

Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Treasury

Committee view

1.2 The committee considers that this bill is compatible with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.3 The committee notes that the bill engages the right to the presumption of innocence contained in Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

Purpose of the bill

1.4 This bill amends the *Commonwealth Inscribed Stock Act 1911* to:

- facilitate trading of beneficial interests in Commonwealth Government Securities (CGS) on financial markets in Australia that are accessible to retail investors; and
- make minor amendments to facilitate the Australian Office of Financial Management's daily administrative work and remove some redundant provisions.

1.5 The bill also amends the *Corporations Act 2001* to require financial advisers to provide a prescribed information statement to retail clients when they give them personal advice about investing in CGS.

Compatibility with human rights

Right to the presumption of innocence (Article 14(2) ICCPR)

1.6 The statement of compatibility with human rights states that this bill may raise human rights issues because it contains a number of offences where the burden of proof is reversed and that this may give rise to concerns with respect to the right to the presumption of innocence.

1.7 The committee notes that new subsection 120AI(1) requires a regulated person providing personal advice to a retail client and who recommends an investment in a particular class of Commonwealth Government Securities depository interest to give the client the information statements relevant to the product that is being recommended. The explanatory memorandum states that this requirement has been closely modelled on existing section 1012A of the *Corporations Act 2001* which

Any Member or Senator who wishes to draw matters to the attention of the committee under the *Human Rights (Parliamentary Scrutiny) Act 2011* is invited to do so.

requires a product disclosure statement to be provided when personal advice is given recommending a particular product.

1.8 New subsections 1020AI(3) and (4) make it an offence for a regulated person not to provide the required information statements. New subsection 1020AI(4) states that this is an offence of strict liability. Strict liability offences are provided for in section 6.1 of the *Criminal Code Act 1995*. The effect of an offence being one of strict liability is to remove the need for the prosecution to prove fault in the defendant, with respect to the contravention of the requirement, which it would otherwise be incumbent on the prosecution to do.

1.9 New subsections 1020AI(2) and 1020AI(6) provide for various defences and exceptions to the offence in relation to which the defendant bears an evidential burden. Under the *Criminal Code Act 1995* a law may impose an evidential burden on a defendant. This means that the defendant bears the burden of pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist. If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt.

1.10 Article 14(2) of the ICCPR protects the right of a person charged with a criminal offence 'to be presumed innocent until proved guilty according to law'. The UN Human Rights Committee has provided little guidance on how Article 14 (2) ICCPR should be interpreted in the context of reverse burden and no-fault offences. However, case law from comparable jurisdictions with analogous protections (such as the United Kingdom, New Zealand and Canada, as well as the jurisprudence of the European Court of Human Rights) indicates that such offences will not necessarily violate the presumption of innocence, so long as they pursue a legitimate aim and are reasonable, necessary and proportionate to that aim.

1.11 The statement of compatibility states that the reversal of the burden of proof is appropriate in these circumstances because these matters are particularly within the knowledge of the defendant and would be very difficult for the prosecution to prove otherwise.

1.12 The statement of compatibility and explanatory memorandum also indicate that the reasons for reversing the burden of proof and for providing for a strict liability offence in this case have been assessed in the light of guidelines provided by the Criminal Justice Division of the Attorney-General's Department and have been found to be consistent with those guidelines.

1.13 The committee considers that reverse burden and no-fault offences which are drafted in accordance with these principles are likely to be consistent with the presumption of innocence, in particular as they require consideration of whether:

- the offence is regulatory (in other words, it is justifiable to expect individuals who participate in a regulated activity to be deemed to have accepted certain conditions and to show why they are not at fault for infringements);

- the burden relates to facts which are within the defendant's own knowledge or to which they have ready access; and
- the penalty falls at the lower end of the scale.