
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## ELEVENTH REPORT

## OF

## 2011

**21 September 2011**

**ISSN 0729-6258**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

## 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 2011

The Committee presents its *Eleventh Report of 2011* 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:

# Landholders' Right to Refuse (Coal Seam Gas) Bill 2011

Introduced into the Senate on 24 August 2011
By: Senator Waters

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 10 of 2011*. The Senator responded to the Committee's comments in a letter dated 21 September 2011. A copy of the letter is attached to this report.

## *Alert Digest No. 10 of 2011 - extract*

**Background**

This bill provides Australian landholders the right to refuse the undertaking of coal seam gas mining activities on their land without prior written authorisation.

**Possible trespass on personal rights**
**Subclause 12**

Subclause 12(1) provides that, without limiting the relief that a court may grant to a plaintiff who brings an action under section 10 (in relation to unauthorised coal seam gas mining), a court may grant an injunction. Subclause 12(2) provides that a court must order that all costs incurred by a plaintiff under this Act are to be paid by the defendant unless the proceedings were instituted vexatiously or without reasonable cause or it would be unreasonable, in the circumstances, to do so. Regrettably the explanatory memorandum merely restates the effect of this provision, and does not explain why this direction to courts as to how costs should be awarded is justified. **The Committee requests the Senator's advice as to the justification for this provision as it may be thought to adversely impact on rights asserted in the course of the litigation**.

> *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.*

## *Senator's response - extract*

Subclause 12(2) of the Bill applies where an action has been brought under the Act by a person with an ownership interest in food producing land. In such cases subclause 12(2)requires that a court must order that all costs incurred by that person are to be paid by the defendant, unless the proceedings were instituted vexatiously or without reasonable cause, or where the court considers is unreasonable in all the circumstances to do so.

This clause has been inserted to ensure that the rights of landholders provided by the Bill are actually able to be exercised. Landholders need the assurance that, in the face of their way of life being threatened by encroachment from coal seam gas operations, they can seek to have their legitimate concerns heard before a court, without the risk of having potentially substantial court costs awarded against them. I consider this subclause is justified in the interest of ensuring genuine access to justice and allow the intent of the bill to be realised. Further, a court is still able to exercise its discretion in awarding costs against a plaintiff where an action is considered vexatious, without reasonable cause, or otherwise unreasonable in all the circumstances.

Finally, regarding the Committee's purview to assess any trespass on personal rights and liberties under Standing Order 24(1)(a)(i), I note that Subclause 12(2) of my Bill would only ever apply to constitutional corporations, in defence of the personal rights and liberties of landholders.

***Committee Response***

The Committee thanks the Senator for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole**. The Committee notes its view that the reference in Standing Order 24(1)(a)(i) to 'personal rights and liberties' can apply to 'legal persons' (legal entities) including corporations.

# National Health Reform Amendment (National Health Performance Authority) Bill 2011

Introduced into the House of Representatives on 3 March 2011
Portfolio: Health and Ageing

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 9 of 2011*. The Minister responded to the Committee's comments in a letter dated 14 September 2011. A copy of the letter is attached to this report.

## *Alert Digest No. 9 of 2011 - extract*

**National Health Reform Amendment (National Health Performance Authority) Bill 2011**
***[Digest 5/11 & 8/11 [amendments] – response in 4th Report]***

On 17 August 2011 the House of Representatives agreed to 29 Government and three Independent (Mr Oakeshott) amendments, tabled a supplementary memorandum and passed the bill.

**Procedural fairness**
**Amendment (7), clause 62**

In the original Bill, the manager of an entity which is to be the subject of a report for poor performance is given an opportunity to respond, to allow 'contextual information to be provided which might vary an assessment of performance' (see the supplementary explanatory memorandum at page 4).

Item (7) of the amendments proposes to substitute a new section 62, which deals with reports. In short, this proposed provision requires that the Performance Authority give a State or Territory Health minister the opportunity to comment on a final draft of a report which may contain adverse comments on poor performance and requires that the comments provided be considered. Although subsection 62(6) requires that an affected LHN or public hospital be given a final draft report by the Performance Authority prior to completion, the amendments make it clear that 'the manager of the network or hospital is not entitled to give the Performance Authority any comments about the final draft'. Further, although subsection 62(7) states that the Performance authority may consult such persons and bodies it considers appropriate, subsection 62(8) states that, where a report indicates poor performance by a LHN or a public hospital, the Authority must not consult

and is ‘not otherwise obliged to observe any requirements of procedural fairness’ in relation to managers or employees of the relevant entity or in relation to ‘any other person who provides services’ in the relevant facility.

By its terms, this provision attempts to expressly exclude the operation of the ‘common law’ rules of procedural fairness. These rules are constraints implied into all statutory powers unless they are excluded with ‘unmistakeable clarity’. The supplementary explanatory memorandum confirms the exclusion of the rules of procedural fairness (i.e. natural justice): it states that subsection 62(8) is intended to remove ‘the obligation on the Performance Authority to provide natural justice directly to LHNs and public hospitals which are likely to be the subject of a report of poor performance’. Further, the supplementary explanatory memorandum states that this is necessary ‘given previous decision[s] of the High Court which would otherwise impose an obligation on the Performance Authority to provide procedural fairness regardless of whether the other provisions of the legislation attempted to limit the path of communications to that between the Performance Authority and state/territory ministers’ (see the supplementary explanatory memorandum at page 5).

The idea that persons who are directly affected by the exercise of executive power have a right to a fair hearing is considered to be a fundamental common law principle. It is therefore surprising that the explanatory memorandum says relatively little to justify the abrogation of this principle. The supplementary explanatory memorandum states at page 5 that the approach ‘reflects the lines of communication preferred by state and territory health ministers, and the role of those ministers as health system managers’. Further, that ‘it is expected that state and territory health ministers will organise matters within their own administrative arrangements to ensure appropriate flows of communication between LHNs, hospitals and the health minister in relation to potential reports of poor performance’ (supplementary explanatory memorandum at 5). However, to the extent that reports of poor performance may contain adverse comment on managers and employees of LHNs and hospitals, there is no guarantee that these persons will have the opportunity to be heard in relation to these matters. Clearly, such comments may have a significant impact on such a person’s reputation, an interest which the law of procedural fairness does protect.

Although the supplementary explanatory memorandum appears to suggest that these concerns will be dealt with through administrative arrangements put in place by State and territory Health Ministers, there is no guarantee that these arrangements will give affected persons procedural fairness. In addition, to the extent that State and Territory Ministers make decisions or take actions in relation to such matters, the Committee's understanding is that these decisions or actions are unlikely to be subject to judicial review (under State and Territory judicial review jurisdictions). The Committee therefore **seeks the Minister's further explanation about the appropriateness of this approach.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

The Committee expressed concern that the amended section will not afford managers and employees of Local Hospital Networks and hospitals procedural fairness in relation to adverse comments made by the National Health Performance Authority on those managers and employees as individuals.

The role of the National Health Performance Authority, as set out in proposed section 60, is to monitor and prepare reports on matters relating to the performance of Local Hospital Networks and hospitals as institutions. It will work within a Performance and Accountability Framework agreed by COAG setting out performance indicators at an institutional level.

The role of the National Health Performance Authority, as set out in proposed section 60, is to monitor and prepare reports on matters relating to the performance of Local Hospital Networks and hospitals as institutions. It will work within a Performance and Accountability Framework agreed by COAG setting out performance indicators at an institutional level.

In this context, there is no expectation that the Authority's reports will contain comments (adverse or otherwise) on individuals. Moreover, I believe the Authority would be acting outside its powers were it to attempt to include comments on individuals in its reports.

Against this background, I do not consider there is a need for the legislation to provide for the Authority to provide procedural fairness to individual managers or employees, as they will not be the subject of adverse findings by the Authority.

***Committee Response***

The Committee thanks the Minister for this response.

# Work Health and Safety Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The Committee dealt with the bill in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 12 September 2011. A copy of the letter is attached to this report.

## *Alert Digest No. 8 of 2011 - extract*

**Background**

This bill will implement the Model Work Health and Safety Bill within the Commonwealth jurisdiction and will form part of a system of nationally harmonised occupational health and safety (OHS) laws. The Bill will apply to businesses and undertakings conducted by the Commonwealth, public authorities, and, for a transitional period, non-Commonwealth licensees.

In February 2008, the Workplace Relations Ministers Council agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. The Commonwealth and each of the States and Territories subsequently signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS which commits jurisdictions to implement the model laws by December 2011.

**'Henry VIII' clause**
**Subclauses 12(7) and 12(8)**

The combined effect of subclause 12(7) and subclause 12(8) of the bill is to enable the making of regulations which relate to matters of a transitional, application or savings nature and these provisions may modify the operation of the primary legislation. As such, this item is a so-called Henry VIII clause, which is a provision which enables a regulation to amend primary legislation. This clearly involves a delegation of legislative power and can be of concern to the Committee.

The Committee is aware that in preparing new legislation it can be difficult to foresee all transitional issues, but is of the view that it is also important to ensure that provisions are not broader than necessary. It is regrettable that in this case the explanatory memorandum does not address the appropriateness of this delegation of legislative power.

The Committee therefore **seeks the Minister's advice as to the need for this provision and whether it would be appropriate for it to be limited to a particular period, such as six months from the commencement of the Act**.

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

## *Minister's response - extract*

**'Henry VIII' clause**
**Subclauses 12(7) and 12(8)**

These subclauses are intended to enable regulations to be made to facilitate the smooth transition of non-Commonwealth licensees out of the coverage of the Work Health and Safety Act (WHS Act) to the State and Territory jurisdictions. On 10 August 2011 the Workplace Relations Ministers' Council (WRMC) agreed that the transfer date of all non-Commonwealth licensees to state and territory jurisdictions would be 1 January 2013. The transfer of coverage will be contingent on the implementation of harmonised work health and safety laws in all jurisdictions.

The Government is committed to ensuring that the transition for non-Commonwealth licensees and their workers is efficient and well planned. Consultation with the licensees, state and territory WHS regulators and unions regarding the proposed transfer is ongoing and it would therefore be inappropriate to limit the period of operation of the transitional regulation making power. However, I would be prepared to remove these provisions after the transfer.

### *Committee Response*

The Committee thanks the Minister for this response, notes the explanation provided and thanks the Minister for being willing to remove the provisions after the transition to which they are intended to apply has taken place. The Committee **requests that the key aspects of this information are included in the explanatory memorandum**.

## *Alert Digest No. 8 of 2011 - extract*

**Possible inappropriate delegation of legislative power**
**Subclause 12C(1) and subclause 12D**

Subclause 12C(1) of the bill provides that nothing in the Act requires or permits action or inaction that would be, or could reasonably be expected to be, prejudicial to Australia's national security. Subclause 12C(2) states that the Director-General of Security may declare that specified provisions of the Act do not apply or apply in a modified way in relation to work a person is carrying out for the Director-General. This amounts to a delegation of legislative power. Although any declaration must be approved by the Minister, and can only be made if the objects of the Act have been considered, the provision confers a broad discretionary power on an administrator that, in effect, enables them to modify the operation of statutory requirements. Clause 12D has a similar operation in relation possible action or inaction under the Act which may be prejudicial to Australia's defence. As the explanatory memorandum merely repeats the effect of these provisions the Committee **seeks the Minister's advice as to the justification for the proposed approach**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## *Minister's response - extract*

**Possible inappropriate delegation of legislative power**
**Subclause 12C(1) and subclause 12D**

Subclauses 12C(1) and 12D(1) are general statements of the principle that the WHS Act is not intended to prejudice Australia's defence or national security. However, the Chief of the Defence Force or the Director-General may consider it necessary to modify the operation of the law to provide an alternative method for protecting the health and safety of workers by making a declaration, having regard to the object of the Act and Australia's defence and national security interests.

These subclauses replicate subsections 6(2) and 7(2) of the *Occupational Health and Safety Act 1991* (the OHS Act) subject to the following change. The agreement of the Minister will be required before the Director-General of Security or Chief of the Defence

Force can make a declaration to disapply specified provisions of the WHS Act. Under the current provisions of the OHS Act, the Minister need only be consulted. The new provision will ensure a higher degree of accountability when making the declarations.

While the provisions have been a long standing feature of the Commonwealth's occupational health and safety laws, I am aware of only two occasions on which the Chief of the Defence Force has disapplied specified provisions of the WHS Act to members of the Australian Defence Force (ADF). The health and safety representation requirements in the OHS Act do not apply to members of the ADF, and the notification requirements for accidents and dangerous occurrences do not apply to ADF deployments and organised sporting activities.

***Committee Response***

The Committee thanks the Minister for this response.

## *Alert Digest No. 8 of 2011 - extract*

**Legislative instrument**
**Subsection 12D(2) and subclause 273B(2) and others**

A concern with these provisions is that although subclause 273B(1) requires a declaration under subsection 12D(2) (Australia's defence) to be made by legislative instrument, subclause 273B(2) provides that a declaration made pursuant to subsection 12C(2) (national security) is not a legislative instrument. Confusingly, the explanatory memorandum at page 93 states that subclause 73B(1), which lists what will be legislative instruments, includes both declarations 'relating to national security and defence'. The bill, however, clearly provides that the two classes of declarations are to be treated differently.

More generally, it can be noted that it is regrettable that the explanatory memorandum is not clear as to whether the instruments listed in subclause 273B(2) of the bill, i.e. instruments which are 'not legislative instruments' are considered to be declaratory of the scope of the *Legislative Instruments Act* or, on the contrary, are considered to be substantive exceptions to its requirements.

The Committee **seeks the Minister's advice as to whether instruments made under subsection 12D(2) and subclause 273B(2) are legislative instruments, and generally as to whether instruments which are stated to not be legislative instruments do not fall**

**within the scope of the Legislative Instruments Act or are being exempted from its operation.**

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

## *Minister's response - extract*

**Legislative instrument**
**Subsection 12D(2) and subclause 2738(2) and others**

I confirm that declarations made under sub clauses 120(2) (Australia's Defence) and 12C(2) (national security) are treated differently. A declaration made by the Chief of the Defence Force under subclause 120(2) is a legislative instrument, while a declaration made by the Director-General of Security is not. In this regard the explanatory memorandum to the Bill is incorrect. The Attorney-General agreed to exempt clause 12(C) declarations from the *Legislative Instruments Act 2003* on the basis that the requirement to register such declaration, and make it subject to disallowance, could have national security implications as they would potentially disclose security operations.

With the exception of declarations made under subclause 120(2), all of the instruments listed in subclause 273B(2) as 'not legislative instruments' fall outside of the scope of the *Legislative Instruments Act 2003*, and as a result the list is declaratory of the law.

### *Committee Response*

The Committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. The Committee requests that the explanatory memorandum is amended to reflect the key aspects of the information provided.**

## *Alert Digest No. 8 of 2011 - extract*

**Reversal of onus**
**Clause 110**

Clause 110 of the bill clarifies the way that the onus of proof operates in criminal proceedings for discriminatory conduct, which is prohibited by clause 104. Once the prosecution has adduced evidence that the discriminatory conduct was engaged in for a prohibited reason, it is for the defendant to establish, on the balance of probabilities that the prohibited reason was not the dominant reason for the discriminatory conduct. The burden of proof is a legal burden, which means that the accused must prove the existence of the matter, i.e. that the prohibited reason was not the dominant reason for the impugned conduct. The explanation of this approach given at page 47 of the explanatory memorandum is that:

> [I]t will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason. The fact that it will be easier for the accused to prove on the balance of probabilities that the prohibited reason was not the dominant reason means that they will not be unfairly treated.

Given the importance of the principle that the presumption of innocence, the Committee usually comments on any bill which reverses the onus of proof. Consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, at page 29, the mere fact that it will be difficult for the prosecution to prove a particular matter is normally not thought to be sufficient justification. Given that this provision imposes a legal burden of proof (rather than an evidential burden), the Committee **seeks the Minister's further advice as to a fuller explanation of the proposed approach.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

The offence of engaging in discriminatory conduct in clause 104 of the Bill is integral to the operation of Part 6, which seeks to protect individuals who act to improve safety in the workplace.

Clause 110 clarifies the way that the onus of proof operates in relation to the offence. As the Committee notes, once the prosecution has adduced evidence that the discriminatory conduct was engaged in for a prohibited reason, it is for the defendant to establish, on the balance of probabilities that the alleged reason was not the dominant reason for the discriminatory conduct. The defendant bears a legal burden of proof, which means that the accused must prove that the prohibited reason was not the dominant reason for the conduct.

The proposed approach is considered appropriate as the burden in clause 110 only applies if the prosecution is first able to prove beyond reasonable doubt that:

- discriminatory conduct was engaged in (for example, a person was dismissed);
- the existence of one of the circumstances in clause 106(a)-(j) (for example, that the person had made a complaint about health and safety); and
- adduces evidence that the conduct was engaged because of the reason alleged (for example, the dominant reason for the dismissal was the fact that the person had made a complaint about health and safety).

The intention of the person who engages in alleged discriminatory conduct will be known to that person. As there may be many reasons why conduct that subjects another person to detriment may occur it will be extremely difficult, if not impossible, for a prosecutor to prove the dominant reason for the conduct. It is comparably easy for the defendant to establish that the conduct was engaged in for another reason and that the reason alleged by the prosecution was not the dominant reason. There is accordingly not considered to be any unfairness in requiring them to do so.

To achieve the objectives of Part 6, the offence in clause 104 must be capable of effective enforcement, and it is considered appropriate to impose a legal burden of proof on the defendant to prove that the alleged reason for the discriminatory conduct was not the dominant reason for the conduct.

***Committee Response***

The Committee thanks the Minister for this response and **requests that the key aspects of the information provided is included in the explanatory memorandum.**

## *Alert Digest No. 8 of 2011 - extract*

**Incorporating material by reference**
**Sections 274 and 76**

The bill provides that codes of practice which may be approved under the proposed section 274, and which are legislative instruments, may apply, adopt or incorporate material from other instruments as in force from time to time. The provision thus raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. Although the incorporation of instruments into regulations 'from time to time' may be justified in certain circumstances, it is unfortunate that the explanatory memorandum merely repeats the effect of these provisions without any explanation or justification of why this is considered an appropriate delegation of power in this instance. It is regrettable that the explanatory memorandum does not explain the reason for the proposed approach.

The same issue arises in relation to the general regulation making power set out in clause 76 of the bill, again without explanation.

**The Committee therefore seeks the Minister's advice about the justification for the proposed approach in these provisions and whether it is likely that any material to be incorporated 'from time to time' will be readily available, involve a cost or be restricted by copyright.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## *Minister's response - extract*

**Incorporating material by reference**

I note the Committee's concerns that regulations and codes of practice made under WHS Bill can incorporate material from other instruments as in force from time to time. However, for the reasons set out below, I consider the Committee's concerns are unjustified.

The regulations and codes of practice will adopt technical material, such as Australian Standards and other published documents that set out detailed specifications, exposure standards and guidance on safe ways of undertaking particular types of work. This material is subject to regular revision as risk management practices evolve over time. Moreover, this material will be specific to particular industries and undertakings, for example, the storage of hazardous chemicals, and should be well known to duty holders in those industries and undertakings. It is incumbent upon duty holders to have regard to the most up to date information and best practice and that this detailed technical material should be read in conjunction with the applicable legislation.

Australian Standards may be purchased at a cost and are subject to copyright, while other documents incorporated by the draft WHS Regulations are freely available online. While a cost may be incurred by businesses and undertakings that engage in activities to which the Australian Standards apply, the cost is considered minimal given the overall budgets of Commonwealth departments, Commonwealth public authorities and non-Commonwealth licensees.

***Committee Response***

The Committee thanks the Minister for this response and **requests that the key aspects of the information provided is included in the explanatory memorandum.**

## *Alert Digest No. 8 of 2011 - extract*

**Drafting error**

*Note*: there is a typo in the Note to subclause 274(3) of the bill. It incorrectly refers to section 275B(1); the reference should be to section 273B(1).

## *Minister's response - extract*

**Drafting error**

Finally, I thank the Committee for drawing attention to the typographical error in the Note to subclause 274(3) and have undertaken to have it corrected before the Bill is referred to the Senate for consideration and debate.

***Committee Response***

The Committee thanks the Minister for this response.

Senator Mitch Fifield
Chair

Parliament of Australia
The Senate

# Senator Larissa Waters

Australian Greens Senator for Queensland

Senator Mitch Fifield
Committee Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

21 September 2011

Dear Senator Fifield

**Landholders' Right to Refuse (Coal Seam Gas) Bill 2011**

I write in response to the issue raised by the Standing Committee for the Scrutiny of Bills with subclause 12(2) of my proposed bill, the *Landholders' Right to Refuse (Coal Seam Gas) Bill 2011*, as outlined in the Committee's Alert Digest of 14 September 2011 (No.10 of 2011).

Subclause 12(2) of the Bill applies where an action has been brought under the Act by a person with an ownership interest in food producing land. In such cases subclause 12(2) requires that a court must order that all costs incurred by that person are to be paid by the defendant, unless the proceedings were instituted vexatiously or without reasonable cause, or where the court considers is unreasonable in all the circumstances to do so.

This clause has been inserted to ensure that the rights of landholders provided by the Bill are actually able to be exercised. Landholders need the assurance that, in the face of their way of life being threatened by encroachment from coal seam gas operations, they can seek to have their legitimate concerns heard before a court, without the risk of having potentially substantial court costs awarded against them. I consider this subclause is justified in the interest of ensuring genuine access to justice and allow the intent of the bill to be realised. Further, a court is still able to exercise its discretion in awarding costs against a plaintiff where an action is considered vexatious, without reasonable cause, or otherwise unreasonable in all the circumstances.

Finally, regarding the Committee's purview to assess any trespass on personal rights and liberties under Standing Order 24(1)(a)(i), I note that Subclause 12(2) of my Bill would only ever apply to constitutional corporations, in defence of the personal rights and liberties of landholders.

Yours sincerely

Senator Larissa Waters
Greens Senator for Queensland

GPO Box 228, Brisbane QLD 4001
Telephone: (07) 3001 8120
Facsimile: (07) 3001 8128

Parliament House, CANBERRA ACT 2600
Telephone: (02) 6277 3580
Facsimile: (02) 6277 5988

# THE HON NICOLA ROXON MP
# MINISTER FOR HEALTH AND AGEING




Senator Mitch Fifield
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Fifield Mitch

I am writing in relation to the Scrutiny of Bills Committee's Alert Digest No 9, which drew attention to an amendment to the National Health Reform Amendment (National Health Performance Authority) Bill 2011 to re-cast the proposed new section 62.

The Committee expressed concern that the amended section will not afford managers and employees of Local Hospital Networks and hospitals procedural fairness in relation to adverse comments made by the National Health Performance Authority on those managers and employees as individuals.

The role of the National Health Performance Authority, as set out in proposed section 60, is to monitor and prepare reports on matters relating to the performance of Local Hospital Networks and hospitals as institutions. It will work within a Performance and Accountability Framework agreed by COAG setting out performance indicators at an institutional level.

In this context, there is no expectation that the Authority's reports will contain comments (adverse or otherwise) on individuals. Moreover, I believe the Authority would be acting outside its powers were it to attempt to include comments on individuals in its reports.

Against this background, I do not consider there is a need for the legislation to provide for the Authority to provide procedural fairness to individual managers or employees, as they will not be the subject of adverse findings by the Authority.

Yours sincerely

**NICOLA ROXON**

14 SEP 2011

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7220 Facsimile: (02) 6273 4146

**Senator Chris Evans**
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the Committee's *Alert Digest No 8 of 2011*, and in particular its comments on the Work Health and Safety Bill 2011.

Attached is a response to the issues raised by the Committee.

I thank the Committee for the opportunity to respond.

Yours sincerely

CHRIS EVANS
12/9/11


Parliament House Canberra ACT 2600 Telephone (02) 6277 7320 Fax (02) 6273 4115

## RESPONSE TO ALERT DIGEST NO 8/11- Work Health and Safety Bill 2011

### 'Henry VIII' clause
### Subclauses 12(7) and 12(8)

These subclauses are intended to enable regulations to be made to facilitate the smooth transition of non-Commonwealth licensees out of the coverage of the Work Health and Safety Act (WHS Act) to the State and Territory jurisdictions. On 10 August 2011 the Workplace Relations Ministers' Council (WRMC) agreed that the transfer date of all non-Commonwealth licensees to state and territory jurisdictions would be 1 January 2013. The transfer of coverage will be contingent on the implementation of harmonised work health and safety laws in all jurisdictions.

The Government is committed to ensuring that the transition for non-Commonwealth licensees and their workers is efficient and well planned. Consultation with the licensees, state and territory WHS regulators and unions regarding the proposed transfer is ongoing and it would therefore be inappropriate to limit the period of operation of the transitional regulation making power. However, I would be prepared to remove these provisions after the transfer.

### Possible inappropriate delegation of legislative power
### Subclause 12C(1) and subclause 12D

Subclauses 12C(1) and 12D(1) are general statements of the principle that the WHS Act is not intended to prejudice Australia's defence or national security. However, the Chief of the Defence Force or the Director-General may consider it necessary to modify the operation of the law to provide an alternative method for protecting the health and safety of workers by making a declaration, having regard to the object of the Act and Australia's defence and national security interests.

These subclauses replicate subsections 6(2) and 7(2) of the *Occupational Health and Safety Act 1991* (the OHS Act) subject to the following change. The agreement of the Minister will be required before the Director-General of Security or Chief of the Defence Force can make a declaration to disapply specified provisions of the WHS Act. Under the current provisions of the OHS Act, the Minister need only be consulted. The new provision will ensure a higher degree of accountability when making the declarations.

While the provisions have been a long standing feature of the Commonwealth's occupational health and safety laws, I am aware of only two occasions on which the Chief of the Defence Force has disapplied specified provisions of the WHS Act to members of the Australian Defence Force (ADF). The health and safety representation requirements in the OHS Act do not apply to members of the ADF, and the notification requirements for accidents and dangerous occurrences do not apply to ADF deployments and organised sporting activities.

**Legislative instrument**
**Subsection 12D(2) and subclause 273B(2) and others**

I confirm that declarations made under sub clauses 12D(2) (Australia's Defence) and 12C(2) (national security) are treated differently. A declaration made by the Chief of the Defence Force under subclause 12D(2) is a legislative instrument, while a declaration made by the Director-General of Security is not. In this regard the explanatory memorandum to the Bill is incorrect. The Attorney-General agreed to exempt clause 12(C) declarations from the *Legislative Instruments Act 2003* on the basis that the requirement to register such declaration, and make it subject to disallowance, could have national security implications as they would potentially disclose security operations.

With the exception of declarations made under subclause 12D(2), all of the instruments listed in subclause 273B(2) as 'not legislative instruments' fall outside of the scope of the *Legislative Instruments Act 2003*, and as a result the list is declaratory of the law.

**Reversal of onus**
**Clause 110**

The offence of engaging in discriminatory conduct in clause 104 of the Bill is integral to the operation of Part 6, which seeks to protect individuals who act to improve safety in the workplace.

Clause 110 clarifies the way that the onus of proof operates in relation to the offence. As the Committee notes, once the prosecution has adduced evidence that the discriminatory conduct was engaged in for a prohibited reason, it is for the defendant to establish, on the balance of probabilities that the alleged reason was not the dominant reason for the discriminatory conduct. The defendant bears a legal burden of proof, which means that the accused must prove that the prohibited reason was not the dominant reason for the conduct.

The proposed approach is considered appropriate as the burden in clause 110 only applies if the prosecution is first able to prove beyond reasonable doubt that:

- discriminatory conduct was engaged in (for example, a person was dismissed);
- the existence of one of the circumstances in clause 106(a)-(j) (for example, that the person had made a complaint about health and safety); and
- adduces evidence that the conduct was engaged because of the reason alleged (for example, the dominant reason for the dismissal was the fact that the person had made a complaint about health and safety).

The intention of the person who engages in alleged discriminatory conduct will be known to that person. As there may be many reasons why conduct that subjects another person to detriment may occur it will be extremely difficult, if not impossible, for a prosecutor to prove the dominant reason for the conduct. It is comparably easy for the defendant to establish that the conduct was engaged in for another reason and that the reason alleged by the prosecution was not the dominant reason. There is accordingly not considered to be any unfairness in requiring them to do so.

To achieve the objectives of Part 6, the offence in clause 104 must be capable of effective enforcement, and it is considered appropriate to impose a legal burden of proof on the defendant to prove that the alleged reason for the discriminatory conduct was not the dominant reason for the conduct.

**Incorporating material by reference**

I note the Committee's concerns that regulations and codes of practice made under WHS Bill can incorporate material from other instruments as in force from time to time. However, for the reasons set out below, I consider the Committee's concerns are unjustified.

The regulations and codes of practice will adopt technical material, such as Australian Standards and other published documents that set out detailed specifications, exposure standards and guidance on safe ways of undertaking particular types of work. This material is subject to regular revision as risk management practices evolve over time. Moreover, this material will be specific to particular industries and undertakings, for example, the storage of hazardous chemicals, and should be well known to duty holders in those industries and undertakings. It is incumbent upon duty holders to have regard to the most up to date information and best practice and that this detailed technical material should be read in conjunction with the applicable legislation.

Australian Standards may be purchased at a cost and are subject to copyright, while other documents incorporated by the draft WHS Regulations are freely available online. While a cost may be incurred by businesses and undertakings that engage in activities to which the Australian Standards apply, the cost is considered minimal given the overall budgets of Commonwealth departments, Commonwealth public authorities and non-Commonwealth licensees.

**Drafting error**

Finally, I thank the Committee for drawing attention to the typographical error in the Note to subclause 274(3) and have undertaken to have it corrected before the Bill is referred to the Senate for consideration and debate.