
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## FOURTH REPORT

## OF

## 2012

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## 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

## FOURTH REPORT OF 2012

The Committee presents its Fourth Report of 2012 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:

# Family Assistance and Other Legislation Amendment Bill 2012

Introduced into the House of Representatives on 15 February 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 2 of 2012*. The Minister responded to the Committee's comments in a letter dated on 14 March 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 2 of 2012 - extract*

**Background**

This bill amends the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to:

- make payment of the family tax benefit Part A supplement conditional on a child meeting the immunisation requirements. This will apply to the income years in which the child turns one, two and five. As a consequence, maternity immunisation allowance will cease from 1 July 2012;

- pause the indexation of baby bonus for three years from 1 July 2012, and resets the amount of the baby bonus to $5,000 per child from 1 September 2012;

- prevent an individual (and partner, if any) from 1 July 2012 from being entitled to family tax benefit Part A and/or Part B as fortnightly instalments on the basis of estimated income where the individual had no actual entitlement after underestimating their income for two consecutive years, starting from 2009-10;

- provide certain carer allowance recipients, who care for a disabled adult, access to bereavement payments on the death of the care receiver;

- allow access to a carer supplement for those carers whose rate of payment is reduced to nil because of income where they or their partner worked in the fortnight covering 1 July in any given year; and

- make minor and technical amendments to clarify provisions in the family assistance law.

**Retrospective application**
**Schedule 6, item 11**

Item 11 of Schedule 6 proposes to make an amendment that will result in 'an absent overseas FTB (Family Tax Benefit) child being disregarded in working out whether an individual's rate of FTB includes the FTB Part B supplement' (see the explanatory memorandum at page 26). The explanatory memorandum comments that this 'corrects a longstanding error in the *Family Assistance Act*' (at 26).

The difficulty with this amendment from a scrutiny perspective is that it commences retrospectively from 1 January 2005 (see clause 2 of the bill), which is the date that the FTB Part B supplement commenced under the *Family Assistance Act*. The explanatory memorandum states at page 26 that the 'correction reflects the current administration of the policy and will therefore not have any actual adverse effect on individuals'.

However, the explanatory memorandum does not address whether the current administration of the policy is consistent with the existing requirements of the legislation. If the current administration of FTB policy is not consistent with legislative entitlements, then in the Committee's view, the justification provided for a retrospective change to the FTB entitlements should be more detailed. **The Committee therefore seeks the Minister's clarification as to whether the current administrative of the policy is consistent with the current legislation.**

> *Pending the Minister's response, 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 Senate Standing Committee for the Scrutiny of Bills commented on item 11 of Schedule 6 of the Bill. This item amends the table in subsection 63(4) of the *A New Tax System (Family Assistance) Act 1999* to give effect to the policy not to pay the FTB Part B supplement to individuals whose relevant FTB child is absent from Australia for more than 13 weeks. Since 2005, the administration of FTB has been not to pay FTB Part B for the child, including the supplement, after the child has been absent for more than 13 weeks.

Under the existing legislation an individual is not entitled to the standard rate of FTB Part B for the child after the child has been absent for more than 13 weeks. However, under the current legislation, they may have been entitled to the FTB B supplement. Given that the supplement is part of the FTB Part B rate, this would produce an anomalous outcome which was never the intended policy. The administration has reflected the policy since 2005 because it had assumed the legislation supported the policy. When my

Department became aware of the error in the legislation, it took steps to seek a prompt amendment of the legislation.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

***Committee Response***

The Committee thanks the Minister for her reply and notes the information provided. In general the Committee is of the view that a sound justification is needed to support the retrospective denial of a benefit beyond the prevention of an anomaly. In the Committee's view persons affected by legislation should normally be able to rely on it as enacted. **In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

# Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Treasury

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 14 of 2011*. The Treasurer responded to the Committee's comments in a letter dated on 14 March 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill is part of a package of five bills relating to the imposition of the minerals resource rent tax.

The bill amends a range of acts and also provides for transitional matters relating to the enactment of the Minerals Resource Rent Tax.

**Retrospective effect**
**Schedule 4, items 1 and 11**

Item 1 of Schedule 4 of this bill states that the 'MRRT law extends to matters and things whether occurring before or after 1 July 2012 (except where a contrary intention appears)'. Although this application provision is general, the only (brief) reference in the explanatory memorandum to it refers specifically to the general anti-avoidance rule (in Division 210 of the Mineral Resource Rent Tax Bill). The explanatory memorandum states at page 334 that this general anti-avoidance rule—which applies if an entity gets an MRRT benefit from a scheme and the sole or dominant purpose of that entity or another party to the scheme was to achieve that MRRT benefit—applies to schemes entered into on or after 2 May 2010, the date the MRRT was announced. The provision is framed in general terms (ie is not limited to the anti-avoidance rule) and the appropriateness of treating the anti-avoidance rule as being applicable from the date of the announcement of the MRRT is not explained in the explanatory memorandum.

In addition, item 11 of Schedule 4 provides that the general anti-avoidance rule also applies to a scheme entered into before 2 May 2010, but the explanatory memorandum

merely repeats the effect of the provision and does not provide reasons for the proposed approach.

In the circumstances the Committee **seeks the Treasurer's fuller explanation of the justification for the approach proposed in these items.**

> *Pending the Treasurer'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.*

## *Treasurer's response - extract*

The Bill does not introduce any retrospective tax liabilities and outside of the anti-avoidance provisions. There is no impact that could be reasonably perceived as being retrospective and detrimental to taxpayers.

The Minerals Resource Rent Tax (MRRT) applies to profits after 1 July 2012. A starting base is provided as a tax shield for investment before the MRRT commenced. This benefits taxpayers as it provides an extra deduction in recognition of existing investment. Determining the starting base requires consideration of the values of assets and expenditures that existed or were incurred prior to the MRRT commencement. Taxpayers are able to utilise historical information when calculating their starting base allowances (it may involve a valuation as at the announcement date and the addition of further expenditure between that date and 1 July 2012).

The effect of item 1 is intended to make it permissible to calculate a miner's historical valuation and expenditure to calculate relevant allowances and it hence works to a miner's advantage.

Retrospectivity is introduced to ensure the effective operation of the Bill's anti-avoidance provisions. The implementation of anti-avoidance measures in the Bill is both logical and justified. The implementation of the general anti-avoidance rule from 2 May 2010 ensures that miners who enter into tax structuring arrangements or schemes to minimise future MRRT (or other foreign or Australian tax) following the government announcement do not benefit from their tax avoidance behaviour.

Similarly, as the MRRT is a profits based tax, avoidance schemes designed to reduce tax under the income tax law may also be effective in avoiding MRRT liabilities. It would not be appropriate to allow such schemes based upon the time at which entities had entered into them. The application of schedule 4, item 11 prior to 2 May 2010 ensures that, where a

tax avoidance scheme was entered into prior to the announcement of the MRRT the anti-avoidance provisions still apply.

The approach taken is aligned with the Government's intention to have fair and robust tax legislation which cannot be avoided through artificial and contrived tax avoidance arrangements.

***Committee Response***

The Committee thanks the Treasurer for his detailed reply and notes the Treasurer's advice as to the justification for the proposed approach, including the beneficial effect to miners from the use of historical information. However, the Committee remains concerned about the use of retrospective legislation which causes a detriment to any person. The Committee notes that this legislation has been passed by the Parliament.

# Personally Controlled Electronic Health Records Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Health and Ageing

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Minister responded to the Committee's comments in a letter dated on 7 March 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 1 of 2012 - extract*

**Background**

This bill establishes the national personally controlled electronic health record system ('PCEHR system') and provides its regulatory framework, including an entity that will be responsible for the operation of the PCEHR system.

The bill also implements a privacy regime specific to the PCEHR system which will generally operate concurrently with Commonwealth, state and territory privacy laws.

**Wide discretion**
**Clause 20**

Clause 20 of the Bill gives the Commonwealth Minister and the head of the Health Department of a State or Territory the discretion to terminate the appointment of a member who represents their interests on the 'jurisdictional advisory committee'. The explanatory memorandum at page 17 repeats the effect of the clause and notes that the Bill does not prescribe 'any criteria' on which such decisions should be made. Given the width of this discretionary power and the clear affect it may have on the interests of an affected individual—although it is not envisaged that members of the committee will be remunerated (clause 22), the regulations may provide for remuneration and termination of appointment may affect reputational interests. **Therefore**, **the Committee seeks the Minister's advice as to why such a broad discretionary power is justified in the circumstances. The advice and recommendations given by the jurisdictional advisory committee are not binding on the System Operator in performing functions under the Act and it is not clear why, in these circumstances, such a broad discretionary power is warranted.**

## *Minister's response - extract*

Under clause 19 of the PCEHR Bill, the Minister and heads of state and territory Health Departments will each appoint a member to the JAC. As the Explanatory Memorandum to the PCEHR Bill notes (page 16), the appointment of members by the Commonwealth and states and territories ensures jurisdictional representation on the JAC, so that states and territories have a voice in relation to the PCEHR system including in relation to how the System Operator performs its functions. Under clause 16 of the PCEHR Bill, the System Operator must have regard to the advice and recommendations (if any) given by the JAC (and the Independent Advisory Council).

The Explanatory Memorandum to the PCEHR Bill notes (page 17) that it is highly likely that appointees to the JAC will be Commonwealth, state and territory government employees, and that they will continue to receive a salary while on the JAC. The ability for the Regulations to prescribe remuneration for JAC members was included so that, in a situation where a JAC member was a part-time government employee and meetings fell on their nonworking days, there was a mechanism to remunerate the member if considered appropriate.

It is envisaged that members of the JAC will be relatively senior members of the Commonwealth, state and territory public services given the need for them to represent the interests of the various jurisdictions.

It is important that the Commonwealth, the states and the territories each retain the ability to have an effective voice on the JAC and that if, for whatever reason, they wish to change their representative, they are able to do so quickly.

The circumstances where this may occur include, for example, where there is a change in personnel within a jurisdiction or the duties of a particular person change such that a change in jurisdictional representative is required.

For these reasons, I consider that the broad discretion in clause 20 of the PCEHR Bill is warranted in the circumstances.

***Committee Response***

The Committee thanks the Minister for this detailed response, notes the arguments made and **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

## *Alert Digest No. 1 of 2012 - extract*

**Penalties**
**Clause 78**

Clause 78 provides that a person who is, or has at any time been, a registered repository operator or a registered portal operator, is subject to an civil penalty of 80 penalty units if they contravene a PCEHR Rule that applies to them. This sort of penalty provision, which applies a single penalty to a number of as yet unspecified obligations should be avoided. Such provisions make it difficult for the relevant penalty to be identified and fail to differentiate between more and less serious obligations. As the committee generally takes the view that penalties of more than 50 penalty units required a sound justification if they are in subordinate legislation, **the Committee seeks the Minister's advice as to the justification for the 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 PCEHR Bill permits the Minister for Health to make PCEHR Rules which will be legislative instruments and subject to disallowance. PCEHR Rules may relate to a range of matters, including access controls of consumers and registration of entities wishing to participate in the PCEHR system. The Rules will allow flexible and fast responses to evolving technologies and security risks, and may contain different obligations for different participants in the PCEHR system. Before making PCEHR Rules, the Minister must consult with the JAC.

The PCEHR Rules may in the future contain important, but detailed, technical and security obligations with which participants in the PCEHR system must comply. Failure to comply with obligations in the PCEHR Rules may adversely affect the security or integrity of the PCEHR system. Due to the potentially technical nature of the Rules, it would not be desirable to include significant detail in a statute, as the PCEHR Rules may need to be changed frequently, sometimes at short notice, in response to emerging issues.

While all participants in the PCEHR system will be required to comply with applicable PCEHR Rules, the Bill provides that only registered repository operators and registered portal operators will be subject to a penalty for contravention. Repository operators and portal operators could be large commercial or government organisations, and will play a critical role as holders of consumers' health information and gateways for access to that information respectively. The level of penalty in the PCEHR Rules needs to be sufficient to provide a credible deterrent against non-compliance by these classes of participant. For participants other than registered repository operators and registered portal operators, remedies other than civil penalties are available should there be a contravention of a PCEHR Rule including seeking injunctions, accepting an enforceable undertaking or seeking to suspend, vary or cancel the participant's registration.

With respect to differentiating between more and less serious obligations, it is also worth noting that clause 78, as with all the other civil penalty provisions in the PCEHR Bill, sets a maximum civil penalty amount. In the case of clause 78, the maximum is 80 penalty units (for individuals). However, courts are able to exercise discretion and could impose a civil penalty below the maximum 80 penalty units.

The level of the civil penalty is appropriate given the importance of ensuring that registered repository operators and registered portal operators (being crucial participants in the PCEHR system) comply with their obligations under the PCEHR Rules, including the protection of personal information.

***Committee Response***

The Committee thanks the Minister for this detailed response and notes the justification for the proposed approach. **The Committee requests that the key points above be included in the explanatory memorandum.**

## *Alert Digest No. 1 of 2012 - extract*

**Delegation of legislative power**
**Paragraph 98(1)(c)**

Paragraph 98(1)(c) of the Bill enables the Systems Operator to delegate one or more of his or her functions and powers to 'any…person with the consent of the Minister'. This power supplements the power to delegate to APS employees in the Department and to the Chief Executive of Medicare. The explanatory memorandum justifies the need to delegate on grounds of administrative necessity but does not indicate why the power to delegate must

be framed so broadly. The committee prefers that delegates be confined to the holders of nominated offices, persons with particular qualifications or experience, or to members of the SES. The committee therefore **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*

The ability for a person or entity to delegate their statutory functions to 'any person' does exist in a number of Commonwealth Acts, for example, see section 53 of the *Australian Citizenship Act 2007* and section 41 of the *Australian Centre* for *International Agricultural Research Act 1982*.

In preparing the legislation, consideration was given to the appropriate scope of power for the System Operator to delegate. It is anticipated that in the vast majority of cases, any delegation from the System Operator will be restricted to the classes of persons specified in paragraphs 98(1)(a) and (b) - that is, to an APS employee of the Department or the Chief Executive Medicare.

However, as the PCEHR system is a new and relatively complex system, and not all the processes necessary for the operation of the system have been finalised, it was considered necessary to ensure the System Operator had the flexibility to delegate to other classes of people if this was considered desirable, subject to appropriate safeguards. For example, consideration is still being given to a form of 'facilitated registration' (e.g. patient may wish for their doctor to register them) for consumers and, as part of such a process, it may be desirable to delegate certain of the System Operator's powers and functions to persons other than APS employees or the Chief Executive Medicare. It was for this reason that paragraph 98(1)(c) of the PCEHR Bill permits the System Operator to delegate his or her functions and powers to any other person with the consent of the Minister.

It was recognised that a wide power of delegation, such as that in paragraph 98(1)(c), needs to be subject to appropriate safeguards. For this reason, the PCEHR Bill provides that:

- delegation to a person other than an APS employee or the Chief Executive Medicare can only be 'with the consent of the Minister' - paragraph 98(1)(c);

- the critical System Operator function of advising the Minister (paragraph 15(1)) cannot be delegated - subclause 98(2); and

- a delegate must comply with any written directions of the System Operator subclause 98(5).

Given the nature of the PCEHR system, and these safeguards, I consider that it is appropriate that the System Operator have the ability to delegate his or her powers and functions in accordance with paragraph 98(1)(c) of the PCEHR Bill.

***Committee Response***

The Committee thanks the Minister for her detailed response and notes the justification provided. **However**, t**he Committee remains concerned about broad delegations to 'any person'. The Committee requests that the key points above be included in the explanatory memorandum, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

## *Alert Digest No. 1 of 2012 - extract*

**Delegation of legislative power**
**Clause 112**

Clause 112 provides that the regulations can prescribe penalties for offences and civil penalties for contraventions of the regulations. Although the maximum limit of penalties that may be set is consistent with the limits in the *Guide to Framing Commonwealth Offences* (not more than 50 penalty units for a criminal offence) the Committee is of the view that it is appropriate to include the details of offences in primary legislation unless a persuasive justification for the use of subordinate legislation exists. In this instance the explanatory memorandum merely repeats the effect of the provisions. **The committee therefore seeks the Minister's advice as to the rationale 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*

Allowing the Regulations to prescribe offences and civil penalties for a contravention of the Regulations is intended to enable varying circumstances to be treated differently as appropriate and provide flexibility in dealing with different situations. The approach of permitting offences to be detailed in subordinate legislation is consistent with that taken under the *Healthcare Identifiers Act 2010* (HI Act) and the Healthcare Identifiers Regulations 2010 (HI Regulations). The HI Act and HI Regulations are an essential building block for the PCEHR system, permitting the accurate and timely identification of consumers and healthcare providers, and consumers and healthcare provider participants in the PCEHR system will all require healthcare identifiers. It is important that the PCEHR Bill contains the same flexibility as exists under the HI Act to prescribe offences in the Regulations.

Similar to the regime that applies under the HI Act, any offences prescribed in Regulations would be subject to disallowance and the maximum penalty would be restricted to 50 penalty units.

Thank you for this opportunity to respond to the issues raised by the Committee for the Scrutiny of Bills.

***Committee Response***

The Committee thanks the Minister for this detailed response and notes the justification for the proposed approach. **The Committee requests that the key points above be included in the explanatory memorandum.**

# Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Minister responded to the Committee's comments in a letter received on 21 March 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 1 of 2012 - extract*

**Background**

This bill amends the *Administrative Decisions (Judicial Review) Act 1977* to make a consequential amendment and enable transitional arrangements.

**Merits review**
**Item 1**

Item 1 of the Bill has the effect of excluding decisions made under the *Road Safety Remuneration Act 2011* from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. This is achieved by listing the *Road Safety Remuneration Act* in Schedule 1 of the ADJR Act.

The explanatory memorandum notes at page 2 that decisions made under the *Fair Work Act* and related legislation are also excluded from ADJR Act review in this way. Further, it is said that Decisions of the Road Safety Remuneration Tribunal and the Fair Work Ombudsman 'will, however, be subject to judicial review by means of prerogative writ'. In other words there is an alternative source of judicial review jurisdiction for the review of such decisions, namely, section 39B(1) of the *Judiciary Act*.

The committee understands the positions argued, but is interested to better understand why the operation of the ADJR has been excluded.. In most instances of Commonwealth decision-making, s 39B(1) review jurisdiction will be available even if the *ADJR Act* cannot be relied upon. However, the *ADJR Act* was enacted as a remedial statute and seeking judicial review under it has a number of important advantages. Potential applicants are entitled to a statement of reasons, there is a single test for standing, and the availability of remedies proceeds on a comparatively straightforward basis. It is also the case that

applicants may succeed on the basis of establishing errors that would not justify a prerogative writ (or 'constitutional' writ). Given these advantages, and the fact that the enactment of the *ADJR Act* was intended to become the primary means for the review of commonwealth administrative decisions (due to its comparative simplicity and the absence of technicality), the Committee looks for compelling reasons before accepting that jurisdiction under the Act should be excluded. The availability of alternative sources of judicial review jurisdiction does not explain the justification for excluding the ADJR Act, and the fact that similar exclusions exist in Schedule 1 of the *AJDR Act* does not substantively address the reason for further exclusions. **The committee therefore seeks the Minister's advice as to the rationale for excluding *ADJR Act* review.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

The Committee notes that Item 1 of the Bill has the effect of excluding decisions made under the *Road Safety Remuneration Act 2012* (RSR Act) from judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (ADJR Act). This is achieved by listing the RSR Act in Schedule 1 of the ADJR Act.

The Committee seeks advice as to the rationale for excluding decisions made under the RSR Act from judicial review under the RSR Act. As the Committee notes, the exclusion is consistent with the approach taken in relation to decisions under the *Fair Work Act 2009* and does not preclude judicial review by means of prerogative writ.

However, the Committee seeks my further advice as to the rationale for excluding ADJR Act review.

The Road Safety Remuneration Tribunal established by the RSR Act is intended to operate in a substantially similar way to Fair Work Australia (FWA) and previous Commonwealth industrial tribunals which are, and have always been, excluded from AJDR Act review. That is, the Tribunal is intended to operate in a quasi-judicial manner. In many .cases, decisions will be made by a full bench of the Tribunal. In those cases where decisions are made by individual Tribunal members, they will be subject to appeal to a Full Bench of the Tribunal.

These provisions are modelled on the appeal provisions contained in the *Fair Work Act 2009* and its predecessors and are intended to maintain the existing jurisprudence in relation to appeals from Commonwealth industrial tribunals as set out in the High Court's decision in *Coal and Allied Operations Pty Ltd* v *Australian Industrial Relations*

*Commission* (2000) 203 CLR 194. Applying ADJR Act review in this situation would undermine the operations of the Tribunal. Moreover, given the Tribunal will operate in substantially the same way as FWA, it would be anomalous to subject its decisions to ADJR Act review in circumstances where FWA decisions are excluded from such review.

***Committee Response***

The Committee thanks the Minister for this response, and notes the additional information about the justification for the proposed approach. The Committee notes that this legislation has been passed by the Parliament.

Senator the Hon Ian Macdonald
Chair

# The Hon Jenny Macklin MP
## Minister for Families, Community Services and Indigenous Affairs
## Minister for Disability Reform

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14 MAR 2012

MN12-000429

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

Dear Senator Fifield

Thank you for seeking my advice, as set out in *Alerts Digest 2 of 2012* about the Family Assistance and Other Legislation Amendment Bill 2012.

The Senate Standing Committee for the Scrutiny of Bills commented on item 11 of Schedule 6 of the Bill. This item amends the table in subsection 63(4) of the *A New Tax System (Family Assistance) Act 1999* to give effect to the policy not to pay the FTB Part B supplement to individuals whose relevant FTB child is absent from Australia for more than 13 weeks. Since 2005, the administration of FTB has been not to pay FTB Part B for the child, including the supplement, after the child has been absent for more than 13 weeks.

Under the existing legislation an individual is not entitled to the standard rate of FTB Part B for the child after the child has been absent for more than 13 weeks. However, under the current legislation, they may have been entitled to the FTB B supplement. Given that the supplement is part of the FTB Part B rate, this would produce an anomalous outcome which was never the intended policy. The administration has reflected the policy since 2005 because it had assumed the legislation supported the policy. When my Department became aware of the error in the legislation, it took steps to seek a prompt amendment of the legislation.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

Jenny Macklin

**JENNY MACKLIN MP**

**DEPUTY PRIME MINISTER**
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14 MAR 2012

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

Dear Senator

I refer to the letter dated 24 November 2011 from the Secretary of the Standing Committee for the Scrutiny of Bills concerning the Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011.

The Committee has requested a response to issues identified in *Alert Digest No.14 of 2011* (23 November 2011) in relation to perceived issues regarding retrospectivity. In relation to this, please find my response to the Committee attached.

I trust this information addresses the concerns raised by the Committee.

Yours sincerely

WAYNE SWAN

**Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011**

Schedule 4, items 1 and 11

**Concern**

The Senate Committee (as recorded in Alert Digest 14/11) has sought my fuller explanation justifying the 'retrospective' effect of Schedule 4, Items 1 & 11 in the Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011.

Item 1 states; 'The MRRT law extends to matters and things whether occurring before or after 1 July 2012...'.

Item 11 states; 'Without limiting Division 210 of the Minerals Resource Rent Tax Act 2011... that Division also applies in relation to a scheme if (a) the scheme was entered into before 2 May 2010...'

**Response**

The Bill does not introduce any retrospective tax liabilities and outside of the anti-avoidance provisions. There is no impact that could be reasonably perceived as being retrospective and detrimental to taxpayers.

The Minerals Resource Rent Tax (MRRT) applies to profits after 1 July 2012. A starting base is provided as a tax shield for investment before the MRRT commenced. This benefits taxpayers as it provides an extra deduction in recognition of existing investment. Determining the starting base requires consideration of the values of assets and expenditures that existed or were incurred prior to the MRRT commencement. Taxpayers are able to utilise historical information when calculating their starting base allowances (it may involve a valuation as at the announcement date and the addition of further expenditure between that date and 1 July 2012).

The effect of item 1 is intended to make it permissible to calculate a miner's historical valuation and expenditure to calculate relevant allowances and it hence works to a miner's advantage.

Retrospectivity is introduced to ensure the effective operation of the Bill's anti-avoidance provisions. The implementation of anti-avoidance measures in the Bill is both logical and justified. The implementation of the general anti-avoidance rule from 2 May 2010 ensures that miners who enter into tax structuring arrangements or schemes to minimise future MRRT (or other foreign or Australian tax) following the government announcement do not benefit from their tax avoidance behaviour.

Similarly, as the MRRT is a profits based tax, avoidance schemes designed to reduce tax under the income tax law may also be effective in avoiding MRRT liabilities. It would not be appropriate to allow such schemes based upon the time at which entities had entered into them. The application of schedule 4, item 11 prior to 2 May 2010 ensures that, where a tax avoidance scheme was entered into prior to the announcement of the MRRT the anti-avoidance provisions still apply.

The approach taken is aligned with the Government's intention to have fair and robust tax legislation which cannot be avoided through artificial and contrived tax avoidance arrangements.

**The Hon Tanya Plibersek MP**
**Minister for Health**



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

Dear Senator Fifield

I refer to the request from the Committee for the Scrutiny of Bills for advice in relation to four issues about the Personally Controlled Electronic Health Records (PCEHR) Bill 2011 raised in the Committee's Alert Digest No 1 of 2012 (8 February 2012).

A detailed response on each issue is set out below.

Issue 1. Wide discretion; Clause 20

The Committee has sought my advice as to the scope of the discretion given to the Minister and to the heads of state and territory Health Departments to terminate the appointment of their respective representatives on the Jurisdictional Advisory Committee (JAC).

The Committee has noted that there are no criteria in the Bill limiting when an appointment may be terminated; that the advice and recommendations given by the JAC are not binding on the System Operator in performing its functions under the Bill; and that the interests of appointees may be affected should their appointment be terminated. In those circumstances, the Committee has sought advice on whether the broad discretion given under clause 20 of the PCEHR Bill to terminate an appointment is warranted.

**Response:**

Under clause 19 of the PCEHR Bill, the Minister and heads of state and territory Health Departments will each appoint a member to the JAC. As the Explanatory Memorandum to the PCEHR Bill notes (page 16), the appointment of members by the Commonwealth and states and territories ensures jurisdictional representation on the JAC, so that states and territories have a voice in relation to the PCEHR system including in relation to how the System Operator performs its functions. Under clause 16 of the PCEHR Bill, the System

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Operator must have regard to the advice and recommendations (if any) given by the JAC (and the Independent Advisory Council).

The Explanatory Memorandum to the PCEHR Bill notes (page 17) that it is highly likely that appointees to the JAC will be Commonwealth, state and territory government employees, and that they will continue to receive a salary while on the JAC. The ability for the Regulations to prescribe remuneration for JAC members was included so that, in a situation where a JAC member was a part-time government employee and meetings fell on their non-working days, there was a mechanism to remunerate the member if considered appropriate.

It is envisaged that members of the JAC will be relatively senior members of the Commonwealth, state and territory public services given the need for them to represent the interests of the various jurisdictions.

It is important that the Commonwealth, the states and the territories each retain the ability to have an effective voice on the JAC and that if, for whatever reason, they wish to change their representative, they are able to do so quickly.

The circumstances where this may occur include, for example, where there is a change in personnel within a jurisdiction or the duties of a particular person change such that a change in jurisdictional representative is required.

For these reasons, I consider that the broad discretion in clause 20 of the PCEHR Bill is warranted in the circumstances.

Issue 2. Penalties; Clause 78

The Committee noted clause 78 of the PCEHR Bill which provides that a person who is, or who at any time has been, a registered repository operator or a registered portal operator is subject to a civil penalty of 80 penalty units if they contravene an applicable PCEHR Rule.

The Committee also took the view that this sort of penalty provision fails to differentiate between more and less serious obligations.

**Response:**

The PCEHR Bill permits the Minister for Health to make PCEHR Rules which will be legislative instruments and subject to disallowance. PCEHR Rules may relate to a range of matters, including access controls of consumers and registration of entities wishing to participate in the PCEHR system. The Rules will allow flexible and fast responses to evolving technologies and security risks, and may contain different obligations for different participants in the PCEHR system. Before making PCEHR Rules, the Minister must consult with the JAC.

The PCEHR Rules may in the future contain important, but detailed, technical and security obligations with which participants in the PCEHR system must comply. Failure to comply with obligations in the PCEHR Rules may adversely affect the security or integrity of the PCEHR system. Due to the potentially technical nature of the Rules, it would not be desirable to include significant detail in a statute, as the PCEHR Rules may need to be changed frequently, sometimes at short notice, in response to emerging issues.

While all participants in the PCEHR system will be required to comply with applicable PCEHR Rules, the Bill provides that only registered repository operators and registered portal operators will be subject to a penalty for contravention. Repository operators and portal operators could be large commercial or government organisations, and will play a critical role as holders of consumers' health information and gateways for access to that information respectively. The level of penalty in the PCEHR Rules needs to be sufficient to provide a credible deterrent against non-compliance by these classes of participant.
For participants other than registered repository operators and registered portal operators, remedies other than civil penalties are available should there be a contravention of a PCEHR Rule including seeking injunctions, accepting an enforceable undertaking or seeking to suspend, vary or cancel the participant's registration.

With respect to differentiating between more and less serious obligations, it is also worth noting that clause 78, as with all the other civil penalty provisions in the PCEHR Bill, sets a maximum civil penalty amount. In the case of clause 78, the maximum is 80 penalty units (for individuals). However, courts are able to exercise discretion and could impose a civil penalty below the maximum 80 penalty units.

The level of the civil penalty is appropriate given the importance of ensuring that registered repository operators and registered portal operators (being crucial participants in the PCEHR system) comply with their obligations under the PCEHR Rules, including the protection of personal information.

Issue 3. Delegation of legislative power; Paragraph 98(1)(c)

The Committee notes that paragraph 98(1)(c) of the PCEHR Bill permits the Minister to delegate one or more of her or his powers to 'any … person with the consent of the Minister'. The Committee notes its preference that delegates be confined to the holders of nominated offices, persons with particular qualifications or experience or to members of the Senior Executive Service, and seeks the Minister's advice as to the justification for the proposed approach.

**Response:**

The ability for a person or entity to delegate their statutory functions to 'any person' does exist in a number of Commonwealth Acts, for example, see section 53 of the *Australian*

*Citizenship Act 2007* and section 41 of the *Australian Centre for International Agricultural Research Act 1982*.

In preparing the legislation, consideration was given to the appropriate scope of power for the System Operator to delegate. It is anticipated that in the vast majority of cases, any delegation from the System Operator will be restricted to the classes of persons specified in paragraphs 98(1)(a) and (b) – that is, to an APS employee of the Department or the Chief Executive Medicare.

However, as the PCEHR system is a new and relatively complex system, and not all the processes necessary for the operation of the system have been finalised, it was considered necessary to ensure the System Operator had the flexibility to delegate to other classes of people if this was considered desirable, subject to appropriate safeguards. For example, consideration is still being given to a form of 'facilitated registration' (e.g. patient may wish for their doctor to register them) for consumers and, as part of such a process, it may be desirable to delegate certain of the System Operator's powers and functions to persons other than APS employees or the Chief Executive Medicare. It was for this reason that paragraph 98(1)(c) of the PCEHR Bill permits the System Operator to delegate his or her functions and powers to any other person with the consent of the Minister.

It was recognised that a wide power of delegation, such as that in paragraph 98(1)(c), needs to be subject to appropriate safeguards. For this reason, the PCEHR Bill provides that:

- delegation to a person other than an APS employee or the Chief Executive Medicare can only be 'with the consent of the Minister' – paragraph 98(1)(c);
- the critical System Operator function of advising the Minister (paragraph 15(l)) cannot be delegated – subclause 98(2); and
- a delegate must comply with any written directions of the System Operator – subclause 98(5).

Given the nature of the PCEHR system, and these safeguards, I consider that it is appropriate that the System Operator have the ability to delegate his or her powers and functions in accordance with paragraph 98(1)(c) of the PCEHR Bill.

Issue 4. Delegation of legislative power; Clause 112

The Committee noted the provision in the PCEHR Bill for Regulations to prescribe penalties for offences and civil penalties for contraventions of the Regulations, in each case not to exceed 50 penalty units. The Committee has asked that the Minister explain the rationale for delegating details of offences to subordinate legislation.

**Response:**

Allowing the Regulations to prescribe offences and civil penalties for a contravention of the Regulations is intended to enable varying circumstances to be treated differently as appropriate and provide flexibility in dealing with different situations. The approach of permitting offences to be detailed in subordinate legislation is consistent with that taken under the *Healthcare Identifiers Act 2010* (HI Act) and the Healthcare Identifiers Regulations 2010 (HI Regulations). The HI Act and HI Regulations are an essential building block for the PCEHR system, permitting the accurate and timely identification of consumers and healthcare providers, and consumers and healthcare provider participants in the PCEHR system will all require healthcare identifiers. It is important that the PCEHR Bill contains the same flexibility as exists under the HI Act to prescribe offences in the Regulations.

Similar to the regime that applies under the HI Act, any offences prescribed in Regulations would be subject to disallowance and the maximum penalty would be restricted to 50 penalty units.

Thank you for this opportunity to respond to the issues raised by the Committee for the Scrutiny of Bills.

Yours sincerely

Tanya Plibersek

**Tanya Plibersek**

7.3.12

# MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
# MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

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

Mitch
Dear ~~Senator Fifield~~

Thank you for your letter to my Senior Adviser on 9 February 2012 on behalf of the Senate Scrutiny of Bills Committee concerning the Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2012 (the Bill). I apologise for the delay in responding to the Committee's concerns.

The Committee notes that Item 1 of the Bill has the effect of excluding decisions made under the *Road Safety Remuneration Act 2012* (RSR Act) from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). This is achieved by listing the RSR Act in Schedule 1 of the ADJR Act.

The Committee seeks advice as to the rationale for excluding decisions made under the RSR Act from judicial review under the RSR Act. As the Committee notes, the exclusion is consistent with the approach taken in relation to decisions under the *Fair Work Act 2009* and does not preclude judicial review by means of prerogative writ.

However, the Committee seeks my further advice as to the rationale for excluding ADJR Act review.

The Road Safety Remuneration Tribunal established by the RSR Act is intended to operate in a substantially similar way to Fair Work Australia (FWA) and previous Commonwealth industrial tribunals which are, and have always been, excluded from AJDR Act review. That is, the Tribunal is intended to operate in a quasi-judicial manner. In many cases, decisions will be made by a full bench of the Tribunal. In those cases where decisions are made by individual Tribunal members, they will be subject to appeal to a Full Bench of the Tribunal.

These provisions are modelled on the appeal provisions contained in the *Fair Work Act 2009* and its predecessors and are intended to maintain the existing jurisprudence in relation to appeals from Commonwealth industrial tribunals as set out in the High Court's decision in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194. Applying ADJR Act review in this situation would undermine the operations of the Tribunal. Moreover, given the Tribunal will operate in substantially the same way as FWA, it would be anomalous to subject its decisions to ADJR Act review in circumstances where FWA decisions are excluded from such review.

I trust the information provided is helpful.

Regards

BILL SHORTEN