



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2000

28 June 2000

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2000

28 June 2000

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

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

NINTH REPORT OF 2000

The Committee presents its Ninth Report of 2000 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:

Financial Sector Legislation Amendment Bill (No. 1) 2000

Migration Legislation Amendment (Parents and Other Measures)
Bill 2000

New Business Tax System (Miscellaneous) Bill (No. 2) 2000

Financial Sector Legislation Amendment Bill (No. 1) 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 6 of 2000*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 24 May 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2000

This bill was introduced into the House of Representatives on 13 April 2000 by the Minister representing the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Banking Act 1959 to:

- enhance the prudential regulation of Authorised Deposit-taking Institutions;
- authorise the delegation of certain of the Treasurer's functions to other Treasury portfolio agencies;
- provide the Australian Prudential Regulation Authority (APRA) and the Treasurer (or delegate) with power to seek an injunction if certain sections of the Banking Act are breached; and
- facilitate the rationalisation and consolidation of the Commonwealth's unclaimed moneys provisions;

Reserve Bank Act 1959 to simplify and modernise the Reserve Bank service, consistent with reforms in the Commonwealth public sector; and

Superannuation Industry (Supervision) Act 1993 to enhance the enforcement and offence provisions in the Act and to facilitate the application of the Commonwealth's Criminal Code to offences under the Act.

The bill clarifies the extent of APRA's powers to provide actuarial services over the period the Australian Government Actuary was part of APRA, and proposes minor miscellaneous amendments to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*, the *Superannuation (Resolution of Complaints) Act 1993* and the *Retirement Savings Accounts Act 1997*.

The bill also proposes consequential amendments to the *Australian Prudential Regulation Authority Act 1998* and the *Financial Corporations Act 1974*.

Strict liability offences

Division 1 of Part 2 of Schedule 3

Schedule 3 to this bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). The amendments proposed in Division 1 of Part 2 to this Schedule relate to the application of the Criminal Code to the SIS Act.

In general terms, the offence provisions in the SIS Act are currently fault-based. The proposed amendments convert these offences into either offences of strict liability, or into 'two-tier' offences which may be prosecuted either as fault-based offences or offences of strict liability at the election of the prosecutor. The maximum penalty applicable where an offence is prosecuted as one of strict liability is generally half that applicable where the prosecution is required to prove the intent or recklessness of the accused.

The Explanatory Memorandum simply notes that these amendments:

will provide Regulators with various new or enhanced enforcement powers. These powers will strengthen the regulatory framework for superannuation and facilitate the prosecution of contraventions of the SIS Act. This in turn will assist in ensuring that superannuation entities are administered prudently and that superannuation savings are adequately protected.

However, it is not clear why it is thought necessary, or appropriate, to replace a scheme under which the prosecution is required to prove all the elements of an offence – including intent – with a scheme based on strict liability. The Committee, therefore, **seeks the Treasurer's advice** as to this matter.

Pending the Treasurer's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

I refer to the letter of 11 May 2000 addressed to the Senior Adviser to the Treasurer, seeking advice in relation to amendments contained in Division 1 of Part 2 of Schedule 3 to the Bill.

I am responsible for the measures contained in the Bill, and am happy to provide further information on the amendments referred to in the Digest.

The amendments relate to certain offence provisions in the *Superannuation Industry (Supervision) Act 1993* ('SIS Act'). As noted in the Digest, many of the offence provisions in the SIS Act are currently fault liability offences, which require the prosecution to prove a mental element, such as intention or recklessness. The amendments in the Bill will convert some existing fault liability offences into strict liability offences, and others into 'two-tier' fault and strict liability offences.

I would like to note that not all fault liability offences in the SIS Act will be amended by the Bill. The majority of fault liability offences will remain so.

Justification for the proposed amendments comes primarily from the experiences of the former Insurance and Superannuation Commission (ISC), and the current prudential regulator of superannuation, the Australian Prudential Regulation Authority (APRA), who have encountered considerable difficulty in prosecuting contraventions of the SIS Act, due in large part to the difficulties in establishing the mental elements of fault liability offences. In effect, this has meant these offences are close to unenforceable.

Many contraventions of the SIS Act occur when a trustee (or another party such as an auditor) fails to perform specified obligations, many of which go to the heart of the prudent operation of a superannuation fund. Examples include advising members of a significant event, keeping accounts of the fund, having the fund audited by an approved auditor, lodging annual returns with APRA, and keeping minutes of trustee meeting.

As the legislation presently stands, it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission (such as offences relating to those obligations mentioned above), as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence.

For example, a case has arisen where the Director of Public Prosecutions (DPP) rejected the former ISC's recommendation to prosecute a trustee that had flagrantly breached the rules relating to the provision of information to members, because of difficulties of obtaining evidence of intention in the absence of an admission by a responsible officer of the corporate trustee, or of recklessness in the absence of evidence from an independent person.

In particular, the DPP has advised that for regulatory offences relating to the lodgement of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.

I should point out that although strict liability offences do not require proof of a mental element, they are nevertheless subject to statutory defences of mistake of

fact, intervening conduct or event, duress, sudden or extraordinary emergency, and self defence under the *Criminal Code Act 1995*.

The pool of superannuation savings in Australia is currently well over \$400 billion and continues to grow rapidly. The difficulty in obtaining convictions for offences against the SIS Act has the potential to seriously undermine the safety of this pool of savings. If it became widely known that offences under the Act were difficult to enforce, this may encourage disreputable practices in the superannuation industry.

Given the sheer number and diversity of participants in the superannuation industry, an effective enforcement regime is a crucial part of the prudential framework. The amendments to the SIS Act proposed in the Bill represent an appropriate response to the difficulty experienced in bringing enforcement actions. In light of the importance of ensuring the safety of superannuation savings, I believe that the proposed amendments are fully justified, and will not unduly trespass on personal rights and liberties.

Thank you for the opportunity to explain the amendments. If you require further information, please don't hesitate to contact me.

The Committee thanks the Minister for this response.

Migration Legislation Amendment Bill (Parenting and Other Measures) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 8 of 2000*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 27 June 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 8 of 2000

This bill was introduced into the House of Representatives on 7 June 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill was introduced with the Migration (Visa Application) Charge Amendment Bill 2000.

The bill proposes to amend the *Health Insurance Act 1973* and the *Migration Act 1958* to enable an increase in parent migration while minimising costs by restricting access to Medicare services.

Schedule 1 proposes to amend the definition of 'Australian resident' in the *Health Insurance Act 1973* to remove Medicare entitlements for certain visa applicants during the processing of their applications, and to ensure that temporary protection visa holders are entitled to Medicare benefits.

Schedule 2 proposes a technical amendment to the note to subsection 45B(1) of the *Migration Act 1958* to clarify that the visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997*.

Schedule 3 proposes amendments to the *Migration Regulations 1994* to:

- replace existing entry options for parents with new visa classes;
- increase the assurance of support bond and period of effect in relation to applicants for the new parent visa classes; and

- offset health costs of parent entry by requiring applicants for the new visa classes to arrange suitable and approved private health insurance cover for 10 years, or to pay a one-off \$25 000 health services charge per person.

Commencement

Subclause 2(6) and Schedule 3

Subclause 2(5) of this bill provides that, subject to subclauses 2(6) and (7), Schedule 3 is to commence on Proclamation, but not before assent to the *Migration (Visa Application) Charge Amendment Act 2000*.

Subclause 2(7) provides that, if the *Migration (Visa Application) Charge Amendment Act 2000* has not received assent within 6 months of assent to this bill, then Schedule 3 is repealed.

Subclause 2(6) provides that, subject to subclause 2(7), if Schedule 3 does not commence under subclause 2(5) within a period of 7 months from the date of assent to the bill, then Schedule 3 commences on the first day after the end of that period.

This is a departure from the usual 6 month period referred to in *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel. That Drafting Instruction states that an explanation should be provided whenever a period longer than 6 months after assent is chosen.

In the case of this bill, the Explanatory Memorandum simply notes that “the effect of subclauses 2(5), (6) and (7) is to ensure that Schedule 3 to this Act does not commence before the *Migration (Visa Application) Charge Amendment Act 2000*”. Given this abbreviated explanation, the Committee **seeks the Minister’s advice** as to the reason for the extended time within which this bill might commence.

Pending the Minister’s advice, the Committee draws Senators’ attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

The Committee has sought advice on the question as to why subclause 2(6) of the Bill refers to a period of “7 months” when *Drafting Instruction No 2 of 1989* refers to a 6 month period.

The reason for the departure from the usual 6 month period was to allow for an early passage of the Bill through the Parliament. The Government has a target implementation date of 1 January 2001 for the measures contained in the Bill, which may have been more than 6 months from the date of such passage if the Bill had been passed in the Winter sittings.

The Government considers it desirable to have actual visa grants under the new scheme contained in the Bill commence in January 2001 to enable parent visa applicants to be reunited with their sponsors in Australia as early as possible. To do so, the legislative scheme needs to be in place by November this year to take into account likely visa processing times.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this response.

New Business Tax System (Miscellaneous) Bill (No. 2) 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 6 of 2000*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 30 May 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 6 of 2000

This bill was introduced into the House of Representatives on 13 April 2000 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 in relation to multiple recognition of inter-entity losses; company losses and bad debts; loss duplication measures; linked group transfer measures; and capital payments received for trust interests. The bill also proposes technical amendments in relation to the continuity of ownership test, unrealised losses, excess mining or exploration deductions, and 13-month prepayments;

Income Tax Assessment Act 1936 in relation to company losses and bad debts and the dividend imputation system;

Income Tax Assessment Act 1936, *Income Tax Assessment Act 1997*, *Income Tax (Transitional Provisions) Act 1997*, *Income Tax Rates Act 1986*, *Income Tax Act 1986* and the *Taxation Administration Act 1953* to broaden the tax base for life insurers, and broadly tax the current pension business of superannuation funds consistently with that of life insurers;

Income Tax Assessment Act 1936 and *Income Tax Assessment Act 1997* in relation to scrip for scrip rollover relief;

Taxation Administration Act 1953 in relation to anti-avoidance rules for Pay As You Go instalments; and

Income Tax Assessment Act 1936 and New Business Tax System (Integrity and Other Measures) Act 1999 to make technical corrections in relation to deducting prepayments.

Tax legislation and the six month rule
Schedule 1, subitem 68(2)

Subitem 68(2) of Schedule 1 to this bill states that the amendments made by items 3 to 5, 20 to 22, 24 to 29, 31 to 33 and 34 to 36 apply to tax losses, net capital losses or deductions claimed in returns for an income year ending after 21 September 1999 – the date these changes were first announced in a Press Release.

This is a further example of ‘legislation by press release’. However, in this case, the legislation giving effect to the proposals as announced has not been introduced within the six-month period specified in the Senate Resolution of 8 November 1988. This resolution deals with the introduction of legislation to give effect to proposed amendments to taxation laws. In general terms it states that, where the relevant legislation has not been introduced into Parliament or made available by way of a draft bill within 6 months of the date of the announcement, “the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill”.

The Committee therefore, **seeks the Treasurer’s advice** as to the effect of this resolution on the proposed commencement date of the bill.

Pending the Treasurer’s response, the Committee draws Senators’ attention to these 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.

Relevant extract from the response from the Assistant Treasurer

The relevant items in Schedule 1 of the Bill extend the existing same share rule in the continuity of ownership test to apply to interposed interests in a loss company. The extended rule, referred to as the same share or interest rule, gives effect to the Government’s announcement on 21 September 1999 aimed at reducing the substantial duplication of losses. Schedule 1 also introduces saving provisions which will treat a taxpayer as having passed the continuity of ownership test in certain circumstances where failure occurred because of the same share or interest rule. The saving provisions were announced on 11 November 1999. Sub-item (68(2) specifies that both the same share or interest rule and the proposed saving provisions are to apply from 21 September 1999.

The same share or interest rule is detrimental to taxpayers as it increases the likelihood of taxpayers failing the continuity of ownership test. However, the proposed saving provisions are concessionary to taxpayers in that they will treat a company as not having failed the test in certain circumstances. Both measures were introduced in Parliament on 13 April 2000 - only slightly more than 6 months after the Government's announcement of the same share or interest rule but well within 6 months of the announcement relating to the saving provisions. The delay was due in part to consultation on the provisions to ensure their workability. The same share or interest rule is necessary to close a loophole in the law that is currently being exploited.

The Committee thanks the Assistant Treasurer for this response.

Tax legislation and the six month rule

Schedule 4, item 6

Schedule 4 to this bill amends the capital gains tax provisions of the *Income Tax Assessment Act 1997* to “take into account the effect of payments out of the CGT discount and small business CGT concessions”. The Explanatory Memorandum states that, under the current law, “a payment by a trustee of a small business 50% reduction amount is not correctly treated in calculating the non-assessable part to which CGT event E4 applies”.

Item 6 of Schedule 4 states that these amendments are to apply from 21 September 1999. The Explanatory Memorandum observes that this measure “was foreshadowed in the explanatory memorandum to the Capital Gains Tax Act that enacted the small business 50% reduction,” but was otherwise not announced.

This would appear to be a further example of tax legislation introduced more than six months after the proposed amendment was ‘announced’, and therefore affected by the Senate Resolution of 8 November 1988. In general terms that resolution states that, where the relevant legislation has not been introduced into Parliament or made available by way of a draft bill within 6 months of the date of the announcement, “the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill”.

The Committee, therefore, **seeks the Treasurer's advice** as to the effect of this resolution on the proposed commencement date of the bill, and whether the amendments proposed in this Schedule are beneficial to taxpayers.

Pending the Treasurer's response, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Assistant Treasurer

Schedule 4 amends section 104-70 of the Income Tax Assessment Act 1997 to ensure that a taxpayer receives the appropriate benefits from the CGT discount and small business CGT concessions allowed in a trust. Item 6 of the Schedule proposes that these amendments apply from 21 September 1999 (the date from which the CGT discount and small business 50% reduction first applied) to ensure that taxpayers can fully benefit from them.

The amendments in Schedule 4 were foreshadowed in paragraph 1.96 of the Explanatory Memorandum accompanying the Bill that became the Business Tax System (Capital Gains Tax) Act 1999. This Bill was introduced into Parliament on 25 November 1999. The amendments proposed favour taxpayers and were introduced into Parliament on 13 April 2000, less than 6 months after being substantially foreshadowed. In these circumstances, we advise that item 6 of Schedule 4 is not affected by the 6 months rule.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

RECEIVED

25 MAY 2000

Senate Standing C'ttee
for the Scrutiny of Bills



24 MAY 2000

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

The HON. Joe Hockey MP
Minister for Financial Services
& Regulation

Parliament House
Canberra ACT 2600
Australia

Telephone (61 2) 6277 7230
Facsimile (61 2) 6273 4075

Dear Senator Cooney 

www.joehockey.com
joe@joehockey.com

FINANCIAL SECTOR LEGISLATION AMENDMENT BILL (NO. 1) 2000 ('THE BILL')

I refer to the letter of 11 May 2000 from the Secretary of your Committee, James Warmenhoven, addressed to the Senior Adviser to the Treasurer, seeking advice in relation to amendments contained in Division 1 of Part 2 of Schedule 3 to the Bill, which are referred to in the Scrutiny of Bills Alert Digest No. 6 of 2000 ('the Digest').

I am responsible for the measures contained in the Bill, and am happy to provide further information on the amendments referred to in the Digest.

The amendments relate to certain offence provisions in the *Superannuation Industry (Supervision) Act 1993* ('SIS Act'). As noted in the Digest, many of the offence provisions in the SIS Act are currently fault liability offences, which require the prosecution to prove a mental element, such as intention or recklessness. The amendments in the Bill will convert some existing fault liability offences into strict liability offences, and others into 'two-tier' fault and strict liability offences.

I would like to note that not all fault liability offences in the SIS Act will be amended by the Bill. The majority of fault liability offences will remain so.

Justification for the proposed amendments comes primarily from the experiences of the former Insurance and Superannuation Commission (ISC), and the current prudential regulator of superannuation, the Australian Prudential Regulation Authority (APRA), who have encountered considerable difficulty in prosecuting contraventions of the SIS Act, due in large part to the difficulties in establishing the mental elements of fault liability offences. In effect, this has meant these offences are close to unenforceable.

Many contraventions of the SIS Act occur when a trustee (or another party such as an auditor) fails to perform specified obligations, many of which go to the heart of the prudent operation of a superannuation fund. Examples include advising members of a significant event, keeping accounts of the fund, having the fund audited by an approved auditor, lodging annual returns with APRA, and keeping minutes of trustee meeting.

As the legislation presently stands, it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission (such as offences relating to those obligations mentioned above), as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence.

For example, a case has arisen where the Director of Public Prosecutions (DPP) rejected the former ISC's recommendation to prosecute a trustee that had flagrantly breached the rules relating to the provision of information to members, because of difficulties of obtaining evidence of intention in the absence of an admission by a responsible officer of the corporate trustee, or of recklessness in the absence of evidence from an independent person.

In particular, the DPP has advised that for regulatory offences relating to the lodgement of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.

I should point out that although strict liability offences do not require proof of a mental element, they are nevertheless subject to statutory defences of mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency, and self defence under the *Criminal Code Act 1995*.

The pool of superannuation savings in Australia is currently well over \$400 billion and continues to grow rapidly. The difficulty in obtaining convictions for offences against the SIS Act has the potential to seriously undermine the safety of this pool of savings. If it became widely known that offences under the Act were difficult to enforce, this may encourage disreputable practices in the superannuation industry.

Given the sheer number and diversity of participants in the superannuation industry, an effective enforcement regime is a crucial part of the prudential framework. The amendments to the SIS Act proposed in the Bill represent an appropriate response to the difficulty experienced in bringing enforcement actions. In light of the importance of ensuring the safety of superannuation savings, I believe that the proposed amendments are fully justified, and will not unduly trespass on personal rights and liberties.

Thank you for the opportunity to explain the amendments. If you require further information, please don't hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter McKelvey', with a stylized, flowing script.



Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

27 JUN 2000

Dear Senator Cooney

**MIGRATION LEGISLATION AMENDMENT (PARENTS AND OTHER MEASURES)
BILL 2000**

I refer to the letter of 22 June 200 from the Secretary of your Committee, Mr James Warmenhoven, addressed to my Senior Adviser, seeking advice in relation to the commencement provisions contained in the *Migration Legislation Amendment (Parents and Other Measures) Bill 2000* ("the Bill").

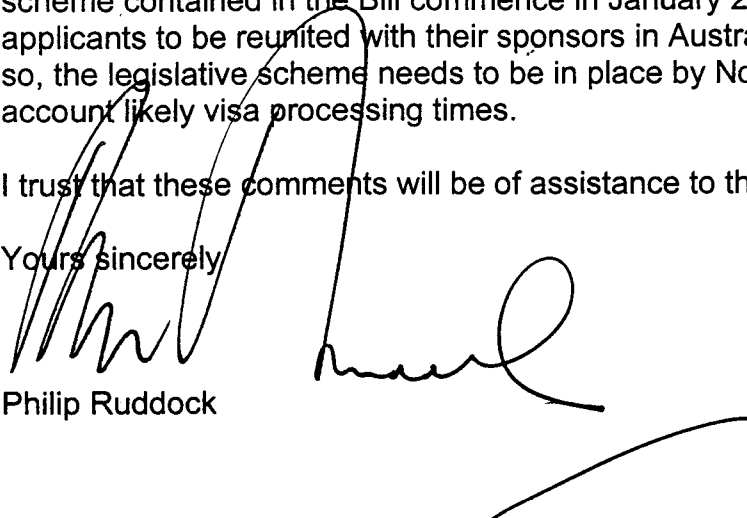
The Committee has sought advice on the question as to why subclause 2(6) of the Bill refers to a period of "7 months" when *Drafting Instruction No 2 of 1989* refers to a 6 month period.

The reason for the departure from the usual 6 month period was to allow for an early passage of the Bill through the Parliament. The Government has a target implementation date of 1 January 2001 for the measures contained in the Bill, which may have been more than 6 months from the date of such passage if the Bill had been passed in the Winter Sittings.

The Government considers it desirable to have actual visa grants under the new scheme contained in the Bill commence in January 2001 to enable parent visa applicants to be reunited with their sponsors in Australia as early as possible. To do so, the legislative scheme needs to be in place by November this year to take into account likely visa processing times.

I trust that these comments will be of assistance to the Committee.

Yours sincerely


Philip Ruddock



RECEIVED

8 JUN 2000

Senate Standing C'ttee
for the Scrutiny of Bills

ASSISTANT TREASURER

PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: (02) 6277 7340
Facsimile: (02) 6273 3420

30 MAY 2000

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

**ALERT DIGEST NO. 6 OF 2000: NEW BUSINESS TAX SYSTEM (MISCELLANEOUS)
BILL (NO. 2) 2000**

I refer to the Committee's request for advice as to the effect of Senate Resolution No. 23 of 1988 on the proposed commencement date of certain items in the New Business Tax System (Miscellaneous) Bill (No. 2) 2000 ('the Bill'). The Committee draws my attention to sub-item 68(2) of Schedule 1 and item 6 of Schedule 4 of the Bill.

Sub-item 68(2) of Schedule 1

The relevant items in Schedule 1 of the Bill extend the existing same share rule in the continuity of ownership test to apply to interposed interests in a loss company. The extended rule, referred to as the same share or interest rule, gives effect to the Government's announcement on 21 September 1999 aimed at reducing the substantial duplication of losses. Schedule 1 also introduces saving provisions which will treat a taxpayer as having passed the continuity of ownership test in certain circumstances where failure occurred because of the same share or interest rule. The saving provisions were announced on 11 November 1999. Sub-item 68(2) specifies that both the same share or interest rule and the proposed saving provisions are to apply from 21 September 1999.

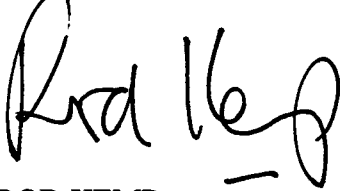
The same share or interest rule is detrimental to taxpayers as it increases the likelihood of taxpayers failing the continuity of ownership test. However, the proposed saving provisions are concessionary to taxpayers in that they will treat a company as not having failed the test in certain circumstances. Both measures were introduced in Parliament on 13 April 2000 – only slightly more than 6 months after the Government's announcement of the same share or interest rule but well within 6 months of the announcement relating to the saving provisions. The delay was due in part to consultation on the provisions to ensure their workability. The same share or interest rule is necessary to close a loophole in the law that is currently being exploited.

Item 6 of Schedule 4

Schedule 4 amends section 104-70 of the Income Tax Assessment Act 1997 to ensure that a taxpayer receives the appropriate benefits from the CGT discount and small business CGT concessions allowed in a trust. Item 6 of the Schedule proposes that these amendments apply from 21 September 1999 (the date from which the CGT discount and small business 50% reduction first applied) to ensure that taxpayers can fully benefit from them.

The amendments in Schedule 4 were foreshadowed in paragraph 1.96 of the Explanatory Memorandum accompanying the Bill that became the New Business Tax System (Capital Gains Tax) Act 1999. This Bill was introduced into Parliament on 25 November 1999. The amendments proposed favour taxpayers and were introduced into Parliament on 13 April 2000, less than 6 months after being substantially foreshadowed. In these circumstances, we advise that item 6 of Schedule 4 is not affected by the 6 month rule.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rod Kemp', with a stylized flourish at the end.

ROD KEMP