

Part 1

Bills introduced 10–14 September 2012

Corporations Legislation Amendment (Derivative Transactions) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Treasury

Committee view

1.1 The committee notes that the bill engages the right to privacy contained in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and considers that the relevant provisions are unlikely to raise issues of incompatibility with the right.

1.2 The committee notes that the statement of compatibility discusses the bill's engagement of the right to be free from self-incrimination contained in article 14(3) of the ICCPR. The committee seeks further information from the Treasurer with regard to the relevant provisions before forming a view whether the bill is compatible with the right.

Purpose of the bill

1.3 This bill amends various related Acts to provide a legislative framework to implement Australia's G-20 commitments in relation to over-the-counter (OTC) derivatives reforms to improve transparency and risk management in the OTC derivatives market. In particular, the bill:

- introduces new restrictions on the trading of over-the-counter derivatives (OTC derivatives);
- allows the Minister for Financial Services to prescribe classes of derivatives in relation to certain mandatory obligations. Subject to a class of derivatives being prescribed for one or more mandatory obligations (trade reporting, central clearing or on platform execution), the Australian Securities and Investments Commission (ASIC) may make related derivatives transaction rules, with the Minister's consent; and
- introduces a licensing regime for trade repositories, a new type of financial market infrastructure.

Compatibility with human rights

1.4 The statement of compatibility discusses the right to privacy and the right to be free from self-incrimination with respect to these measures.

Right to privacy

1.5 The bill allows the Minister to prescribe certain classes of derivatives as subject to ASIC rule-making powers. ASIC is then empowered to introduce a requirement that individuals trading in that class of derivatives must report information related to those trades to licensed trade repositories.

1.6 The statement of compatibility acknowledges that legislation that involves collection of personal information may have implications for individuals right to privacy and identifies that the mandatory reporting requirements in the bill engage article 17 of the ICCPR.

1.7 Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Collecting, using, storing, disclosing or publishing personal information amounts to an interference with privacy. In order for the interference not to be 'arbitrary', the interference must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

1.8 The statement of compatibility states that the bill pursues the legitimate objective of regulating the OTC derivatives market and the limitation on the right to privacy is not arbitrary for the following reasons:

- Effective regulation of the OTC derivatives market requires regulators to have detailed data on derivatives exposures where these will pose a systemic risk. A requirement to report transactions is the most effective method of achieving this goal.
- The bill does not impose a blanket requirement for reporting. Instead, ASIC will be required to assess the need for mandatory trade reporting for each class of derivatives once they have been prescribed by the Minister, and on an ongoing basis after that. Any mandate will require public consultation, and ministerial consent. As a legislative instrument the ASIC rules will also require the preparation of a regulation impact statement and a human rights compatibility statement. This ensures that the requirement will only apply to individuals where such a requirement has a clear public interest.
- The bill provides for the protection of trade data through imposing restrictions on the use and disclosure of reported data, including that trade repositories will be prohibited from using data other than for purposes provided for under the Bill. The regulations and derivative trade repository rules that ASIC is required to make will also impose requirements in relation to the integrity and security of a trade repository's systems. These regulations and rules will also require a human rights compatibility statement.

1.9 The committee considers that these provisions are unlikely to raise issues of incompatibility with article 17 of the ICCPR given that any interference with the right to privacy would appear to be necessary to achieve the stated objective of regulating the OTC derivatives market, which can be considered to be a legitimate objective. Further, the provisions appear to be drafted with sufficient precision and contain appropriate safeguards to ensure that the degree of interference is proportionate to that objective.

Right to be free from self-incrimination

1.10 The statement of compatibility notes that the bill requires trade repositories to report to ASIC any breaches they have committed of the requirements under their licence and concludes that these requirements do not engage the right to be free from self-incrimination in article 14(3)(g) of the ICCPR because the requirements are civil in nature.

1.11 The statement does not identify the specific provisions in the bill which are being discussed but it is assumed that the relevant provision is section 904C, which requires a derivative trade repository licensee to notify ASIC if the licensee becomes aware that it may no longer meet its obligations under section 904A. This encompasses a failure to comply with conditions on its licence, failure to properly register if it is a foreign body corporate or failure to ensure that no disqualified individuals becomes or remains involved in the operator. The failure to comply with the requirement in section 904C is an offence under section 1311(1) of the *Corporations Act 2001*.

1.12 Article 14(3)(g) of the ICCPR protects the right to be free from self-incrimination by providing that a person may not be compelled to testify against him or herself or to confess guilt. The right to be free from self-incrimination may be subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective.

1.13 It is not apparent if section 904C is intended to abrogate the privilege against self-incrimination. If the privilege is intended to be abrogated, the bill does not appear to provide any protections or safeguards as to how any self-incriminating information may be used. Abrogation of the privilege against self-incrimination is more likely to be permissible where protections relating to the use of the information are included, such as a 'use immunity', which prohibits use of the information against the person in subsequent criminal proceedings; or a 'derivative use immunity', which additionally prevents the information being used to gather other evidence against the person.

1.14 The basis for the statement's conclusion that article 14(3)(g) of the ICCPR is not engaged in these circumstances is also unclear as no supporting reasons are

provided for the claim that the requirements are civil in nature. The protections in article 14(3) of the ICCPR relate to minimum guarantees that are applicable in criminal proceedings. However, the approach under international and comparative human rights law has been to look at the substance and the effect of the proceedings, rather than their label. Accordingly, it is possible for a civil penalty regime which subjects a person to a high penalty and is intended to be punitive or deterrent in nature to constitute a 'criminal charge' for the purposes of the prohibition on the right to be free from self-incrimination.

1.15 Before forming a view whether the bill is compatible with the right to be free from self-incrimination, the committee proposes to write to the Treasurer to seek clarification on the following matters:

- **in what respect these requirements are considered civil in nature;**
- **whether section 904C intends to abrogate the privilege against self-incrimination; and**
- **if so, whether safeguards are provided to prevent any self-incriminating information obtained as a result of the requirement to comply with section 904C from being used in any subsequent criminal proceedings.**