



AUSTRALIAN SENATE

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Ms Christine McDonald  
Secretary  
Standing Committee on Finance and Public Administration  
Parliament House  
Canberra ACT 2600

Dear Ms McDonald

**REMUNERATION AND OTHER LEGISLATION AMENDMENT BILL 2011**

Thank you for the Committee's invitation to provide a submission on the Remuneration and Other Legislation Amendment Bill 2011. I understand that the principal issues for consideration are the speed with which the bill has been progressed to date, and the removal of the ability for either House to disallow determinations relating to parliamentary entitlements.

*Speed*

Insofar as speed of consideration is concerned, it is true that the bill was introduced into the House of Representatives on 24 March 2011 and passed the same day. It was received by the Senate the following day and the Selection of Bills Committee initially resolved to defer consideration of it. That committee has now recommended that the bill be referred to the Finance and Public Administration Legislation Committee for inquiry and report by 17 June 2011 and the Senate adopted the recommendation on 12 May 2011, giving the committee just over a month to report.

I make no further comment on this issue except to say that the speed of consideration has not prevented the bill from being included in the routine referral of a significant proportion of bills to Senate legislation committees. The timetable for its consideration by the Senate is not unusual.

*Removal of provision for disallowance*

As a general rule, Commonwealth law provides for parliamentary scrutiny by disallowance of instruments of a legislative character made under the authority of Acts of Parliament. While there are some Act-specific disallowance arrangements, the majority of instruments are

covered by the provisions of the *Legislative Instruments Act 2003*. Sections 5 to 7 of that Act define what is a legislative instrument and declare certain instruments either to be or not to be legislative instruments.

Generally speaking, an instrument has a legislative character if it determines the law or alters the content of the law (rather than applying the law in a particular case) and if it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right. Numerous classes of instruments are declared not to be legislative instruments for the purposes of the *Legislative Instruments Act 2003*. Such instruments are not subject to the tabling and disallowance provisions of the Act. As well as various instruments concerning national security or law enforcement or of a commercial nature, they include:

- instruments made under fair work legislation;
- decisions and orders of Fair Work Australia, the Australian Industrial Relations Commission and the Australian Fair Pay Commission; and
- instruments relating to terms and conditions of employment (other than public or parliamentary service "exceptional circumstances" determinations of terms and conditions of employment – noting that remuneration and other terms and conditions are now largely provided for in enterprise agreements).

In other words, there is a body of precedent for instruments concerning terms and conditions of employment not to be disallowable. Although members of parliament are not employees in the ordinary sense, they nonetheless receive remuneration for undertaking public office and there is an argument that instruments setting their terms and conditions should be treated in a comparable manner with determinations of terms and conditions of employment.

At variance with this practice is the determination by the Remuneration Tribunal of the remuneration payable to a wide range of public officers. Such determinations are disallowable.

These provisions of the bill arise from recommendations of the *Review of Parliamentary Entitlements*, April 2010, that the power of the Remuneration Tribunal to determine the remuneration of members of parliament be restored, that the Tribunal be required to give reasons for its determinations of parliamentary remuneration and that such determinations not be disallowable. In making this recommendation, the authors of the review concluded:

On balance, the committee considered the value of the Tribunal's independence could be further enhanced if its determinations were not subject to disallowance in the parliament. The committee did not reach this conclusion lightly. Parliamentary scrutiny of proposed expenditure with the possibility of amendment and rejection is usually the ideal. Current arrangements, however, do not provide the means to ensure an appropriate level of remuneration for senators and members. The committee considered that the Tribunal's parliamentary determinations should be implemented without political intrusion. In this regard, the committee noted that a disallowance provision was not a universal feature of other tribunals' decision-making; for example, minimum wage determinations made by the wages panel of Fair Work Australia are not subject to parliamentary disallowance. (p. 51)

The history of arrangements for parliamentarians' remuneration was given in the second reading speech on the bill by the Special Minister of State who noted the enactment of the *Remuneration Tribunal Act 1973* and the responsibility of the Tribunal to set parliamentarians' base salary until it was removed by the *Remuneration and Allowances Act*

1990. Under current arrangements, parliamentarians' base salary is set by reference to a salary determined for another purpose but the government of the day retains the effective power to determine parliamentarians' salaries and may take political considerations into account rather than the kinds of considerations that apply to the determination of salaries of other sections of the community (such as work value).

In the end, whether it is appropriate to change the current arrangements is a matter for the Parliament to decide.

In terms of the principles involved, the following considerations may assist the committee:

- Parliamentary scrutiny of delegated legislation has evolved to ensure that power delegated to the executive to make subsidiary rules is not exercised inappropriately.
- There may well be good public policy reasons for certain types of instruments not to be disallowable, but decisions on the disallowable status of classes of instruments will always involve the balancing of competing public policy concerns.
- Independent tribunals are established to perform particular functions and the enabling legislation usually contains numerous procedural safeguards, including in relation to the appointment of members and the processes by which the functions of the tribunal are carried out (perhaps involving public proceedings or requirements for reasons or reports to parliament, to name a few).
- There are numerous precedents for independently made employment-related determinations not to be disallowable.
- If houses of parliament have no power to override the determinations of an independent tribunal there can be no basis for allegations of conflict of interest or political interference in the process.

Finally, I would point out that the Senate established its Scrutiny of Bills Committee to examine all bills against particular criteria which relate to the protection of individual rights and the rights of the Parliament. The last of its terms of reference in standing order 24 requires the committee to report whether provisions of bills, by express words or otherwise, insufficiently subject the exercise of legislative power to parliamentary scrutiny. The committee examined the Remuneration and Other Legislation Amendment Bill 2011 in Alert Digest No. 4 of 2011, tabled on 11 May 2011, and made no comment on the bill, apparently finding no provisions of concern in relation to its terms of reference.

I would be happy to assist the committee further in any way that I can.

Yours sincerely

(Rosemary Laing)