

Tax Laws Amendment (2013 Measure No. 2) Bill 2013

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

Summary of committee view

1.57 The committee considers that Schedule 3 of the bill engages the right to work and, in introducing a civil penalty, requires examination of whether the penalty is 'criminal' in nature. The committee has concluded that the bill does not give rise to human rights concerns but intends to write to the Treasurer to bring these matters to his attention and notes it would assist the committee in future if further analysis is set out in the statement of compatibility.

Overview

1.58 This bill seeks to amend a number of taxation laws to:

- require certain large entities to pay Pay As You Go instalments monthly (Schedule 1);
- provide a tax incentive for entities that carry on a nationally significant infrastructure project (Schedule 2);
- create a regulatory framework for tax (financial) advice (Schedules 3 and 4);
- increase transparency of the business tax system by requiring the publication of certain taxation data (Schedule 5);
- apportion expenditure for petroleum projects (Schedule 6);
- remove the capital gains tax discount for foreign resident and temporary resident individuals (Schedule 7);
- exempt from income tax, payments made under the Defence Abuse Reparation Scheme (Schedule 8);
- ensure certain services and other things supplied to a participant as part of a National disability Insurance Scheme plan are GST-free (Schedule 9);
- update the list of specifically listed deductible gift recipients (Schedule 10);
- make a number of amendments, including clarifying the treatment of native title benefits distributed through charities (Schedule 11).

Compatibility with human rights

1.59 The bill is accompanied by separate statements of compatibility for each Schedule of the bill. The committee is satisfied that Schedules 1, 2, 4, 6, 8 and 10 do not, as stated in the statements of compatibility, engage human rights, and that Schedules 9 and 11 may promote human rights. The committee considers that Schedules 5 and 7 appear to engage and limit the right to privacy and the right to non-discrimination respectively, but that these limitations have been adequately justified in the statement of compatibility.

Schedule 3

1.60 The committee notes that government amendments agreed to in the House of Representatives removed Schedules 3 and 4 to the bill. However, the committee notes that the framework set out in these schedules, creating a regulatory framework for tax (financial) advice services, were referred to the Parliamentary Joint Committee on Corporations and Financial Services. As the content of these schedules may be re-introduced following that Committee's report, the committee sets out its views on the human rights implications of the bill as originally introduced.

1.61 The statement of compatibility notes that Schedule 3, in requiring that all persons who give tax advice in relation to financial affairs must be registered, engages the right to freedom of expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR), as it ensures only appropriately qualified and registered persons can provide such advice. It also notes that a public register of entities who are regulated to provide tax advice engages the right to privacy (article 17 of the ICCPR), but that it does not include intrinsically personal information about an individual and the measure is necessary as a customer protection mechanism.

1.62 The committee notes that regulation of financial tax advisers would also appear to engage the right to work under article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The committee notes that the reasons given in the statement in relation to the above rights would appear to justify any limitation on the right to work:

These limitations operate to protect consumers from inadequate or inappropriate advice and reasonably require professionals seeking to provide that advice to be appropriately trained and registered to provide consumers with confidence in the advice they receive.¹¹

11 Statement of compatibility to Schedule 3, p. 118.

1.63 The committee notes that it would have been helpful for the committee's analysis of this bill if the right to work had also been identified in the statement of compatibility, and any limitation justified.

1.64 The committee also notes that Schedule 3 inserts a number of new civil penalty provisions into the *Tax Agent Services Act 2009*, which already includes a civil penalty regime. The committee notes its advice in its interim *Practice Note 2* that civil penalty provisions may engage rights if the penalties are 'criminal' in effect. The committee has set out its position that it would be helpful if statements of compatibility were to address the issues set out in the interim Practice Note whenever a bill incorporates or applies civil penalty provisions.

1.65 In assessing whether a civil penalty provision is 'criminal' under human rights law, the committee looks at: (a) the classification of the penalty under domestic law; (b) the nature of the penalty provision (punitive or deterrent, as opposed to protective or compensatory); and (c) the severity of the penalty.

1.66 *Classification of the provision under domestic law:* The committee notes that the civil penalty provisions are classified as 'civil' under domestic law and procedures to enforce the civil penalties are to be governed by the rules and procedures relating to civil proceedings. As the committee has noted in its interim *Practice Note 2*, the classification under domestic law and the consequences are relevant but given relatively little weight when the domestic law classifies a provision as 'civil'.

1.67 *The nature of the sanction or penalty:* The committee notes that the civil penalty regime in the *Tax Agent Services Act 2009*, which the amendments to the bill add to, appear to be punitive and deterrent. However, the context in which they are introduced appears to be regulatory, to ensure only appropriately qualified and registered persons provide this type of tax advice.

1.68 *Severity of the penalty:* Where significant penalties are imposed, this may be sufficient to justify characterising the penalty as criminal. In assessing the severity of a penalty, the maximum penalty is taken into account. The maximum penalty for contravention of the civil penalty in the bill that may be awarded by a court is 250 penalty units for an individual (\$42,500).

1.69 While these penalties involve significant sums of money for individuals, the committee is not persuaded that of themselves they are sufficient to lead to the conclusion that they involve the imposition of a criminal penalty. Taking into account the cumulative effect of the nature and severity of the penalty, the committee does not consider that this would lead to the classification of these civil penalties as 'criminal'.

1.70 The committee intends to write to the Treasurer to bring the matters set out above to his attention, and to note that it would assist the committee in future if this analysis is set out in the statement of compatibility.