training

Background

The bill amends the *Higher Education Support Act 2003* to provide for the inclusion of 'Higher Education Workplace Relations Requirements' in the Commonwealth Grant Scheme Guidelines.

Universities will need to satisfy the Minister that they have complied with these requirements in their workplace agreements, as well as with the National Governance Protocols, in order to be eligible for increased funding under the Commonwealth Grant Scheme.

Possible retrospectivity
Schedule 1, item 1

According to the Minister's second reading speech the provisions of Schedule 1 will apply to all workplace agreements made and approved or certified after 29 April 2005, the date on which the measures were announced.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, neither the bill itself nor the explanatory memorandum makes any mention of retrospectivity.

The Committee **seeks the Minister's advice** as to whether the bill has retrospective application and, if so, the basis on which provisions of the bill are to apply retrospectively and whether that retrospectivity will operate to the detriment of any person.

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

> There is no retrospective application of the Higher Education Workplace Relations Requirements (HEWRRs). The reference to 29 April 2005 is: a) for identification of those Higher Education Providers required to have their workplace agreements compliant with the HEWRRs on or before 30 November 2005; and b) identification of those employees who must be offered AWAs in order for a higher education provider to be compliant with the HEWRRs as at 30 November 2005 (those employees being new employees engaged after 29 April 2005 for a period longer than a month). It is a beneficial provision.
>
> The 29 April 2005 date is the day that the HEWRRs were jointly announced by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP and me.
>
> The Government could have legislated to make all higher education providers comply with the HEWRRs in their workplace agreements as well as in policies and practices by 30 November 2005. However, the Government chose to give those higher education providers with existing agreements, that is, collective agreements that were subject to a concluded ballot as at 29 April 2005 and certified by the Australian Industrial Relations Commission, with a nominal expiry date on or after 1 October 2005, until 31 August 2006 to be compliant with the HEWRRs in their workplace agreements. I trust this information will assist the Committee in clarifying the intentions of the Bill.

The Committee thanks the Minister for this response and for clarifying the intended operation of the provision.

The Committee makes no further comment on this provision.

Trade Practices Legislation Amendment Bill (No. 1) 2005 – Supplementary Comments

Introduction

The Committee dealt with this bill in *Alert Digests Nos. 2* and *10 of 2005*. The Parliamentary Secretary to the Treasurer responded to the Committee's comments in a letter dated 15 September 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 10 of 2005

[Introduced in the House of Representatives on 24 June 2004 and reintroduced on 10 February 2005. Portfolio: Treasury]

Abrogation of the privilege against self-incrimination
Schedule 8, item 4

In *Alert Digest No. 2 of 2005*, the Committee commented on proposed new subsection 154R(3) of the *Trade Practices Act 1974*, to be inserted by item 4 of Schedule 8 to this bill, because it would abrogate the privilege against self-incrimination. In that Alert Digest, the Committee accepted that the provision struck a reasonable balance between the competing interests of obtaining information and protecting individual's rights. It has been brought to the Committee's attention that it may be necessary to revise that view.

In all occasions in the past where the Committee has been prepared to accept an abrogation of the privilege against self-incrimination, the provision has gone on to protect not only the use of the information itself but also the use of any other information, document or thing which has been obtained as a direct or indirect consequence of the giving of the information, typically referred to as 'derivative use immunity.' It appears, however, that proposed new subsection 154R(4) of the *Trade Practices Act 1974* protects from admissibility in criminal proceedings only the answer actually given by the relevant person. The proposed subsection does not protect against the use of other information obtained as a direct or indirect consequence of the giving of the initial information.

The Committee **seeks the Treasurer's advice** as to whether it is the case that derivative use is not protected and, if so, the reason for the diminution on this occasion of the protection afforded to someone who is required, by force of proposed new subsection 154R(1), to provide information despite the fact that the information might tend to incriminate him or her.

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

Relevant extract from the response from the Parliamentary Secretary

In Alert Digest No. 10 of 2005 the Committee considers aspects of proposed new section 1548 of the *Trade Practices Act 1974,* which is to be inserted by Item 4 in Schedule 8 of the Bill. New subsection 154R(1) enables an officer of the Australian Competition and Consumer Commission (ACCC), having obtained a warrant from a magistrate to enter premises to search for and, if necessary, seize evidence, to ask a person at the premises to answer questions or to produce evidential material to which the warrant relates. New subsection 154R(2) makes it an offence, punishable by a fine, for the person at the premises to fail to comply with the officer's request. New subsection 154(3) abrogates an individual's right to refuse to answer the question or fail to produce the material on the ground that the answer, or the production of the evidential material, might tend to incriminate the individual or make the individual liable to a penalty. New subsection 154R(4) then prohibits any answer given from being used against the individual in any criminal proceedings or any proceedings that would make the individual liable to a penalty.

In particular, in Alert Digest No. 10 of 2005 the Committee seeks advice as to whether derivative use of individual's answers is protected under proposed new subsection 154R(4). If not, the Committee seeks an explanation of why this is the case.

I confirm that derivate use is not protected under proposed new subsection 154R(4). The degree of protection provided to individuals under this subsection is consistent with the degree of protection specified on page 87 of the document entitled *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which was issued by authority of the Minister for Justice and Customs in February 2004. As that document notes, after the consideration of a number of detailed reviews and research, the Government has accepted that protection for full use and derivative use immunity would unacceptably fetter the investigation and prosecution of corporate misconduct offences, including those in the *Trade Practices Act 1974.*

In this particular case, if derivative use immunity were provided in the proposed new subsection 154R(4), it would be likely to unreasonably hinder the investigation and prosecution of corporate offences and contraventions in the *Trade Practices Act 1974.* For example, it may prevent the tendering of documentary evidence showing a senior manager's involvement in establishing a cartel if that documentary evidence only came to light because of answers given by that senior manager when premises were entered and searched by the ACCC. Such documentary evidence is routinely only within the knowledge of a small number of people in a corporation and is often concealed. It cannot, therefore, be assumed that such documentary evidence will be revealed by asking questions of others present on the premises but not intimately involved in the conduct.

In light of the above, the Government does not consider that proposed new section 1548 trespasses unduly on personal rights and liberties.

I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns.

The Committee thanks the Parliamentary Secretary for this response. The Committee accepts that it may generally be appropriate to circumscribe such immunities in relation to the corporate regulation responsibilities of bodies such as the ACCC, as set out in the Criminal Law Guide. The Committee would, however, prefer to see an explanation of relevant matters in the explanatory memorandum to enable the Committee, and the Parliament, to determine whether the reduced immunity is appropriate in the circumstances. In this case, the response from the Parliamentary Secretary meets the Committee's concerns.

The Committee makes no further comment on this provision.

Brett Mason
Deputy Chair

MINISTER FOR EDUCATION, SCIENCE AND TRAINING
THE HON DR BRENDAN NELSON MP

Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

28 SEP 2005

Robert

Dear Senator Ray

I write in response to a letter received from Mr Richard Pye, Secretary, Standing Committee for the Scrutiny of Bills, on 11 August 2005 concerning the *Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005*. I am pleased to provide you with clarification in relation to issues relating to possible retrospectivity of the Bill.

There is no retrospective application of the Higher Education Workplace Relations Requirements (HEWRRs). The reference to 29 April 2005 is: a) for identification of those Higher Education Providers required to have their workplace agreements compliant with the HEWRRs on or before 30 November 2005; and b) identification of those employees who must be offered AWAs in order for a higher education provider to be compliant with the HEWRRs as at 30 November 2005 (those employees being new employees engaged after 29 April 2005 for a period longer than a month). It is a beneficial provision.

The 29 April 2005 date is the day that the HEWRRs were jointly announced by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP and me.

The Government could have legislated to make all higher education providers comply with the HEWRRs in their workplace agreements as well as in policies and practices by 30 November 2005. However, the Government chose to give those higher education providers with existing agreements, that is, collective agreements that were subject to a concluded ballot as at 29 April 2005 and certified by the Australian Industrial Relations Commission, with a nominal expiry date on or after 1 October 2005, until 31 August 2006 to be compliant with the HEWRRs in their workplace agreements.

I trust this information will assist the Committee in clarifying the intentions of the Bill.

Yours sincerely

Brendan Nelson

BRENDAN NELSON

Parliament House, Canberra ACT 2600. Tel: (02) 6277 7460 Fax (02) 6273 4116

THE HONOURABLE CHRIS PEARCE MP

Parliamentary Secretary to the Treasurer
Federal Member for Aston

15 SEP 2005

Senator the Hon Robert Ray
Chair of the Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to Mr Richard Pye's letter of 7 September 2005 to the Treasurer's Senior Adviser concerning the Trade Practices Legislation Amendment Bill (No. 1) 2005 (the Bill). Mr Pye invites the Treasurer to respond to a request for advice from the Standing Committee for the Scrutiny of Bills (the Committee), in relation to the Bill, that is contained in the Committee's Alert Digest No. 10 of 2005. The Treasurer has asked me to respond.

In Alert Digest No. 10 of 2005 the Committee considers aspects of proposed new section 154R of the *Trade Practices Act 1974*, which is to be inserted by Item 4 in Schedule 8 of the Bill. New subsection 154R(1) enables an officer of the Australian Competition and Consumer Commission (ACCC), having obtained a warrant from a magistrate to enter premises to search for and, if necessary, seize evidence, to ask a person at the premises to answer questions or to produce evidential material to which the warrant relates. New subsection 154R(2) makes it an offence, punishable by a fine, for the person at the premises to fail to comply with the officer's request. New subsection 154(3) abrogates an individual's right to refuse to answer the question or fail to produce the material on the ground that the answer, or the production of the evidential material, might tend to incriminate the individual or make the individual liable to a penalty. New subsection 154R(4) then prohibits any answer given from being used against the individual in any criminal proceedings or any proceedings that would make the individual liable to a penalty.

In particular, in Alert Digest No. 10 of 2005 the Committee seeks advice as to whether derivative use of individual's answers is protected under proposed new subsection 154R(4). If not, the Committee seeks an explanation of why this is the case.

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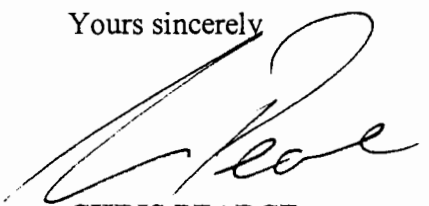
In this particular case, if derivative use immunity were provided in the proposed new subsection 154R(4), it would be likely to unreasonably hinder the investigation and prosecution of corporate offences and contraventions in the *Trade Practices Act 1974*. For example, it may prevent the tendering of documentary evidence showing a senior manager's involvement in establishing a cartel if that documentary evidence only came to light because of answers given by that senior manager when premises were entered and searched by the ACCC. Such documentary evidence is routinely only within the knowledge of a small number of people in a corporation and is often concealed. It cannot, therefore, be assumed that such documentary evidence will be revealed by asking questions of others present on the premises but not intimately involved in the conduct.

In light of the above, the Government does not consider that proposed new section 154R trespasses unduly on personal rights and liberties.

I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns.

Yours sincerely



CHRIS PEARCE